

AMERICAN BAR ASSOCIATION
SECTION OF CRIMINAL JUSTICE

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state, local and territorial
2 governments to reduce the risk of convicting the innocent, while increasing the likelihood of
3 convicting the guilty, by ensuring that no prosecution should occur based solely upon
4 uncorroborated jailhouse informant testimony.

REPORTINTRODUCTION

In *Actual Innocence*, Jim Dwyer, Peter Neufeld, and Barry Scheck examined 62 DNA exonerations secured through Cardozo Law School's Innocence Project to ascertain what factors contributed to these miscarriages of justice. Snitches or informants were involved in 21 percent of the cases.¹ Jailhouse informants also played a pivotal role in the wrongful conviction of Guy Paul Morin in Canada: "Such testimony related to a purported confession to the murder, made by Mr. Morin to a fellow inmate at the jail, Robert Dan May. The confession was allegedly heard by a second inmate in an adjoining cell who also testified at the trial."² Morin was later freed due to DNA testing. Another Canadian case involved Thomas Sophonow:

In addition to the three jailhouse informants called in the case, police had offers from nine other jailhouse informants, including Terry Arnold, who is currently the prime suspect in the killing, to testify against Sophonow. In the end, one of the three called, Thomas Cheng, had twenty-six counts of fraud withdrawn. While proclaiming the best of motives for his testimony, a police report from a polygraph operator, which was not disclosed to the defence, confirmed Cheng's primary motive was to secure his liberty and have his charges dropped. After testifying at the first and second trials, he was released and never seen again. The Crown read in his evidence at the third trial. The second jailhouse informant, Adrian McQuade, was a career informant, who upon his arrest as a material witness, threatened to perjure himself unless released. He was told that if he failed to testify in accordance with a taped conversation, he would be exposed as an informant and face whatever consequences may come. Additional records that were never disclosed to the defence but were available at the Inquiry confirmed that while McQuade offered to be placed in the cell block with Sophonow, he admitted never receiving a confession from him. The third informant, Douglas Martin, is best described by the words of the Commissioner himself: "[Douglas Martin] . . . is a prime example of the convincing mendacity of jailhouse informants. He seems to have heard more confessions than many dedicated priests." Martin had testified as a jailhouse informant in at least nine cases in Canada and had a record for perjury. According to the police, at the time, he appeared to be a credible witness.³

¹ JIM DWYER ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 246 (2000). See also John M. Broder, *Starting Over, 24 Years After a Wrongful Conviction*, N.Y. TIMES, June 21, 2004, at A14 ("Mr. Goldstein was able to establish conclusively that Mr. Fink, a habitual criminal, heroin addict and serial liar, had fabricated his account of Mr. Goldstein's confession to him when they met together briefly in a Long Beach police holding pen.").

² Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 761 (2002).

³ Richard J. Wolson & Aaron M. London, *The Structure, Operation, and Impact of Wrongful Conviction Inquiries: The Sophonow Inquiry as an Example of the Canadian Experience*, 52 DRAKE L. REV. 677, 682 (2004)

Problems with jailhouse informants, however, predate the recent DNA exonerations. One of the most notorious examples involved Leslie Vernon White. "In his appearance on *60 Minutes*, White admitted to consistently fabricating confessions of fellow inmates and offering perjured testimony to courts."⁴ A grand jury investigating the matter concluded:

The Los Angeles County Sheriff's Department failed to establish adequate procedures to control improper placement of inmates with the foreseeable result that false claims of confessions or admissions would be made.

The Los Angeles County District Attorney's Office failed to fulfill the ethical responsibilities required of a public prosecutor by its deliberate and informed declination to take the action necessary to curtail the misuse of jailhouse informant testimony.⁵

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

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration. . . .

[B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting

(discussing MANITOBA JUSTICE, THE INQUIRY REGARDING THOMAS SOPHONOW (2001)).

⁴ ROBERT M. BLOOM, *RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM* 65 (2002). "[White's] exploits were documented in a 1989 segment of *60 Minutes* and resulted in a Los Angeles County grand jury investigation on the use of jailhouse informants." *Id.* at 64. See also Robert Reinhold, *California Shaken Over an Informer*, N.Y. TIMES, Feb. 17, 1989, at A1 ("Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some sentenced to death, in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County.").

⁵ REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 6 (June 26, 1990).

others into the plot, a circumstance we appear to confront in this case.⁶

The United States Supreme Court has made similar comments concerning accomplices: “[T]he evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.”⁷ Justice Jackson put it this way over 50 years ago: “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.”⁸

Witnesses who receive benefits from the government for their testimony include jailhouse informants, immunized witnesses, and accomplices. This Resolution is directed at the former. A jailhouse informant is “someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously.”⁹

Prosecution Screening

The first check (and perhaps the most important) on unreliable testimony by informants is the prosecutor.¹⁰ The Canadian (“Kaufman”) Commission in the Guy Paul Morin case provided the following list of factors that prosecutors should review:

- (1) The extent to which the statement is confirmed¹¹;
- (2) The specificity of the alleged statement. For example, a claim that the accused said “I killed A.B.” is easy to make but extremely difficult for any accused to disprove;
- (3) The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;

⁶ Commonwealth of N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123-24 (9th Cir. 2001). Judge Trott had previously written on this subject. See Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381(1996).

⁷ Crawford v. United States, 212 U.S. 183, 204 (1909). See also Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 847 (2002) (“The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers. For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury.”).

⁸ On Lee v. United States, 343 U.S. 747, 757 (1952).

⁹ For a definition of jailhouse informant, see 725 ILL. COMP. STAT. ANN. § 5/115-21(a) (West 2004).

¹⁰ See Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 827-28 (2002).

¹¹ HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN, Recommendation No. 39 (Ontario Ministry of the Attorney General 1998) (“Confirmation should be defined as credible evidence or information, available to the Crown, independent of the in-custody informer, which significantly supports the position that the inculpatory aspects of the proposed evidence were not fabricated. One in-custody informer does not provide confirmation for another.”).

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

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

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

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

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

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

(10) Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;

(11) The circumstances under which the informer's report of the alleged statement was taken (e.g. report made immediately after the statement was made, report made to more than one officer, etc);

(12) The manner in which the report of the statement was taken by the police (e.g. though use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement). . . .;

(13) Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;

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(14) Any relevant information contained in any available registry of informers.¹²

Judge Trott has also provided step-by-step guidance for prosecutors.¹³ Nevertheless, the little empirical data on the subject and the exoneration cases indicate that there is often difficulty in screening out unreliable informant testimony.¹⁴

Corroboration Requirement

The inherent skepticism of the testimony of accomplices has led many jurisdictions to require corroboration.¹⁵ A significant number mandate this requirement by statute.¹⁶ However, a greater number of states do not require corroboration and are satisfied with only a cautionary jury instruction. Corroboration should be required in *jailhouse* informant cases; no person should lose liberty or life based solely on the testimony of such a witness. As Judge Trott has observed, "The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him."¹⁷

"Corroborative evidence is usually considered to be that which, when viewed independent of the accomplice, would tend to connect the defendant with the commission of the crime charged. The existence of corroboration is usually a threshold question for the judge; if

¹² Recommendation 41, *id.*

¹³ Trott, *supra* note 6.

¹⁴ See Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 *FORDHAM L. REV.* 809, 811 (2002) ("Surprisingly, however, professionals who regularly make these kinds of [truth-termination] judgments for a living, like the rest of us, are highly prone to error. In one study, researchers Paul Kwan and Maureen O'Sullivan were curious to know whether groups of so-called experts – such as police investigators; CIA, FBI, and military polygraph examiners; trial judges; psychiatrists; and U.S. Secret Service Agents – are truly better than the average person. Using stimulus materials from past studies – consisting of true and false stories – they found that college students had a 52.8 percent accuracy rate, which is pretty typical. Police detectives were only slightly higher, at 55.8 percent; CIA, FBI, and military polygraph examiners were at 55.7 percent, trial judges were at 56.7 percent, and psychiatrists were at 57.6 percent. U.S. Secret Service Agents won the prize, exhibiting a 64 percent accuracy rate, the highest of all groups."); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 953 (1999) (study based on interviews with former Assistant U.S. Attorneys; "Four AUSAs expressed the belief that, due to a host of factors, most prosecutors are 'horrible' at the cooperation process and many, unwittingly, obtain false information."). See also Gersham, *supra* note 7, at 848-49 ("Some prosecutors trust their cooperators too much – one former prosecutor described the relationship as 'falling in love with your rat' – and this mindset skews the prosecutor's ability to evaluate the cooperator's credibility objectively.").

¹⁵ See, e.g., *Humber v. State*, 466 So. 2d 165 (Ala. Crim. App. 1985) (citing statute); *State v. Shaw*, 37 W.3d 900, 903 (Tenn. 2001) ("In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice.").

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

¹⁷ Trott, *supra* note 6, at 1394.

found, she may then submit the accomplice testimony to the jury.”¹⁸

Respectfully submitted,

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Chair, Criminal Justice Section
February, 2005

¹⁸ Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L. J. 785, 791 (1990). See also *Bland v. State*, 263 A.2d 286, 288 (Del. 1970) (“In those states which require corroboration, the usual rule is that corroborative evidence is not sufficient if it merely shows the commission of the offense or the circumstances thereof, and does not connect the defendant therewith. It is likewise the usual rule in such states that testimony of one accomplice is not sufficient corroboration of the testimony of another accomplice; corroboration from an independent source is not dispensed with, regardless of the number of accomplices.”) (citations omitted); *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994) (“[T]here must be some fact testified to, entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant’s identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice’s evidence.”) (citations omitted). In Tennessee, whether sufficient corroboration exists is a determination for the jury. *Id.*

GENERAL INFORMATION FORM

1. Summary of Recommendation.

No prosecution should occur based solely upon uncorroborated jailhouse informant testimony.

2. Approved by Submitting Entity.

This recommendation was approved by the Criminal Justice Section Council at its November 13-14, 2004 meeting.

3. Similar Recommendations Submitted Previously.

This recommendation has not previously been submitted to the House of Delegates or the Board of Governors.

4. Relevant Existing ABA Policies and Affect on These Policies.

None.

i. Urgency Requiring Action at this Meeting.

This is part of several recommendations proposed by the Innocence Committee and approved by the Criminal Justice Section. The House of Delegates has already approved a number of prior recommendations.

6. Status of Congressional Legislation (If applicable).

None.

7. Cost to the Association.

The recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation adopted or implemented at the state and federal levels. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

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8. **Disclosure of Interest (If Applicable).**

No known conflict of interest exists.

9. **Referrals.**

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the February 2005 House of Delegates agenda, it is being circulated to the following:

Sections, Divisions and Forums:

All Sections and Divisions

10. **Contact Person (Prior to 2005 Mid-Year Meeting).**

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11. **Contact Persons (Who will present the report to the House).**

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