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Jailhouse Informants

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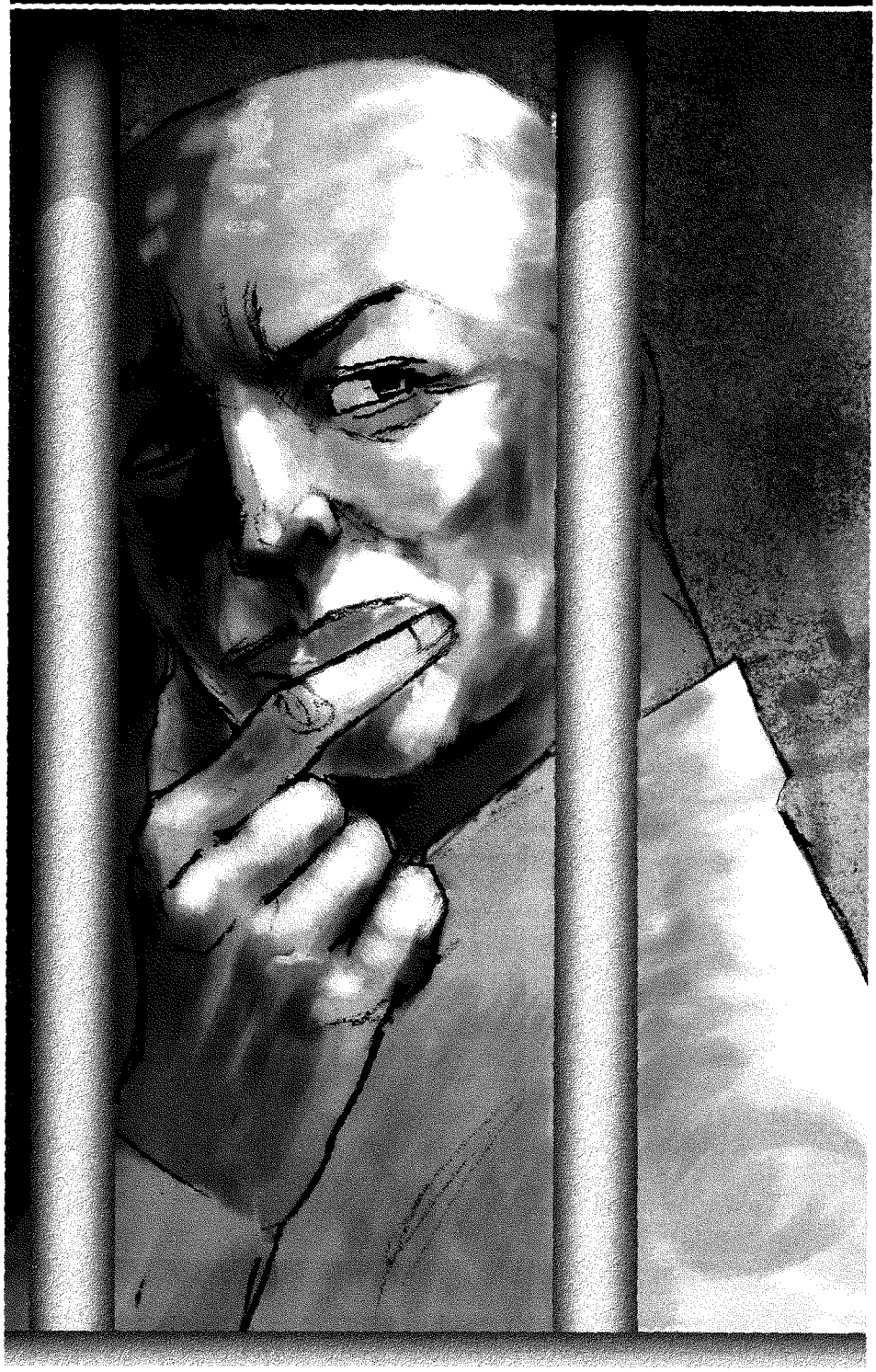
Jailhouse



Jailhouse informants probably have existed since the advent of the plea bargain (although a check of LEXIS finds the earliest reference to be 1966.) In return for testimony, these informants gain a powerful tool in their plea negotiations. And the payoff for them—a reduced sentence, perhaps even their freedom—is incentive enough to testify and, sometimes, to lie.

Unlike "street" informants, jailhouse informants are witnesses who testify as to statements made by a fellow inmate while both are in custody. The statements usually relate to offenses that occurred outside the custodial institution. (It should be pointed out that there is a small percentage of jailhouse informants who are motivated less by the prospect of receiving favors than their disdain for another inmate's alleged crime, such as sexual abuse of a child.)

Up until the late-1980s, untruthful testimony and other systemic problems associated with jailhouse informants were largely a closeted aspect of the criminal justice system. Then, in the fall of 1988, Leslie Vernon White, an informant and admitted perjurer, demonstrated to a newspaper reporter how he obtained confidential information while in jail and used it to fabricate confessions of his fellow prisoners. As a result of the ensuing *Los Angeles Times* investigative series, the Los Angeles County district attorney convened a grand jury, which produced *Report of the 1989–90 Los Angeles County Grand Jury* (The L.A. Grand Jury Report.) The report included recommendations on how to rectify the problems inherent to the use of jailhouse snitches. (*L.A. Grand Jury Report* at 5.)

Subsequent investigations include two in Canada: *The Commission on Proceedings Involving Guy Paul Morin*, before The Honorable Fred Kaufman C.M. Q.C. (1998) and the *Report of the Commission of Inquiry Regarding Thomas Sophonow* (the Sophonow Inquiry) in September

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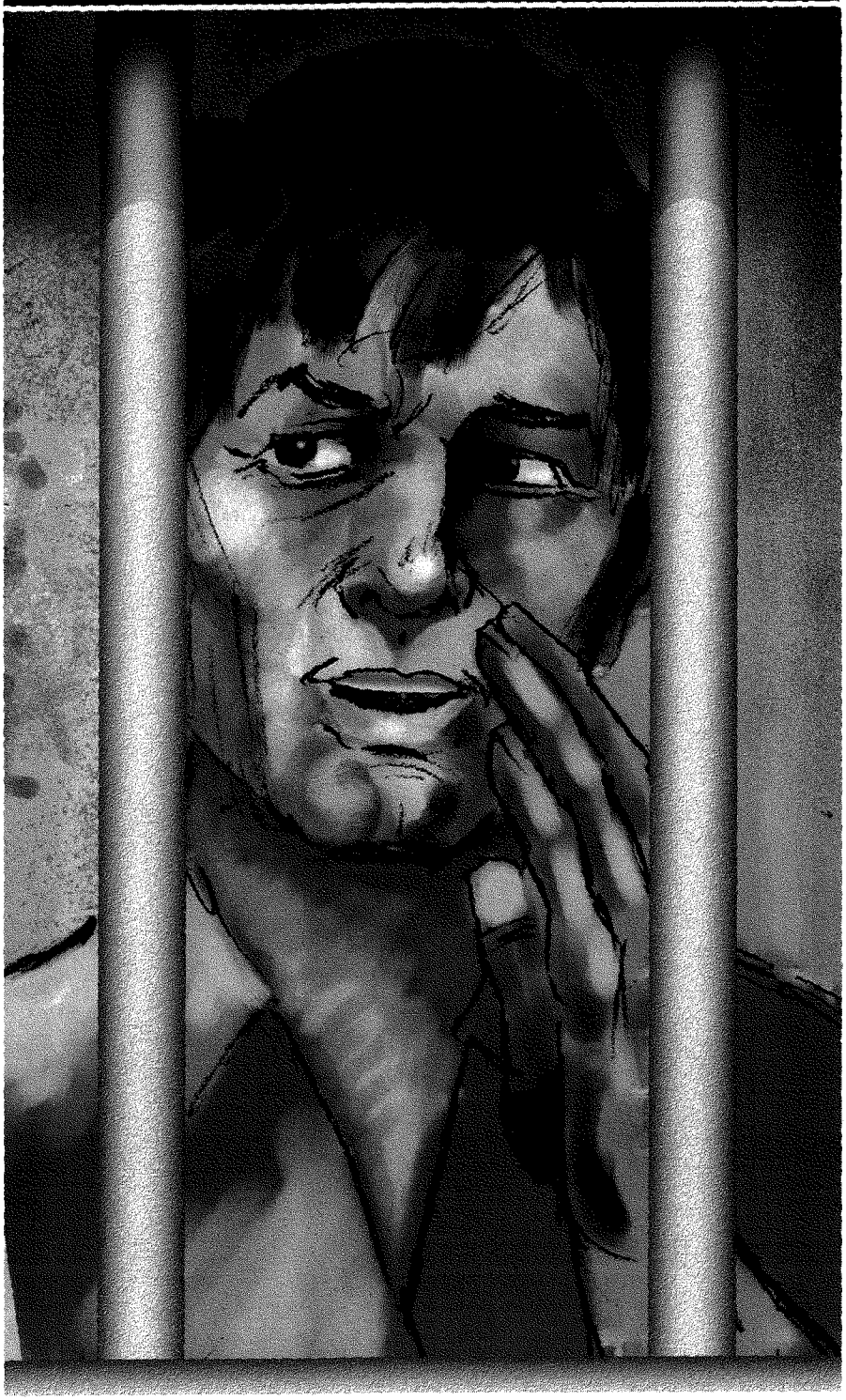
Informants

By Robert M. Bloom



2001. The issue was also recently examined in the April 15, 2002, *Report of the Governor's Commission on Capital Punishment* (the Ryan Report), which was established by Illinois Governor George H. Ryan. The Ryan Report had its genesis in November 1999, when the *Chicago Tribune* newspaper did a series of articles analyzing more than 300 capital cases in the state. The newspaper found that half of the cases had been reversed either for resentencing or for a new trial. In 46 of these cases, a jailhouse informant was used. (*See* Ken Armstrong & Steve Mills, *Series: Tribune Investigative Report, The Failure of the Death Penalty in Illinois: A Five-Part Series*, CHI. TRIB., Nov. 14, 1999, to Nov. 19, 1999.) As a result of these revelations, George H. Ryan, then-governor of Illinois, declared a moratorium on capital punishment in January 2000. In March 2000, he created a commission to study the problem. On January 11, 2003, as one of his last acts before leaving office, Governor Ryan issued a blanket commutation, converting every death sentence (involving 164 inmates) to life in prison without parole. He gave a full pardon to several others.

L.A. Grand Jury Report

The Los Angeles grand jury's extensive investigation encompassed interviews and documentary evidence from all the principal players: defense attorneys, prosecutors, correction personnel, and, of course, informants. Given the benefits provided for testifying, coupled with the realization that lying informants are rarely, if ever, prosecuted, the grand jury concluded that informants have much to gain and little to lose by testifying falsely. (*See L.A. Grand Jury Report*, 16–19.) Many of these informants face serious charges and have a history of recidivism, so they face lengthy prison terms. In addition to the possibility of a shorter sentence, prosecutors are also in a position to promise informants improved prison conditions such as money, phone calls, visits, access to television, or other privileges. (*Id.* at 13–15.) With the advent of sentencing guidelines and mandatory sentences for certain offenses, as well as the movement nationwide to truth-and-sentencing legislation, prosecutors have greater sentencing powers. Thus, cooperation by informing might be the only way for a defendant to avoid lengthy prison sentences.

The grand jury also found that most infor-

Illustration: Marty Martinez

mants did not hesitate to violate the so-called criminal mores of "honor among thieves." It is a logical inference that these informants would not hesitate to lie under oath. Among its recommendations, therefore, the Los Angeles grand jury urged an increase in perjury prosecutions.

The other investigations also concluded that testimony of jailhouse informants were unreliable:

"Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars." (*Sophonow Inquiry: Jailhouse Informants, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them*, at www.gov.mb.ca/justice/sophonow/jailhouse/index.html.)

The Los Angeles grand jury found that informants often used elaborate strategies to access information about a crime in order to enhance the substance of the confessions they fabricated. For example, White, the California informant, would call courthouse sources from jail and impersonate a prosecutor, using shorthand legal jargon to learn information not known to the general public or the press. (*See L.A. Grand Jury Report*, 28–31.)

Possibly the most disturbing aspect of the jailhouse informant problem is the implicit and sometimes explicit involvement of law enforcement and prosecutors in the procurement of the false testimony. The Los Angeles grand jury found that detectives who needed more evidence often placed the defendant in what was known as the "informant tank"—a section of the jail that housed informants. (*See L.A. Grand Jury Report*, 20–23, 60–67.) In addition, the grand jury heard allegations that a deputy district attorney directly provided information to informants. (*Id.* at 27–28.) The grand jury saw very little effort expended by the prosecutor's office to investigate the background and motivation of informants or to test the veracity of their information and its sources. The prosecutor was primarily concerned with the informant's effectiveness on the stand rather than the authenticity of the testimony. (*Id.* at 74.)

In Illinois, prosecutors acknowledged that jailhouse informants were unreliable as witnesses, yet used them in 46 capital cases. In half of those cases, the informant played a significant role in the conviction. (Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois*, CHI. TRIB., November 16, 1999.)

Morin Commission

A primary objective of any criminal justice system is to ensure that innocent people are not convicted. Jailhouse informants, with their powerful testimony of an accused's confession, can certainly distort the fact-finding process. The case of Canadian Guy Paul Morin is a prime example. Morin was convicted of first-degree murder in the death of a nine-year-old girl. His conviction was based upon questionable hair and fiber evidence, as well as a confession he purportedly made to a jailhouse informant. Morin was ultimately acquitted based upon DNA evidence, which established that he was not the source of semen associated with the crime. (Jack King, *The Ordeal of Guy Paul Morin: Canada Copes With Systematic Injustice*, NAT'L ASS'N CRIM. DEF. LAW, (1998).) Although it is hard to quantify the effect of the informant testimony, it has generally been assumed that confessions by an accused are given great weight by jurors, and that jurors will give the same weight to confessions made to jailhouse informants as they will to confessions made to police officers. (*See Sophonow Inquiry.*)

Ryan Report

Analyzing 13 released death row inmates, the *Ryan Report* found that uncorroborated testimony of jailhouse informants played a significant role in at least two of the cases. Further, Peter Neufeld, codirector of the Innocence Project at Cardozo School of Law, testified at the Sophonow inquiry that his studies revealed that jailhouse informants were used in 20 percent of the cases in which wrongful convictions were established. The introduction of DNA evidence spotlights even more the faults of testimony by jailhouse informants. With such a legacy, how can the criminal justice system protect itself from being manipulated by these witnesses?

Constitutional approaches

Sixth Amendment. The Sixth Amendment provision for the right to counsel provides only limited protection to the accused from jailhouse informants. The Sixth Amendment attaches "on or after the time that judicial proceedings have been initiated." (*Kirby v. Illinois*, 406 U.S. 682, 688 (1972).) Judicial proceeding could be in the form of an indictment, court appearance, or possibly even an arrest warrant. (*Matteo v. Superintendent, SCI Albion*, 171 F.3d 887 (3d Cir.) (en banc), *cert. denied*, 528 U.S. 824 (1999).) Thus, since an accused in custody is entitled to be brought to court as soon as possible (*see Gerstein v. Pugh*, 420 U.S. 103, 116 (1975)), it is likely in most instances that the right to counsel has attached for the accused at the time he or she comes into contact with a jailhouse informant.

Assuming the critical stage has occurred, in *Massiah v. United States*, 377 U.S. 201, 204 (1964), the Court held that the government violates an accused's Sixth Amendment right when it uses a statement "deliberately elicited" from the accused. The term "deliberately elicit-

ed" was further discussed in two subsequent Supreme Court decisions involving jailhouse informants. In *United States v. Henry*, 447 U.S. 264 (1980), Henry was in jail as a result of an indictment for armed robbery. The Federal Bureau of Investigation contacted a paid informant called Nichols, and arranged to have him placed in Henry's cell. When a statement from Henry was obtained, the Court suppressed that statement because the government "intentionally create[d] a situation likely to induce Henry to make incriminating statements without the assistance of counsel." (*Henry* at 274.) This language might indicate that any deliberate government plant would be deliberate elicitation under the Sixth Amendment. However, in *Kuhlman v. Wilson*, 477 U.S. 436 (1986), the Court distinguished between an active and passive jailhouse informant. The Court held that when a prisoner makes incriminating statements to a passive listener, that situation would not constitute deliberate elicitation under the Sixth Amendment. In setting a bar for how much activity on the part of an informant is necessary to make out a Sixth Amendment violation, the Court stated that a defendant needs to "demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks" (*Kuhlman* at 459). Thus, if by "luck or happenstance" when an informant is merely acting as a "listening post," deliberate elicitation will not occur.

> Informants may keep the conversation going.

One other limitation on the Sixth Amendment protection can be found in *Maine v. Moulton*, 474 U.S. 159 (1985), which limited the attachment of the right to counsel only to the pending charges. Inquiries into other criminal activity, therefore, do not implicate the Sixth Amendment. The recent decision of *Texas v. Cobb*, 532 U.S. 162 (2001), narrowly defined charges as those not requiring the proof of a different element as opposed to an approach that would include criminal acts that are "closely related" or "inextricably intertwined with" the pending charge. In *Cobb* the pending charge was burglary, a crime with different elements than the crime of murder, which occurred at the time of the burglary and was the subject of the police interrogation. The court held that the interrogation as to the murder did not implicate the Sixth Amendment because that charge was not pending. The narrow technical approach is the same as the standard for defining double jeopardy found in *Blockburger v. United States*, 284 U.S. 299 (1932). At present, a "passive" or "active" jailhouse informant who obtains information about a crime other than the one pending would generally not be subject to Sixth Amendment constraints.

Kirby, *Massiah*, *Henry*, *Kuhlman*, and *Moulton* set some rough boundaries as to what constitutes a Sixth Amendment violation in the context of jailhouse informants. In order to make out a Sixth Amendment violation, the defendant must show by a preponderance of evidence four basic elements: (1) the right to counsel has attached; (2) the statement was related to the charges in which the right to counsel had attached; (3) the jailhouse informant was acting as a government agent; and (4) the informant deliberately elicited incriminating statements. (*See Moore v. United States*, 178 F.3d 994 (8th Cir. 1999).)

The issue as to whether the informant was acting as an agent for the government has received recent attention from the circuits. Being told by the government to listen for information about criminal activity from any and all inmates does not make an informant a government agent. (*See U.S. v. LaBare*, 191 F.3d 60 (1st Cir. 1999); *see Moore* at 999.) It appears that there must be specific instructions to gather information from a specific individual. (*See LaBare*; *Moore*; *U.S. v. Birbal*, 113 F.3d 342 (2d Cir. 1997); and *U.S. v. York*, 933 F.2d 1343 (7th Cir. 1991).) Also, the timing of the instructions is important. A jailhouse informant who has deliberately elicited information before being deputized by the government has not violated the defendant's right to counsel. (*See Birbal* at 345–46.)

What constitutes deliberate elicitation has been the fodder of many lower court decisions. The distinction between passive listening and deliberate elicitation is not easily determined. Focused listening or, in other words, being told by the government to be alert for certain information without more affirmative conduct would not constitute deliberate elicitation. This would be consistent with *Kuhlman*'s "mere listening" formulation. (*See Moore* at 1,000; *Birbal* at 113.) Also, passive silence on the part of an informant is not necessary. An informant may, in the course of interaction with a defendant, say normal things to keep the conversation going. The circuits seem to see a warning flag when a jailhouse informant takes active steps to form a relationship or create an environment in which to facilitate sharing incriminating information. An informant who engages in lying or other ruse to gain a defendant's trust, would certainly create an atmosphere in which incriminating statements may likely be made, and this might constitute deliberate elicitation. (*See U.S. v. Brink*, 39 F.3d 419 (3d Cir. 1994).) In addition, it is not necessary for the informant to engage in questioning; general conversation about the defendant's crime might be

enough. (*U.S. v. Johnson*, 196 F. Supp. 2d 795 (2002).) However, merely making a statement that requires no answer in response to a defendant's statement would not be enough (*see York* at 1355) or monosyllabic responses such as "yeah" or "uh-huh" might not constitute deliberate elicitation. (*Matteo* at 895.)

Due process approach. The Sixth Amendment approach does not directly address the reliability problems associated with jailhouse informants, but due process or fundamental fairness would. This analysis encompasses two aspects of a prosecutor's duty: not to knowingly present false testimony and to provide exculpatory information to the defense.

Prosecutors have a more important objective than just winning a case. As the Court indicated in *Berger v. United States*, 295 U.S. 78, 88 (1935), "it is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial." The duty of the prosecutor to try the defendant fairly and impartially is "utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation." (*Commonwealth v. Bowie*, 243 F.3d 1109, 1114 (9th Cir. 2001).) Further, the Supreme Court has been very sensitive to the use of false testimony and has readily found a violation of due process when such testimony is knowingly used. (*See Mooney v. Holohan*, 294 U.S. 103 (1935).) Even when perjured testimony is not actively sought, the Court has found a due process violation if the prosecutor offers the testimony knowing it to be false. (*Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam).) Particularly relevant to jailhouse informants is the case of *Napue v. Illinois* 360 U.S. 264 (1959), in which an informant falsely testified that no promises had been made. The Court held that the prosecutor was required to correct this testimony. This obligation extended even if another prosecutor had made the leniency agreement and the trial prosecutor was unaware of the arrangement. (*Giglio v. U.S.*, 405 U.S. 150 (1972).) In this way, the Court demonstrated its concern not just for prosecutorial misconduct, but also for accuracy of the testimony.

In light of the Los Angeles grand jury investigation and others mentioned in this article, the question is: Should prosecutors know that jailhouse informant testimony is likely to be false? The Ninth Circuit has indicated that the prosecutor should avoid even the possibility of perjury. (*Commonwealth v. Bowie*, 243 F.3d 1109 (2001).) Despite this obligation, the Los Angeles grand jury found that evidence of knowledge of abuses concerning jailhouse informants in the district attorney's office was not reported or disseminated throughout the office. (*See L.A. Grand Jury Report.*) The grand jury also found that a particularly clever informant realizes that a successful performance on the witness stand is enhanced if it appears he or she is not benefiting from the testimony. (*See id.* at 84.) These informants wait until after they've testified to request favors—a request that is generally answered. (*See id.*) And, because the reward is not offered before the testimony, the jury has no way to measure the informant's motivation to fabricate testimony, as the prosecutor, under *Giglio*, is under no obligation to disclose nonexisting exculpatory evidence.

Reward for testifying is a systemic reality. Thus, a question to an informant such as, "Do you anticipate any future benefits or consideration?" should result in a positive reply. Any other answer should require correction by the prosecutor. (*Napue* at 269.) To ensure dissemination of knowledge, the Ryan Commission recommended that both prosecutor and defense attorney be trained with regard to the risk of false testimony by in-custody informants. (*Ryan Report* at 96–97.) It also recommended that benefits, potential benefits, or detriments making up the agreement be put in writing and disclosed to the defense. (*Id.* at 120–21.) The Los Angeles grand jury and the *Morin Report* recommended maintaining a central index that lists all favorable actions taken on behalf of an informant, which would be available to the defense. (*L.A. Grand Jury Report* at 149; *Morin Report* at 625–26.) The *Morin Report* recommended that rewards be written, and that they be determined before testimony is given with no opportunity for later enhancement. (*Morin Report* at 611–12.)

> Clever informants wait until after testifying to ask for favors.

The prosecution is also under an obligation to disclose to the defense any evidence that might help the defense and is material to either guilt or punishment. (*Brady v. Maryland*, 373 U.S. 83 (1963).) With regard to jailhouse informants, the defendant has a right to everything that is relevant to the credibility of a witness. This could even include work product. (*Goldberg v. U.S.*, 425 U.S. 94 (1976).) In *U.S. v. Bagley*, 473 U.S. 667 (1985), the Court eliminated the need for the defense to make a specific request for the information. In addition, it defined materiality as any evidence that creates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A rea-

sonable probability is a probability sufficient to undermine confidence in the outcome." (*Bagley* at 684.) This is a standard somewhat less than a showing by a preponderance of evidence. (*Kyles v. Whitely*, 514 U.S. 419 (1995).) *Kyles* placed a burden on individual prosecutors "to learn of any favorable evidence known to others acting on the government's behalf in the case." The burden to gather exculpatory evidence emanates from *Arizona v. Youngblood*, 488 U.S. 51 (1988), in which the Court indicated that law enforcement was under an obligation not just to preserve evidence but to gather and collect evidence that may be helpful. Even though *Youngblood* required a showing of bad faith by the state to make out a due process violation, given what is known about jailhouse informants, the state would seem to have accountability in gathering evidence. The Court in *Kyles*, in elaborating on the prosecutor's responsibility said:

> 'Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy the confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.'

(*Kyles* at 439.)

The general approach to the disclosure requirements can be found in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997), which described disclosure requirement with regard to witnesses with criminal involvement such as jailhouse informants, as follows:

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

(*Carriger* at 479.)

The specific disclosure requirements with regard to jailhouse informants can be found in *Dodd v. State of Oklahoma*, 993 P.2d 778 (2000):

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

(*Dodd* at 784.)

Other approaches to reliability problem

Jury instruction. Many state and federal courts have jury instructions suggesting to the jury it weigh the testimony of any type of informant with caution and close scrutiny. In *United States v. Villafranca*, 260 F.3d 374 (5th Cir. 2001), the Fifth Circuit provides jury instructions for testimony of an alleged accomplice, paid informants, and immunized witness. (*Also see State v. Bledsoe*, 39 P.3d 38 (Kan. 2002).) Only in California and Illinois has there been legislative action for specific jury instructions for jailhouse informants. The senate in Illinois has passed a resolution urging the Illinois Supreme Court to adopt such jury instructions for death penalty cases. (Illinois 92d General Assembly SR 0543 Dec. 5, 2002.) California deals specifically with jailhouse informants:

> (b) In any criminal trial or proceeding in which an in-custody informant testifies as a witness, upon the request of a party, the court shall instruct the jury as follows:
>
> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in the case.

(CAL. PENAL CODE 1127(a).)

In addition to the above instruction, I would recommend a statement be included that tells the jury that this category of evidence has resulted in wrongful convictions.

Expert testimony

Another way to get at the reliability problem would be to allow experts to testify as to the systemic issues relating to jailhouse informants.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise,

if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." (FED. R. EVID. 702.)

Rule 702 was designed to liberalize the admissibility of expert testimony. The question is: Does the expert have special knowledge that is unknown to the jurors and would such knowledge be helpful to them? An expert requires no specific qualifications other than persuading the trial judge that he or she has knowledge beyond that of the ordinary juror. In this area, the trial judge has a great deal of discretion and it is rare for an appellate court to overturn a trial judge's ruling on this issue as the standard is whether the trial judge abused his or her discretion.

In the case of eyewitness testimony, the courts generally disfavored expert testimony. (*U.S. v. Hall*, 165 F.3d 1095 (7th Cir. 1999); *U.S. v. Fred Smith*, 122 F.3d 1355 (11th Cir. 1997).) One reason is that the courts do not want one witness commenting on the credibility of another. Yet expert testimony has been allowed in cases in which the eyewitness identification is the pivotal evidence and there is limited collateral evidence as to the defendant's guilt. By the same token, would it not make sense to subject jailhouse informant testimony to the scrutiny of an expert? Informant testimony is inherently suspect because of the potential for perjury. Given what is known about jailhouse informants, it would seem that a jury would benefit from an expert who could point out the instances in which such testimony has proven to be unreliable. Such expert opinion, unlike eyewitness expert testimony, would not be directed at the individual witness, but at systemic concerns. Given the broad discretion afforded trial judges in their determination of the admissibility of expert witnesses, a judge with concerns as to the credibility of an informant, and without the discretion to preclude the actual testimony, might utilize this approach.

> Should such information be subjected to expert review?

Pretrial exclusion because of unreliability

Since the primary concern over jailhouse informants is reliability, would it not make sense to determine pretrial whether or not to exclude such testimony unless the prosecutor could effectively demonstrate that it was reliable? Both the *Sophonow Inquiry* and *Morin Report* urged the Canadian criminal justice system to exclude jailhouse informant testimony unless it was crucial and there was an independent basis to trust its credibility. (*See generally Sophonow Inquiry*; *Morin Report*.) Points to consider when judging the validity of an alleged confession include: could it have been obtained from media reports; are the contents of the confession known only by the perpetrator of the crime; is the confession confirmed by independent investigations? Even if all were found to be true, the confession as reported by a jailhouse informant would only be allowed if it were crucial to the case. An example of crucial information is the disclosure of the whereabouts of a kidnapping victim.

The Ryan Commission recommended that a judge hold an evidentiary hearing to determine the reliability and admissibility of statements made by a jailhouse informant, putting the burden on the prosecution to prove that an informant is reliable. (*See Ryan Report* at 122.) Although this was the subject of some debate in the Illinois house, the legislature did not approve this recommendation. (Illinois HB 1844 92 General Assembly (2001).)

The commission also suggested factors for the trial judge to consider, including the witness's history of testifying, any deals or inducements made, the criminal record of the witness, and any recantation of testimony. (*Ryan Report* at 122.) In the first *Dodd v. State* decision (1999 OK CR 29), the court adopted the requirement of a reliability hearing to be conducted by the judge with similar factors as suggested by the Ryan Commission. After considering the evidence, the *Dodd* court would have the judge determine whether the moving party established that the informant's testimony was probably more true than not. This provision was withdrawn in the later *Dodd* decision. (993 P.2d 778 (2000) rehearing granted vacating and withdrawing opinion, 70 OBJ 2952 (Oct. 6, 1999).)

The *Morin Report* specifically recommends legislation that would make in-custody informer's testimony presumptively inadmissible unless the trial judge is satisfied as to its reliability:

> It is my strongly held belief that the dangers associated with jailhouse informant evidence, together with its great potential to mislead, should make such evidence presumptively inadmissible. A trial judge should determine whether the evidence, together with surrounding circumstances, meets a threshold of reliability sufficient to justify its reception as evidence.

(*Morin Report* at 627.)

Even though the courts have been reluctant to exclude the tes-

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nonetheless, human and often do want to know the rest of the story.

The judge as a leader

Judges routinely see their role during a trial as a referee moving the contest along and blowing the whistle when one of the attorneys goes offsides.

As we know, judges cannot and should not even appear to take sides during a trial. Still, jurors look to judges for leadership. Probably the best way judges can do this within the bounds of the law is to be clear and concise in communicating with the jury.

It sometimes amazes me that a judge who previously may have been an effective trial advocate can turn jury instructions into a mumbled drone of confusing language. Judges should take heed and make sure that instructions are clearly written and presented.

Getting feeback

Although I don't always concur with feedback from jurors—sometimes the feedback from individual jurors is significantly contradictory and makes me wonder if we were at the same trial—I have nonetheless used this information to modify how I try a case to a jury.

If permitted in your jurisdiction, exit polling jurors can, in time, provide helpful feedback. While personally contacting jurors after a trial may yield helpful information, questionnaires mailed to jurors with a stamped return envelope and the option to remain anonymous may be more effective. ■

JAILHOUSE INFORMANTS

(Continued from page 26)

timony of witnesses because of incompetence, this is a worthwhile recommendation. As the Federal Rule of Evidence relating to competency states:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

(FED. R. EVID. 601.)

The trend has been toward qualifying everyone to testify who can understand the requisite oath. Although other rules of evidence would permit exclusion of testimony where its prejudicial effect would substantially outweigh its probative value (FED. R. EVID. 403), the rule does not permit the exclusion of evidence simply because the judge does not find it credible as opposed to probative if believed. (*See Ballow v. Henri Studios Inc.*, 656 F.2d 1147 (5th Cir. 1981).) With regard to jailhouse informants, it is thought that the danger of perjured testimony can be addressed by vigorous cross-examination, informing the fact finder of any deals made, and jury instructions. (*United States v. Fallon*, 776 F.2d 727 (7th Cir. 1985). *Also see Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (counsel's failure to impeach unreliable jailhouse informants could amount to ineffective assistance of counsel); *People of the Territory of Guam v. Dela Rosa*, 644 F.2d 1257 (9th Cir. 1981) (failure to give a jury instructions warning about informant's possible motivation constitutes reversible error).) It is right to be skeptical of this approach, especially in light of the *Sophonow Inquiry* that found juries give weight to this testimony even with the safeguards in place. Given the restrictions of Rule 601, the trial judge has limited discretion in this area. Therefore, legislation similar to that suggested by the Ryan Commission is a better vehicle to accomplish a pretrial hearing process.

Conclusion

The best way to deal with perjured testimony is to exclude it, and in light of the evidence that testimony from a jailhouse informant is so often false, it, too, should be subject to exclusion. Exclusion under the Sixth Amendment partially deals with the problem, although the Sixth Amendment is not applicable in every case. Pretrial discovery, jury instructions, cross-examination (with the discovery provided), and the use of experts will at least put the trier of fact on notice as to the credibility problems associated with jailhouse informants. However, even with these approaches in place, one could rightly be cynical about their effectiveness. The jailhouse informant is often a seasoned witness who can appear convincing even during tough cross-examination. And it's been shown that juries tend to give weight to the evidence of a defendant's confession, even after warnings as to the credibility of jailhouse informants in general. I believe the only effective way to deal with this problem is to provide a pretrial exclusion process to ensure the reliability of an informant's testimony. ■