

# **Constructing Systemic Safeguards Against Informant Perjury**

Peter A. Joy\*

Reliance on an informant's testimony as the primary basis for charging and convicting the accused is fraught with problems. While the hypothetical explicitly addresses the ethical dilemmas defense counsel faces when her client is trading false testimony in exchange for a reduced charge and shorter sentence, the hypothetical also implicitly illustrates the inadequacies of our criminal justice system's current handling of testimony from cooperating witnesses.

The focus on the ethical, and perhaps moral, obligations of Lawyer representing a potentially perjurious Client begs larger questions. Are there safeguards the prosecutor's office could employ to ensure that the trial prosecutor, who is focused on convicting Kingpin, has not been manipulated by Client or has not consciously or unconsciously supplied the facts necessary for Client to manufacture the testimony required to convict Kingpin? What criminal justice reforms would help to prevent or discredit such perjury and make a wrongful conviction less likely? These are some of the additional questions we should be exploring. In my comment, I first illustrate why focusing solely on defense counsel ethics is not wholly sufficient and next briefly discuss some criminal justice system reforms that would better safeguard the accused.

## **I. WHY WE SHOULD FOCUS ON THE JUSTICE SYSTEM AND NOT SOLELY DEFENSE COUNSEL**

That Kingpin is set-up to be convicted based on false testimony is almost inevitable given the way the criminal justice system currently operates, and solely focusing on the ethical obligations of defense counsel will not reliably prevent or remedy perjury in most instances. In order to understand how this happens, let us briefly review some of the facts in the hypothetical.

Client, who is charged with transporting heroin into the United States, knows that she will likely be convicted and receive a long prison term. Lawyer tells Client that if she has any information about Kingpin or others involved in the crime she may be able to reduce her sentence considerably. Under current federal law this could change the sentence for transporting heroin, which carries a penalty of ten years to life for a defendant without a prior felony conviction, to a charge of drug possession and a sentence of less than two years in prison. This huge sentence reduction creates an enormous incentive for Client to accuse Kingpin

---

\* Vice Dean, Professor of Law, and Co-Director of the Criminal Justice Clinic, Washington University School of Law in St. Louis.

falsely, particularly where the U.S. Attorney's Office is eager to make a case against Kingpin.

With a prosecutor's office focused on convicting Kingpin and Client focused on minimizing her prison sentence, should Lawyer have told Client about the possibility of reducing her sentence by cooperating? At least one federal district court has said that it is ineffective assistance for a defense lawyer not to have such a discussion,<sup>1</sup> and many defense lawyers would view such a discussion as necessary for the competent representation of Client even if they were not concerned with ineffective assistance of counsel claims.

Client offers to testify against Kingpin, and the prosecutor agrees to reduce the charge against Client so that she will receive a much shorter sentence provided her cooperation is truthful. While other commentators will more thoroughly analyze what Lawyer may, should, or must do in response to Client's revelation that her testimony against Kingpin will be "all lies," the following overview of the issues demonstrates that many of the options open to a defense lawyer may do little to stop an informant's perjury.

Lawyer's duty of loyalty to Client underlies the very strong presumption that Lawyer will maintain confidentiality about Client's planned perjury. Model Rule of Professional Conduct 1.6 reflects this strong preference for client confidentiality over competing interests by *permitting*, but *not requiring*, Lawyer to "reveal information relating to the representation" of Client if Lawyer believes it necessary to prevent Client from committing the crime of perjury and the possible resulting wrongful conviction and incarceration of Kingpin.<sup>2</sup> Most jurisdictions follow Model Rule 1.6. Even if one argues that Lawyer "should" take steps that may include revealing Client's planned perjury (or actual perjury if one argues that Lawyer should wait to see if Kingpin is convicted), Lawyer is not ethically compelled to do so under Model Rule 1.6.

Model Rule 3.3, Candor toward the Tribunal, supersedes the obligation to protect confidentiality found in Model Rule 1.6 in some situations, however. Under Model Rule 3.3(b), Lawyer has an obligation to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal" if Lawyer "knows" that Client intends to commit perjury in "an adjudicative proceeding" in which Lawyer represents Client.<sup>3</sup> For Model Rule 3.3 to apply, Lawyer must represent Client when Client testifies as a witness in Kingpin's trial, and Lawyer must *know* Client is going to lie. Even if we assume that Lawyer believes she has the requisite actual knowledge that Client will commit perjury, Model Rule 3.3(b)'s

---

<sup>1</sup> *United States v. Fernandez*, No. 98 CR. 961 JSM., 2000 WL 534449 (S.D.N.Y. May 3, 2000), *adhered to on reconsideration*, No. 98 CR. 961 JSM., 2000 WL 815913 (S.D.N.Y. June 22, 2000).

<sup>2</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009).

<sup>3</sup> *Id.* at R. 3.3(b).

applicability is not clear because we do not know that Lawyer will represent Client at Kingpin's trial.<sup>4</sup>

Some may argue that Lawyer should, or is required to, seek to withdraw from representing Client,<sup>5</sup> but withdrawal is unlikely to stop the perjury. If one argues that Lawyer should inform the court of the planned perjury, does that solve the problem? Not necessarily, because the judge could determine that the jury will decide Client's credibility. If Lawyer is also willing to testify for Kingpin's defense to impeach Client, would that solve the perjury problem? Again, we cannot be confident that the judge in Kingpin's trial would permit such impeachment if Client asserted a claim of attorney-client privilege, even though one may argue that the conversation falls under the crime-fraud exception to attorney-client privilege.

If we assume Lawyer could derail or remedy Client's planned perjury in some way, what about the countless cases in which cooperating witnesses do not admit to their lawyers that they plan to commit perjury to achieve a significant sentence reduction? What safeguards exist to prevent another defendant facing a possible life sentence from "volunteering" to testify for the government against Kingpin with manufactured testimony calculated to convict?

As this brief summary of the issues suggests, more satisfactory resolutions to the underlying issue posed by the hypothetical require looking into how to prevent, make less likely, or more effectively counteract a cooperating witness testifying falsely in the first place.

## II. COUNTERACTING THE PROSECUTOR'S TUNNEL VISION TO CONVICT

The unreliability of cooperating witnesses such as Client is well-recognized. More than fifty years ago, the United States Supreme Court warned that "informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."<sup>6</sup> As Judge Stephen Trott, a former Associate Attorney General sitting on the Ninth Circuit, explained:

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase

---

<sup>4</sup> If Lawyer does not represent Client in Kingpin's trial, Lawyer faces another Model Rule 3.3 dilemma if Lawyer continues to represent Client at the plea and sentencing in her own case because her plea agreement relies on Client's cooperation against Kingpin. Model Rule 3.3(a) states that, "A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *Id.* at R. 3.3(a).

<sup>5</sup> *Id.* at R. 1.16.

<sup>6</sup> On *Lee v. United States*, 343 U.S. 747, 757 (1952).

leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.

... Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike.<sup>7</sup>

Judge Trott also warned prosecutors that informants would do anything to get out of trouble with the law, 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,” and they “are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom ‘truth’ is a wholly meaningless concept.”<sup>8</sup>

Although the prosecutor may understand the risk of a cooperating witness manufacturing evidence in the abstract, in Kingpin’s case the prosecutor wants to believe Client because the prosecutor enters the room to talk with Client already certain that Kingpin is guilty. There are a number of psychological impediments the prosecutor faces, including tunnel vision, which may make the prosecutor a poor judge of Client’s credibility.<sup>9</sup>

To counteract the prosecutor’s likely predisposition to believe Client, there need to be more controls on the use of informant testimony. Presently, the justice system relies on the prosecutor to make an initial credibility judgment, the defense to test the testimony through cross-examination at trial, and the jury as fact-finder to determine whether to believe the testimony. As data from DNA exonerations demonstrate, these are often insufficient safeguards. In sixteen percent of the more than 250 exonerations, testimony from cooperating witnesses, such as Client, were the basis for or contributed to the wrongful convictions.<sup>10</sup>

Realizing the need for more safeguards when using informants, in 2005 the American Bar Association (ABA) House of Delegates passed a resolution calling on federal, state, and local governments to adopt measures so “no prosecution

---

<sup>7</sup> Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1123–24 (9th Cir. 2001).

<sup>8</sup> Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996).

<sup>9</sup> See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (arguing that confirmation bias, selective information processing, belief perseverance, and avoidance of cognitive dissonance impede prosecutor decision making); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (analyzing how tunnel vision—focusing on a particular suspect—affects all phases of criminal proceedings); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002) (exploring how tunnel vision leads to constructing guilt based on unreliable informants).

<sup>10</sup> The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, <http://www.innocenceproject.org/Content/351.php> (last visited Apr. 15, 2010).

should occur based solely upon uncorroborated jailhouse informant testimony.”<sup>11</sup> As the ABA notes in its report accompanying the resolution, the prosecutor is “[t]he first check (and perhaps the most important) on unreliable testimony by informants.”<sup>12</sup> But psychological experiments demonstrate that “as a general rule, people are poor human lie detectors.”<sup>13</sup>

To help guard against the psychological impediments prosecutors face and to guarantee greater reliability in making credibility decisions at every stage of using informant testimony, there needs to be “a greater degree of transparency, oversight, and neutrality into the process.”<sup>14</sup> Here are some reforms that should be implemented.

#### A. Require More Transparency

As a starting point, state and federal criminal discovery rules should be amended to require prosecutors to disclose more to the defense concerning informants. Prosecutors should be required to disclose all of the information corroborating the witness’s testimony as well as any information that may be used to possibly impeach the informant, such as all benefits the informant is receiving for her testimony, inconsistent statements, and whether the informant has testified for the government in other cases.

Legislatures should also enact laws requiring law enforcement officers and prosecutors to videotape all conversations with the informant, and to disclose the tapes to the defense for possible impeachment use,

. . . so that there is the ability, after the fact, to determine if the witness has been coached into inculcating the accused, or if the witness has manipulated the police or prosecutor into disclosing details of the crime known only to the victim, the real perpetrator, and involved law enforcement officials.<sup>15</sup>

---

<sup>11</sup> ABA Res. 108(b), adopted by the House of Delegates (Feb. 14, 2005), *available at* <http://www.thejusticeproject.org/wp-content/uploads/aba-108b.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Saul M. Kassir, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002). “Dozens of studies of the communication of deception provide compelling evidence that people are not very skilled at distinguishing when others are lying from when they are telling the truth. In experimental studies of detecting deception, accuracy is typically only slightly better than chance.” Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 346 (1997).

<sup>14</sup> THE JUSTICE PROJECT, *JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 2* (2007), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death\\_penalty\\_reform/Jailhouse%20snitch%20testimony%20policy%20brief.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Jailhouse%20snitch%20testimony%20policy%20brief.pdf).

<sup>15</sup> Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 639–40 (2007).

For cross-examination by the defense to be an effective tool to test credibility, there must be more transparency concerning the promises made to the informant, how the informant may have been coached, and how the informant may have manipulated the prosecutor to shape the testimony against the accused.

### *B. Require More Oversight*

There needs to be more oversight within the prosecutor's office of the use of informants. A prosecutor or team of prosecutors not involved in the case should review all of the recordings of interviews of the informant and all corroborating evidence to make the credibility determination in order to provide an internal check.<sup>16</sup> In evaluating the informant's testimony, the reviewing prosecutors should require corroborative evidence that, independent of the informant's testimony and the testimony of other informants, connects the accused to the crime. As Judge Trott advocates, the prosecutors making the credibility determination must "[c]heck out everything your witness says. Look for documentary evidence, corroborating witnesses, prior consistent statements—everything. If he says he made an important telephone call, bring in the phone company records. If he says he was in Las Vegas, prove it independently of what he says with hotel clerks and records."<sup>17</sup>

### *C. Require More Neutrality*

The ultimate decision of whether to admit informant testimony against the accused should not be made solely by the prosecutor, a partisan advocate, but should also involve the trial judge. Juries also should have more information to evaluate the credibility of informants. Both of these safeguards are attainable, and both require some changes in the criminal justice system.

Judges should become involved in evaluating the credibility of an informant's testimony to determine if it is reliable enough to be presented to the jury. Existing evidence law provides some basis for judges taking a more active role in monitoring the use of informants through the use of pretrial reliability hearings. The Federal Rules of Evidence provide: "Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court,"<sup>18</sup> and "[h]earings on . . . preliminary matters shall be so conducted when the interests of justice require."<sup>19</sup> In addition, Federal Rule of Evidence 403 provides that "evidence may be excluded if its probative value is

---

<sup>16</sup> *Id.* at 640.

<sup>17</sup> Trott, *supra* note 8, at 1407.

<sup>18</sup> FED. R. EVID. 104(a).

<sup>19</sup> *Id.* at 104(c).

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”<sup>20</sup>

Given the many problems of false informant testimony, such as those revealed by the analysis of DNA exonerations, there is a strong basis for trial judges to require reliability hearings. As one judge has argued, “to ensure the utmost reliability in the admission of jailhouse informant testimony, I would . . . mandate the reliability hearing.”<sup>21</sup> In order to ensure that all judges conduct such hearings, states and the federal government should adopt rules to require reliability hearings whenever the government promises the informant in exchange for testimony something of value, such as a reduced charge, more lenient sentence, or money.<sup>22</sup>

For the jury to be an adequate neutral check on admitted informant testimony, the jury needs more information to determine credibility effectively. This requires special jury instructions. The jury should be instructed to consider promises made to the informant, the informant’s prior criminal record, whether the informant has testified for the government in prior cases, whether the informant has made any statements inconsistent with the testimony at trial, and any other factors that may render the testimony unreliable.

### III. CONCLUSION

As this brief comment on the issues presented by the hypothetical suggests, more satisfactory resolutions to the underlying problem require both looking into how to prevent, or at least make less likely, cooperating witnesses testifying falsely in the first place and minimizing the weight given to false testimony when it is admitted. Some of the recommended reforms to achieve these goals, such as amending the discovery rules, requiring the taping of law enforcement conversations with informants, and providing more detailed jury instructions have already been adopted in whole or part by some jurisdictions. Similarly, some prosecutors’ offices have implemented more oversight in evaluating informant testimony, and some courts have ordered reliability hearings before admitting informant testimony. These are achievable reforms that, although they may not always prevent false testimony, would better protect the accused if a defense lawyer is unable to stop a client from testifying falsely. And, in the numerous situations where informants do not reveal to their defense attorneys that they intend to lie on the stand, the reforms would provide prosecutors, defense lawyers, judges, and juries with more tools to exclude, counteract, or disregard the lies.

---

<sup>20</sup> *Id.* at 403.

<sup>21</sup> *Dodd v. State*, 993 P.2d 778, 785 (Okla. Crim. App. 2000) (Strubhar, P.J., concurring).

<sup>22</sup> THE JUSTICE PROJECT, *supra* note 14, at 2, 5.

