CPCS
CRIMINAL DEFENSE TRAINING

THE SNITCH PROJECT
FOR THE CRIMINAL DEFENSE TRIAL LAWYER

Resources on How to Effectively Prepare
For Jailhouse Informants and Accomplice Witnesses

"Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favors from the authorities, attention or notoriety they are in every instance completely unreliable. … They must be recognized as a very great danger to our trial system."[i]

"[S]nitch cases account for 45.9% of Wrongful Convictions. That makes snitches the leading cause of wrongful convictions in U.S. capital cases.[ii]

Anyone who has ever had a case coming up for trial that involves these unreliable and untrustworthy witnesses knows how very dangerous they are. This is intended to be a comprehensive guide to help the busy trial lawyer get a head start in dealing with the issues that arise from discovery, all the way through closing arguments, jury instructions and beyond. Many challenges remain in dealing with informant testimony. It is up to us - defense counsel - to raise them and litigate them thoroughly. Included in these materials are Federal and State law enforcement protocols; Statutes and Rules of Evidence; the major Law Review articles and Task Force Reports on Wrongful Convictions; support for excluding this type of witness; preventing the creation of this witness; presenting expert testimony regarding the unreliability of this type of witness; checklists for discovery and investigation; sample motions; actual transcripts of closings and cross examinations; models of better jury instructions and more. Everything you need to get started. See **Jumpstarts** for a quick beginning. We can use these materials to hopefully – ultimately – keep all of these witnesses from testifying at all; and, for at least right now, to get as much information as we need to effectively try our case. This is our mission that we must choose to accept.[iii] Let us "Make it so".[iv]

Materials Collected By:
Stephanie Page,
Senior Trial Counsel,
Public Defender Division,
Committee for Public Counsel Services, Massachusetts 2015

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The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines (Redacted) Special Report September Office of the Inspector General 2005
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Florida Amendment to Rule of Criminal Procedure 3.220 2014
Illinois Capital Punishment Reform Study Committee Summary 2010
Illinois State Statute Sec. 115-21. Informant testimony. 2003
Illinois State Statute Sec. 725 ILCS 5/115-21 Reliability Hearing 2003
Texas Art. 38.075. Corroboration Of Informant Testimony Required
Washington Proposed Legislation Informant Disclosure 2011

CASE LAW

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Commonwealth v. Murphy
Commonwealth v. Marrero
Commonwealth v. Ciampa
Commonwealth v. Reynolds
Commonwealth v. Gomes
Commonwealth v. Meas
Commonwealth v. Rodwell
Massachusetts Case Law Bruce E. Ferg

Other Jurisdictions

United States Supreme Court

Kyles v. Whitley
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Nevada Reliability Hearing Mandated Dagostino v State
Nevada Boehm v. Nevada
Oklahoma Dodd v. State 2000
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Texas Westbrook v State 2000

Overview

National Canvas Informant Successful Massiah Henry Law 2010
Supreme Court Criminal Law Jurisprudence—October 2008 Term Richard Klein

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Practical Tips from NACDL EGroup
Preparing For The Snitch Part 1 Discovery Larry Pozner 1985
Preparation For Cross-Examining The Snitch Michael Howell
Prosecutor's Informant Checklist Stephen S. Trott
There are Three Types of Informants Paris London
Updated Rat Manual: Finding Evidence To Search For And Undermine The Snitch 2005

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Marty Weinberg Lecture on How to Cross Examine a Snitch Mid 1980'S
Cross Exam Practice Guide Drug Cop and Informant BNA 2000: Winning Through Cross Examination: The Possible Dream
Cross Examination Preparation System Larry Posner
Cross Examination of Cooperating CoDefendants Federal Brian Steel 2006
Cross Examining Snitches Carlos Gonzalez ABA 2014
Cross Examining the Accomplice Witness Brodsky Harris
Cross Examining the Snitch Checklist Steve Harmon 2010
Cross Examination of Cooperating Witness Federal Defenders Indiana Juval Scott
Cross-examining the Cooperating Witness Roy Black 2011
How To Impeach A Witness: Trial Attorney Eviscerates Guy Who Gave Yale A Baseball Stadium With Money He Stole Henry Blodget 2011
Never Insult the Alligator Hugo Rodriguez 2000
Notes from a NACDL Seminar on How to Cross Examine a Snitch/Rat (early 1990's (?) Stephanie Page)
Preparing for the Snitch Part 2 Cross Examination Larry Pozner 1985
Primer on Crossing An Informant THE CHAMPION April 2011 Vida B. Johnson
Put the Snitch in the Ditch: Practical Roadmap to Effective Cross-Examination of "Snitches"

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Massachusetts Motion For Discovery Of Exculpatory Evidence: Any And All Information Regarding CoD Informant
Massachusetts Motion for Discovery of Exculpatory Evidence: Any and All Information Regarding Rewards, Promises or Inducements Made to any Potential Witness
Massachusetts Motion For: Statements of Defendant and Codefendants
Massachusetts Motion For Discovery Of Exculpatory Evidence: Any And All Information Regarding Commonwealth Witnesses Mr. Defendant Is Alleged To Have Made Statements To
Massachusetts Motion for Production of Department of Corrections "6-Part" Folder Records and House of Corrections Records of Inmate Informant Parts 01 and 02
Massachusetts Affidavit in Support of Supplemental Lampron Motion for Production of Relevant Exculpatory Evidence: the House of Corrections Records of Informant
Massachusetts Department of Correction 103 CMR 155.00: INMATE CASE RECORDS
Massachusetts Motion For Disclosure Of Informant File Luke Ryan
Massachusetts Jailhouse Informant Discovery Requests Support Stephanie Page
Federal Discovery Request Paid Informant Karnig Boyajian 1995

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Motion Seeking True Identity of Cooperating Witness Hugo Rodriguez 2001
Opposition to Concealing Witness ID with False Name Cohen 2014

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Jumpstart States or Taskforces That Require or Recommend Informant Reliability Hearings
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Massachusetts Motion For A Voir Dire Hearing Regarding The Reliability Of The Jailhouse Informant And Affidavit In Support Stephanie Page
Federal Motion to Exclude and Reliability Hearing Natapoff Affidavit 2010-3
Illinois Reliability Hearing Recommendation Sixth and Final Report Of The Capital Punishment Reform Study Committee 2010
Reliability Hearing Factors to Explore Discovery and Hearing: Canada In Custody Informers Prevention of Miscarriage of Justice Inquiry
Oklahoma Dodd v. State 2000
Oklahoma Dodd v. State 1999

Motion to Suppress

Massachusetts Motion To Suppress Testimony Of Jailhouse Informant Stephanie Page
Massachusetts Jailhouse Informant Motion To Suppress And Affidavit Stephanie Page
Massachusetts Jailhouse Informant Memorandum In Support Of The Motion To Suppress Statements Allegedly Made By The Defendant To Jailhouse Informant Michael It Stephanie Page
Kentucky Motion Discovery Suppress Hearing Johnson post Dodd 2007

Motions to Exclude Informant Testimony

Massachusetts Motion for Relief to Exclude Informant Last Minute Witness and Affidavit in Support Stephanie Page
Federal Motion Exclude Cooperating Witness Request for Hearing Jensen Barber 2007
Federal Motion to Exclude and Reliability Hearing US v Benedict Carpenter 2013
Federal Motion to Exclude and Reliability Hearing US v Benedict Affidavit Neuschatz 2013
Georgia Motion to Exclude Accomplice/Snitch Testimony 2008
Oklahoma Motion Exclude Testimony of Jail House Informants Post Dodd State v. Henry
Oklahoma Dodd v. State 2000
Oklahoma Dodd v. State 1999
Texas Motion To Exclude Testimony Of Jailhouse Snitches (Evidentiary Hearing Requested)

Motion to Introduce Expert Testimony

Federal Motion for Expert US v Benedict 2013 2
Federal Motion To Present Expert Witness US v Benedict 2013
Federal Motion To Present Expert Witness US v Benedict memo USA Response 2013
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Jailhouse Informant Closing Argument Stephanie Page Larry Tipton
James "Whitey" Bulger
Plea Deal Bulger Closing Hank Brennan
Plea Deal Bulger Closing Jay Carney
Plea Deal Closing by Albert Krieger: Credibility of Witnesses
Plea Deal Closing Portion Larry Tipton
Plea Deal Jailhouse Informants Closing Max Stern - Commonwealth v. Lewin
Plea Deal Witness System Closing Marty Weinberg: The Witness System
Sample Bits of Closings

PLEA and COOPERATION AGREEMENT SAMPLES

Massachusetts

Massachusetts Plea Agreement Letter to Attorney from Suffolk County District Attorney 2002
Massachusetts Cooperation Agreement Redacted Middlesex

Federal

Federal Witness Immunity Authorization to Apply for a Compulsion Order 2014
Federal Plea Agreement 2014
Federal Cooperation Plea Agreement 2014
Federal Cooperating Defendant Immunity Deal 2014

Federal Protocols

US Attorneys Title 9 Criminal Resource Manual 9-27.000 Non-prosecution Agreements in Return for Cooperation
US Attorneys Title 9 Criminal Resource Manual Witness Immunity 9-23
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JURY INSTRUCTIONS – Limiting and Final

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Model Jury Instructions to Commonwealth v. Marrero
District Court Instruction 2260 Credibility of Witness
District Court Instruction 2260-5 Plea Agreement Accomplice 5. Prosecution witness with plea agreement contingent on truthful testimony
Limiting Instruction re Cooperating Witness Andy Klyman
Caution as to Cooperating Witness/Accomplice/Paid Informant/ Immunized Witness Mike Bourbeau
Cooperating Agreement Jury Instruction Scott Matson 2015

Massachusetts Bias and Expectation of Favorable Treatment When No Promises Made
ID Model Instruction Com v Gomes 2015
Massachusetts Governor's Council on Capital Punishment – Informant Unreliability 2003

Other Jurisdictions

California Statute Requiring Corroboration of Accomplice and In-Custody Informant Testimony Section 1111, 111.5 and 1127a
Canada Witnesses of Unsavoury Character 11.23 (*Vetrovec* Warning) Canadian Judicial Council Model Jury Instructions in Criminal Matters (Last revised February 2004)
Connecticut Instruction Informant Testimony
Practical Tips on Drafting Jury Instructions John Thompson 2011 Regarding Connecticut Instruction Informant Testimony
Federal First Circuit Cooperating Witness Accomplice Paid Informant 2014
Federal Second Circuit Witnesses Agreements With Government
Illinois Jury Instruction Recommendation Sixth And Final Report Of The Capital Punishment Reform Study Committee 2010
New South Wales Judicial Commission
Oklahoma Dodd v. State 2000
Pennsylvania Accomplice Testimony
States That Require Corroboration Accomplice/Immunized Witness Testimony

WRONGFUL CONVICTION CAUSES STATES TASK FORCE RECOMMENDATIONS

California Report Recommendations re Informant Testimony 2006
Canada In Custody Informers Prevention of Miscarriage of Justice Inquiry
Florida Innocence Commission Final Report
Illinois Capital Punishment Reform Study Committee Summary 2010
Innocence Project Proposed Legislation Jailhouse Informant 2011
Justice Project Reliability Hearing Jailhouse Snitch Testimony A Policy Review 2007
Massachusetts Governor's Council on Capital Punishment – Informant Unreliability 2003
Missouri Proposed Legislation Informant Discovery Reliability Hearing
National Summit International Association of Police Chiefs Building a Systemic Approach to Prevent Wrongful Convictions
NY State Bar Task Force Wrongful Convictions Summary 2009
Ohio Joint Task Force to Review the Administration of Death Penalty 2014
Oklahoma Justice Commission Recommendations 2013
Pennsylvania Summary Report Of The Advisory Committee On Wrongful Convictions September 2011

LAW REVIEWS AND STUDIES RE: UNRELIABILITY OF SNITCH TESTIMONY

American Bar Association Section Of Criminal Justice Report To The House Of Delegates Recommendation Corroboration 2005
ABA Achieving Justice Freeing the Innocent Jailhouse Informants Chapter Five 2006
ACLU Brief Skatzes v Warden
ACLU Study of Use of Confidential Informants in New Jersey 2011
ACLU Hearing on Informants California 2006
An Historical Overview of Informants Robert Bloom Ratting: The Use and Abuse of Informants in the American Justice System 2005
Beyond Unreliable: How Snitches Contribute to Wrongful Convictions Alexandra Natapoff Golden Gate University Law Review 2010
Brady and Jailhouse Informants Giannelli 2007

Characteristics of Informant Testimony in DNA Exonerations Garrett 2011
Convictions of Innocent Persons in Massachusetts An Overview Stan Fisher 2002
Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges Monroe H. Freedman 2010
Defense Responses to Jailhouse Informant Testimony 2014
The Effects of Accomplice Witnesses and Jailhouse Informants On Jury Decision Making Neushatz 2007 Neuschatz, Lawson, Swanner and Meissner American Psychological Association 2007
Innocence Project Data
Jailhouse Informants Robert Bloom ABA 2003
Jailhouse Snitch Testimony A Policy Review The Justice Project 2007
Judicial Gatekeeping Of Police Generated Witnesses Thompson 2012
Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches, C. Blaine Elliott, 16 Cap. Def. J. 1 2003
National Registry of Exonerations Informants 2014.pdf
National Registry of Exonerations 2013.pdf
NIJ Policing and Wrongful Convictions 2014
Prison Informants: Learning The Lessons Of The Jailhouse Informant Paul Genua 2003
Prosecuting the Informant Culture Andrew Taslitz Michigan Law Review 2011
Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions *By* Carl N. Hammarskjold 2011
Than That One Innocent Suffer: Evaluating State Safeguards Against Wronful Convictions Norris Bonventre 2011
The Snitch System Northwestern University School of Law Center on Wrongful Convictions 2005
Snitching.Org Professor Alexandra Natapoff Loyola Law School, Los Angeles 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 Robert P. Mosteller University of North Carolina (UNC) at Chapel Hill – School of Law 2012
Testimony for Sale: The Law and Ethics of Snitches and Experts, George C. Harris
Unreliable Informant Testimony Jeffrey S. Neuschatz 2012
The Use Of A Criminal As A Witness: A Special Problem Stephen S. Trott, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit 2007
When Snitch Testimony Goes Wrong: How Informant Testimony Contributes To Wrongful Convictions Sakinda L. Skinner 2013
The Potential for Injustice in the Use of Informants in the Criminal Justice System, Hon. Arthur L. Burnett, Sr., 37 Southwestern L. Rev. 1079, 1086 (2008)

Ethics

Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges Monroe H. Freedman 2010
See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts Raede 2007
Toward A New Vision Of Informants: A History Of Abuses And Suggestions For Reform Zimmerman 1994

TRANSCRIPTS

Accomplice/Cooperating Witness/CoDefendant

James “Whitey” Bulger Transcripts Jay Carney and Hank Brennan
- Accomplice John Martorano - Cross Hank Brennan
- Accomplice Kevin Weeks - Cross Jay Carney
- Accomplice Stephen “The Rifleman” Flemmi - Cross Hank Brennan

Accomplice John Morris FBI – Cross Hank Brennan
U.S. v. Owens Transcripts Robert Sheketoff and Miriam Conrad
Accomplice Owens Allen Direct Cross Robert Sheketoff
Accomplice Owens Robinson Direct Cross Robert Sheketoff
Accomplice U.S. v. Owens Cross Keillan Robert Sheketoff
Accomplice U. S. v. Owens Cross Fields Robert Sheketoff
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Accomplice Drug Snitch Buyer Transcript Shaeffer
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Bias Cross draft Pending Charges at Time of Incident Stephanie Page
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CoDefendant Cross Rodriguez Promises Andrews
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CoDefendant Immunized Witness - Cross Ferguson Elliot Weinstein – Plea Agreement
CoDefendant Testifies Against D Cross Promises and Rewards Transcript Roger Witkin John Ruby
Cooperating Witness Cross Exam Gooch James Connell
Cooperating Witness Cross Mills Jay Carney
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Jailhouse Informant Cross Drafts: This is the draft of the Trial Cross examination separated by subject Stephanie Page
Jailhouse Informant Transcript Motion to Suppress State Police Sargent re: Relationship with IT Stephanie Page
Jailhouse Informant Transcript Motion to Suppress Stephanie Page
Jailhouse Informant Transcript Trial Stephanie Page
Jailhouse Informant US v. Burke, et al Witness Connelly David Mirsky

JUMPSTARTS

Goals: Many challenges remain in dealing with informant testimony. It is up to defense counsel to raise them, from discovery through jury instructions and beyond, and litigate them thoroughly. The following involve a few of the issues that need to be developed with several resources to support them. They are just a beginning.

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Jumpstart States That Require Corroboration Informant Testimony
Jumpstart Taskforce Reports Recommend Audio or Video Recording of Informant Statements

RULES, REGULATIONS, STANDARDS AND PROTOCOLS

ATF, DEA, DOJ, FBI, USA, STATES

ABA Standards on Prosecutorial Investigations 2014
Downloaded from

Standard 2.4 Use Of Confidential Informants

Standard 2.5 Cooperation Agreements And Cooperating Individuals And Organizational Witnesses

Prosecutorial Investigations is the subject of a new set of ABA Criminal Justice Standards approved by the ABA House of Delegates in February 2008. "ABA Standards for Criminal Justice: Prosecutorial Investigations," Third Edition © 2014

Federal

ATF--Investigative Priorities Procedures Techniques 1989

These used to be online but have since disappeared. Unclear if they have ever been updated. Still a good resource for discovery requests and cross examination.

ATF DOJ Review of Fast and Furious Policy or Order Segments
U.S. Department of Justice Office of the Inspector General: **A Review of ATF's Operation Fast and Furious and Related Matters** (REDACTED) Office of the Inspector General Oversight and Review Division 2012

Although the ATF Guidelines regarding the use of confidential informants do not appear to be online they clearly have them. This 2012 DOJ Review refers to several ATF Policies or Orders and states that the ATF has incorporated the Attorney General's Guidelines Regarding the Use of

Confidential Informants. This document has the portions that discuss specific policies. This could be a source for discovery requests. For the entire 516 page report see **ATF DOJ Review of Fast and Furious Policy Full Report**

DEA Agents Manual Informants Section 6612 2002

This section contains policies and procedures ·to be followed in the establishment, use, and handling of informants by DEA.

DEA Agent Manual Notes-Defending People Mark Bennett 2009 I

Includes what an DEA-5 File Jacket contains [informant file], report writing and note taking responsibilities.

Department Of Justice Confidential Informants Guidelines Reno 2001

Although there have been recent calls for reform after the Whitey Bulger fiasco they still appear to be current.

Department of Justice Confidential Informants Guidelines Ashcroft 2002

Department Of Justice Confidential Informants Guidelines 2015

FBI Manual - Informant and Entrapment Chapter 2003

FBI Manual - Informant Chapter 1985

This is a very poor copy of the FBI Procedures on Informants and Entrapment. Again useful for discovery and cross examination.

The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines (Redacted) Special Report September Office of the Inspector General 2005

" … A confidential informant differs from two other categories of sources. "Cooperating witnesses," or "CWs," differ from CIs in that CWs agree to testify in legal proceedings and typically have written agreements with the Department of Justice (DOJ) (usually with an Assistant U.S. Attorney) that spell out their obligations and their expectations of future judicial or prosecutive consideration. …"

Chapter Three: The Attorney General's Guidelines Regarding the Use of Confidential Informants

"In this chapter we discuss the role of confidential informants in FBI investigations and the rewards and risks associated with their operation. We also describe the requirements of the Confidential Informant Guidelines and the May 2002 revisions to the Guidelines. We then describe the results of our compliance review of informant files in 12 FBI field offices. Finally, we provide our analysis and recommendations based on those findings, our surveys and interviews,

and the results of more than 40 FBI Inspection Division audits of field office Criminal Informant Programs. …" [Post Whitey Bulger]

US Attorneys Title 9 Criminal Resource Manual 9-27.000 Non-prosecution Agreements in Return for Cooperation

"… the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable …"

9-27.600 Entering into Non-prosecution Agreements in Return for Cooperation Generally
9-27.620 Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed
9-27.630 Entering into Non-prosecution Agreements in Return for Cooperation—Limiting the Scope of Commitment
9-27.640 Agreements Requiring Assistant Attorney General Approval
9-27.641 Multi-District (Global) Agreement Requests
9-27.650 Records of Non-Prosecution Agreements

US Attorneys Title 9 Criminal Resource Manual Witness Immunity 9-23

"This chapter contains the Department's policy and procedures for seeking "use immunity" under Title 18 U.S.C. §§ 6001-6005. Sections 6001 to 6005 provide a mechanism by which the government may apply to the court for an order granting a witness limited immunity in all judicial, administrative, and congressional proceedings when the witness asserts his or her privilege against self-incrimination under the Fifth Amendment."

9-23.100 Witness Immunity. Generally
9-23.110 Statutory Authority to Compel Testimony
9-23.130 Approval by Assistant Attorney General to Compel Testimony
9-23.140 Authority to Initiate Immunity Requests
9-23.210 Decision to Request Immunity. The Public Interest
9-23.211 Decision to Request Immunity. Close-Family Exception
9-23.212 Decision to Request Immunity. Conviction Prior to Compulsion
9-23.214 Granting Immunity to Compel Testimony on Behalf of a Defendant
9-23.250 Immunity for the Act of Producing Records
9-23.400 Authorization to Prosecute after Compulsion

US Attorneys Title 9 Criminal Resource Manual Witness Immunity 716-726

716 Use Immunity, Transactional Immunity, Informal Immunity, Derivative Use
717 Transactional Immunity Distinguished
718 Derivative Use Immunity
719 Informal Immunity Distinguished From Formal Immunity
720 Authorization Procedure for Immunity Requests

726 Steps to Avoid Taint

US Attorney General Guidelines FBI Use of Informants Confidential Human Sources 2006

"The purpose of these Guidelines is to set policy for all Department of Justice personnel regarding the use of Confidential Human Sources … that are operated by the FBI … These Guidelines are mandatory and supersede the Attorney General's Guidelines … of May 30, 2002 …" USAG Gonzales

State

Boston Police Department Rule 333 Confidential Informant Procedures 2006

Boston Police Rules and Regulations are online.

Massachusetts State Police Confidential Informant Order INV-02 2009

This Order does not have the Standard Agreement Statement, Informant Information Report, Confidential Expenditure Fund Voucher or Confidential Expenditure Fund Voucher Log that were contained in the 2000 Orders.

Massachusetts State Police Confidential Informant Order INV-02-2A 2000

This Order does contain the Standard Agreement Statement, Informant Information Report, Confidential Expenditure Fund Voucher or Confidential Expenditure Fund Voucher Log that are not in the 2000 Orders

NJ Prosecutors Manual Use of Informants 2001

EVIDENCE RULES and STATUTES

I have tried to collect statutes that apply to informant testimony. Illinois and Florida are excellent sources for discovery and jury instruction requests. I think even though some of the statutes are limited to death penalty cases, the reasoning supporting them applies to all cases. Please as with everything else double check to see if they still exist before referencing them. See **Wrongful Conviction Causes States Task Force Recommendations Section** for further support.

Massachusetts

Massachusetts Rules of Criminal Procedure

Massachusetts Rules of Criminal Procedure provide that "[t]he prosecution shall disclose to the defense . . . all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial." Mass. R. Crim. P. 14(a)(1)(A)(ix).

Massachusetts Guide To Evidence Section 1104. Witness Cooperation Agreements 2014

Massachusetts Guide To Evidence Section 509. Identity of Informer, Surveillance Location, and Protected Witness Privileges

Basis for the so-called "informant's privilege." Commonwealth v. Dias, 451 Mass. 463, 468 n.11 (2008) (citing Roviaro v. United States, 353 U.S. 53, 59 (1957)); see also Commonwealth v. Ennis, 1 Mass. App. Ct. 499, 501 (1973).

Massachusetts Immunity from Prosecution MGL c. 233 Section 20C-20I Requires Corroboration

Crimes Subject to Immunity MGL c. 233 Section 20D
Application for Witness Immunity by Attorney General or District Attorney; Hearing; Representation of witness; Notice or Waiver; Transcript Crimes Subject to Immunity MGL c. 233 Section 20E
Scope of Immunity; Copies of Transcripts of Testimony Compelled and Documents Furnished; Availability to Witness MGL c. 233 Section 20G
Contempt of Court; Punishment; Appeal MGL c. 233 Section 20H
Necessity of Corroborating Testimony of, or evidence produced by, person granted immunity MGL c. 233 Section 20I

Other Jurisdictions

California Statute Requiring Corroboration of Accomplice and In-Custody Informant Testimony Section 1111, 111.5 and 1127a

Excellent source for discovery requests and limiting and/or jury instructions.

California Statute 701.5 Cannot Use 12 year old or younger as Informant

Florida Innocence Commission Final Report

VIIA: Informant and Jailhouse Snitches
"The Florida Supreme Court . . . finally has changed the rules of evidence. Beginning this month, prosecutors now are **required to disclose** both a summary of the jailhouse informant's criminal history and just what kind of deal a snitch will be getting in return for testimony. And now, **jurors will hear about prior cases** that relied on testimony from that particular informant. The justices ordered new restrictions on the much abused informant testimony, because snitches, the court noted, "constitute the basis for many wrongful convictions."

Florida Amendment to Rule of Criminal Procedure 3.220 2014

Mandating detailed disclosure by the prosecutor of the use of an informant witness.

Florida Supreme Court regulates criminal informant testimony 2014

"In 2012, the Florida Innocence Commission made a series of reform recommendations in recognition of the "dangers of false informant and jailhouse snitch testimony." The Florida Supreme Court has now amended the rules of evidence to reflect those recommendations. See

In re: Amendments to Florida Rules of Criminal Procedure 3.220. The Miami Herald reported the story here: Florida's high court puts brakes on snitches' testimony."

Illinois State Statute Sec. 115-21. Informant testimony. 2003

Mandates **discovery and requires a reliability hearing**: "(a) For the purposes of this Section, "informant" means someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously…."

Illinois State Statute Sec. 725 ILCS 5/115-21 Reliability Hearing 2003

Illinois Reliability Hearing Recommendation Sixth And Final Report Of The Capital Punishment Reform Study Committee 2010

Requires a hearing regarding reliability. Great example of the discovery that must be provided. "The court shall conduct a hearing to determine whether the testimony of the informant is reliable …"

Texas Art. 38.075. Corroboration Of Informant Testimony Required

Title 21 United States Code (USC) Controlled Substances Act Exemptions

21 USC 862(e) exempts any individual "who cooperates or testifies with the Government" is **exempt from the exclusion of federal benefits provisions** that relate to drug traffickers or possessors. Can be used for discovery requests. Opens door to questions about snitches drug issues and penalty provisions the client faces.

Washington Proposed Legislation Informant Disclosure 2011

Although not passed it is a good example of what discovery, evidence and instructions should be…

"**AN ACT Relating to disclosure and regulation of criminal informant evidence and testimony**; and adding a new chapter to Title 10 RCW. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: NEW SECTION. **Sec. 1.** The legislature finds that evidence and testimony from criminal informants who have reason to seek leniency and other benefits from the criminal justice system are inherently suspect because a system in which criminal informants are rewarded by the state produces dangerous incentives to manufacture or fabricate evidence…"

CASE LAW

Massachusetts

Commonwealth v. Murphy, 448 Mass. 452; 862 N.E.2d 30; 2007

"We conclude that, where the government has entered into an "articulated agreement containing a specific benefit," or promise thereof, *Commonwealth v. Reynolds, 429 Mass. 388,*

394, 708 N.E.2d 658 & n.7 (1999), the recipient inmate is a government agent for purposes of the *Sixth Amendment to the United States Constitution* and *art. 12 of the Massachusetts Declaration of Rights* even if the inmate is not directed to target a specific individual."

Commonwealth vs. Miguel A. Marrero (and seven companion cases) 436 Mass. 488, (2002)

Mandates Model Jury Instruction. "The judge pointedly instructed the jury on the issue of testimony pursuant to a **plea bargain or immunity agreement**, as required by Commonwealth v. Ciampa, supra at 266, both immediately after Washington's testimony and in his final charge. The judge told the jury that "[t]he testimony of a witness under such an agreement must be considered with particular caution and care," and that the prosecutor did not have "any special knowledge of the truthfulness of her testimony." The jury's attention was clearly focused on the incentives that could have influenced Washington's testimony and they were warned that the prosecutor did not know whether Washington was telling the truth. There was no objection to the judge's instructions. The charge was complete and comprehensive, and we set it forth (with some revisions) in the Appendix of this opinion for possible use by other judges in future cases."

Commonwealth Vs. Carmen G. Ciampa (and ten companion cases). 406 Mass. 257 (1989)

Certain criminal convictions, which were largely dependent upon the credibility of an admitted accomplice who testified pursuant to a written **plea agreement**, were reversed by this court, where the trial judge erred in admitting the agreement in evidence without redacting repeated references to the witness's obligation to tell the truth, a reference to the witness's placement in a program for protection of his life and safety, and language that the agreement was contingent on the truth of the witness's representation that he did not shoot the victim of a homicide, and where the judge also erred in admitting testimony that the witness's attorney had signed a statement representing that the witness understood the agreement and that the attorney believed the witness had entered into the agreement freely and voluntarily. [262-263] O'CONNOR, J., with whom NOLAN and LYNCH, JJ., joined, dissenting.

At a criminal trial in which the Commonwealth's case was largely dependent upon the credibility of an alleged accomplice who testified pursuant to a written plea agreement, the judge's **instructions** to the jury insufficiently conveyed a need to treat the witness's testimony with caution, failed to focus adequately on the incentives that could have influenced that witness's testimony, and did not dispel any suggestion that the prosecution was vouching for the witness's truthfulness. [263-264] O'CONNOR, J., with whom NOLAN and LYNCH, JJ., joined, dissenting.

Observations for the guidance of judges in future criminal trials in which an alleged accomplice testifies pursuant to a plea agreement. [264-266]

Commonwealth v. Reynolds*,* 429 Mass. 388, 394-395 (1999)

"…an **evidentiary hearing and findings of fact are required** to determine whether the witness obtained the information…prior to the establishment of any agency relationship."

Commonwealth v. Meas, 467 Mass. 434, 452 (2014)

"Testimony offered by a witness in exchange for the government's **promise of a plea bargain or immunity** should be treated with caution, lest the jury believe that the government has special knowledge of the veracity of the witness's testimony." Commonwealth v. Marrero, 436 Mass. 488, 500, 766 N.E.2d 461 (2002). (452) … "The danger increases when the jury are informed that the validity of the agreement depends on the truthful nature of the testimony." Id. "If properly handled, however, such an agreement does not constitute improper prosecutorial vouching for the witness." Id. "In the Ciampa decision, this court set forth guidelines to be used when a witness testifies pursuant to a plea or immunity agreement that explicitly incorporates a witness's promise to testify truthfully, to minimize the possibility that the jury will believe the witness because the Commonwealth, in effect, has guaranteed the truth of the witness's testimony." Id., citing Commonwealth v. Ciampa, supra at 264-266.

In Commonwealth v. Washington, 459 Mass. 32, 44 n.21, 944 N.E.2d 98 (2011), we explained: "Where a Ciampa instruction is warranted, the following rules apply. A prosecutor may generally bring out on direct examination the fact that a witness has entered into a plea agreement and understands his obligations under it, but any attempts to bolster the witness by questions concerning his obligation to tell the truth should await redirect examination, and are appropriate only after the defendant **[*455]** has attempted to impeach the witness's credibility by showing the witness struck a deal with the prosecution to obtain favorable treatment. Commonwealth v. Ciampa, 406 Mass. 257, 264, 547 N.E.2d 314 (1989). A prosecutor in closing argument may then restate the witness's agreement, but commits reversible error if she 'suggests that the government has special knowledge by which it can verify the witness's testimony.' Id. at 265. To guard against an implied representation of credibility, the judge must 'specifically and forcefully tell the jury to study the witness's credibility with particular care.' Id. at 266, citing United States v. Mealy, 851 F.2d 890, 900 (7th Cir. 1988). Where the jury are aware of the witness's promise to tell the truth, the judge also should warn the jury that the government does not know whether the witness is telling the truth. . . ." Here, where Nou was granted immunity and where the prosecutor on redirect examination elicited that Nou had promised to tell the truth, we agree with the defendant that the Ciampa instruction should have been given. (455) …

Commonwealth v. Rodwell, 394 Mass. 694, 700 (1985) **Bias is never collateral.**

A prosecution witness's past cooperation with the Commonwealth, which has led to the apprehension and conviction of others and to favorable treatment of the witness, is relevant to the question of the witness's bias, an issue that is never collateral. Commonwealth v. Marcellino, 271 Mass. 325 , 327 (1930).

We do not think you need to ask the snitch, nor have him admit at the voir dire/trial that he hoped for favorable treatment when he made the statements to the police back when. It is enough to get him to acknowledge that sometime before he gave the statement he had been stopped and accused of (for example possessing the guns and drugs).

ID Model Instruction Com v Gomes 2015

One of the future issues is to file requests for jury instructions that incorporate the social science literature similar to the recent *Commonwealth vs. Jeremy D. Gomes*, 470 Mass. 352, 379 (2015).

Massachusetts Case Law Bruce E. Ferg, Esq. Committee For Public Counsel Services, Public Defender Division Somerville "Cooperating" Government Witnesses: Immunized Witnesses, Snitches, Informants, And "Hopeful" Witnesses – Corroboration Required

> "Witnesses who "cooperate" with the prosecution come in various guises, but predominantly they are witnesses who:
>
> - have been granted immunity under G.L. c. 233, §§ 20C–20E;
> - have been given a plea bargain with or without a written agreement; or
> - have criminal charges pending against them and are hoping for a break. …"

Other Jurisdictions

United States Supreme Court

Kyles v. Whitley (93-7927), 514 U.S. 419 (1995)

> A must resource for informant discovery, as long as everything else.

Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985)
Downloaded from http://law.uark.edu/documents/Maine-v-Moulton.pdf

> A defendant's sixth Amendment right to counsel is violated by the admission at trial of incriminating statements made by him after indictment to his codefendant, a secret government informant.

US v. Henry, 447 U.S. 264 (100 S.Ct. 2183, 65 L.Ed.2d 115) 1980
Downloaded from: https://www.law.cornell.edu/supremecourt/text/447/264

> "Held: Respondent's statements to the informant should not have been admitted at trial. By intentionally creating a situation likely to induce respondent to make incriminating statements without the assistance of counsel, the Government violated respondent's Sixth Amendment right to counsel. Under the facts.particularly the facts that the informant was acting under instructions as a paid informant for the Government while ostensibly no more than a fellow inmate, and that respondent was in custody and under indictment at the time.incriminating statements were "deliberately elicited" from respondent within the meaning of Massiah. Since respondent was unaware that the informant was acting for the Government, he cannot be held to have waived his right to the assistance of counsel."

States

Nevada Boehm v. Nevada 113 Nev. 910 (1997)
Downloaded from https://casetext.com/case/boehm-v-state-11

> "Defendant was convicted in the Third Judicial District Court, Churchill County, Mario G. Recanzone, J., of robbery with deadly weapon and conspiracy to commit robbery. Defendant

appealed. The Supreme Court held that: (1) conversation between defendant and cellmate, who was "wired" and deliberately placed in defendant's cell as agent of police, was functional equivalent of express custodial interrogation; (2) since defendant had invoked right to counsel, interrogation by cellmate was forbidden "reapproach" of defendant in violation of right to counsel; and (3) erroneous admission of recording and transcript of jailhouse conversation was not harmless. Reversed and remanded."

Nevada Reliability Hearing Mandated Dagostino v State, 107 Nev. 1001, 823 P.2d 283 (Nev. 1992)

Holds that before "jailhouse incrimination" testimony is admissible the "trial judge [must] first determine [] that the details of the admissions supply a sufficient indicia of reliability").

Oklahoma Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000)

Can be used as a basis for a **reliability hearing, jury instructions and discovery**. (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to Daubert hearing) [See sample motions and Oklahoma Dodd v. State, OKCR29, ___P.2d___ 1999]

Oklahoma Dodd v. State, OKCR29, ___P.2d___ 1999

Even though this decision which originally mandated a **reliability hearing** has been narrowed to no longer mandate the reliability hearing it still can be used as a basis for a reliability hearing, jury instructions and discovery. [see Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000)

"¶5 Prior to trial, the judge shall conduct a reliability hearing. At the reliability hearing, the reviewing court should evaluate the evidence by hearing the testimony of the informant, any other relevant witness (including possibly the defendant), and any evidence bearing on the informant's credibility. The judge shall specifically consider the following factors: (1) whether the informant has received or will receive anything in exchange for testifying; (2) whether the informant has testified or offered evidence in other cases and any benefit there received; (3) the specificity of the informant's testimony; (4) the manner in which the statement from the defendant was obtained; (5) the degree to which the statement can be independently corroborated; (6) whether the informant has changed his testimony in this case or any case;**7** and (7) the informant's criminal history. … ¶6 After considering the evidence, the judge should determine whether the moving party established that the informant's testimony is more probably true than not. If not, the testimony should be excluded."

Texas Wesbrook v. State, 29 S.W.3d 103 (2000)
Downloaded from https://www.courtlistener.com/opinion/1473130/wesbrook-v-state/

" … a jail house informant, acting at the behest of the State, cannot elicit information to be used at any stage of trial concerning charges in which the Sixth Amendment right to counsel had already attached and counsel had not been notified."

Overview

National Canvas Informant Successful Massiah Henry Law 2010

This is a fairly recent casenote summary dealing with the issue of jailhouse informants. It contains US Supreme Court, Federal and State Caselaw.

SUPREME COURT CRIMINAL LAW JURISPRUDENCE—OCTOBER 2008 TERM Richard Klein

"The Court also considered a case wherein the State had utilized a jailhouse snitch to elicit inculpatory statements from a defendant in violation of his Sixth Amendment right to counsel … **Kansas v. Ventris**, 129 S. Ct. 1841, 1845 (2009)." Although the Court allowed the informant testimony into evidence there is a good review of the arguments and literature supporting the unreliability of this testimony. (at pages 551-557.)

"In *Ventris*, the prosecution and the police placed an individual into the same jail cell in which Ventris was being held awaiting trial.58 Doser, the jailhouse snitch, was instructed to be a human listening device. Doser and Ventris engaged in conversations and Doser was able to elicit incriminating statements from Ventris. Ventris did not know that Doser was acting on behalf of the State, therefore there was no way that Ventris could have waived his Sixth Amendment right to counsel."

PREPARATION

Discovery Preparation

Goals: Finding out the most basic information – including whether or not the prosecution intends to call an informant to testify – can be very difficult. Starting early with specific discovery requests is imperative. Most states, including Massachusetts, have general discovery obligations in their Rules of Criminal Procedure. However there are several states which have statutes that mandate much more information to be automatically given to defense counsel. There are multiple Wrongful Conviction Task Forces that recommend the same. See **Jumpstart: Jailhouse Informant Discovery Requests Support** Tailor your discovery requests to your case. Be specific. There are many examples in this section.

Please do not be concerned that many of the following practice guides and articles are older. Classic discovery and cross-examination preparation are timeless. Many of these presentations on cross examination include discovery checklists and ideas. For specific discovery checklists see **Discovery** and **Motions Creative and Wishful.**

Jumpstart: Jailhouse Informant Discovery Requests Support Stephanie Page

In Massachusetts the specific discovery obligations concerning informants of the prosecutor are laid out in **Massachusetts Rules of Criminal Procedure.** Mass. R. Crim. P. 14(a)(1)(A)(ix). Pretty limited to rewards, promises and inducements. We need to be more aggressive in our discovery requests. Several states and/or Wrongful Convictions Task Forces have mandated and/or recommended further mandatory discovery.

Use the following as support for more specific discovery requests especially for recantations. Go back to the Task Force reports contained in **Wrongful Conviction Causes States Task Force Recommendations** for further authority. The following are support for general discovery

requests if an informant is involved in the case. More specific requests are included in the **Motions Creative and Wishful** section.

Discovery Cross Examining the Informant NORML 2005

"…prosecutors often begin trials by trying to redefine the way that informants are thought of, by using new and different ways of to refer to them and their benefits. Terms like *informant*, *snitch*, *rat*, *Judas*, *deal*, *plea- bargain*, *reward,* and *payoff,* have now become *cooperating witness*, *confidential source*, *C.I.*, *plea agreement*, *5k1 motion*, *cooperation agreement*, and *information & expense payment*. While these two sets of terms mean the same thing, the terms used to describe the informant and his "reward" may well control the way they are thought of and thus the considerations given to them, by the jury. …"

Federal Exemptions Title 21 United States Code (USC) Controlled Substances Act

21 USC 862(e) exempts any individual "who cooperates or testifies with the Government" is **exempt from the exclusion of federal benefits provisions** that relate to drug traffickers or possessors. Can be used for discovery requests. Opens door to questions about snitches drug issues and penalty provisions the client faces.

Federal Witness Immunity Authorization to Apply for a Compulsion Order 2014

This form is a great source of discovery. State motions could be guided by this type of information. It contains personal information, jurisdictions involved, types of proceedings, name of targets, offenses under investigation, date investigations began, source of anticipated evidence, background information, promises made, relationship between the witness and defendant/targets, witnesses culpability and criminal history, hearings, etc.

Inside the Informant File ATF Fitzgerald 2011

"The defense lawyer's perspective that law enforcement views its snitches as free agents, conveying to them near 007 status, is seriously flawed. That misconception may place you at a serious tactical disadvantage in the defense of your client."

Litigating Snitches: from Reliability Hearings to Jury Instructions Bradley R. Haywood Sheldon, Flood & Haywood PLC Fairfax, VA 22030 www.sfhdefense.com

"The outline and presentation contain a brief overview of the problem snitches present to a reliable determination of guilt and punishment (previously the subject of a presentation at the 2012 Capital Defense Workshop), basic legal principles guiding the admissibility of and limitations on snitch testimony, and most importantly, a discussion of motions to consider filing in challenging snitch testimony…."

In addition, I discuss methods for obtaining information about snitches (including a laundry list of items to request through discovery/as *Brady*, or to seek out through investigation), special cautionary jury instructions and some recent legislative reforms in other jurisdictions."

Practical Tips from NACDL EGroup

Preparing For The Snitch Part 1 Discovery Larry Pozner 1985

Preparation For Cross-Examining The Snitch Michael Howell Capital Defender N.C.

Prosecutor's Informant Checklist Stephen S. Trott , Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit 2006

Prosecutors: Improving Informants to Win Cases 2001
(Handout at a NACDL Conference)

> This checklist was prepared based on an article offering prosecutors advice to maximize the usefulness of Informers and their testimony. It appeared in the South Carolina Law Review. Rowland, Effective Use of Informants and Accomplice Witnesses, 50S.C.L. Rev. 679 (1999).

There are Three Types of Informants Paris London

Updated Rat Manual: Finding Evidence To Search For And Undermine The Snitch 2005

> This manual was prepared and updated by San Diego California Public Defenders Charles Sevilla and Verna Wefald. 2012

Cross Examination Preparation

Jumpstart: Jailhouse Informant Discovery Requests Support

In Massachusetts the specific discovery obligations concerning informants of the prosecutor are laid out in **Massachusetts Rules of Criminal Procedure.** Mass. R. Crim. P. 14(a)(1)(A)(ix). Pretty limited to rewards, promises and inducements. We need to be more aggressive in our discovery requests. Several states and/or Wrongful Convictions Task Forces have mandated and/or recommended further mandatory discovery.

Use the following as support for more specific discovery requests especially for recantations. Go back to the Task Force reports contained in **Wrongful Conviction Causes States Task Force Recommendations** for further authority. The following are support for general discovery requests if an informant is involved in the case. More specific requests are included in the **Motions Creative and Wishful** section.

Jumpstart: Cross-examination Expectation of Rewards and Promises – When None are Expressly Made

What do you do when the snitch and prosecutor say that no promises have been made to the snitch in exchange for his testimony? The question is if the perception of the witness is that he is getting a benefit or saving himself from being charged, even if no official offer is ever made, is this fair game for cross-exam? YES. You still have the **right** to cross examine the snitch about his/her hope/expectation for favorable treatment. **Practical tips by Cathleen Bennett and Stephanie Page**

Marty Weinberg Lecture on How to Cross Examine a Snitch Mid 1980'S

I have transcribed my hand written notes pf this lecture of Marty's. Over the next 25 years or so I referred to it often. The main points were and still are: (1) thorough and relentless preparation either through formal or informal discovery and investigation; (2) Picture painting: drawing out through the words of the witness what life is like and what will be lost if the witness does not help the government; (3) that the witness will do and say anything in order to ensure his freedom. Make sure you read the actual transcript of Marty's timeless cross of Bangs in *Commonwealth Clemente* Medford Depositers Trust Bank Robbery – a true piece of history. Thank you Marty.

Cross Exam Practice Guide Drug Cop and Informant BNA 2000: Winning Through Cross Examination: The Possible Dream

Cross Examination Preparation System Larry Posner

These are the materials from the 1986 CPCS Annual Conference. Although the materials are dated the content is still current and used every day by criminal defense lawyers.

Cross Examination of Cooperating CoDefendants Federal Brian Steel 2006

"It is imperative to have a full understanding of the rules under which cross examination can be conducted, so that you are able to delve into all the areas on which you seek to examine the witness. Below is a summary of relevant rules and principles (Federal) to enable successful discrediting of the cooperating co-defendant. …"

Cross Examining Snitches Carlos Gonzalez ABA 2014

"…A snitch is a very special type of witness. He or she was arrested, accused of committing a crime, and offered a deal. The witness is not testifying out of a moral obligation or because he or she is a good citizen. The testimony of the witness is a requirement imposed by the government in exchange for a reduced sentence. …"

Cross Examining the Accomplice Witness Brodsky Harris

"As a group, the seven accomplice witnesses in the racketeering trial of reputed mobster John Gotti and six codefendants could not have been more reprehensible. Collectively, these career criminals had been convicted of nearly 70 different crimes, ranging from bank robbery and car theft to drug trafficking and murder. On cross-examination, each confessed to a life of crime, to lying and cheating when it suited some criminal purpose. The accomplices' testimony against the *Gotti* defendants was devastating, and painted a picture of heinous and violent crime. Nevertheless, in a verdict that stunned seasoned court watchers, the jury acquitted all defendants of all counts. Many believe that the government's witnesses were simply too tainted by crime to be credited."

Cross Examining the Snitch Checklist Steve Harmon 2010

NACDL Snitches and Science Presentation

Cross Examination of Cooperating Witness Federal Defenders Indiana Juval Scott

Cross-examining the Cooperating Witness Roy Black 2011

> "A beautiful set of examples of cross-examining the cooperating witness comes from the New York State trial of James W. Marguilies, an Ohio lawyer indicted for a pump and dump scheme."

How To Impeach A Witness: Trial Attorney Eviscerates Guy Who Gave Yale A Baseball Stadium With Money He Stole Henry Blodget 2011

Never Insult the Alligator Hugo Rodriguez 2000

> This was a presentation to the Essex Bar Advocates.

Notes from a NACDL Seminar on How to Cross Examine a Snitch/Rat (early 1990's (?) Stephanie Page)

Preparing for the Snitch Part 2 Cross Examination Larry Pozner 1985

Primer on Crossing An Informant THE CHAMPION April 2011 Vida B. Johnson Downloaded from

> "Cross-examining a cooperating witness is an extremely important part of a criminal trial and can be one of the most exhilarating experiences a criminal defense lawyer will have. It requires significant preparation."

Put the Snitch in the Ditch: Practical Roadmap to Effective Cross-Examination of "Snitches"
Presented to North Carolina Public Defender Spring Conference –2005 By Peter Crane Anderson

MOTIONS CREATIVE and WISHFUL

GOALS: What better way to deal with this type of unreliable and cause for wrongful convictions than to try to keep the witness from being created at all – at least in the context of a jailhouse informant? (see **Jumpstart Motion to Preclude Creation of Jailhouse Informant Testimony Support)** If unsuccessful then why not file a motion to have all future interviews with the informant recorded (see **Jumpstart Taskforce Reports Recommend Audio or Video Recording of Informant Statements**); a motion to exclude or suppress; to exclude because there is no corroboration of what the witness says (see **Jumpstart States That Require Corroboration Informant Testimony**; ask for a pretrial reliability hearing (see **Jumpstart States or Taskforces That Require or Recommend Informant Reliability Hearings)?** File a motion for a Daubert hearing; a motion to present your own expert on the unreliability of such a witness; an expert on why cross examination and jury instructions are no cure for this type of witness (see **Jumpstart: Informant Testimony Effect on Jurors Cross Examination And Instructions Are Not Enough)**. Impossible? No. You will find support for these and more in the following Motions. See also **WRONGFUL CONVICTION CAUSES STATES TASK FORCE RECOMMENDATIONS and LAW REVIEWS AND STUDIES RE: UNRELIABILITY OF SNITCH TESTIMONY.**

Please do not be concerned that many of the following motions are dated. The requests are timeless and limited by the facts in your case and your creativity. Make sure that all cases are shepardized and/or all protocols/guidelines are updated. See **Wrongful Conviction Causes States Task Force Recommendations Section** for further support.

Overview

Litigating Snitches: from Reliability Hearings to Jury Instructions Bradley R. Haywood 2014

> "The outline and presentation contain a brief overview of the problem snitches present to a reliable determination of guilt and punishment (previously the subject of a presentation at the 2012 Capital Defense Workshop), basic legal principles guiding the admissibility of and limitations on snitch testimony, and most importantly, a discussion of motions to consider filing in challenging snitch testimony. These motions include:
>
> **Motion for Reliability Hearing**
> **Motion to Bar Uncorroborated Snitch Testimony**
> **Motion to Exclude Testimony Pursuant to an Unconstitutional Cooperation Agreement (Consistency Provision)**
> **Equal Protection/Selective Prosecution Challenge**
> **Motion for Psychiatric Evaluation of Snitch**
> **Motion for protective measures to prevent government from developing snitch evidence**
> **Motion for Snitch Expert**
>
> In addition, I discuss methods for obtaining information about snitches (including a laundry list of items to request through discovery/as *Brady*, or to seek out through investigation), special cautionary jury instructions and some recent legislative reforms in other jurisdictions." Also why why cross examination is an ineffective safeguard.

Justice Project Reliability Hearing Jailhouse Snitch Testimony A Policy Review 2007

> Recommends reliability hearings and corroboration.

Practice Tips on Testimony of Bribed Witnesses John Thompson

> "The SJC has been inconsistent in dealing with the testimony of bribed witnesses for the prosecution. But the case law does provide defense counsel with some useful tools. …"

Motions to Preclude Creation of Snitch Testimony

Jumpstart Motion to Preclude Creation of Jailhouse Informant Testimony Support

Kansas Motion to Preclude Creation of Informant Testimony Longoria

Louisiana Motion To Preclude Creation Of Snitch Testimony

> From Louisiana post Crawford: "…He has absolutely no intention of talking to anyone but his lawyers about the facts of the case. He has been approached by law enforcement officers, the F.B.I., and others, and has established a track record of refusing to discuss anything about his case. He is not about to change that now. …"

Motion to Have Interviews Recorded

Jumpstart Taskforce Reports Recommend Audio or Video Recording of Informant Statements

Motion to Have Future Interviews with Any Potential Cooperating Commonwealth Witness Recorded
Stephanie Page

Discovery Motions

The following are motions that were filed in specific cases. Make sure you review the **Discovery and Cross Examination Preparation** sections in this Project.

Massachusetts Last Minute Notice of Informant Testimony

The following motion, along with a **Motion for Relief to Exclude Informant Last Minute Witness and Affidavit,** were filed and heard in a murder case where the prosecutor gave notice of the intent to use a jailhouse informant at the final pretrial conference. We were lucky. We were successful in excluding the witnesses testimony – not for the right reasons mind you; but because the court did not want to give a continuance. It was important that we had made repeated requests for this type of discovery beginning from the pretrial conference on.

Last Minute Informant Discovery Request Eve of Trial Stephanie Page

Massachusetts Motions for Discovery re: CoDefendant Plea Deal Stephanie Page

The following motions were filed in a murder case where the shooter codefendant was given a deal [including hundreds of thousands of dollars] to testify against the defendant. I had to keep going back with supplemental motions as the discovery was reluctantly allowed and provided. Stephanie Page

Motion For Discovery Of Exculpatory Evidence: Any And All Information Regarding CoD Informant
Motion for Discovery of Exculpatory Evidence: Any and All Information Regarding Rewards, Promises or Inducements Made to any Potential Witness
Motion For: Statements of Defendant and Codefendants
Motion For Discovery Of Exculpatory Evidence: Any And All Information Regarding Commonwealth Witnesses Mr. Defendant Is Alleged To Have Made Statements To
Motion for Production of Department of Corrections "6-Part" Folder Records and House of Corrections Records of Inmate IT Roche Parts 01 and 02
Affidavit in Support of Supplemental Lampron Motion for Production of Relevant Exculpatory Evidence: the House of Corrections Records of IT Roche
Department of Correction 103 CMR 155.00: INMATE CASE RECORDS

> Pursuant to 103 CMR 155.07 the Department of Corrections is required to maintain "one case record on each of its current inmates. The case record shall normally be a standardized six-part folder containing relevant material related to the inmate's admittance, transfer, background data, classification, programming, and release, as outlined by 103 CMR 155.000."

Massachusetts Motion for Disclosure of Informant File Luke Ryan

Federal Discovery Request Paid Informant Karnig Boyajian 1995

The case in question provided dramatic result since the government ended up voluntarily dismissing the case prior to trial apparently unwilling to respond to the questions. The two informants involved had received over $350,000 in fees baiting (trolling) for potential defendants to buttress their own ongoing lucrative formal "employment" by the DEA, as well as other benefits to them regarding passes on past criminal conduct which I had learned about in my own investigation.

The motion is obviously old and the citations could be more current, but the questions regarding personal benefits, rewards and inducements, to include their filing of tax returns on monies received, or any assistance given to them or their family members concerning immigrations issues, and other similarly related issues addressed in the motion (some yellow highlighted), might well form part of a core list of questions that could asked a snitch at trial.

Motion for Identity of Informant

Federal Motion Seeking True Identity of Cooperating Witness Hugo Rodriguez 2001

Federal Opposition to Concealing Witness ID with False Name Cohen 2014

"This memorandum of law is submitted in opposition to the Government's motion for an order permitting a cooperating witness (hereinafter "CW")1 to testify at trial under a pseudonym, rather than using his true name. …"

Motion for Reliability Hearing

Jumpstart States or Taskforces That Require or Recommend Informant Reliability Hearings

Massachusetts Motion For A Voir Dire Hearing Regarding The Reliability Of The Jailhouse Informant And Affidavit In Support Stephanie Page

Massachusetts Motion for Reliability Hearing Luke Ryan

Massachusetts Motion for Reliability Hearing Memorandum In Support Luke Ryan

This memo contains many law review and other studies along with a good summary of out of state cases.

Federal Motion to Exclude and Reliability Hearing Natapoff Affidavit 2010-3

Alexandra Natapoff, Professor of Law Loyola Law School, is an expert who has written and testified about the unreliability of confidential informant testimony. See Law Review Section.

Illinois Reliability Hearing Recommendation Sixth And Final Report Of The Capital Punishment Reform Study Committee 2010

Reliability Hearing Factors to Explore Discovery and Hearing: Canada In Custody Informers Prevention of Miscarriage of Justice Inquiry

Oklahoma Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000)

> This has a summary of other state law and law review articles. Even though this appellate decision no longer mandates a reliability hearing it still can be used as a basis for a reliability hearing, **jury instructions and discovery**. (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to Daubert hearing) See Oklahoma Dodd v. State, OKCR29, ___P.2d___ 1999 and an example: **Kentucky Motion Discovery Suppress Hearing Johnson post Dodd 2007** which discusses both. See **Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000) Summary**

Oklahoma Dodd v. State, OKCR29, ___P.2d___ 1999

> Even though this decision which originally mandated **a reliability hearing** has been narrowed to no longer mandate the reliability hearing it still can be used as a basis for a reliability hearing, jury instructions and discovery. [see Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000)

Motion to Suppress

Massachusetts Motion to Suppress Testimony of Jailhouse Informant Stephanie Page

> This Motion to suppress was filed to challenge the reliability of the Jailhouse Informant who claimed that the defendant, who was a stranger to IT, fully confessed to IT while they were in a cell for about forty minutes. We actually got a hearing. Stephanie Page
>
> The memorandum began with:
>
> > "Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favors from the authorities, attention or notoriety they are in every instance completely unreliable. … They must be recognized as a very great danger to our trial system."

Massachusetts Jailhouse Informant Motion to Suppress and Affidavit Stephanie Page

Massachusetts Jailhouse Informant Memorandum In Support of the Motion To Suppress Statements Allegedly Made By The Defendant To Jailhouse Informant Stephanie Page

Kentucky Motion Discovery Suppress Hearing Johnson post Dodd 2007

> **"**Motion To Immediately Disclose Any And All Contact Between Government Agents Or Prosecutors And Potential Jailhouse Informants Incarcerated With Defendant Billy Joe Johnson, Motion For Discovery, Motion To Suppress And Motion For Evidentiary Hearing And Memorandum In Support"

This motion discusses the first Dodd v. State [mandating a reliability hearing and discovery] and the second Dodd v. State [no longer requiring the reliability hearing] but see (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to Daubert hearing), very effectively 993 P.2d 778, 783 (Ok. Cr. App. 2000)

.

Motions to Exclude Informant Testimony

Massachusetts Motion for Relief to Exclude Informant Last Minute Witness and Affidavit in Support Stephanie Page

Federal Motion Exclude Cooperating Witness Request for Hearing Jensen Barber 2007

This motion and memo does a good job of 1. why cross examination is insufficient to adequately test an informant's truthfulness and 2. discussing the gatekeeping issues in Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993). It was allowed.

Federal Motion to Exclude and Reliability Hearing US v Benedict Carpenter 2013

Federal Motion to Exclude and Reliability Hearing US v Benedict Affidavit Neuschatz 2013

This is an affidavit by Jeffrey Neushatz, a professor, expert and author of many studies regarding the unreliability of informant testimony. See Law Review and Studies section.

Georgia Motion to Exclude Accomplice/Snitch Testimony 2008

Oklahoma Motion Exclude Testimony of Jail House Informants Post Dodd State v. Henry

Oklahoma Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000)

This has a summary of other state law and law review articles. Even though this appellate decision no longer mandates a reliability hearing it still can be used as a basis for a reliability hearing, **jury instructions and discovery**. (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to Daubert hearing) See Oklahoma Dodd v. State, OKCR29, ___P.2d___ 1999 and an example: **Kentucky Motion Discovery Suppress Hearing Johnson post Dodd 2007** which discusses both. See **Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000) Summary**

Oklahoma Dodd v. State, OKCR29, ___P.2d___ 1999

Even though this decision which originally mandated **a reliability hearing** has been narrowed to no longer mandate the reliability hearing it still can be used as a basis for a reliability hearing, jury instructions and discovery. [see Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000) http://law.justia.com/cases/oklahoma/court-of-appeals-criminal/2000/48885.html]

Texas Motion To Exclude Testimony Of Jailhouse Snitches (Evidentiary Hearing Requested)

This Texas Motion Memo is a memo post *Crawford v. Washington,* 124 S. Ct. 1354, 1367 n.7 (2004) and *Dodd v. State*, 993 P.2d 778, 783 (Ok. Cr. App. 2000). It has a summary of other state law and law review articles.

Motion to Introduce Expert Testimony

Federal Motion for Expert US v Benedict 2013 2

Federal Motion To Present Expert Witness US v Benedict 2013

Federal Motion To Present Expert Witness US v Benedict memo USA Response 2013

Federal Motion To Present Expert Witness US v Benedict memo 2013

Potential Expert Names

These were gathered from the Internet and Law Review articles. They have no official endorsement from CPCS. As always check with your colleagues and Forensic Services Directors.

Alexandra Natapoff , Professor of Law Loyola Law School, Los Angeles Joint Oversight Hearing on Law Enforcement Confidential Informant Practices 2007

Written Testimony For The U.S. House Of Representatives Committee On The Judiciary Subcommittee On Crime, Terrorism And Homeland Security, And The Subcommittee On The Constitution, Civil Rights And Civil Liberties

CLOSINGS

I have included potions of several closings that deal with paid informants, codefendants who have cut deals in exchange for their testimony against the defendant and jailhouse stranger informants.

Plea Deal Witness System Closing Marty Weinberg: **The Witness System**

"During my opening, which seems like it was months ago, I talked to you about the architecture, the structure of the witness reward system. I told you then that the way the system operates-and it was proven out witness after witness-is that they are charged with and often sentenced under the narcotics statutes to huge terms of imprisonment. Life. 30 years. 20 years. Guidelines of 25 to life. In this case, Mr. Isern was facing a huge sentence. A life-threatening sentence. And that these sentences must be served. It is not like the state system where you get out in a fraction of what you get. …"

James "Whitey" Bulger

"From 1972 to 2000, James "Whitey" Bulger was allegedly a leading member of a criminal organization — initially the Winter Hill Gang and later the Bulger Group — that earned money

through drug trafficking, extortion, loansharking and bookmaking. Bulger and Stephen Flemmi allegedly killed and assaulted people to protect their organization and fostered relationships with law enforcement officials to get confidential information about investigations and cooperating informants and witnesses. Bulger is charged with participating in 33 criminal acts, including 19 murders, a half dozen extortions — including the hostile takeover of a South Boston liquor store — and forcing drug dealers, bookmakers, loansharks and businessmen to pay rent or tribute to his organization." http://www.bostonglobe.com/2013/06/12/bulger-trial-preview/Bk2rBy13wzT1WvR6UMGkJK/story.html#charges-page
The entire closing can be located at **Closing Bulger Brennan Carney**.

Plea Deal Bulger Closing Hank Brennan

> "About an hour ago, Mr. Wyshak was telling you about the fact that some of the most dangerous murderers in the history of Boston were walking the streets. John Martorano admitted to killing at least 20 people, shooting most of them in the back of the head. Kevin Weeks, Pat Nee, James Martorano. He talked about how vicious and violent they were on the streets of Boston. And you have to sit there and ask yourself: Why are they still walking the streets? If they're so vicious and violent and our government knows about it, why are they out there right now? When you go home and decide to go shopping and go to Stop & Shop and get something to eat, you have to worry about turning around and having these men in the aisle next to you. …"

Plea Deal Bulger Closing Jay Carney

> "… What is really going on here? And you probably don't hear lawyers talking this bluntly, but this, I submit to you, is what goes on: The government is buying the testimony of these witnesses. Sounds pretty awful to put it that way, doesn't it? The government is buying their testimony. The witnesses are selling their testimony to the government. The currency that's used here: How much freedom is the person going to get? The currency is the power of the government to keep someone locked up in a cell surrounded by four concrete walls, topped by barbed wire, and that's where the person lives, in a prison. And what the government can pay an individual is the individual's freedom. That's what they buy the testimony with. They buy it, and the witnesses sell it."

Plea Deal Closing Portion Larry Tipton

This portion of the argument dealing with the plea deal, what the witness had to lose and inconsistences gives a sense of a dramatic presentation.

Plea Deal Jailhouse Informants Closing Max Stern - Commonwealth v. Lewin.

This was a highly publicized trial where the defendant was charged with shooting a Boston Police Officer. Maz Stern and Patty Garin did incredible work that changed the search warrant universe and Albert Lewin's life. In addition to the Not Guilty verdict they exposed the use of a fictional informant that the police used in search warrants. See prior SJC decision at 405 Mass. 566 (1989) (reversing dismissal of indictment and remanding for trial).
http://masscases.com/cases/sjc/405/405mass566.html

The following portions of Max's closing deal with three witnesses who received deals in exchange for their testimony. One was present at the time of the shooting. The other two were stranger jailhouse informants. The entire closing can be located at **Closings Max Stern.**

CoDefendant Plea Deal Closing Milly Whatley

This closing done by Millie Whatley deals with a codefendant [Frank the rat] who is in custody and while in custody recruits a second jailhouse informant [the second rat]. who testify against the defendant in exchange for a deal. The entire closing can be located at **Closing Milly Whatley.**

Jailhouse Informant Closing Argument Stephanie Page Larry Tipton

This is a part of a closing argument in a murder case that deals with a jailhouse informant. The prosecutor alleged that the defendant [XX] met a total stranger [QQ] in a holding cell at the Shattuck hospital and decided to confess to the murder – after having maintained his silence for almost two years. Through discovery, investigation and a motion hearing on the reliability of the jailhouse informant we learned that the informant had a long standing relationship with the State Police and had given information in the past that he greatly benefited from. The Motion hearing and Trial testimony transcripts are included in the Transcript folder. [See Jailhouse Informant MTS Page; Jailhouse Informant MTS State Police Sargent Relationship with IT; Jailhouse Informant Trial Page] The entire closing can be located at **Closing Page Tipton.**

Plea Deal Closing by Albert Krieger: Credibility of Witnesses

"Now there is no reason why you wouldn't trust me. I have told you what the circumstances are. So to demonstrate that you trust me, why don't you give me your car or give me your house or give me something of enormous value and personal value to you. And I realize I should pay for it, but don't worry, I will pay you maybe next year, maybe 10 years from now. I will pay you. Don't worry."

Sample Bits of Closings

"Ladies and gentlemen, this case rests on the testimony of Joe Schmoe, the informant in this case. If your child was sick and you were trying to decide whether to have an important operation, would you rely on Joe Schmoe, …"

PLEA and COOPERATION AGREEMENT SAMPLES

Massachusetts

Massachusetts Plea Agreement Letter to Attorney from Suffolk County District Attorney 2002

Massachusetts Cooperation Agreement Redacted Middlesex

Federal

Federal Witness Immunity Authorization to Apply for a Compulsion Order 2014

This form is a great source of discovery. State motions could be guided by this type of information. It contains personal information, jurisdictions involved, types of proceedings, name of targets, offenses under investigation, date investigations began, source of anticipated evidence, background information, promisies made, relationship between the witness and defendant/targets, witnesses culpability and criminal history, etc.

Federal Plea Agreement 2014

Federal Cooperation Plea Agreement 2014

Federal Cooperating Defendant Immunity Deal 2014

Federal Protocols

US Attorneys Title 9 Criminal Resource Manual 9-27.000 Non-prosecution Agreements in Return for Cooperation

"… the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable …"

9-27.600	**Entering into Non-prosecution Agreements in Return for Cooperation Generally**
9-27.620	**Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed**
9-27.630	**Entering into Non-prosecution Agreements in Return for Cooperation—Limiting the Scope of Commitment**
9-27.640	**Agreements Requiring Assistant Attorney General Approval**
9-27.641	**Multi-District (Global) Agreement Requests**
9-27.650	**Records of Non-Prosecution Agreements**

US Attorneys Title 9 Criminal Resource Manual Witness Immunity 9-23

"This chapter contains the Department's policy and procedures for seeking "use immunity" under Title 18 U.S.C. §§ 6001-6005. Sections 6001 to 6005 provide a mechanism by which the government may apply to the court for an order granting a witness limited immunity in all

judicial, administrative, and congressional proceedings when the witness asserts his or her privilege against self-incrimination under the Fifth Amendment."

9-23.100 Witness Immunity. Generally
9-23.110 Statutory Authority to Compel Testimony
9-23.130 Approval by Assistant Attorney General to Compel Testimony
9-23.140 Authority to Initiate Immunity Requests
9-23.210 Decision to Request Immunity. The Public Interest
9-23.211 Decision to Request Immunity. Close-Family Exception
9-23.212 Decision to Request Immunity. Conviction Prior to Compulsion
9-23.214 Granting Immunity to Compel Testimony on Behalf of a Defendant

US Attorneys Title 9 Criminal Resource Manual Witness Immunity 716-726

716 Use Immunity, Transactional Immunity, Informal Immunity, Derivative Use
717 Transactional Immunity Distinguished
718 Derivative Use Immunity
719 Informal Immunity Distinguished From Formal Immunity
720 Authorization Procedure for Immunity Requests
726 Steps to Avoid Taint

JURY INSTRUCTIONS – Limiting and Final

Goals: Most jurisdictions do not require an instruction for an informant's testimony to be corroborated while corroboration is required for accessory testimony. Why is that? There are several states that mandate corroboration and Task Forces that recommendation instructions to include corroboration. Most states have general cautionary instructions that this type of witness should be scrutinized with care. But is that enough? See **Jumpstart: States or Taskforces That Require or Recommend Corroboration of Informant Testimony**. Why not submit something like the instruction that is mandated in South Wales, Australia that tells the jury about specific influences, for example the toll prison life might take on an informant? See **Judicial Commission of New South Wales**.

Jumpstart Informant Testimony Effect on Jurors and More

Jumpstart Jury Instructions Timing Is Important and More

Jumpstart States That Require Corroboration Informant Testimony

The timing and the lack of effect of jury instructions when dealing with informant testimony has also been documented. Ask for a limiting instruction at the time of the testimony. See **Jumpstart: Jury Instructions: Timing Is Important** and **Jumpstart: Informant Testimony Effect On Jurors Cross Examination and Instructions Are Not Enough**

Massachusetts

Massachusetts Model Jury Instructions to **Commonwealth vs. Miguel A. Marrero** (and seven companion cases) 436 Mass. 488, (2002)

District Court Instruction 2260 Credibility of Witness
District Court Instruction 2260-5 Plea Agreement Accomplice 5. Prosecution witness with plea agreement contingent on truthful testimony

Massachusetts Limiting Instruction re Cooperating Witness Andy Klyman

To be given either before or after the witness is testifies.

Massachusetts Caution as to Cooperating Witness/Accomplice/Paid Informant/ Immunized Witness Mike Bourbeau

Massachusetts Cooperating Agreement Jury Instruction Scott Matson 2015

Massachusetts Governor's Council on Capital Punishment – Informant Unreliability 2003

In 2003, under Governor Romney, the Council issues a series of ten proposals "… that, if adopted in their entirety, can allow creation of a fair capital punishment statute for Massachusetts …" including "…statements made by codefendants or informants, especially when the codefendant or informant receives or hopes to receive any benefit from the state (such as reduction of a criminal charge or sentence), may be unreliable …" page 19. Could be used as support in a request for funds, discovery, voir dire, motion hearings, jury instructions, etc.

Massachusetts Bias and Expectation of Favorable Treatment When No Promises Made

Either use as both limiting or final instruction.

Massachusetts ID Model Instruction Com v Gomes 2015

One of the future issues is to file requests for jury instructions that incorporate the social science literature similar to the recent *Commonwealth vs. Jeremy D. Gomes*, 470 Mass. 352, 379 (2015).

Other Jurisdictions

California Statute Requiring Corroboration of Accomplice and In-Custody Informant Testimony Section 1111, 111.5 and 1127a

Excellent source for discovery requests and limiting and/or jury instructions.

Canada Witnesses of Unsavoury Character 11.23 (*Vetrovec* Warning) Canadian Judicial Council Model Jury Instructions in Criminal Matters (Last revised February 2004)

Connecticut Instruction Informant Testimony

Practical Tips on Drafting Jury Instructions John Thompson 2011 Regarding Connecticut Instruction Informant Testimony

"Note that in the model instruction, the jury is told that the informant is one who "obtains information from the defendant." This statement gives at least half the battle to the prosecution/informant, where the defense takes the position that the defendant did not give information to the informant. …"

Federal First Circuit United State District Court 2014

2.08 Caution as to Cooperating Witness/Accomplice/Paid Informant/
Immunized Witness

Federal Second Circuit Witnesses Agreements With Government

Illinois Jury Instruction Recommendation Sixth And Final Report Of The Capital Punishment Reform Study Committee 2010

New South Wales Judicial Commission

This would be a great model for a proposed instruction with the supporting social science research. It even talks about the effect of prison life on an informant:

"People like [*name of prison informer*] are also affected by the standards and culture of prison society, where respect for the law, and telling the truth, may not be valued in the same way as would be the case outside prison. In prison there is often not a lot for prisoners to do to occupy their time and they live very close to each other. It is easy in those circumstances for one prisoner to develop a grudge against another over something that would seem quite trivial to someone outside jail. "

Oklahoma Dodd v. State, 993 P.2d 778, 783 (Ok. Cr. App. 2000)

It has a summary of other state law and law review articles. Can be used as a basis for a reliability hearing, jury instructions and more. (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to Daubert hearing)

Pennsylvania Accomplice Testimony

"…Experience shows that an accomplice, when caught, will often try to place the blame falsely on someone else. …"

States That Require Corroboration Accomplice/Immunized Witness Testimony

Alaska, Arkansas, Georgia, Maryland, Massachusetts, Nevada, New York, Oklahoma and Oregon

"Skepticism about the reliability of accomplice testimony has led many jurisdictions to require **corroboration** as a condition for a conviction. A significant number mandate this requirement by statute. The ABA recently adopted a resolution recommending that the corroboration rule be extended to jailhouse snitch testimony." **Brady and Jailhouse Informants Giannelli 2**007

WRONGFUL CONVICTION CAUSES STATES TASK FORCE RECOMMENDATIONS

Goal: The following are great resources for data, case law and arguments to support discovery requests, motions and jury instructions. Use them.

After the Innocence Projects' DNA exonerations became known many states commissioned Task Forces or Commissions to study the causes of wrongful convictions. One of the main causes was the use of Jailhouse Informant testimony. After lengthy hearings recommendations for **reliability hearings** and/or **corroboration** were made if the government intended to use this type of witness. Even though most of these dealt with death penalty cases the reasoning behind the recommendations is the same for non-death cases. These can be used in support of the need for not only discovery requests but Motions for Reliability Hearings and either limiting or final **jury instructions.** Start your motion with: "… no person should lose liberty or life based solely on the testimony of such a witness." (**ABA Informant Use Recommendations 2005**

California Report Recommendations re Informant Testimony 2006

> Recommends **(3) recording** of all interviews with in custody informants and
> (4) The **corroboration** of any testimony of an in-custody informant by evidence which independently tends to connect the defendant with the crime, special circumstance or circumstance in aggravation to which the informant testifies.

Canada In Custody Informers Prevention of Miscarriage of Justice Inquiry

> **Recommendation 39 - Confirmation of in-custody informer evidence defined** … "Confirmation should be defined as credible evidence or information, available to the Crown, **independent of the in-custody informer …"**
> **Recommendation 41 - Matters to be considered in assessing informer Reliability**
> **Recommendation 47 - Disclosure respecting in-custody informers**
> **Recommendation 58 - Police videotaping of informers**
> **Recommendation 59 - Reliability voir dires for informer evidence**
> **Recommendation 64 - Placement of inmates** An accused and another inmate should not be placed together to facilitate the collection of evidence against the accused…
> **Recommendation 65 - Placement of witnesses …** to reduce the potential of interwitness contamination. This generally means that prosecution jailhouse witnesses in the same case should not be placed together …
> **Recommendation 67 - Timing and content of informer jury caution …** and to do so immediately before or after the evidence is tendered by the prosecution, as well as during the charge to the jury. …
> **Recommendation 68 - Crown videotaping of informers**

Florida Innocence Commission Final Report

> **VIIA: Informant and Jailhouse Snitches**
> "The Florida Supreme Court . . . finally has changed the rules of evidence. Beginning this month, prosecutors now are **required to disclose** both a summary of the jailhouse informant's criminal history and just what kind of deal a snitch will be getting in return for testimony. And now, **jurors will hear about prior cases** that relied on testimony from that particular informant. The

justices ordered new restrictions on the much abused informant testimony, because snitches, the court noted, "constitute the basis for many wrongful convictions."

Illinois Capital Punishment Reform Study Committee Summary 2010
For the original 2002 report see **Illinois Commission Capital Punishment Full Report 2002**

This is the sixth and final report of the Capital Punishment Reform Study Committee (the Committee), created by statute in 2003. It recommends, among other things, that **reliability hearings** should be held and cautionary jury instructions should be given when jailhouse informants are used

Innocence Project Proposed Legislation Jailhouse Informant 2011

An Act Regarding Disclosure And Regulation Of Jailhouse Informant Testimony Excellent resource for discovery motions through to jury instructions. Includes: Electronic Recording Of Informant Statement, Timely Disclosure Of Material Relating To Informant Testimony, Pre-Trial Reliability And Corroboration Hearings and Jury Instructions

Justice Project Reliability Hearing Jailhouse Snitch Testimony A Policy Review 2007

Recommends **reliability hearings** and **corroboration.**

Massachusetts Governor's Council on Capital Punishment – Informant Unreliability 2003

In 2003, under Governor Romney, the Council issues a series of ten proposals "… that, if adopted in their entirety, can allow creation of a fair capital punishment statute for Massachusetts …" including "…statements made by codefendants or informants, especially when the codefendant or informant receives or hopes to receive any benefit from the state (such as reduction of a criminal charge or sentence), may be unreliable …" page 19. Could be used as support in a request for funds, discovery, voir dire, motion hearings, jury instructions, etc.

Missouri Proposed Legislation Informant Discovery Reliability Hearing

In order for the testimony of an in-custody informant to be admissible at trial, the prosecuting or circuit attorney must file a motion and prove at a hearing that the testimony is reliable and corroborated by other evidence. The bill specifies the factors for the court to consider when ruling on the motion.

National Summit International Association of Police Chiefs
National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions Report from the International Association of Chiefs of Police/U.S. Department of Justice, Office of Justice Programs Wrongful Convictions Summit 2013

False Confessions, Testimony, and Informants 4. At a minimum, law enforcement agencies should **record** audio of all interviews involving major crimes. **Video** recordings of interviews are preferred. 5. Investigators should gather **corroborating** evidence in cases of jailhouse testimony

of informants. (See IACP Model Policy link in Resources.) page 18 **William Brooks** Chief Norwood (MA) Police Department A-1 and **Peter Carnes** Chief Stonehill College (MA) Campus Police were authors of this report

NY State Bar Task Force Wrongful Convictions Summary 2009

This Committee recommended the necessity for **pretrial reliability hearings, videotaping of any informant statements, jury instructions and detailed discovery disclosure.**

Ohio Joint Task Force to Review the Administration of Death Penalty 2014

18) Enact legislation that does not permit a death sentence where the State relies on jailhouse informant testimony that is not independently **corroborated** at the guilt/innocence phase of the death penalty trial.

Oklahoma Justice Commission Recommendations 2013

"The Commission also recommends that a **pre-trial hearing** which would allow the trial court to determine the reliability of such evidence be required. The purpose of this pre-trial hearing shall be to determine the credibility of the informant, as well as to determine whether the discovery mandates have been met." Page 28

Pennsylvania Summary Report Of The Advisory Committee On Wrongful Convictions September 2011

Recommends discovery and reliability hearing.

Smart On Crime Coalition Federal Constitution Project 2014

A comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were wrongfully convicted, at least in part, on the basis of informant, jailhouse informant, or cooperating alleged co-perpetrator testimony.

LAW REVIEWS AND STUDIES RE: UNRELIABILITY OF SNITCH TESTIMONY

Goals: These are just a few of the research sources that can be used for discovery, motions and jury instructions. One of the future issues is to file requests for jury instructions that incorporate the social science literature similar to the recent *Commonwealth vs. Jeremy D. Gomes*, 470 Mass. 352, 379 (2015). See **Jury Instructions** folder for the case. They are also a resource for finding expert witnesses.

American Bar Association Section Of Criminal Justice Report To The House Of Delegates Recommendation Corroboration 2005

"**Corroboration** should be required in *jailhouse* informant cases; no person should lose liberty or life based solely on the testimony of such a witness."

ABA Achieving Justice Freeing the Innocent Jailhouse Informants Chapter Five 2006

"A number of jurisdictions require **corroboration** for accomplice testimony. The ABA recommends that this approach be extended to jailhouse informants: "No prosecution should occur based solely upon uncorroborated jailhouse informant testimony."" For complete Report see ABA Standards Achieving Justice Freeing the Innocent 2006

ACLU Brief Skatzes v Warden

Great review re: Prisoner Informant Testimony Is Unreliable Without Independent, Objective Corroborating Evidence, Historically, Prisoner Informant Testimony Has Been Increasingly Recognized as Presumptively Unreliable, The Nature of Accomplice Testimony Makes It Inherently Unreliable, Cross-Examination and a Cautionary Jury Instruction Do Not Provide Legally Sufficient Corroboration: Cross-Examination Insufficient; A Cautionary Jury Instruction Is Insufficient; Only Independent, Objective Evidence Can Provide Adequate Corroboration

ACLU Hearing on Informants California 2006

Recommends all interviews with informants be electrically **recorded**; that substantial **corroboration** be required for all informant testimony; that pretrial **reliability hearings** be held.

ACLU Study of Use of Confidential Informants in New Jersey 2011

Recommends **Corroboration: "**No county prosecutor shall bring a criminal prosecution where each element of the offense is solely dependent on the information from a CI." Page 64

An Historical Overview of Informants Robert Bloom Ratting: The Use and Abuse of Informants in the American Justice System 2005

Beyond Unreliable: How Snitches Contribute to Wrongful Convictions Alexandra Natapoff Golden Gate University Law Review 2010

"Part III concludes with a litigation suggestion for a judicial check on the use of informant witnesses, namely, a Daubert-style **pre-trial reliability hearing**."

Brady and Jailhouse Informants Giannelli 2007

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

Characteristics of Informant Testimony in DNA Exonerations Garrett 2011

This is a breakdown of sixty cases where informant testimony was used and DNA exonerated the defendant. It is a user friendly table that could be appended to any motion. It breaks the evidence down into 1. Examples of Nonpublic or Corroborated Facts and Inconsistencies; 2. Quotes From Testimony and 3. Quotes Regarding Any Deal or Leniency with Informant or Prior

Use of Informant. It can easily be updated at http://www.innocenceproject.org/causes-wrongful-conviction/informants

Convictions of Innocent Persons in Massachusetts An Overview Stan Fisher 2002

This law review article discusses Massachusetts wrongful conviction cases that involved informant testimony.

Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges Monroe H. Freedman 2010

According to the United States Department of Justice, many cooperating witnesses are "outright conscienceless sociopaths" who will do anything to benefit themselves, including "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact."

Defense Responses to Jailhouse Informant Testimony 2014

"The following paragraphs describe strategies now in practice in different parts of the country, or recommended in the literature. Finally, we include our own recommendation to further explore the issues of jury selection and jailhouse informant testimony."

The Effects of Accomplice Witnesses and Jailhouse Informants On Jury Decision Making Neuschatz, Lawson, Swanner and Meissner American Psychological Association 2007

Innocence Project Data

This site is a good beginning for statistics and data. Should be checked for updated information. "In 18% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial. Often, statements from people with incentives to testify — particularly incentives that are not disclosed to the jury — are the central evidence in convicting an innocent person. …"

Jailhouse Informants Robert Bloom ABA 2003

Recommends exclusion and pretrial reliability hearing.

Jailhouse Snitch Testimony A Policy Review The Justice Project 2007

States should adopt **corroboration** requirements for jailhouse snitches to mitigate the inherent risks incentivised witness testimony carries.

Recommends **pretrial reliability hearing**

Judicial Gatekeeping Of Police Generated Witnesses Thompson 2012

> "… the Article argues that trial courts should conduct pretrial **reliability hearings** for police-generated witness testimony. … Informants may be psychologically vulnerable to police pressure due to a variety of conditions similar to those observed in the context of interrogations. … The question would be whether the incentives offered by law enforcement were so great as to create an unacceptable likelihood that any person would be tempted to commit perjury to gain the benefit or avoid the punishment . … Laboratory protocols guide the scientist, and standardized protocols can guide law enforcement in gathering and preserving eyewitness identification evidence, confessions during custodial interrogations, and the use of police informants."

Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches, **C. Blaine Elliott, 16 Cap. Def. J. 1 2003**
National Registry of Exonerations 2013 Report.pdf

National Registry of Exonerations Informants 2014.pdf

NIJ Policing and Wrongful Convictions 2014

> **"**All case-relevant discussions with informants should be electronically **recorded**, and copies of the recordings should be given to the defense. Because most of these conversations occur in a custodial setting, this would not be a major bur-den for police departments, especially in light of the increased use of recording interrogations."

Prison Informants: Learning The Lessons Of The Jailhouse Informant Paul Genua 2003

> "By definition, a jailhouse informant is an inmate, usually awaiting trial or sentencing, who claims to have been the recipient of an admission made by another prisoner awaiting trial, and who agrees to testify against that prisoner in a court of law, usually in exchange for some benefit. …"

Prosecuting the Informant Culture Andrew Taslitz Michigan Law Review 2011

> "Alexandra Natapoff,' in her outstanding new book, *Snitching: Criminal Informants and the Erosion of American Justice,* makes a compelling case for reform of the system by which we regulate police use of criminal informants. Indeed, as other writers have discussed,' law enforcement's overreliance on such informants has led to a "snitching culture" in which informant snitching replaces other forms of law enforcement investigation …Yet snitches, especially jailhouse snitches, are notoriously unreliable."

Smart On Crime Coalition Federal Constitution Project

> A comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were wrongfully convicted, at least in part, on the basis of informant, jailhouse informant, or cooperating alleged co-perpetrator testimony.

Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions *By* Carl N. Hammarskjold 2011

> "… innocent defendants are placed in jeopardy of wrongful convictions in states where snitch testimony is considered direct evidence. This Comment proposes that all jurisdictions reclassify snitch testimony as circumstantial evidence. In this way, eligible criminal defendants will still be entitled to have the jury hear a **circumstantial evidence jury instruction** even after a snitch emerges in a trial where the prosecutor's case-in-chief otherwise consists entirely of circumstantial evidence. …"

Snitching.Org Professor Alexandra Natapoff Loyola Law School, Los Angeles

> "SNITCHING.ORG provides resources for lawyers, journalists, law enforcement, legislators, and members of the public who want information about the law and policies associated with snitching."

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 Robert P. Mosteller University of North Carolina (UNC) at Chapel Hill – School of Law 2012

> "Fabricated testimony by informants often plays an important role in convictions of the innocent. In this article, I examine the particularly problematic situation of defendants who are innocent of the particular crime charged but are not strangers to crime. As to such defendants, potential informants abound among crime associates, and they have a ready story line that authorities are preconditioned to accept. Independent proof, which could be an antidote, will predictably be lacking. …"

Testimony for Sale: The Law and Ethics of Snitches and Experts, George C. Harris, 28 PEPP. L. REV. 1, 54 (2000)

> "Paradoxically, the more a witness's fate depends on the success of the prosecution, the more resistant the witness will be to cross-examination. A witness whose future depends on currying the government's favor will formulate a consistent and credible story calculated to procure an agreement with the government and will adhere religiously at trial to her prior statements."

Than That One Innocent Suffer: Evaluating State Safeguards Against Wronful Convictions Norris Bonventre 2011

> Recommends full discovery, pretrial reliability hearings, corroboration.

The Potential for Injustice in the Use of Informants in the Criminal Justice System, **Hon. Arthur L. Burnett, Sr., 37 Southwestern L. Rev. 1079, 1086 (2008)**

> "Such a hearing thus would be analogous to **pretrial hearings** on the identification procedures used by law enforcement to have an eyewitness identify a suspect in a criminal investigation. …"

The Snitch System Northwestern University School of Law Center on Wrongful Convictions 2005

> This has a table that analyzes the causes of Wrongful Conviction Cases in the US since 1973. Out of the 111 cases 45% involved snitch testimony.

Recommends: Snitches be wired to electronically record incriminating statements made by suspects, at least when the relevant conversations occur in jails or prisons. … Law enforcement authorities electronically record their discussions with potential snitches and provide copies of the recordings to the defendant.

Unreliable Informant Testimony Jeffrey S. Neuschatz 2012

"First, we outline the problems associated with jailhouse informant testimony by giving a brief history of the practice of using informants and reviewing the relevant data on wrongful convictions, major cases, and infamous informants. Second, we identify the foundational research that informs the research on informant testimony. Third, we review the current psychological research on informant testimony. Finally, we discuss suggested legal reforms pertaining to informant testimony and their likely efficacy in light of the psychological research."

"The present study presents one of the first investigations of the effects of accomplice witnesses and jailhouse informants on jury decision-making. …"

The Use Of A Criminal As A Witness: A Special Problem Stephen S. Trott, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit 2007

" … A cooperating criminal is far more dangerous than a scalpel because an informer has a mind of his own, and almost always, it is a mind not encumbered by the values and principles that animate our law and our own Constitution. …"

When Snitch Testimony Goes Wrong: How Informant Testimony Contributes To Wrongful Convictions Sakinda L. Skinner 2013

Recommends **reliability hearings** and **corroboration:** "Section I of this article is a brief examination of national data on snitch testimony as a leading factor in wrongful convictions. Section II introduces the historical background of snitch testimony. Section III explains the significance of *Giglio v. United States*, which explores the constitutional implications of unregulated snitch testimony. Section IV analyzes the misuse of criminal informants in the criminal justice system. Finally, section V compares the Maryland Criminal Procedure Statute on Informant Testimony to The **Justice Projects' Model Statute on Informant Testimony**; and, offers recommendations …"

ETHICS

Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges Monroe H. Freedman 2010

According to the United States Department of Justice, many cooperating witnesses are "outright conscienceless sociopaths" who will do anything to benefit themselves, including "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact."

See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts Myrna S. Raede, Professor of Law, Southwestern Law School 2007

"Are prosecutors at fault for reaching out to witnesses whose testimony sounds too good to be true when it fills in the gaps that otherwise would likely derail the prosecution's case? This essay addresses the following questions: Does such conduct clearly violate prosecutorial ethical obligations when all impeachable material possessed by the government is disclosed? Is an ethical violation sufficient to obtain a reversal of the defendant's conviction by a jury that chooses to believe the testimony of these impeachable witnesses? 13 Assuming that answer is no, is it beneficial to clearly label the presentation of such testimony as ethically problematic and to propose clarifying ethical rules to specifically address such conduct?"

Toward A New Vision Of Informants: A History Of Abuses And Suggestions For Reform Clifford S. Zimmerman Hastings Constitutional Law Quarterly 1994

"This article first presents a history of informant misconduct and mishandling by law enforcement officials. … This article proposes a framework that builds on established constitutional rights and incorporates the nature of the informant-handler and informant-state relationships. The key to incorporating the informant relationship is to apply a rebuttable presumption that informant conduct is state action (as required by the Fourteenth Amendment) and action under color of law (in accord with s 1983). This presumption will instill responsibility in law enforcement agencies for their choice in using informants."

TRANSCRIPTS

Accomplice/Cooperating Witness/CoDefendant

James "Whitey" Bulger Transcripts Jay Carney and Hank Brennan

"From 1972 to 2000, James "Whitey" Bulger was allegedly a leading member of a criminal organization — initially the Winter Hill Gang and later the Bulger Group — that earned money through drug trafficking, extortion, loansharking and bookmaking. Bulger and Stephen Flemmi allegedly killed and assaulted people to protect their organization and fostered relationships with law enforcement officials to get confidential information about investigations and cooperating informants and witnesses. Bulger is charged with participating in 33 criminal acts, including 19 murders, a half dozen extortions — including the hostile takeover of a South Boston liquor store — and forcing drug dealers, bookmakers, loansharks and businessmen to pay rent or tribute to his organization." http://www.bostonglobe.com/2013/06/12/bulger-trial-preview/Bk2rBy13wzT1WvR6UMGkJK/story.html#charges-page

Accomplice John Martorano - Cross Hank Brennan

Bulger associate, confessed hitman and government witness: "A hitman-turned-government witness who began cooperating with the government in 1998 after learning that his longtime associates and fellow Winter Hill Gang members, Flemmi and Bulger, were FBI informants. Martorano was at the center of much of the Winter Hill Gang's dirty work in the 1970s. The Milton native admitted to committing 20 murders between 1965 and 1982, some allegedly at the direction of Bulger and Flemmi -- or with the gangsters' direct participtation. Martorano served 12 years and two months in prison for

the murders and became a free man in March 2007. He wrote a book with Howie Carr about his life story." http://www.bostonglobe.com/2013/06/12/bulger-trial-preview/Bk2rBy13wzT1WvR6UMGkJK/story.html#cast-page

Accomplice Kevin Weeks - Cross Jay Carney

"Bulger's "surrogate son" and sidekick beginning in the 1980s: A South Boston native and loyal tough guy whom Bulger groomed as his successor and treated like a son. Weeks began cooperating with investigators in early 2000 after his own racketeering indictment. During the 1980s, Weeks operated several of the Southie convenience stores and liquor marts that served as fronts for the Bulger organization. Weeks received "rent" payments from loan sharks and bookmakers, allegedly to insulate Bulger from the transactions, and also helped shake down local crooks and businessmen behind on their debts to the gang. Following Bulger's disappearance in 1995, Weeks acted as "operational chief" of the Bulger organization, taking orders from the fugitive gangster over the phone and delivering fake identification to him during clandestine meetings in Chicago and New York. After learning that Bulger and Flemmi had been FBI informants, Weeks led investigators to secret graves containing the remains of some of Bulger's alleged victims. He served five years for being an accessory to five murders and wrote a book about his exploits with Bulger."
http://www.bostonglobe.com/2013/06/12/bulger-trial-preview/Bk2rBy13wzT1WvR6UMGkJK/story.html#cast-page

Accomplice Stephen "The Rifleman" Flemmi - Cross Hank Brennan

Bulger's friend and righthand man: "A gangster and longtime FBI informant who teamed up with Bulger in the 1970s while both were members of the Winter Hill Gang. Flemmi served as Bulger's front man, collecting money from bookies and inspiring fear in those who didn't pay their debts on time. He was one of Bulger's closest associates and is expected to be the government's key witness against his former friend. Flemmi pleaded guilty to participating in 10 murders with Bulger under a deal that spared him the death penalty but sent him to prison for life."
http://www.bostonglobe.com/2013/06/12/bulger-trial-preview/Bk2rBy13wzT1WvR6UMGkJK/story.html#cast-page

Crooked FBI John Morris – Cross Hank Brennan

FBI special agent (Ret.): **"**A corrupt FBI supervisor who admitted to pocketing bribes from Bulger and Flemmi and leaking information to them in the 1980s. Morris never served a day in jail because he was granted immunity from prosecution in exchange for his cooperation. He had supervised the FBI's organized crime squad in Boston, including John J. Connolly Jr., who was the FBI handler of Bulger and Flemmi. Morris, Connolly, and other agents wined and dined with the two gangster informants, and exchanged gifts with the pair while protecting them from prosecution."
http://www.bostonglobe.com/2013/06/12/bulger-trial-preview/Bk2rBy13wzT1WvR6UMGkJK/story.html#cast-page

U.S. v. Owens Transcripts

These are Robert Sheketoff's and Miriam Conrad's crosses of Devone Robinson, Keillan Smith and Kenneth Allen (Sheketoff) and Anthony Lewis (Conrad): accomplices in drug activity and murder with the defendant. Was alleged that the defendant confessed to the killing of Rodney Belle. Covers last minute discovery issues, plea agreements, past and pending cases, timelines with allegations and contacts with prosecutors and law enforcement.

" … the government's allegation that, from 1988 to 1995, Owens ran a large-scale drug enterprise that obtained cocaine from suppliers in New York and Florida for distribution in Massachusetts. The government also accused Owens of possessing numerous handguns, resorting to violence and threats of violence to protect his drug interests, and of the murder of one Rodney Belle, who had double-crossed him in a drug deal …"... Owens, a well-known New England cocaine czar at the time of the murder, thought Bell had set him up to have his drugs stolen."

Accomplice U.S. v. Owens Allen Direct Cross Sheketoff
Accomplice U.S. v. Owens Robinson Direct Cross Sheketoff
Accomplice U.S. v. Owens Cross Keillan Sheketoff
Accomplice U. S. v. Owens Cross Fields Sheketoff
CoDefendant Immunized Witness Lewis Miriam

Accomplice Drug Snitch Buyer Transcript Shaffer

"This contains excerpts from a cross-examination by attorney Kent Schaffer of Bires and Schaffer, Houston, Texas that demonstrates how a planned, balanced approach to the cross-examination of the Informant can yield impressive results. Schaffer's client was charged with participating in a conspiracy to distribute cocaine, and was allegedly the individual who oversaw the importation of the cocaine into the United States. The government's key witness was an informant who had engaged in several transactions with Schaffer's client, but whose credibility was virtually negligible. Schaffer's intent in conducting the cross was to lock the witness in on a number of important points, and then argue those points to the jury as reasons why the witness' story could not be believed. Schaffer avoided a confrontational or sarcastic tone with the witness, and instead demonstrated a patient, thorough approach to exploring the history of the witness' drug dealing and cooperation with federal authorities. We have digested Schaffer's cross of the witness below, and prefaced each portion of the transcript with the relevant point that Schaffer was seeking to make with the witness. The transcribed portions demonstrate how he scored points with the witness and then moved on to others, leaving the jury to concentrate more on the witness' own legal baggage and less on his knowledge ofthe illegal activities of the defendants who were on trial."

Accomplice Drug Snitch Buyer User Cross Locke Nat Green

This is a cross of a drug user who the police paid on a regular basis to do buys for them.

Accomplice Ritchie Egbert Cross

No one could cross examine this type of witness better than Ritchie Egbert. Fearless, relentless and detailed. "Robert A. Urciuoli was federally indicted in 2006 along with two other hospital executives for buying the "honest services" of Celona, a once-powerful North Providence, Rhode Island legislator, to benefit the hospital. The board of trustees fired Urciuoli "for cause" days after his indictment.

Jurors in 2006 convicted Urciuoli … , senior vice president at Roger Williams, after a trial in which Celona delivered bumbling testimony as the government's star witness."

US v Urciuoli John Cerona Direct
US v Urciuoli John Cerona Cross Ritchie Egbert

Bias Cross draft Pending Charges at Time of Incident Stephanie Page

Example of Impeachment by Prior Conviction and Bias/SODDI. Victim had pending cases at the time he was shot on 4/28/00 Which were later dismissed or dealt with favorably after the date of the shooting and before the date of testimony. The timeline is important. Make sure you have certified copies of complaint, docket sheet and appearance of counsel.

CoDefendant Immunized Witness – Cross Bangs Marty Weinberg [Medford Depositers Trust Bank Robbery – piece of history]

Classic cross of immunized witness [police officer] re: benefits of not being charged; detailed meetings with prosecutors, USA, FBI; income received from criminal activities not reported or not seized; details of all the criminal acts he benefited from; great timeline re: crimes, arrests and cooperation; Effect of ada determining truthfulness of testimony; what didn't tell ada; fear of what D might say. COMMONWEALTH vs. GERALD CLEMENTE, 25 Mass. App. Ct. 229 (1988)

CoDefendant Testifies Against D Cross Promises and Rewards Transcript Roger Witkin John Ruby

This … "cross examination is excerpted from a murder trial in Suffolk Superior Court in which the defendant is alleged to have shot and killed a 78year-old furrier, at approximately 9:30 a.m., in his fur shop across the street from the Park Street subway station. The defendant was one of four participants in a planned armed robbery. The defendant and the key Commonwealth witness against him were actually scheduled to go to trial together when the Commonwealth offered a deal to the witness on the eve of trial to testify against the defendant. Prior to that, the defendant and the witness had spent approximately ten months together at the Suffolk County Jail awaiting trial. The cross examination begins with the participants having fled the scene, abandoning their automobile near the Public Garden, and taking a taxi to the South End. (The cross examination skips various sections and includes only those pages which have to do with promises, rewards, and inducements to the witness.)"

CoDefendant Cross Rodriguez Promises Andrews

This is from a federal trial of Cape Verdeans alleged to be part a gang and charged with racketeering. Represented Mr. DeBurgo: a case of cooperators re promises and rewards.

CoDefendant Cross Silva Whatley

This is a murder case where the codefendant reached a manslaughter plea deal in exchange for his testimony. The codefendant's knife was used in the killing. This is an excellent example of painting pictures, making sure the witness answers the question asked and impeachment.

CoDefendant Cross Silva Medical Examiner Neni Odiaga

Cross of Medical Examiner Used to Impeach CoDefendant's Testimony re: Stab wounds: Single or Double Edged Blade and Blunt Trauma: Whether Hit on Head

CoDefendant Immunized Witness - Cross Ferguson Elliot Weinstein – Plea Agreement

Great example of painting the pictures of living "the criminal life", prison life experience, day by day, and contrasting it with life on the outside. Step by step. Nice.

Cooperating Witness Cross Exam Gooch James Connell

"Defense counsel James G. Connell conducts a thorough cross-examination of a government cooperating witness in a federal drug conspiracy case. As is often the case with federal prosecutions, the Government relies primarily on testimony from former co-defendants or associates of the accused who are being offered substantial leniency in exchange for testifying against the defendant. Of note, as is often the case, is that the government cooperator does not want to admit that is being virtually guaranteed leniency, or that it matters to him if the accused is convicted. He essentially pretends to believe that he has no idea what sentence he will receive. The cross examination exposes, as much as possible, the fact that the government cooperator actually knows he will be heavily rewarded by the prosecutors for helping them to secure a conviction." Crosses about prison life.

Cooperating Witness Cross Mills Jay Carney

This is a transcript from a Federal trial by Jay Carney. His client was an alleged hit man for a large crack cocaine ring, and was facing multiple murders. This trial focused on the murder of a front-seat passenger sitting in the "cream-colored Bentley" of Whitney Houston, driven by her then husband, Bobby Brown, when he was visiting his old stomping grounds at the Orchard Park projects. This is the cross of the sixth cooperating witness, who was the kingpin of the drug conspiracy. Every top level guy had cut a deal. The cross is suspended at the end of the day, a Thursday before a long weekend. That weekend, the prosecutor called Jay and offered to reduce the charge from murder to conspiracy to commit an assault and illegal use of a telephone, and wrap up all pending Federal and expected State murder charges into one package, along with the client's getting credit for five years he served on a Federal gun charge that had been reversed. This is an excellent example of exposing the snitch for the liar that he is.

Cooperating Witness Smith Lisa Kavanaugh

Smith was also impeached with his extensive criminal record, as well as the fact that he was testifying pursuant to a cooperation agreement whereby he stood to benefit in two separate Middlesex Superior Court cases: a witness intimidation case, in which he was charged as a habitual offender and faced a mandatory term of ten years, and a drug case, in which he faced

an additional mandatory five year term. The jury learned that Smith did not become a cooperating witness until after he had been detained on a $75,000 cash bail for over a year awaiting trial on witness intimidation charges (Tr. 3/366, 383-384, 411), and that as a result of his earlier testimony against Benzan in Middlesex Superior Court, he had already earned his release from jail on personal recognizance.

Cooperating Witness US v. Jeffers Leibig

This transcript contains the direct and cross of a government cooperator in a federal case where the defendant is alleged to have taken part in a scam to steal fuel from the US Army in Iraq. The witness was the defendant's boss at a contracting company that worked in Iraq. His plea deal ultimately resulted in his being sentenced to less time to serve than the defendant, who earned one tenth the amount of money at the company and operated only as a driver's escort. **Of note is the witness' refusal to admit he expects a sentencing reduction for his testimony, and his explanation of why his testimony directly conflicts with a prior sworn statement he made in front of a different Judge.**(See page 200-201). Before becoming a cooperating witness, he had maintained the defendant had no direct knowledge of the scam.

Jailhouse Informant

Jailhouse Informant US v. Burke, et al Witness Connelly David Mirsky

"This is a good example of weaving motives to lie and favors obtained from the government given the difficulty of being the second defense lawyer to cross. There were six defendants charged with a variety of federal offenses related to a string of bank and armored car robberies that took place between 1990 and 1996. Connolly was a longtime friend of two of the defendants and an acquaintance to the others."

Jailhouse Informant Transcript Motion to Suppress Stephanie Page

Jailhouse Snitch: D alleged to have been in a cell with IT [stranger to D] for a few hours and fully confessed. IT had a long record and a seventeen year history with a State Police Sargent.

Jailhouse Informant Transcript Motion to Suppress State Police Sargent re: Relationship with IT Stephanie Page

State Police Sargent seventeen year relationship with IT explored. IT had given information many times while out on the street and while incarcerated.

Jailhouse Informant Transcript Trial Stephanie Page

Jailhouse Informant Cross Drafts: This is the draft of the Trial Cross examination separated by subject Stephanie Page

Cross Draft IT Ability to Lie

Cross Draft IT Danger

Cross Draft IT Expectation of Hope

Cross Draft IT Given Money

Cross Draft IT Lack of Memory

Cross Draft IT Life in Jail

Cross Draft IT Meeting D

Cross Draft IT Movement Jails

Cross Draft IT Parole

Cross Draft IT Probation

Cross Draft IT Record Relationship with MSP 01

Cross Draft IT Record Relationship with MSP 02

Cross Draft IT Record Relationship with MSP 03

Cross Draft IT Relationship with MSP 01

Cross Draft IT Relationship with MSP 02

Cross Draft IT Relationship with MSP 03

Cross Draft IT D report

[i] The Inquiry Regarding Thomas Sophonow: Jailhouse Informants, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them. See Law Reviews and Studies section.
[ii] The Snitch System Northwestern University School of Law Center on Wrongful Convictions 2005
[iii] Paraphrase of a quote from the television show Mission Impossible (1963-1973).
[iv] Catchphrase used in Star Trek: The Next Generation.