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## THE USE OF INCENTIVIZED TESTIMONY

The use of jailhouse informants and other incentivized witnesses is a demonstrated cause of wrongful conviction. A groundbreaking report that focused upon the “snitch system,” published by the Center on Wrongful Convictions in 2004, found that incentivized witnesses were the leading cause of wrongful convictions in U.S. capital cases. A comprehensive study of the nation’s first 200 exonerations proven through DNA testing concluded that 18% were convicted, at least in part, on the basis of informant, jailhouse informant or cooperating alleged co-perpetrator testimony.<sup>1</sup>

Informant testimony is an undeniably valuable law enforcement tool, but it generally functions in service of only one side of the adversarial system and with little oversight. Although unsubstantiated testimony represents hearsay in its basest form, courts have done little to ensure that safeguards are in place to regulate its use.

There are many reasons why a witness might be compelled to provide untruthful testimony. The witness may have been promised cash or something else of value: leniency, reduced charges, a reduced sentence or immunity from prosecution. All of these motives can be tracked, controlled or otherwise regulated through a requirement that the prosecution disclose its arrangement with an incentivized witness to the defense. However, lying witnesses who have been promised nothing, but nevertheless act based on an expectation of some form of future compensation, fall outside of the scope of a prosecutorial disclosure requirement.

In order to ensure that all categories of incentivized witnesses – both those who have been promised an inducement by the prosecution and those who operate in the hope that a reward may follow – are properly vetted by the court before their testimony taints the judgment of the fact finders, the Innocence Project recommends the following:

### **I. Informant Statements Should Be Electronically Recorded**

Much like the false confession phenomenon, the opportunity for law enforcement to “feed facts” about a crime’s commission to a potential informant is a risk that must be protected against. In light of the ever-increasingly common practice of electronically recording interrogations, efforts should also be made to electronically record informant statements to law enforcement.

### **II. Pre-plea and pre-trial reliability/corroboration hearings for all informants**

Pre-plea and pre-trial hearings that both assess reliability and corroborate the content of informant testimony should be held in all cases where informant testimony is intended for use at trial or in connection with a plea agreement. At minimum, before allowing for the use of informant testimony, the court should make a finding relating to reliability and consider the following factors at such a hearing:

#### **Determining Reliability**

- the relationship between the witness and the defendant
- a description from the witness of how many times he spoke to the defendant; the specific location of those conversations; who else, if anyone, was present during those conversations; and the nature of their conversations, including a specific accounting of the

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<sup>1</sup> Brandon L. Garrett, *Judging Innocence*. 108 Colum. L. Rev. 55, 62 (2008).



conversation(s) in which the defendant allegedly provided the incriminating information to the witness

- a description of the time and place of the statements made by the witness to law enforcement, including the names of individuals who were present
- the criminal history of the informant
- other cases in which the informant either provided testimony or offered to do so and whether or not incentives were offered to the witness in any of those cases
- a description of the specific arrangement between the witness and the prosecution, including promises of leniency, sentence reductions, immunity, cash, or anything of value
- a description of any form of recantation, including the substance of the recantation; where it took place; when it took place; the circumstances under which it took place (i.e. the reason provided by the informant for the recantation); and who was present

### **Corroboration of the Testimony**

- The substance of testimony provided by the witness must be corroborated by other evidence that connects the defendant with the commission of the crime (i.e. could the informant's testimony be factually linked to the details of the crime?)
- In weighing the substance of the corroborated testimony, the fact finder should consider the reliability of the witness along with the following:
  - Did the informant statement lead to the discovery of new evidence previously unknown to the police?
  - Did the informant statement include an accurate description of the details of the crime that are not easily guessed, have not been reported publicly and can be independently corroborated?

Illinois law requires the use of reliability hearings to determine whether informants can provide testimony in capital cases (725 ILCS 5/115-21). In 2007, the California legislature passed a bill – later vetoed by the Governor – that would disallow convictions based upon uncorroborated testimony. Texas has a statutory corroboration requirement for drug informants (Vernon's Ann. Tex. Crim. Code Art. 38-141). Canada's inquiry into the famed Thomas Sophonow case recommended, at minimum, a judicial assessment of credibility before the admittance of informant testimony.

### **III. Jury Instructions**

In those wrongful conviction cases documented by the Center on Wrongful Convictions, juries believed untruthful informants; it is evident that jury instructions need to be strengthened. States should approve jury instructions that seek both to educate jurors about the long-established fallibility of informant testimony and the specific factors (including implicit or explicit incentives, the informant's criminal history, information about other times he has provided informant testimony, etc.) that may have influenced the testimony in the particular case at hand. Juries should also be told about how easily an informant can obtain access to information that seemingly only the perpetrator of a crime would know and that informant testimony has been shown to be a large contributing factor to wrongful convictions.