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Jailhouse Informants

In the most general term, informants provide information about criminal activity (e.g., accomplice witnesses, jailhouse informants, cooperating witnesses). Sometimes informants are engaged by the government to provide evidence against other suspected criminals, and in other cases, informants have procured incriminating evidence and contact the authorities in the hopes of brokering deals for themselves. This article focuses on jailhouse informants — individuals who, while in custody, gain evidence about a fellow inmate’s case and assist the prosecution in return for an incentive, such as reduced jail time.¹

Use of jailhouse informants is widespread, yet little is known about the circumstances surrounding their use at trial. An analysis of DNA² exonerations revealed that most jailhouse informants were prosecution witnesses and were used in murder and rape cases in which there was little or no other evidence against the defendants. When giving testimony, the jailhouse informants generally denied receiving incentives, had criminal histories, were friends or acquaintances of the defendant, and had testimonial inconsistencies.

The Jailhouse Informant’s Effect on Juries

Jailhouse informant testimony is extremely persuasive to jurors, as evidenced by wrongful conviction cases

and empirical evidence. The Northwestern University School of Law — Center on Wrongful Convictions³ reviewed 111 cases of persons released from death row between 1973 and 2004 and found false testimony from informants in more than 45 percent of those cases. This makes false testimony from informants the leading cause of wrongful convictions in capital cases. According to the Innocence Project,⁴ jailhouse informant testimony has contributed to more than 15 percent of wrongful convictions later overturned through DNA testing. The National Registry of Exonerations,⁵ which tracks both DNA and non-DNA exoneration cases in the United States, estimates that jailhouse informants have been involved in over 150 proven wrongful convictions.

Social scientific research using trial simulation methods has also consistently found that jailhouse informant testimony is extremely persuasive. This research has revealed five key findings regarding jailhouse informant testimony. First, jailhouse informants increase the likelihood of conviction. Jurors vote guilty significantly more often when a jailhouse informant provides testimony.⁶ The impact of a jailhouse informant is hard to shake. The research shows that the jailhouse informant’s impact was effective even when the jailhouse informant’s testimony is inconsistent with facts of the case⁷ and even when the defense proffered an experienced jailhouse informant as an expert witness for the defense to educate the jury about the phenomenon and craft of jailhouse informants.⁸

Second, jurors do not discount jailhouse informant testimony when they learn of the incentives associated

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with the informant's testimony. In the simulation research, conviction rates were unaffected by whether the jailhouse informant received an incentive in exchange for his testimony.⁹

Third, jailhouse informant testimony has a greater impact on jurors than other forms of evidence. In one study, researchers compared four separate types of evidence (confession, confession from jailhouse informant, eyewitness testimony, and character evidence).¹⁰ The conviction rate was highest — regardless of type of case (rape, murder, or theft) — when there was a confession, either from a jailhouse informant or a direct admission of guilt from the defendant. This demonstrates not only that jurors tend to believe jailhouse informant testimony, but that jurors credit this testimony in much the same way as they do when someone admits to have committed a crime.

Fourth, jailhouse informant testimony is immune to judicial instruction meant to protect against false testimony from jailhouse informants.¹¹ In one experiment, judicial instructions about jailhouse informants did not reduce the impact of jailhouse informant testimony on conviction rates. The jury instruction had no significant impact on verdicts even when the jailhouse informant indicated he was getting an incentive, his testimony was inconsistent with the facts of the case, and when the informant could have learned the proffered details from a source other than the defendant. To be clear, these compromising factors led jurors to rate the informant as less honest, less trustworthy, less interested in justice and more self-serving, but these factors did not affect conviction rates.

Fifth, it is clear that people will lie for very small incentives in order to achieve their goals. A survey found that 20 percent of respondents who were asked to assume the role of a prisoner were willing to provide false evidence in exchange for an incentive.¹² Furthermore, people's willingness to be dishonest increases as the incentive gets larger.¹³ As one can imagine, the larger the incentive is, the more enticing it is to lie. Research on jailhouse informants confirms that larger incentives elicit more lies.¹⁴

Addressing Jailhouse Informant Testimony

The defense lawyer faced with jailhouse informant testimony should be aware of how jailhouse informants have been positioned in previous cases.¹⁵ Some general observations can be gleaned from exoneration cases involving jailhouse

informant testimony.¹⁶ Not surprisingly, all of the prosecution jailhouse informants testified about the defendants' alleged confessions. Most jailhouse informants claimed that the defendants confessed to

capacity as indication of his trustworthiness. The prosecution also often ascribed laudable motives for the jailhouse informant's testimony (e.g., trying to do the right thing).

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them *only after directly asking the defendants about their guilt*. In order to establish some credibility for their testimony, jailhouse informants must show that they had contact with the defendant. Indeed, almost all the informants testified they had contact opportunities with the defendants. The most common contact opportunity arose from being housed in the same facility.

As might be expected, much of the testimony given by jailhouse informants was consistent with the actual case facts. The informants denied hearing about the crime details anywhere other than from the defendant. Some of the details were facts in evidence and could have been provided to the informant by the prosecutor. There were also inconsistencies in the testimony of the informants. In a review of informant testimonies, over half the sample had an inconsistency between their trial testimony and the actual case facts or between the trial testimony and what they had previously reported to the authorities. When there were inconsistencies in the testimony, prosecutors commonly tried to minimize the impacts of these inconsistencies in their closing arguments.

During closing arguments prosecutors almost always mentioned the jailhouse informant and did so in a way to bolster the credibility of the testimony. For example, one prosecutor argued the fact that the jailhouse informant had testified in many previous trials in the same

The defense lawyer should also consider educating the jury about jailhouse informant testimony. The history and nature of jailhouse informant testimony is likely outside the ken of the jury. For example, the average juror would likely not know that jailhouse informant testimony is a recurring phenomenon in cases in which other evidence is scant, that jailhouse informants are courted with significant incentives, and that the sudden development of a moral conscience is an unlikely explanation for the jailhouse informant's cooperation with the prosecution. In short, an expert witness can inform the jury about the history and patterns around jailhouse informants. The expert can explain to the jury the prevalence of jailhouse confessions in exoneration cases, citing statistics and research findings such as those discussed earlier.

The expert can also educate factfinders about important factors that may explain the informant's behavior. For example, one study found that participants have been shown to inform on their peers for minimal incentives. The expert witness can also inform the jury about the psychological factors involved in jailhouse informant testimony. The expert should be able to draw upon and explain the relevant research on behavioral psychology (for example, the impact of incentives on behavior), deception, deception detec-

tion, and false confessions. False confessions, addressed at length in the July 2020 issue of *The Champion*, are relevant to jailhouse informant testimony as well. The informant, after all, may be giving a false — though secondhand — confession of the defendant.

The expert will not be able to opine on the ultimate issue — whether the informant is providing false testimony. There is no way to know whether the jailhouse informant is lying about how he obtained the information. The expert can, however, point out specific factors within a case that are generally indicative of deception. For example, the expert can point out that the jailhouse informant's statements changed over time and that this is common in cases of false jailhouse informant testimony. Moreover, the use of an expert may be the only way to impeach the jailhouse informant and educate the factfinders on the dangers of this type of testimony.

Proffering an Expert on Jailhouse Informants

Getting an expert admitted is easier said than done¹⁷ — as exemplified in the California case *People v. Johnson*,¹⁸ in which the court refused to admit an expert in a case that involved a jailhouse informant. The court stated:

Appellants contended that the trial court erred by excluding their proffered expert testimony from two witnesses, a sociology professor and an “expert” liar, to the effect that imprisoned inmates will sometimes lie and will give false testimony incriminating others. The court affirmed the trial court’s ruling and found no abuse of discretion because the proposed testimony would not be sufficiently relevant. The court determined that the idea that inmates lie would not be outside the common understanding of jurors and that witness credibility should be the subject of impeaching evidence. The court found that the testimony of the sociologist would have been of dubious scientific nature that was not certain to aid the trier of fact.

How can defense counsel support an expert proffer? First, proffer an expert on psychology of confessions. As discussed, jailhouse informants are relaying a confession they heard from the defendant (social scientists call this a secondary confession). An expert

must prove to a judge that the evidence he or she will provide is reliable based on *Daubert v. Merrell Dow Pharmaceuticals*.¹⁹ Based on *Daubert*, the U.S. Supreme Court has listed four nonexhaustive factors that judges can consult in order to decide the reliability of an expert:

- ❖ Can the data be falsified?
- ❖ Has the data been subjected to peer review or publication?
- ❖ Are there known or potential error rates?
- ❖ What is the general acceptance of the findings in the relevant scientific community?

The first factor is falsifiability. Scientifically, falsifiability refers to the ability of a scientific statement to be tested and disproved by empirical evidence. If an expert is relying on peer-reviewed research to form an opinion, then the answer is yes. An expert can say, based on experimental data, that people will produce false secondary confessions even with minimal incentives.²⁰ Can a psychological expert say for sure, however, what the base rate of a jailhouse informant’s lying is? The answer is no. There is no data on true secondary confessions because there is simply no way to get the rate of true secondary confessions. Regarding the second *Daubert* factor of peer review, there is now a growing body of peer-reviewed jailhouse informant literature.²¹ The third *Daubert* factor of evaluating expert testimony concerns the known error rate. Error rate may apply if the expert was to offer a diagnosis or to predict the likelihood of some event, but that would not be the role of an expert in this case. The role of the expert would be to educate the factfinder about the informants and false confessions. Thus, the concept of error rate does not apply. Lastly, regarding the fourth *Daubert* factor, there is relatively little disagreement among psychologists about the reality of false secondary confessions. Some may argue that not all of them are false and that jailhouse informants are valuable to the legal system, but they acknowledge that false secondary confessions exist.

Second, as a confession, the defense attorney may request a reliability hearing. Judges routinely grant reliability hearings in cases involving confessions to make sure that the confessions were given voluntarily. In fact, the Federal Rules of Evidence²² allow pretrial admissibility hearings outside of the presence of the jury for all con-

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fessions. Given the growing scientific literature on coerced and false confessions²³ and the growing realization of the role of false confessions in wrongful convictions,²⁴ psychologists are sometimes admitted as experts in contested confession cases.²⁵

Third, when proffering an expert, lawyers can make several arguments that were not available to them when the court ruled in *People v. Johnson*.²⁶ There are now many large databases that detail wrongful convictions based on false jailhouse informant testimony: The Innocence Project (<https://innocenceproject.org/>), National Registry Exonerates (<http://www.law.umich.edu/special/exoneration/Pages/about.aspx>), and the Northwestern Center for Wrongful Convictions (<https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/perjury/>). These databases clearly show that laypeople do not appreciate the potential dangers jailhouse informants can pose. Additionally, there is now scientific literature on jailhouse informants and secondary confession evidence.²⁷ This literature has recently emerged; however, the results are very conclusive — testimony from jailhouse informants is extremely persuasive.²⁸ In this scientific literature, there also exists an archival analysis that defines both the attributes of a typical jailhouse informant and the informant's false testimony.²⁹ Again, the research points to the same conclusion that can be garnered from the databases, which is the psychology of confession evidence is beyond the ken of the layperson.

The final advice is twofold. First, additional reasons exist to hire experts

other than their testimony. An expert can help educate the attorney on the science, prepare questions for direct and cross-examination of witnesses, and help the attorney develop opening and closing statements when the jailhouse informant is relevant. In addition, it is strongly recommended that attorneys who cannot get their expert admitted at trial should request a proffer and preserve the expert's testimony for appeal. Lastly, defense attorneys must communicate with their peers. In fact, two attorneys have developed a step-by-step playbook, known as the "Rat Manual," for defense attorneys dealing with jailhouse informants.³⁰ This guide makes many useful suggestions for defense attorneys, including retaining experts.

Conclusion

Jailhouse informants represent a significant challenge to the defense lawyer. One might think that the link between jailhouse informant testimony and wrongful convictions, the magnitude of the incentives offered to jailhouse informants in exchange for their testimony, inconsistencies in their testimony, and their general shady characters would be enough to neutralize them in the eyes of the jury. Trial simulation research and actual cases, however, teaches us that despite these shortcomings, jailhouse informants are influential. The likely root of their influence is the power and allure of confessions, even false confessions. Defense lawyers faced with jailhouse informants should be aware of the common threads in jail-

house informant cases and the availability of expertise in the form of other defense lawyers experienced in these matters and psychologists versed in the topics of confessions and informants.

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Notes

1. *State v. Dedge*, Fla. Cir. Ct. Aug. 28, 1984; *People v. Restivo*, N.Y. Dis. Ct. (1986); *People v. Wyniemko*, Mich. Cir. Ct. Nov. 3, (1994).

2. J.S. Neuschatz, D.K. DeLoach, M.A. Hillgartner, M.B. Fessinger, S.A. Wetmore, A.B. Douglass, B.H. Bornstein & A.M. Le Grand, *The Truth About Snitches: An Archival Analysis of Informant Testimony*, PSYCHIATRY, PSY. & L. (forthcoming).

3. R. Warden, *The Snitch System: How Incentivized Witnesses Put 38 Innocent Americans on Death Row*, Northwestern University 1-16 (2004).

4. *Informing Injustice: The Disturbing Use of Jailhouse Informants*, Innocence Project, Dec. 4, 2019, <https://www.innocenceproject.org/causes/incentivized-informants>.

5. Exoneration Detail List, accessed Aug. 23, 2020, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>.

6. J.S. Neuschatz, D.S. Lawson, J.K. Swanner, C.A. Meissner & J.S. Neuschatz, *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision-Making*. 32 LAW & HUM. BEHAV. 137-149 (2008); J.S. Neuschatz, M.L. Wilkinson, C.A. Goodsell, S.A. Wetmore, D.S. Quinlivan & N.J. Jones, *Secondary Confessions, Expert*

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Life Depends on It, 36 HOFSTRA L. REV. 693, 746 (2008) ("The building blocks of a competent social history investigation are the collection of life history records and interviews of all significant persons in the defendant's life. ... An exhaustive documentary history can reveal important clues establishing or leading to the discovery of persuasive mitigating evidence, including the developmental history of the client, conditions affecting him in utero, medical conditions, mental retardation, mental illness, substance abuse, poverty, environmental toxins, and other factors that may have impaired the health and development of the client and his family").

46. *Id.*

47. See, e.g., Don Bambino Geno Tai, *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 72 CLINICAL INFECTIOUS DISEASE 703, Feb. 15, 2021; Linda Morris, *A Wave of Mass Evictions Is Inevitable, and Black Women Will Be Hit the Hardest*, July 24, 2020, <https://thehill.com/blogs/congress-blog/politics/508897-a-wave-of-mass-evictions-is-inevitable-and-black-women-will-be>; Ava MacBlane, *Dr. Sherita Hill Golden Discusses the Impact of COVID-19 and Systemic Racism in US During MLK Community Celebration Event*, THE CAVALIER

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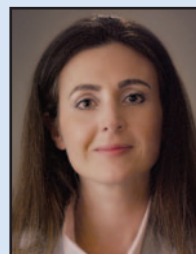
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8. Neuschatz et al., *Secondary Confessions*, *supra* note 6.

9. Neuschatz et al., *Effects of Accomplice Witnesses*, *supra* note 6; J.M. Golding, J.S. Neuschatz, B.H. Bornstein, A.M. Riederer & S.A. Wetmore, *The Perception of a Jailhouse Informant in a Sexual Assault Case*, J. POLICE & CRIM. PSYCHOL. (forthcoming).

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11. S.A. Wetmore, J.S. Neuschatz, M.B. Fessinger, B.H. Bornstein & J.M. Golding, *Do Judicial Instructions Aid in Distinguishing Between Reliable and Unreliable Jailhouse Informants?* 47 CRIM. JUST. & BEHAV. 582-600 (2020).

12. C.T. Robertson & A. Winkelman, *Incentives, Lies, and Disclosure*, 20 J. CONST. L. 33-84 (2017).

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15. *State v. Dedge*, *supra* note 1.

16. Neuschatz et al. (forthcoming), *supra* note 2.

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testimony as through 2005, see Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 227-255 (2005).

18. *People v. Johnson*, 19 Cal. App. 4th 778, 780, 23 Cal. Rptr. 2d 703, 705 (1993).

19. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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24. B.L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

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