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What Jurors Should Know about Informants: The Need for Expert Testimony

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WHAT JURORS SHOULD KNOW ABOUT INFORMANTS: THE NEED FOR EXPERT TESTIMONY

Robert M. Bloom[*]

2019 MICH. ST. L. REV. 345

"DON'T GO TO THE PEN, SEND A FRIEND AND IF YOU CAN'T DO THE TIME, JUST DROP A DIME."[1]

INTRODUCTION 345
I. INFORMANT TESTIMONY EXONERATIONS 351
A. Eye Witness Identification and Expert Witnesses 354
B. State Experience: The Connecticut Example 360
C. Alternate Approaches to Test the Credibility of Informants 363
D. The Argument for Expert Witnesses for Informant Testimony 365
1. *What Would an Expert Say?* 365
a. Benefits 366
b. Informant Information 368
c. Prosecutor Information 368
2. *Possible Consequences to Informant for Lying* 372
CONCLUSION 372

INTRODUCTION

Justice Antonin Scalia once opined that

> the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had

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* Professor of Law, Boston College Law School. I wish to thank Sarah Murphy of the class of 2020 and Vasundhara Prasad of the class of 2019 for their valuable assistance.

1. Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1419 (2007) (quoting Leslie Vernon White, a jailhouse informant who appeared on *60 Minutes* in February 1989 and admitted to multiple acts of lying as an informant).

> occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby.[2]

Well, allow me to shout the name of Cameron Todd Willingham (Willingham) from the rooftops.

On December 23, 1991, three young girls were burned alive in their Corsicana, Texas, home.[3] Willingham, the girls' own father, was charged with arson and murder.[4] To avoid the death penalty, lawyers advised Willingham to accept a plea deal whereby he would plead guilty and serve a life in prison sentence.[5] However, Willingham refused to accept the plea deal, stating, "I ain't gonna plead to something I didn't do, especially killing my own kids."[6] He was convicted in August 1992 and sentenced to death.[7] He was executed in February 2004.[8]

Willingham's conviction was supported by expert witness testimony in arson and by a prison informant's testimony.[9] During the trial, however, the experts' testimony of arson was largely discredited because of the reliance on questionable science.[10] In response to a clemency petition shortly before the execution, the prosecutor, John Jackson, argued that the testimony of prison inmate Johnny E. Webb

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2. Kansas v. Marsh, 548 U.S. 163, 188 (2006) (Scalia, J., concurring).

3. *See* David Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/magazine/2009/09/07/trial-by-fire [https://perma.cc/46ZA-4T7U].

4. *See id.*

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *See id.*

10. The prosecution proffered two seasoned experts who were considered "old school" investigators. They relied on intuition and rules of thumb to determine whether a fire was a result of arson. Paul C. Gianelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221, 225 (2013). The arson experts "relied on old wives' tales and junk science to send men to prison, and perhaps even the death chamber, top experts on fire behavior say." Christy Hoppe, *Some Experts Question Science in Texas Arson Cases*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 20, 2009, at 11A. Exemplifying the imprecise nature of an arson investigation, one of the experts, Manuel Vasquez, stated that "[t]he fire tells a story. I am just the interpreter. . . . And the fire does not lie. It tells me the truth." CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES AGAINST ERNEST RAY WILLIS AND CAMERON TODD WILLINGHAM 49 (2009).

was enough to override the questionable arson evidence for the court to deny the petition of clemency.[11]

Mr. Webb told the jury that he communicated with Willingham through a food slot while passing by his cell.[12] He claimed that though Willingham had repeatedly told him that the fire was an accident, there was one interaction where Willingham spontaneously confessed to setting the fire.[13] According to Webb, Willingham set the fire to hide the injuries that his wife, Stacy, had inflicted on one of his daughters.[14] However, the autopsies revealed no evidence of bruises or other signs of trauma on the children's bodies.[15]

At the arson trial, Jackson asked Webb during his direct testimony, "Johnny, have I ever promised you anything in return for your testimony in this case?"[16] Webb replied, "No sir, you haven't."[17] Jackson then asked, "As a matter of fact, I told you there was nothing I can do for you."[18] Webb responded, "You said there was nothing no one can do for me."[19]

Mr. Webb had been using drugs since he was nine years old and had an extensive criminal record, including car theft, forgery, and robbery.[20] During the arson trial, Webb testified that he was sexually assaulted in prison in 1988 and suffered from post-traumatic stress disorder, for which he was taking antidepressants.[21] On cross-examination, he had no memory of the robbery charge he had pleaded guilty to only a month earlier.[22]

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11. *See* John Schwartz, *Evidence of Concealed Jailhouse Deal Raises Questions About* a *Texas Execution*, N.Y. TIMES (Feb. 24, 2014), https://www.nytimes.com/2014/02/28/us/evidence-of-concealed-jailhouse-deal-raises-questions-about-a-texas-execution.html?_r=2 [https://perma.cc/H83C-ZA2G].
12. *See* Maurice Possley, *The Prosecutor and the Snitch*, THE MARSHALL PROJECT (Aug. 3, 2014) [hereinafter *The Prosecutor and the Snitch*], https://www.themarshallproject.org/2014/08/03/did-texas-execute-an-innocent-man-willingham [https://perma.cc/H83C-ZA2G].
13. *See id.*
14. *See id.*
15. *See id.*
16. Maurice Possley, *Fresh Doubts Over a Texas Execution*, WASH. POST (Aug. 3, 2014) [hereinafter *Fresh Doubts Over a Texas Execution*], http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/?utm_term=.f7d0c25f0aa6 [https://perma.cc/SHX9-W6GX].
17. *Id.*
18. *Id.*
19. *Id.*
20. *See* Grann, *supra* note 3.
21. *See The Prosecutor and the Snitch*, *supra* note 12.
22. *See id.*

Mr. Webb recanted his testimony against Willingham on several occasions, claiming that Jackson had threatened a life sentence for his robbery charge unless he testified against Willingham.[23] "I did not want to see Willingham go to death row and die for something I damn well knew was a lie and something I didn't initiate," Webb said.[24] "I lied on the man because I was being forced by John Jackson to do so . . . I succumbed to pressure when I shouldn't have. In the end, I was told, 'you're either going to get a life sentence or you're going to testify.' He coerced me to do it."[25]

Despite Jackson's claims that he did not promise any benefits to Mr. Webb in exchange for his testimony, Jackson's actions appear to tell a different story.[26] In a previously undisclosed letter that Webb wrote from prison in 1996, Webb urged Jackson to make good on an earlier promise to downgrade his conviction.[27] Webb also hinted that he might make his complaint public.[28] Within days of receiving the letter, Jackson sought out the Navarro County judge who had handled Willingham's case and came away with a court order that altered the record of Webb's robbery conviction to make him immediately

23. *See* Maurice Possley, *Doubts from Death Row*, THE MARSHALL PROJECT (Mar. 9, 2014) [hereinafter *Doubts from Death Row*], https://www.themarshallproject.org/2015/03/09/doubts-from-death-row#.hIPGtWW8P [https://perma.cc/B69N-78BB].

24. *Id.*

25. *Id.*

26. Two months after Willingham's trial, a note given to the Navarro County clerk informed the clerk how to respond to prison officials who inquired about Webb. The note was unsigned but marked "per John Jackson" and provided that Webb was convicted of second-degree robbery, not first-degree aggravated robbery, as he had just testified in court. Days after the note, Jackson requested that Webb be assigned to a medical unit instead of protective custody, thereby placing Webb in "an environment that guarantees the smallest risk." One month later, Jackson sent a letter to prison officials noting that Webb had received death threats and requesting that Webb be transferred back to the Navarro County Jail. *The Prosecutor and the Snitch*, *supra* note 12.

27. Letter from Johnny E. Webb, Inmate, to John Jackson, Assistant Dist. Attorney, Navarro Cty. Tex. (June 24, 1996), https://www.themarshallproject.org/documents/1684125-johnny-webb-letter-june-1996#.erYywHuqP [https://perma.cc/GZ73-KFK4] (writing to Jackson that "you had told me that the charge of aggravated robbery would be dropped, or lowered" and urging Jackson to "review the Judgement of Conviction").

28. *See id.* (positing to Jackson that he was "unsure whether . . . to file a writ of habeus corpus . . . to clarify th[e] matter, or [if Jackson could] take care of it on [his] own").

eligible for parole.[29] Jackson also wrote numerous letters to prison officials, the Board of Pardons and Paroles, and others claiming that Webb was a pivotal witness.[30] Jackson never informed Willingham's attorney of his efforts to downgrade Webb's conviction.[31] Accordingly, Jackson faced disciplinary action by the Texas Bar for failing to disclose benefits promised to Webb for his testimony.[32] However, after a jury trial, the disciplinary proceeding found no misconduct.[33] Notably, Webb took the Fifth Amendment at the disciplinary proceedings, thereby never substantively testifying against Jackson.[34]

The story of Webb highlights the need for greater scrutiny with regard to informant testimony. Webb, with his criminal record, was experienced in the ways of the criminal justice system.[35] He was facing life in prison for an aggravated robbery, which compelled him to testify for the greatest of all incentives: his freedom.[36] Moreover, there is a strong likelihood that Webb provided false testimony and that those lies contributed to Willingham's execution.[37] Interestingly, in

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29. *See The Prosecutor and the Snitch*, *supra* note 12. On July 15, 1996, the Judge who presided over Willingham's trial and sentenced Webb to prison in 1992 entered a new judgment in Webb's case at the request of Jackson. *See id.* Webb's crime was officially recorded as second-degree robbery instead of a first-degree aggravated robbery, which ultimately reduced the time Webb had to wait before seeking parole. *See id.*

30. *See id.* Following the change of Webb's record, Jackson sent a letter to the Texas parole board saying that he had "recently" become aware that prison records mistakenly showed Webb was convicted of aggravated robbery. *Id.* Claiming to have consulted with Webb's attorney, Jackson wrote that he had obtained a court order to change Webb's record of conviction to the lesser crime of second-degree robbery. *See id.* In a subsequent letter to the parole board, Jackson wrote that Webb had "volunteered information and testified . . . without any agreement from the State respecting diminution of the recommendation in his own case" and asked that Webb be given consideration for his "[c]ooperation in the murder prosecution without expectation of leniency." *Id.*

31. *See* Maurice Possley, *Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row*, THE MARSHALL PROJECT (May 11, 2017), https://www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row [https://perma.cc/BR67-7UD4].

32. *See id.*

33. *See id.*

34. *See id.* Webb invoked the Fifth Amendment over fifty times and stated that he did not recall or did not remember nearly 100 times. *Id.*

35. *See The Prosecutor and the Snitch*, *supra* note 12 (noting that Webb had previous criminal convictions).

36. *See id.* (discussing Webb's robbery charge and Jackson's offer to reduce Webb's sentence should he testify against Willingham).

37. *See id.* (discussing Webb's discussions with Jackson).

2015, Texas—"a minefield of wrongful convictions"—established a state commission to investigate and address causes of exoneration.[38] In regard to jail house informants, the Commission highlights the significance of maintaining records of conversations with the informant.[39] The prosecutor should detail the informant's criminal history and whether any benefits have been offered in exchange for the informant's testimony.[40] Further, the Commission recommends that this information is disclosed to defense counsel.[41]

The need for informants has been an important aspect of the criminal justice system for many years.[42] This is because the information provided by informants oftentimes plays a key role in the government's investigation of crimes and ultimate prosecution.[43] Moreover, "[i]nformants have become integral to the success of many FBI investigations of organized crime, public corruption, the drug trade, counterterrorism, and other initiatives."[44] Our discussion will focus on the use of informant testimony at trial.

Though United States courts have endorsed the use of informants, they also have cautioned their use with regard to credibility.[45] As early as 1952, Justice Robert Jackson opined in *Lee v. United States* that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."[46] Commenting on the use

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38. Editorial Board, *Texas Cracks Down on the Market for Jailhouse Snitches*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/opinion/sunday/texas-cracks-down-on-the-market-for-jailhouse-snitches.html [https://perma.cc/BR67-7UD4].

39. *See id.* (noting that the Texas Legislature accepted the Commission's recommendations by passing a new law).

40. *See id.*

41. *See id.*

42. *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 747–49 (2016) (stating that according to United States Sentencing Commission data for a seven-year period (2009–2015), between 11.2% and 12.5% of defendants received sentencing discounts for providing "substantial assistance" in the prosecution of others).

43. *See generally* Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L. Q. 81 (1994) (discussing the detrimental impact of untruthful informants).

44. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, CHAPTER THREE: THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF CONFIDENTIAL INFORMANTS, *in* SPECIAL REPORT: THE FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE GUIDELINES 63, 65 (2005).

45. *See* Lee v. United States, 343 U.S. 747, 747–57 (1952).

46. *Id.* at 797.

of informants, Chief Justice Earl Warren stated, "One of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement."[47] The Ninth Circuit opined:

> 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.[48]

This Article will first explore the problem of wrongful convictions resulting in part from false informant testimony. Eyewitness exoneration has gotten considerable attention by the courts. False informant testimony exoneration has gotten less attention than other causes of exoneration.[49] We will argue for the use of expert witnesses to assist the juries. We will explore the acceptance of expert witnesses in eyewitness identification cases. It will be our main argument that a similar approach of utilizing expert witnesses should be taken with regard to informant testimony. We will then examine the acceptance of expert testimony regarding informants using the state of Connecticut as an example.[50] Finally, we will explore the value of the expert testimony regarding informants to demonstrate the information the fact finder should know in evaluating the credibility of an informant witness.

I. INFORMANT TESTIMONY EXONERATIONS

The first DNA exoneration took place in 1989.[51] Today, the Innocence Project reports 364 DNA exonerations, 17% of which involved informants.[52] Informants are usually nonexpert witnesses who get some benefit from testifying against the defendant.[53] Various

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47. Hoffa v. United States, 385 U.S. 293, 315 (1966) (Warren, J., dissenting).

48. N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

49. *See* Roth, *supra* note 42, at 743–44.

50. The author has direct experience in testifying in Connecticut as an expert witness on factors to consider in weighing the credibility of informants.

51. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/CCR7-8A7K] (last visited May 16, 2019).

52. *Id.*

53. *See* ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 155 (2002).

incentives are provided to informants for testifying, such as monetary inducements.[54] There are several different types of informants. However, studies looking at exoneration focus on two types: an incarcerated person, or so-called "jailhouse informant," and an accomplice informant who participated in the defendant's crime.[55] These informants are looked at most closely because the types of benefits offered provide high incentives to provide untruthful testimony.[56] Specifically, both types of informants may be incarcerated and facing criminal sanctions, which incentivizes them to cooperate with prosecutors.[57] This Article will focus on these two types of informants who seek to gain benefits such as elimination or reduction of charges, a favorable sentencing recommendation, or, in some cases, release from incarceration. "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."[58]

Since the introduction of DNA evidence, 364 convicted individuals were exonerated by DNA.[59] Although many of these exonerations have been the result of faulty eyewitness identifications (70%), false confessions (28%), or problematic forensics (44%), a significant number have been from false informant testimony (17%).[60]

In his book, Professor Garrett of the University of Virginia studied the initial 250 DNA exonerations.[61] He concluded that fifty-two cases involved, in whole or in part, false informant testimony (21%).[62] Of the fifty-two cases, twenty-eight utilized jailhouse informants and twenty-three utilized codefendants.[63] In the jailhouse cases, the informant testified to the defendant's statements.[64] In analyzing their testimony, Professor Garrett found that "made to

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54. *See id.* at 1.

55. *Id.* at 63, 95.

56. *See* Robert W. Stewart, *Jailhouse Snitches: Trading Lies for Freedom*, L.A. TIMES (Apr. 16, 1989), http://articles.latimes.com/1989-04-16/news/mn-2497_1_veteran-jailhouse-informants-jailhouse-snitches [https://perma.cc/3QVD-Z7KZ] (noting that jailhouse informant Leslie White said, "[t]he motivation to lie is too great").

57. *See id.*

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

59. *DNA Exonerations in the United States*, *supra* note 51.

60. *Id.*

61. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 124 (2011).

62. *Id.*

63. *Id.*

64. *See id.*

order" statements supported the State's case.[65] He also found that only two of the twenty-eight jailhouse informants admitted that they had beneficial agreements with the State for their testimony.[66] Interestingly, the other jailhouse informants claimed no explicit promises were made, just as Johnny E. Webb did.[67] Yet, like Mr. Webb, they ultimately received favorable outcomes in their own cases.[68] Moreover, Professor Garrett found that informants rarely admitted they were testifying for any gain, providing that "[s]ome informants claimed they were testifying as public-minded citizens."[69] In looking at the codefendants or accomplices, Professor Garrett observed that all twenty-three shifted the blame of the enterprise on to the exoneree.[70]

In the 2005 Northwestern University Law School study looking at 111 death row exonerations, fifty-one of them, or 45.9%, involved, in whole or in part, the testimony of informants.[71] Though the large bulk of the cases involved jailhouse informants, twenty-one of these involved accomplices who received benefits in their sentencing.[72] In addition, Governor George Ryan of Illinois sanctioned a state-wide study on defendants who were sentenced to death.[73] Ultimately, the study concluded that jailhouse informants were a major cause of convictions.[74] Additional studies have indicated the significant impact of confession evidence on the jury.[75] In fact, according to one study,

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65. *Id.* at 124 (explaining that a "made to order" statement is one that is "neatly molded to the litigation strategy of the State").

66. *See id.* at 127.

67. *See id.* at 128.

68. *See id.*

69. *Id.* at 138.

70. *See id.* at 139.

71. ROB WARDEN, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004).

72. *See id.* at 3–12.

73. *See* George H. Ryan, Report of The Governor's Commission on Capital Punishment 7–8 (2002).

74. *See id.* at 8.

75. *See, e.g.*, Jeffrey S. Neuschatz et al., *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE CRIM. PSYCHOL. 179, 188 (2012) [hereinafter *Secondary Confessions, Expert Testimony, and Unreliable Testimony*]. The study made use of two experiments. *See id.* at 181, 185. In the first experiment, participants were told that the jailhouse informant had testified previously in zero, five, or twenty cases. *See id.* at 181. In the second experiment, an expert testified about the unreliability of informant testimony. *See id.* at 185. Both experiments found that participants who were exposed to informant testimony were significantly more likely to return a guilty verdict than those in the control group. *See id.* at 181, 185–86, 188.

informant secondary confession testimony has a greater effect on jurors than even eyewitness identifications.[76]

A. Eye Witness Identification and Expert Witnesses

Misidentification tends to be the major cause of DNA exonerations.[77] Although scientific research historically has backed faulty eyewitness identifications, DNA exonerations have transformed eyewitness identifications from mere speculation to confirmation.[78] Significant research on eyewitness identification indicates that memory does not act like a camera: very often, the eyewitness may be inaccurate.[79] Further research suggests problems with cross-racial identification.[80] Nevertheless, as the number of eyewitness exonerations increased, courts began to adopt a number of different

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76. *See* Stacy Ann Wetmore et al., *On the Power of Secondary Confession Evidence*, 20 PSYCHOL. CRIME & L. 339, 354 (2014). The study made use of three experiments. In the first two experiments, participants read a murder trial transcript that contained eyewitness identification, informant testimony, and character testimony. The experiments demonstrated that informant testimony was the most incriminating. In the third experiment, participants read summaries of criminal trials that contained a primary confession, a secondary confession (informant testimony), eyewitness identification, or none of the above. The primary confessions and secondary confessions produced significantly higher conviction rates than the eyewitness identification. Overall, the study indicated that informant testimony is a potentially dangerous piece of evidence. *Id.*

77. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (opining that eyewitness identification was the cause of DNA exoneration more than all other causes combined); *see also* Garrett, *supra* note 61, at 279.

78. *See* People v. Norstand, 939 N.Y.S.2d 261, 262 (N.Y. Sup. Ct. 2011); Benn v. United States, 978 A.2d 1257, 1257 (D.C. 2009).

79. *See* Perry v. New Hampshire, 565 U.S. 228, 262–63 (2012) (Sotomayor, J., dissenting) (noting that over the past three decades, more than 2,000 studies related to eyewitness identification have been published and that the empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country).

80. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT 255–57 (1932) (finding that cross-racial misidentifications were one of the most prominent causes of erroneous convictions in sixty-five cases); *see also* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984) (highlighting considerable evidence that supports the fact that people are generally poor at identifying members of a race different from their own). An analysis of data from thirty-nine research articles utilizing nearly 5,000 participants found that the probability of a mistaken identification is 1.56 times greater when a witness makes an other-race identification than when a witness makes a same-race identification. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 15 (2001).

approaches to combat the issue and prevent wrongful convictions.[81] For example, some courts utilize procedures for police to follow to limit suggestiveness,[82] liberally allow for cross-examination, or provide extensive jury instructions.[83] Another method to ensure that jurors are aware of the vagaries of eyewitness identifications is the use of expert witnesses to aid the jury in its evaluation of the eyewitness.[84]

The primary reason courts are reluctant to allow eyewitness experts is because they feel that juries already are perfectly capable of determining the problems with eyewitness identifications.[85] Specifically, they believe that the current procedural safeguards—jury instructions and cross-examination by defense counsel—are sufficient enough for the jury to determine how much credence to give an eyewitness identification.[86] Thus, an expert would invade the jury's role to determine credibility.[87] Notwithstanding, some courts have

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81. *See infra* notes 82–84 and accompanying text.

82. *See* Roth, *supra* note 42, at n.20.

83. *See, e.g.*, Frazier v. State, 699 S.E.2d 747, 747 (Ga. Ct. App. 2010).

84. *See* Miller v. State, 770 N.E.2d 763, 773–74 (Ind. 2012); Commonwealth v. Bastaldo, 32 N.E.3d 873, 876–77 (Mass. 2015); People v. Boone, 91 N.E.3d 1194, 1201 (N.Y. 2017) (holding that when the identifying witness and defendant are of different races and identification is at issue, the jury is entitled to hear information on cross-racial identification); State v. Henderson, 27 A.3d 872, 877 (N.J. 2011); State v. Cromedy, 727 A.2d 457, 458–59 (N.J. 1999); State v. Lawson, 291 P.3d 673, 695–97 (Or. 2012); *see also* DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES § 8-1.1, at 370 n.3 (2002); Jennifer L. Mnookin, *Constructing Evidence and Educating Juries: The Case for Modular, Made-in-Advance Expert Evidence About Eyewitness Identifications and False Confessions*, 93 TEX. L. REV. 1811, 1826 (2015); Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 621–31 (2010); George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 114–15 (2011) ("Recently . . . [because of the exoneration data] there has been a trend in both federal and state courts toward the acceptance of expert eyewitness testimony."). Experts are used to testify in cross-racial identification cases. *See supra* note 80 (outlining additional information on cross-racial identification).

85. *See, e.g.*, United States v. Smith, 736 F.2d 1103, 1105 (6th Cir. 1984) (agreeing with the district court that the "jury is fully capable of assessing the eyewitness' ability to perceive and remember" and noting that idea is consistent with First Circuit decisions).

86. *See* United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (developing a specific set of jury instructions to cover various issues with eyewitness identifications, such as distance, lighting, prior exposure to the defendant, and time lapse).

87. *See* State v. Guilbert, 49 A.3d 705, 729 (Conn. 2012).

specifically held that eyewitness identification is not within the knowledge of most jurors.[88]

The Wigmore Treatise describes the test for when to use expert witnesses as a subjective: "On *this subject* can a jury receive from *this person* appreciable help?"[89] Or, as Professor Allen provided, "[d]oes the expert in fact possess knowledge useful to this trial that is being brought to bear upon it in a way that increases the probability of accurate outcomes?"[90] In general, a judge can allow expert testimony if it will help the jury understand issues of fact beyond its common experience.[91] In thinking about an expert, one must ask whether the expert would provide the jury with information it otherwise would not know.[92] However, an expert cannot testify as to the credibility of a particular witness, which is within the exclusive province of jurors.[93] Rather, the purpose of an expert witness is to assist jurors on subjects it may not know about or may have misconceptions about.[94] The expert

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88. *See* United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) ("[J]urors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable."); Newsome v. McCabe, 319 F.3d 301, 305 (7th Cir. 2003) ("Jurors . . . tend to think that witnesses' memories are reliable . . . and this gap between the actual error rate and the jurors' heavy reliance on eyewitness testimony sets the stage for erroneous convictions."); United States v. Smithers, 212 F.3d 306, 312 n.1, 316 (6th Cir. 2000) ("[T]here is no question that . . . perception and memory are not within the common experience of most jurors . . . ."); United States v. Sullivan, 246 F. Supp. 2d 696, 699 (E.D. Ky. 2003) (finding that expert testimony would educate the jury and that "[m]any of the hazards of eyewitness identification are not within the ordinary knowledge of most lay jurors"); Commonwealth v. Walker, 92 A.3d 766, 785–89 (Pa. 2014) (rejecting the long-standing Pennsylvania ban on expert testimony for eyewitness reliability and holding that such expert testimony will assist the jury); *see also* Peter A. Joy, *Constructing Systemic Safeguards Against Informant Perjury*, 7 OHIO ST. J. CRIM. L. 677, 683 (2010) (observing that special jury instructions are needed to aid the jury in assessing an informant's credibility); Mnookin, *supra* note 84, at 1812 (noting that judicial acceptance of expert witnesses has been growing, even to the point where a trial court's exclusion of a qualified expert who could have educated the jury on the dangers of misidentification was a reversible error).

89. 7 JOHN HENRY WIGMORE, EVIDENCE § 1923 (Chadbourn rev. 1978) (emphasis in original).

90. Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867 n.164 (2005). *See also* Ronald J. Allen, *Expertise and the Supreme Court: What is the Problem?*, 34 SETON HALL L. REV. 1, 7 (2003).

91. *See* Luna v. Massachusetts, 224 F. Supp. 2d 302, 315 (D. Mass. 2002).

92. *See* State v. Moran, 728 P.2d 248, 251 (Ariz. 1986).

93. *See id.* at 252.

94. *See id.* at 251.

can help the jury understand factors that may help it weigh the credibility of a witness.[95]

> Expert testimony . . . is not, as some current practice suggests, a mechanism for having someone of elevated education . . . engage in a laying on of the hands, placing an imprimatur, upon the justice of one's cause. . . . Experts are not, in theory, called to tell the jury who should win. They are called, instead, to provide knowledge to the jury to permit the jury rationally to decide the case before it.[96]

An eyewitness case from California aptly describes the value of an expert witness:

> [E]xpert testimony [on the reliability of eyewitness identification] does not seek to take over the jury's task of judging credibility: . . . [I]t does not tell the jury that any particular witness is or is not truthful or accurate in his identification . . . . Rather, it informs the jury of certain factors that may affect such an identification . . . . The jurors retain both the power and the duty to judge the credibility and weight of all the testimony in the case.[97]

Similarly, in cases involving informants, an expert witness can raise factors about informant testimony to help the jury make an informed decision regarding whether to credit the testimony of that witness. Certainly, cross-examination and jury instructions contribute to that understanding, but it is not enough.[98]

Trial judges are given considerable leeway to make the determination as to the necessity for expert witnesses and will only be overturned if there is an abuse of discretion.[99] The judge, in exercising her discretion, generally determines two things.[100] First, whether the expert is truly an expert—does he know what he is talking about?—and second, whether the information will aid the jury in its deliberations.[101] In determining the validity of expert testimony, the judge also considers whether the jury might afford the expert evidence

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95. *See id.*

96. *Id.* at 255 n.7 (citing MORRIS K. UDALL & JOSEPH M. LIVERMORE, LAW OF EVIDENCE § 22, at 30–31 (2d ed. 1982)).

97. People v. McDonald, 27 Cal. 3d 351, 370–71 (Cal. 1984) (emphasis removed).

98. *See* State v. Guilbert, 49 A.3d 705, 725–26 (Conn. 2012) (noting that cross-examination is better suited to exposing lies than it is for countering sincere but mistaken beliefs and concluding that cross-examination and jury instructions are less effective than expert testimony in assisting the jury).

99. *See* Brodin, *supra* note 90, at 899–905 (discussing the role of a trial judge in deciding whether jurors need expert guidance and the lack of structural certainty involved).

100. *See id.* at 898.

101. *See id.*

undue weight.[102] This discretion with regard to informants is more carefully evaluated when there is limited or no corroborating evidence.[103] Because appellate courts give a great deal of deference to the trial judge's judgment, it is rare that they reverse this judgment.[104]

Often, expert testimony is the best way to aid the jury in its evaluation of the eyewitness.[105] In one study, expert witnesses' effects on understanding eyewitness identification showed that expert witnesses had a greater effect in helping jurors understand and improve their sensitivity to eyewitness identification.[106] I would suggest the same for experts on informant testimony. Studies have indicated that jurors do not really understand jury instructions,[107] and further research is required to determine the effects of such jury instructions.[108] Jury instructions do not allow jurors to explore the information provided.[109] They are often reduced to a sentence or two

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102. *See id.*

103. *See generally* Frazier v. State, 699 S.E.2d 747 (Ga. Ct. App. 2010) (demonstrating the importance of corroborating evidence in the context of eyewitness identifications). In *Frazier*, the victim was the eyewitness who specifically described the defendant in the 911 call, and police officers subsequently located the defendant three to four blocks away from the crime scene matching the exact description of the eyewitness. *See id.* at 749–50. This was considered substantial corroborating evidence that justified the trial court's exclusion of the expert's testimony. *See id.* at 750.

104. *See* United States v. Rodriguez-Berrios, 573 F.3d 55, 72 (1st Cir. 2009) (demonstrating that an appellate court rarely overturns evidence admitted by the trial judge).

105. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 689 (2000) (providing a comprehensive review of empirical research on jury decision making and concluding that "expert testimony has more influence when tailored to the specific facts of the case at hand" and that juries scrutinize expert testimony "as intensively as the testimony of any other witness"); *see also* Loftus, *infra* note 106.

106. *See generally* Elizabeth F. Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOL. 9 (1980). In the first experiment, "jurors" heard testimony of an eyewitness. Only half of the jurors read about expert testimony regarding the reliability of eyewitness identification. *See id.* at 11–13. When expert testimony was read, the researchers found that there were fewer convictions. *See id.* at 12–13. In the second experiment, the jurors deliberated on whether to rule in favor or against the defendant. *See id.* at 13–14. Jurors who had read about the expert testimony in experiment one discussed the eyewitness account for much longer than the jurors who were not exposed to the expert testimony. *See id.* Ultimately, the researchers found that expert testimony may help enhance the scrutiny that jurors give to eyewitness accounts. *See id.* at 14.

107. *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1421 n.335 (2014); *see also* Vallas, *supra* note 84, at 131.

108. *See* GARRETT, *supra* note 61, at 251.

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

without sufficient explanation.[110] Furthermore, jury instructions usually occur at the end of trial, and at that point, jurors are often wedded to their positions.[111]

Commenting on the ineffectiveness of jury instructions, Justice Brennan wrote, "To expect a jury to engage in the collective mental gymnastic of segregating and ignoring such [eyewitness] testimony upon instruction is utterly unrealistic."[112] Research on jury instructions and eyewitness testimony supports that view.[113] "However, I would suggest that jury instructions are akin to using a Band Aid on a head wound: perhaps better than nothing but not the right solution to a serious problem."[114] Studies have shown that using both jury instructions and expert testimony is the best way to ensure jury understanding.[115] The issue with relying solely on jury instructions is that they come at the end of trial when the majority of jurors have already made up their minds.[116] Additionally, a judge delivers jury instructions in lecture form after live testimony, making it harder for jurors to comprehend.[117]

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

110. *See* 1 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS §§ 7:02, 7:06 (6th ed. 2008) (noting that standard forms of jury instructions "may not be swallowed whole" and recognizing the balance between conveying the technicalities of the law while attempting to ensure layperson comprehension).

111. *See id.* at § 7:06 (noting that the majority of judges deliver their instructions after final arguments); *see also* Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. EXPERIMENTAL PSYCHOL. 91, 98 (2001) (finding in a study based on a mock trial that pro-plaintiff or pro-defendant attitudes influenced the verdicts of prospective jurors despite instructions to ignore prior beliefs).

112. Watkins v. Sowders, 449 U.S. 341, 356 (1981) (Brennan, J., dissenting).

113. *See* Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 L. & HUM. BEHAV. 233, 263–64 (1987).

114. Mnookin, *supra* note 84, at 1838.

115. *See, e.g.*, Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861, 891 (2015).

116. *See* Loftus, *supra* note 106, at 9.

117. *See* Note, *The Province of the Jurist: Judicial Resistance to Expert Testimony on Eyewitnesses As Institutional Rivalry*, 126 HARV. L. REV. 2381, 2382 (2013).

B. State Experience: The Connecticut Example

States have been innovative in amending their criminal procedure as they begin to deal with the reasons for exoneration.[118] Connecticut presents a good example of this, as it recently allowed for expert testimony for informants in the case *State v. Leniart*,[119] in which George Michael Leniart was convicted of murder and capital felony in connection with the kidnapping, sexual assault, and murder of a teenage victim.[120] The body of the victim was never found.[121] In his appeal from the conviction, the defendant claimed that the evidence was insufficient to support his conviction because the only evidence of the victim's death was the testimony of four witnesses who told the jury that he had confessed to them about killing the victim and disposing of her body.[122] Three of these witnesses were inmates with whom the defendant previously had been incarcerated.[123] At the time of his confessions to the inmates, the defendant was incarcerated for having sexually assaulted another teenage girl.[124] Among the issues on appeal was defendant's claim that the trial court improperly excluded from evidence expert witness testimony about the use and effects of jailhouse informant testimony.[125]

The Appellate Court of Connecticut rendered a decision on the issue of expert testimony regarding the use and effects of jailhouse informants.[126] The defendant argued that he sought to introduce evidence that was not within the understanding of an average juror.[127] The State argued that the testimony was within the knowledge of the

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118. *See* GARRETT, *supra* note 61, at 241; Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 524 (2004).

119. *See* State v. Leniart, 140 A.3d 1026, 1036 (Conn. App. Ct. 2016), *cert. granted*, 150 A.3d 1149 (Conn. 2016), *cert. granted*, 149 A.3d 499 (Conn. 2016). The appeal to the Supreme Court of Connecticut was limited to the issue of whether the appellate court properly applied the "corpus delicti rule in concluding that there was sufficient evidence to sustain the defendant's convictions for murder and capital felony." *Leniart*, 149 A.3d at 499 (Conn. 2016).

120. *See Leniart*, 140 A.3d at 1036–37.

121. *See id.* at 1037.

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.* at 1036.

126. *See id.*

127. *See id.* at 1071.

average juror and that such testimony would invade the role of the jury to determine credibility of the witness.[128]

The court began its analysis by citing *State v. Arroyo*, in which the court recognized the inherent unreliability of informant testimony and its contribution to wrongful convictions.[129] The *Arroyo* court provided instructions to the jury to review the informant testimony, as well as evidence that corroborated this testimony, with greater scrutiny and care.[130] As the court then observed in *Leniart*, jurors may not have a clear understanding of the workings of the criminal justice system and specifically what the culture is like in jail.[131] Further studies have indicated that jury instructions are not effective even when jurors are cautioned about the credibility issues and made aware of the informant's possible motivation.[132] Furthermore, most jury instructions usually occur at the end of trial, and at this point, jurors have made up their minds.[133]

The court, in looking at the need for experts, said that "[t]he true test for the admissibility of expert testimony is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the question at issue" in this particular case, jailhouse informants.[134] In stating this proposition, the court cautioned that the expert can invade the province of the jury by rendering a credibility opinion of a witness.[135] The *Leniart* court concluded that the expert testimony

128. *See id.*

129. *See id.* at 1072 (citing State v. Arroyo, 973 A.2d 1254 (Conn. 2009)).

130. *See id.*

131. *See id.* at 1074; *see also supra* notes 107–117 and accompanying text (discussing the inadequacies of jury instructions).

132. *See, e.g.*, ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 78 (2009); *see also* Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137 (2008) [hereinafter *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*] (describing a study wherein the group of jurors who were told that the informant was testifying in exchange for a benefit convicted at the approximately the same rate as the control group that did not receive that information).

133. *See* RICHARD NISBETT & LEE ROSS, HUMAN INTERFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGEMENT 172 (1980) ("First impressions are important, and the primary effect in impression formation, in which early-presented information has an undue influence on final judgment . . . .") (emphasis removed).

134. *Leniart*, 140 A.3d at 1075.

135. *See id.* at 1076.

would have aided the jury in this case and thus remanded the case for a new trial.[136]

In extending the need for experts for informants, the court cited *State v. Guilbert*, a case involving an eyewitness identification expert where the court held that an expert can assist the jury in learning about factors that generally have an adverse effect on the reliability of an eyewitness identification.[137] Although this case recognized the value of experts, the court found that the expert testimony would not be helpful because the eyewitness knew the defendant and was thus less likely to render a mistaken identification.[138]

The Federal District Court in *United States v. Noze* had occasion to consider the *Leniart* decision.[139] The court cited the Second Circuit in *Nimely v. New York* for the proposition that it is the jury that determines credibility using "their natural intelligence and their practical knowledge."[140] In *Nimely*, the expert testimony involved information about the propensity of police officers to lie, which goes to the ultimate issue of credibility, as opposed to factors that should be determined in weighing the credibility of a particular witness.[141] Unlike the experts in *Nimely*, using experts in regard to accomplices or jailhouse informants will not go to the ultimate issue of credibility of a particular witness (i.e., propensity to lie); it will only make the jury aware of factors it should consider in determining credibility. There is a great deal more to these factors than simply that jails are a "miserable place."[142] The court in *Noze* seemed to rely on cooperating agreements prevalent in the federal system that indicated the nature of the deal to testify.[143] However, the deal is often not promulgated until after the testimony, so the informant will likely say that he is testifying out of a civic responsibility and not for any personal gain. Further, he will likely say that the prosecutor told him to tell the truth.[144]

136. *See id.* at 1079–80.
137. *See* State v. Guilbert, 49 A.3d 705, 734–37 (Conn. 2012).
138. *See id.*
139. *See* United States v. Noze, 255 F. Supp. 3d 352, 354 (D. Conn. 2017).
140. Nimely v. New York, 414 F.3d 381, 397 (2d. Cir. 2005).
141. *See id.*
142. *Noze*, 255 F. Supp. 3d at 354.
143. *See id.*
144. *See generally* GARRETT, *supra* note 61, at ch. 9.

C. Alternate Approaches to Test the Credibility of Informants

There have been a number of efforts by courts and legislatures to deal with the problem of false testimony by informants. The most common methods have been jury instructions and the need for corroboration.[145] There have been jury instructions with regard to accomplices and jailhouse informants.[146] The jury instructions usually include a caution to weigh informant testimony with particular scrutiny and greater care than the testimony of an ordinary witness.[147] In addition, the jury is asked to consider the amount of independent corroboration of the informant's testimony; the specificity of the testimony; the extent to which the testimony discloses details only the defendant knows; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record and his previous experience as an informant; any benefits received in exchange for the testimony; whether the informant has previously provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor.[148]

The ABA and many state statutes adopted the mandatory corroboration requirement.[149] It should be pointed out that corroboration evidence connecting the accused to a crime is often

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145. *See, e.g.*, State v. Arroyo, 973 A.2d 1254, 1262 (Conn. 2009).

146. Most states resort to jury instructions to deal with the problems with informant testimony. *See* Carlson & Russo, *supra* note 111, at 91. In studies of eyewitness identification, jury instructions did not necessarily increase the jurors' sensitivity to the problem associated with eyewitness identification. *See, e.g.*, *id. See generally* Gabriella Ramirez et al., *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31 (1996).

147. *See, e.g.*, *Arroyo*, 973 A.2d at 1262 (Conn. 2009) (requiring higher scrutiny for accomplice witnesses). *See also* Peter P. Handy, *Chapter 153: Jailhouse Informants' Testimony Gets Scrutiny Commensurate with its Reliability*, 43 MCGEORGE L. REV. 517, 755 (2012) (describing higher scrutiny requirement with accomplice witness testimony).

148. *See Arroyo*, 973 A.2d at 1262 (listing additional considerations the jury is instructed to weigh).

149. *See, e.g.*, ALASKA STAT. § 12.45.020 (2018); CAL. PENAL CODE § 111 (Deering 2003); GA. CODE ANN. § 24-14-8 (2018); N.Y. CRIM. PROC. § 60.22 (McKinney 2018). *See also* Covey, *supra* note 107, at 1416–17 n.308–11 (describing how the evidentiary standard is not difficult to meet because there is usually ample evidence of corroboration); Handy, *supra* note 147; Roth, *supra* note 42, at 743–44.

minimal.[150] Other reforms include pretrial reliability hearings,[151] in which a judge evaluates the evidence and may exclude evidence not determined to be reliable by a preponderance of the evidence.[152] Exculpatory disclosures are also required, which include existing or future consideration for testimony; frequency and locations of interviews, including any transcripts; an informant's criminal records and number of times used as an informant; and how the informant came to the attention of the government.[153] Some have suggested greater internal controls of ethical behavior within the prosecutor's office.[154] So, with regard to further reforms, efforts should be made to exercise greater control over creating and developing an informant.[155] One example of doing so would be a stringent procedure for recording interviews by police and prosecutors. This would be similar to the movement in eyewitness identification, which has created police procedures for conducting pretrial eyewitness identification. With regard to eyewitness cases,[156] police protocols to be followed by the police and district attorneys have been established in order to make and maintain a record of all interactions with the informant.[157] These protocols are also a fundamental concern for informant testimony.

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150. *See* Roth, *supra* note 42, at 761. Additionally, the corroboration evidence may be unreliable. *See id.* In several DNA exoneration cases involving informant testimony, the corroboration evidence was suspect (e.g., false confessions, eyewitness misidentification, and faulty forensic science). *See id.*

151. *See* Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000).

152. *See* Ryan, *supra* note 73, at 122; *see also* John O'Connor, *Illinois Adopts the Nation's Toughest Test for Snitch Testimony*, ASSOCIATED PRESS (Dec. 8, 2018), https://www.apnews.com/5a41098570fa40d2b08f96680bae866e [https://perma.cc/V2CC-M72R] (discussing the use of pretrial reliability hearings in Illinois). Illinois recently amended its Code of Criminal Procedure. *See* 725 ILL. COMP. STAT. § 5/115-21(d) (2019) ("The court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial.").

153. *See* § 5/114-13(b) (providing exculpatory disclosure requirements in criminal cases).

154. *See* Raeder, *supra* note 1, at 1417.

155. *See, e.g.*, REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 149–50 (1990) [hereinafter REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY].

156. *See, e.g.*, State v. Henderson, 27 A.3d 872 (N.J. 2011); State v. Lawson, 291 P.3d 673 (Or. 2012).

157. *See* REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY, *supra* note 155; *see also* Handy, *supra* note 147, at 760; Joy, *supra* note 88.

Certainly, all of these approaches are useful, but the one safeguard which needs to become more prevalent is the use of expert testimony. The last few years have witnessed an evolution of the acceptance of expert testimony regarding eyewitness identifications. Some have even suggested that a confession, even if it is coming from a secondary source, has a greater effect on influencing jurors than eyewitness testimony.[158]

D. The Argument for Expert Witnesses for Informant Testimony

> Never has it been more true . . . that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.[159]

Often, testifying is the only way to avoid long prison sentences.[160] One court noted that it is obvious that a promise of reduced time is a strong incentive to falsify statements.[161] Those already incarcerated or facing incarceration have a great incentive to testify falsely.[162] Jurors tend to give great weight to secondary confessions, or confessions the informant claims the defendant made.[163]

1. *What Would an Expert Say?*

So it is a fair question to posit—what information can an expert provide to the jury to aid in the determination of credibility? The

158. *See, e.g.*, Saul M. Kassin & Katherine Neuman, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469 (1997); Wetmore, *supra* note 76; Robert McCoppin, *High Court Opens Door to Experts Who Say Eyewitness IDs Are Unreliable*, CHICAGO TRIBUNE (Sept. 12, 2016, 6:10 AM), https://www.chicagotribune.com/news/ct-eyewitness-expert-testimony-illinois-met-20160911-story.html.

159. N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

160. *See* Jack Call, *Judicial Control of Jailhouse Snitches*, 22 JUST. SYS. J. 73, 74 (2001).

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

162. *See* Call, *supra* note 160, at 73–74.

163. *See supra* note 158 and accompanying text.

Connecticut Appellate Court in *Leniart* characterized it as the workings of the criminal justice system.[164]

a. Benefits

In considering the benefits, it is important to be aware that jails and prisons are awful places. It is hard to imagine a greater incentive to get out of jail and reduce one's time in prison.[165] In most instances, the benefits for testifying are not realized until after the testimony has been given. In this way, an informant on the witness stand can truthfully testify that there were no promises or benefits given in return for his testimony. This contributes to making the witness more convincing. However, benefits are indeed expected, and are realized, depending upon the helpfulness of the testimony.[166] In addition, the informant is aware that the benefits to be received will be based on the usefulness of his testimony on behalf of the state's case. Federal prosecutors, who are required to provide the defense with information as to promises, rewards, or inducements for a witness's testimony, will often withhold these promises or refer to them in a vague manner to avoid disclosure.[167]

In 1972, in *Giglio v. United States*, a witness falsely provided on cross-examination that there were no promises made in exchange for his testimony.[168] The Supreme Court held that the prosecution's failure to disclose a promise of leniency to the witness was a material issue

164. *See* State v. Leniart, 140 A.3d 1026, 1072 (Conn. App. Ct. 2016) ("[T]he extensive use of jailhouse informants in criminal prosecutions . . . [was] 'largely a closeted aspect of the criminal justice system.'").

165. *See generally* United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987). *See also* FRED KAUFMAN, 1 COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN: REPORT 13 (Ottawa: Ontario Ministry of the Attorney General, 1998); Christopher Sherrin, *Declarations of Innocence*, 35 QUEEN'S L.J. 437, 462 (2010) (commenting on the Commission of Inquiry into proceedings Guy Paul Morin).

166. *See generally* BLOOM, *supra* note 53.

167. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 150–53 (1972).

168. *See id.* Giglio was sentenced to five years in prison for passing forged money orders. *See id.* at 150. At trial, Robert Taliento, Giglio's alleged coconspirator testified against Giglio as the only witness linking Giglio to the crime. *See id.* at 151. Giglio's defense attorney attempted to elicit testimony from Taliento that a deal was made whereby Giglio would testify in exchange for leniency. *See id.* However, Taliento denied any deal and the jury heard that "[Taliento] received no promises that he would not be indicted." *Id.* at 152. After this trial, evidence was brought to light that "Taliento would definitely be prosecuted if he did not testify" against Giglio. *Id.* at 153.

affecting the witness's credibility.[169] Nevertheless, numerous cases interpreting *Giglio* have read the decision narrowly so as to require disclosures only for express agreements. In this way, an informant witness can say that no promises were made for his or her testimony.[170] Even when there are cooperative agreements, the U.S. Attorney will condition recommendations on substantial assistance (vague term).[171] So much is left to be determined at a later date.[172]

Even if the benefits are specifically known and presented to the jury, Professor Garrett, in studying the first 250 DNA exonerations, found that of the twenty-eight jailhouse informants, only two of them admitted that they had a deal with the prosecutor, while the others denied any explicit promise.[173] "Informants rarely admitted that they were testifying because they hoped for some gain. Instead these informants often gave high-minded motives for testifying that belied their likely motives. Some informants claimed they were testifying as public-minded citizens."[174]

"[T]he jury not knowing the system of how it works is going to believe [me] when I get up there with all these details and facts that this guy sat in the jail cell, or he sat on the bus [transporting to court], or he sat in the holding tank somewhere or told me through a door or something, they're going to believe me."[175] Further, jurors have been shown to be ineffective in evaluating reliability because they do not

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169. *See id.* at 155. (deciding ultimately to issue a new trial).

170. *See* Michael Cassidy, *"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. L. REV. 1129, 1138 n.52 (2004).

171. *See id.*

172. *See* Roth, *supra* note 42, at 755 n.90–91, 756 n.98; *see also* Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 336 (2012) [hereinafter *Judicial Gatekeeping of Police-Generated Witness Testimony*] (noting that "jurors . . . [are] generally ineffective at evaluating the reliability of police informants because they do not appreciate the government incentives or coercion . . . nor do they appreciate the vulnerability of some informants in the face of police pressure").

173. *See* GARRETT, *supra* note 61, at 138.

174. *Id.* Juries give great weight to testimony of accomplices even when they are aware that the accomplice has benefited from the testimony. *See The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, *supra* note 132, at 138.

175. REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY, *supra* note 155, at 72 (stating that over the course of the investigation, the grand jury heard 120 witnesses, including six self-professed jailhouse informants).

understand the government's proffered benefits or the pressures exerted on the informant.[176]

b. Informant Information

Given the value of the testimony, how do informants gain this information if not from the perpetrator? There are many methods informants obtain information, such as from the streets, Internet, news, cell phones, and occasionally intentionally, or perhaps unintentionally, from investigators.[177]

c. Prosecutor Information

Often the jurors will automatically believe the prosecutor. I recall that when I testified in Connecticut, the prosecutor in cross-examination would ask me, "Do you think I would knowingly put on a witness who is not telling the truth?" She expanded on this point by asking me about ethical obligations of prosecutors to seek justice.[178]

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176. *See* Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 657, 723; *Judicial Gatekeeping of Police-Generated Witness Testimony*, *supra* note 172, at 336.

177. *See* Raeder, *supra* note 1, at 1419 (noting that increasing access to technology has increased informants' access to insider information). In the case of jailhouse informant Leslie White, Mr. White would call various precincts to get information about a crime, such as the date, the name and age of the victim and suspect, and the jail cell number. *See* Robert Reinhold, *California Shaken Over an Informer*, N.Y. TIMES (Feb. 17, 1989), https://www.nytimes.com/1989/02/17/us/california-shaken-over-an-informer.html [https://perma.cc/7UR3-W5NH]. Next, White would call the prosecutor on the case posing as a sergeant at the precinct to gain more information. *See id.* Mr. White said,

> At this point, I've got the victim's name, date of arrest, date of occurrence, method of murder, facts in the case, down to detailed specific information. I would need no more at this time than I was somewhere near the suspect . . . [a]nd I could easily say this suspect had in fact made a jailhouse admission to me concerning the crime and explained to me he had done it this way with the facts I have at this point. I don't think there's any homicide detective in the county who would not believe what I've got to say.

Id.; *see also* REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY, *supra* note 155.

178. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (4th ed. 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); *cf.* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.2 (4th ed. 2015) ("The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and

She also pointed out her obligation to provide exculpatory evidence to the defense.[179] However, prosecutors often are young and inexperienced and are not always good at detecting lying.[180] Also, cultural and linguistic issues between prosecutors and informants often make the assessment of truth difficult.[181] In addition, there are rarely consequences to the prosecutor for putting on false testimony.[182]

Prosecutors will often use informants so as to shore up an otherwise weak case.[183] One of the aspects that an expert would testify to is the amount of discretion afforded to prosecutors.[184] Prosecutors and investigators have wide latitude in developing informant testimony.[185] Prosecutors often decide in crimes involving more than one perpetrator who shall help the state prove its case and receive benefits and who shall experience the brunt of the punishment.[186] This discretion may be exercised randomly, for example, depending on who is the first to turn the state's evidence or who is the first to have gotten caught. There is virtually no monitoring of this process. Roth

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other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity."); *see also* John C. Brigham & Melissa P. WolfsKeil, *Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 337, 346–47 (1983) (finding that prosecutors "regard eyewitness identification as relatively accurate and feel that its importance is appropriately emphasized by judges and jurors," while "defense attorneys . . . [feel] that eyewitness identifications are often inaccurate and overemphasized by triers of fact").

179. *See generally* Brady v. Maryland, 371 U.S. 812 (1962).

180. Kassin, *infra* note 190; Roth, *supra* note 42, at 774–75.

181. *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 948 (1999) (noting that prosecutors do not look critically enough at the reliability of the statement because they believe they have the right person and are looking for corroboration).

182. *See* Raeder, *supra* note 1, at 1425 (citing the Chicago Tribune analysis of 381 murder cases that were reversed for prosecution misconduct). However, none of the prosecutors were disbarred. *See id.*

183. *See generally Secondary Confessions, Expert Testimony, and Unreliable Testimony*, *supra* note 75. Additionally, in cases with weak evidence, the situational incentives of law enforcement agents and accomplices align to create the greatest opportunity for false testimony. *Id.*

184. *See* Covey, *supra* note 107, at 1415.

185. *See id.* at 1383; *see also* Findley, *supra* note 176, at 754 n.109 (quoting the Canadian inquiry into the wrongful conviction of Thomas Sophonow, noting that "jailhouse informants are 'polished and convincing liars'"). *See generally* PETER DE C. CORY, THE INQUIRY REGARDING THOMAS SOPHONOW: THE INVESTIGATION, PROSECUTION AND CONSIDERATION OF ENTITLEMENT TO COMPENSATION (Winnipeg: Manitoba Justice, 2001) [hereinafter *Sophonow Inquiry*].

186. *See* Covey, *supra* note 107, at 1388.

coined the phrase "The Black Box Aspect of Informant Use" to emphasize the lack of controls regarding how informant testimony is developed and gathered and how it is introduced at trial.[187] Thus, an informant may gain information that contributes to his or her credibility either deliberately or mistakenly by police or prosecutor.[188]

Jurors tend to believe in prosecutors who are working for the "people" and would thus not put anyone on the stand that they thought was not truthful. To this end, jurors should be aware of two factors—first, jurors should know that prosecutors are not better at discovering truth than an average citizen, and secondly there is an adversarial process going on in the courtroom where sometimes prosecutors are blinded by their desire to win.[189] Not to mention, prosecutors, even honest ones, sometimes fall prey to cognitive failures. Studies have shown that prosecutors are no more reliable than a lay person in detecting lying.[190] Furthermore, prosecutors are prone to confirmation

187. Roth, *supra* note 42, at 756.

188. *See id.* at 755; *see also* BLOOM, *supra* note 53, at 65 (describing the story of Leslie Vernon White); REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY, *supra* note 155, at 1; *Sophonow Inquiry*, *supra* note 185.

189. *See* Yaroshefsky, *supra* note 181, at 952. *See generally* Steven M. Cohen, *What Is True? Perspectives of A Former Prosecutor*, 23 CARDOZO L. REV. 817 (2002).

190. *See* Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 811 (2002); *see also* Roth, *supra* note 42, at 774. Prosecutors are not necessarily more apt to detect deceptions than average citizens. Additionally, prosecutors are prone to confirmation bias, as the informant version is often consistent with their own theory. Thus, they tend to be less skeptical of informant testimony. *See* Covey, *supra* note 107, at 1384–85; *see also* Yaroshefsky, *supra* note 181.

bias.[191] Because the informant's version is consistent with their own theory of the case, they are less skeptical of any gaps in the narrative.[192]

With regard to accomplices, the old adage "it takes a crook to catch a crook" is applicable. Accomplices usually have pled guilty and are awaiting sentencing and thus choose to testify so they can minimize their own role in the enterprise and implicate others as the masterminds.[193] Furthermore, this testimony is highly believable to jurors because an accomplice is admitting wrongdoing.[194] "[P]sychological profile of accomplice witnesses suggests that they may be more likely than ordinary witnesses to perjure themselves because, by their own admission, most have committed crimes, thereby demonstrating a tendency to disregard legal norms."[195]

As the *New York Times* recently observed, "[M]any prosecutors are far too willing to present testimony from people they would never trust under ordinary circumstances. Until prosecutors are more concerned with doing justice than with winning convictions, even the

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191. *See* JAMES COMEY, A HIGHER LOYALTY: TRUTH, LIES, AND LEADERSHIP 104 (2018) ("Our brains have evolved to crave information consistent with what we already believe. We seek out and focus on facts and arguments that support our beliefs. More worrisome, when we are trapped in confirmation bias, we may not consciously perceive facts that challenge us, that are inconsistent with what we have already concluded. In a complicated, changing, and integrated world, our confirmation bias makes us very different people. We simply can't change our minds."); *see also* George Thomas III, *Blinded by the Light: A Review of Mark Godsey's* Blind Injustice, 15 OHIO ST. J. CRIM. L. 597, 604 (2018) ("Once police officers or detectives have a theory of the case, and a suspect, they tend to *see* every piece of evidence as confirming their theory. It is this way the brain is wired. Pieces of evidence that go against the original theory are often rejected; that evidence is unreliable or the witness mistaken. Prosecutors who get a case file with a theory and a suspect suffer the same confirmation bias.").

192. *See* United States v. Roberts, 618 F.2d 530, 536 (1980) (explaining how prosecutors by putting witness on stand appear to be vouching for their testimony, yet studies show prosecutors not the best in detecting perjury); *see also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1596–97 (2006) (noting that people tend to view information that reinforces their existing beliefs favorably).

193. *See* Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 786 (1990).

194. *See id.* at 787.

195. Cassidy, *supra* note 170, at n.66; Paul C. Gianelli, *Brady and Jailhouse Snitches*, 57 CASE W. RES. 593, 610 n.53 (2007) (noting because of truthfulness concerns, eighteen states have statutes requiring corroboration of accomplice testimony); *see also* Roth, *supra* note 42, at 765–66 n.153 (noting that accomplices may admit to participating in a crime but minimize their own involvement while inflating the roles of others, and some may admit guilt but fabricate the involvement of others).

most well-intentioned laws will fall short."[196] Given DNA exonerations, the possibility that the informant testimony is not truthful should be obvious to prosecutors.[197]

2. *Possible Consequences to Informant for Lying*

One might think that perjury prosecutions might exist for lying. However, as the L.A. grand jury discovered, there are almost never such prosecutions.[198] We have previously discussed the importance of the informant to the criminal justice system.[199] If perjury prosecutions became prevalent, informants might be deterred from testifying.[200] Additionally, perjury prosecutions are difficult to prove.[201]

Another consequence is the threat of violence on the streets or in the prison system for being an informant.[202] If the informant does not get released as a result of providing testimony, he could be transferred within the system.[203] Conversely, if the informant is released and there is a significant likelihood of violence, he might be offered a witness protection program.[204]

CONCLUSION

DNA exonerations have established that some informants lie.[205] Recognizing the need for informants in the prosecution of crimes,

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196. Robert S. Mosteller, *Prosecutorial Discretion: The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 519 (proposing a review of prosecutorial decision-making in cases where informant testimony is critical to the outcome). *See* Raeder, *supra* note 1, at 1417 (discussing the potential ethical violations of prosecutors when they offer informant testimony, knowing there might be a high probability that the testimony is false); *Texas Cracks Down on the Market For Jailhouse Snitches*, *supra* note 38.

197. *See* Raeder, *supra* note 1, at 1413.

198. *See* REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY, *supra* note 155.

199. *See* Roth, *supra* note 42, at 765.

200. *See* Mark Curriden, *The Lies Have It: Judges Maintain that Perjury is on the Rise but the Court System May Not Have Enough Resources to Stem the Tide*, 81 A.B.A. J. 68, 69 (1995).

201. *See id.* (citing Michael McCann, a Milwaukee County prosecutor, describing a growing prevalence of perjury: "Outside of income evasion, perjury is probably the most under prosecuted crime in America.").

202. *See* BLOOM, *supra* note 53, at 63.

203. *See id.*

204. *See id.*

205. *See* Raeder, *supra* note 1, at 1413.

safeguards need to be implemented to ensure the truthfulness of informant testimony.[206] The use of expert witnesses has evolved in eyewitness cases to assist the jury in its evaluation of the credibility of a witness.[207] It is the hope that experts will be utilized more readily when dealing with an informant witness.

206. *See* Mosteller, *supra* note 196, at 519.
207. *See* Vallas, *supra* note 84, at 114.