THE UPDATED RAT MANUAL:

FINDING EVIDENCE TO SEARCH FOR

AND UNDERMINE THE SNITCH

The English historian, Sir Thomas Erskine May, writing in the middle of the 19th century, observed: "Next in importance to personal freedom is immunity from suspicions and jealous observation. Men may be without restraints upon their liberty; they may pass to and fro at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, — who shall say that they are free? Nothing is more revolting ... than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency." (2 May, Constitutional History of England (1863) p. 275.) Quoted in **White v. Davis** (1975) 13 Cal.3d 757, 777.

BY

CHARLES M. SEVILLA[1] **AND VERNA WEFALD**[2]

updated February 15, 2012

---

[1] Attorney at law, Law Offices of Charles Sevilla, San Diego, California. Formerly Chief Deputy State Public Defender 1979-1983.

[2] Attorney at law in private practice in Los Angeles, formerly San Diego Deputy Federal Defender (1985-1989) and Deputy State Public Defender (1989-1992).

INTRODUCTION

While certain politicians and prosecutors, both liberal and conservative, scramble to outdo each other in pandering to public hysteria about crime -- by promoting the return of barbaric and inhumane punishment and by championing the erosion of civil liberties -- a segment of our society is actually profiting quite nicely from the war on crime, and it is not the innocent victims. So who benefits? Ironically, it is the manipulating sociopathic crooks who betray their fellow human beings who are the beneficiaries of the largesse.

Forget about advances in forensic science or diligent and clever police work -- law enforcement frequently depends on other criminals to "solve" their cases. Don't have any suspects? Get a snitch. Don't have a motive or evidence of intent? Get a snitch. Don't have enough drug dealers? Get a snitch. Need a search warrant? Get a snitch. Need a confession? Get a snitch. Can't prove the special circumstances? Get a snitch. Want the death penalty? Get a snitch.

Snitches come in many shapes and sizes but they all have one thing in common -- a proclivity for lying. Their concept of the truth may be defined as, "what's in it for me?" Whether they're accomplices, confidential informants, or jailhouse informants, they will tell any story the prosecution wants to hear in order to benefit themselves. It's the ultimate symbiotic relationship.

In recent years, the federal government has officially spent millions upon millions to keep informants happy. One can only imagine how many unofficial dollars have gone to this venture. Asset forfeitures and hard earned taxpayer dollars are lining the pockets of criminal informants. Witness protection funds and even victim assistance programs are but euphemisms for a new program of governmental hand-outs: the Aid-To-Dependent-Criminals.

The money snitches make, however, is just the tip of the iceberg. Criminal informants are often very dangerous people who continue to prey on the innocent public as well as our clients with the full cooperation of law enforcement. They not only get off scot free, but they get off **and** get paid for it. Incredible but true. A horrible example of this is the case of Randall Dale Adams who was prosecuted and sentenced to death in Texas on the testimony of the actual killer (who was let off). Adams death penalty was reversed on a death qualification issue (**Adams v. Texas,** 448 U.S. 38 (1980)), but he spent twelve years in prison until a

documentary movie, **The Thin Blue Line**, exposed the circumstance of his false conviction and his innocence. It was too late, however, for another innocent person. The murderer who made his deal with the prosecutor was let go, proceeded to murder again, and ended up on Texas death row for his second killing.

More recently, in the release of the **"Memphis 3"** defendants (Jason Baldwin, Damien Echols and Jessie Misskelly) after 18 years confinement, among a number of other enormous errors, lying snitches were called to the stand by the prosecution. Film documentaries on the case ("**Paradise Lost I, "Paradise Lost II,**" "**Paradise Lost III**," and "**West of Memphis"**) show the multiple ways false convictions can be had including with perjuring snitches.

Despite the occasional scandal occasioned by the exposure of lying snitches, snitches are the vanguard of state and federal governmental crime fighting troops. The federal sentencing guidelines were specifically designed to force more and more criminal defendants to become snitches. Not only is cooperation the key to avoiding light years in prison, but those who decline to cooperate or who just don't have anything to sell are severely penalized. The fact that the federal sentencing guidelines do nothing to promote the goals of truth or justice does not concern the lawmakers. A prime example of this craziness[3] run amok is **United States v.**

---

[3] Snitch frenzy in federal court is engulfing not only criminal defendants but their lawyers as well. Rare is the federal practitioner who can steer clear of becoming a snitch lawyer these days. In **United States v. Lopez,** 4 F.3d 1455 (9th Cir. 1993), the prosecutor had violated Justice Department policy and the state bar ethical code in going behind the defense lawyer's back to try to make a deal directly with the client. The 9th Circuit vacated the conviction but did not think the conduct was outrageous enough to bar reprosecution. In fact, the concurring opinion of two appeals court judges actually laid blame to the defense attorney for advising his client that he had a policy not to represent someone who was going to cooperate. Now, Janet Reno has issued a Justice Department rule to permit federal prosecutors to defy state professional ethics mandates and make deals with criminal defendants without telling their attorneys. The deals will no doubt incorporate information about the defense attorney and lawyers will soon need advocates to protect themselves from their own clients. *See also* **United States v. Ofshe,** 817 F.2d 1508 (11th Cir. 1987), where a

(continued...)

Brigham, 977 F.2d 317 (7th Cir. 1992), where the least culpable defendant received the 10 year minimum mandatory but all the heavies snitched and got far less time.

> Bold dealers may turn on their former comrades, setting up phony sales and testifying at ensuing trials. Timorous dealers may provide information about their courses and customers. Drones of the organization -- the runners, mules, drivers and lookouts -- having nothing comparable to offer. They lack the contacts and trust necessary to set up big deals, and they know little information of value. Whatever tales they have to tell, their bosses will have related. Defendants unluckily enough to be innocent have no information at all ... the more serious the defendant's crimes, the lower the sentence -- because the greater his wrongs, the more information and assistance he has to offer to a prosecutor. (**Id.** at 318).

Law enforcement officials publicly attempt to justify their alliance with hardened criminals by saying they can't bring wrongdoers to justice without them. But often the only kind of "justice" produced in a case where informant testimony is a central factor is the "prosecution always wins." Regrettably, law enforcement knows full well that snitches are the worst of the lot -- as more recent cases show, they would sell their own mother down the river to get a deal -- and too often conceal the truth about the snitch in order to prevail.

The dismissal of the federal case post-conviction against former Senator Ted Stevens is one of the more highly publicized examples of government withholding impeachment evidence of a government star witness. But this is a pervasive problem not restricted to high profile cases. In moving for dismissal in that case, the Department of "Justice said it 'recently discovered' that prosecutors withheld from the defense notes about an interview last April with the state's star [snitch] witness, Bill Allen, that contradicted his subsequent testimony." *The Wall Street Journal*, April 2, 2009, "The Ted Stevens Scandal." *See* online article: http://online.wsj.com/article/SB123863051723580701.html.

(...continued)
prosecutor used a lawyer as an informer against his own client by placing a bug on the lawyer to record attorney-client conversations.

More recent cases have recognized the misuse of snitches to steal away another person's life or liberty with perjured testimony about confessions. *See, e.g.*, **Maxwell v. Roe** (9th Cir. 2010) 628 F.3d 486, cert. denied **Cash v. Maxwell**, 565 U.S. __; 132 S.Ct. 611; 181 L.Ed. 2d 785 (2012) (Sydney Storch,"The Neophyte" gave false testimony and lots of it; the Brady violations were: a) he denied deals even the one he secretly negotiated with the DA himself! b) did not disclose his informant status in prior cases);[4] **U.S. v. Kohring**, 637 F.3d 895 (9th Cir. 2011)(reversal due to use of same cooperator as in Ted Stevens case discussed above in an Alaska prosecution where **Brady** information, the cooperator's child molestations and attempts to obstruct investigation, was withheld); A jailhouse snitch testified that the defendant confessed to him. The snitch denied any deal for lenient treatment. The DA had letters in his file indicating there was such a deal. The Circuit holds that this violates Brady and Napue (the snitch lied about receiving a benefit from the DA; death penalty reversed). **Sivak v. Hardison** 658 F.3d 898 (9th Cir. 2011) (jailhouse snitch testified the defendant confessed to him while denying any deal for lenient treatment. The prosecutor had letters in his file indicating there was such a deal. Held: violation of both **Brady** and **Napue** [the snitch lied about receiving a benefit from the DA]; death penalty reversed); **Jackson v. Brown,** 513 F.3d 1057, 1070 (9th Cir. 2008) (**Brady** and **Napue** error re promises of benefits to snitches and not correcting perjured testimony); **Silva v. Brown,** 416 F.3d 980 (9th Cir. 2005) (prosecutor makes a deal with a co-defendant for a reduced sentence and a delay in the psychiatric examination, which is not disclosed. Reversed for **Brady** violation); **Singh v. Prunty,** 142 F.3d 1157(9th Cir. 1998)(prosecutor keeps from defense information regarding the benefits conferred on its major witness which would have demonstrated they he came forward to testify for reasons other than civic duty); **United States v. Kojayan,** 8 F.3d 1315 (9th Cir. 1993) (reversing a conviction where the prosecutor concealed **Brady** information and a cooperation agreement with a material witness-informant from defense and jury, and then

---

[4] This is a very important case tenaciously handled over many years by co-author Verna Wefald. The Supreme Court denied cert on January 9, 2012 with a spirited debate between Justices Sotomayor and Scalia. In dissent, Scalia notes the Circuit hold was that "the use of Storch's false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity. See 628 F. 3d, at 506-507. We have never held that, and are unlikely ever to do so." Cash v. Maxwell, 132 S. Ct. 611, __ (2012).

continued hiding-the-ball on appeal); **People v. Kasim,** 56 Cal.App.4th 1360 (1997) (prosecutor misleads defense and the jury as to his favorable treatment of his cooperating witnesses).

Often, the testimony of the snitch appears so obviously fabricated, so unreasonable in nature, incredible and of no value whatsoever, it should easily be discounted by the jury. It is testimony only a judge could believe. But as smelly as the surrounding circumstances may be, juries will usually give some value to the snitch's story because it so nicely solves the case.

The defense attorney's job, therefore, is to expose the truth about these snitches. Merely filing a discovery motion will not be enough. You can never rely upon the prosecution to turn over all the evidence that will enable the defense to make the prosecution case look bad. You have to dig up the dirt yourself and you may have to make a big stink while doing it. But therein lies the fun. When prosecutors rely on snitches, you can **always** make them look bad. Count on it.[5]

Perhaps as a product of the good work of defense attorneys in exposing the mendacity of the snitch and the unwholesome relationships they establish with the police, a new disturbing trend is evolving — giving the snitch guaranteed anonymity. In **People v. Hobbs**, 7 Cal.4th 948 (1994), the court approved a warrant which was denuded of all information about the case because revelation of it might reveal the informant. That examination was conducted entirely *in camera*

---

[5] State court judges may not be sympathetic to your plight. Perhaps because they are more insulated from politics by lifetime appointments, some federal judges have been less timid about overturning convictions when the truth comes to light. In Chicago, for example, dozens of racketeering convictions of "El Rukn" gang members were overturned by no less than three different federal judges when it was revealed that informants got benefits that had not been disclosed by the prosecutors. These federal judges permitted wide scale post-judgment discovery and conducted extensive evidentiary hearings to ferret out the truth. No Los Angeles Superior Court judge has been so accommodating even though a grand jury in 1990 reported on a multitude of instances of informant perjury in high-profile (*i.e.,* death) cases which went on for at least a decade. *See also*, **Actual Innocence**, by Sheck, Neufeld and Dwyer (Signet 2001), pointing out the conviction of the innocent in capital cases through use of snitches. Thus, as with every issue in state court these days, you must make your record for federal court.

by the trial court. Dissenting from the approval of this procedure, Justice Mosk stated the issue, "A search warrant containing no information other than the address of a home to be searched. Not a word as to what the government seeks to discover and seize. ¶ A government informer, his—or, indeed, her—identity kept secret from the suspect, the suspect's counsel, and the public.¶ Both the suspect and counsel barred from a closed proceeding before a magistrate. No record of the proceeding given to the suspect or counsel. ¶ Based entirely on the foregoing, a court order approving an unrestricted search of the suspect's home.¶ Did this scenario occur in a communist dictatorship? Under a military junta? Or perhaps in a Kafka novel? No, this is grim reality in California in the final decade of the 20th century." **(Id.** at 977-8.)

In an effort to call it like it is, a federal court issued a controversial and short lived decision in **U.S. v. Singleton,** 144 F.3d 1343 (10th Cir. 1998). The case was overturned in an *en banc* ruling and has not been followed in the other Circuits. Too bad because the court told the truth when it held that based on an interpretation of 18 USC §201(c)(2), it is a criminal act for a prosecutor to "pay" a cooperating witness to testify against another person in return for sentencing consideration.[6] The decision also held such conduct was unethical under the state ethical rules to give such rewards. The decision, although not precedent, is must reading for every defense attorney because it is a goldmine of useful quotes and cases which portray reality as we know it -- that it is every bit as much a bribe to pay cold cash for witness testimony as it is to reward the witness with huge reductions in years in prison, dismissed counts, or returns of forfeited crime proceeds.

You can never remind the courts too often -- before, during, and after a trial -- that when prosecutors rely on snitches there is a heightened risk that these witnesses are lying. "A recent study conducted by the Actual Innocence Project revealed that out of sixty-two cases in which DNA has exonerated an innocent defendant, thirteen cases, or twenty-one percent relied to some extent on the testimony of informers." **Commonwealth of Northern Marian Islands v. Bowie**, 243 F.3d 1109 (9th Cir. 2001). You can never remind the courts too often that

---

[6] See **U.S. v. Feng,** 277 F.3d 1151 (9th Cir. 2002), and **U.S. v. Smith**, 196 F.3d 1034 (9th Cir. 1999), also rejecting the argument in the contexts of immigration and criminal leniency respectively.

when prosecutors rely on snitches to make their cases for them they are encouraging perjury.

> Few things are more repugnant to the constitutional expectations of our criminal justice system than covert perjury, and especially perjury that flows from a concerted effort by rewarded criminals to frame a defendant. The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth, and to do so in a manner that comports with due process of law as defined by our Constitution. This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation. See United States v. Wallach, 935 F.2d 445 (2nd Cir. 1991) ("Indeed, if it is established that the government knowingly permitted the introduction of false testimony 'reversal is virtually automatic.'") (citations omitted); Cf. Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978) ("It would be an unthinkable imposition upon [the authority of a magistrate judge] if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.").

N. Mariana Islands v. Bowie, 243 F.3d 1109, 1114 (9th Cir. 2001)

> These duties imposed on police and prosecutors by the requirements of due process are hardly novel or burdensome. Investigating and verifying the credibility of witnesses and the believability of testimony and evidence is a task which they undertake every day in the regular discharge of their ordinary responsibilities, and we cannot conceive of any fair-minded prosecutor chaffing under these mandates. All due process demands here is that a prosecutor guard against the corruption of the system caused by fraud on the court by taking whatever action is reasonably appropriate given the circumstances of each case. The Attorney General's faulty decision and calculated course of non-action in this case deprived Bowie of the fair process that was his due under our Constitution before he could be deprived of his liberty.

N. Mariana Islands v. Bowie, 243 F.3d 1109, 1125 (9th Cir. 2001)

What follows are some ideas we have picked up from our own experience litigating snitch issues in the courts, reading the many cases about snitches, and from speaking with other attorneys experienced in this area. We hope this outline provides ideas and references to assist you in trying to expose the truth about the perjuring informant. There is also a fine on-line source of information at http://www.snitching.org/.

I. FINDING OUT BEFORE ITS TOO LATE IF THERE'S A RAT

A. Investigation Stage: Is there a snitch and who is it?

1. What kind of snitch?
- ☞ Accomplice/co-defendant?
- ☞ Confidential informant?
- ☞ Police plant?
- ☞ Jailhouse informant?
- ☞ Spy in the defense camp?

2. Interviewing Client & Others

3. *Caveat:* Joint Co-Counsel & Co-defendant Conferences

4. taking precautions with written agreements if a co-defendant turns out to be a snitch; *see* **In re Neely** 6 Cal.4th 901 (1993) (police lie about setting him up to take statements).

5. motion for prophylactic protective order

B. Discovery Motions Pretrial Standard:

People v. Coddington (2000) 23 Cal. 4th 529, 589-590 (at trial, favorable evidence must be disclosed, that is, "Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution.")

1. IDENTITY

a. Reveal the Informant (California)

i. Petitioner's right to a fair trial required the prosecution to disclose all evidence that was both favorable and material "either to guilt or to punishment" **Brady v. Maryland** 373 U.S. 83, 87 (1963).

ii. **Cal. Penal Code § 1041:** "Privilege for Identity of Informer" -- "... a public entity has a privilege to refuse to disclose the identity of a person who has furnished information... purporting to disclose a violation of the law... and to prevent another form disclosing such identity...."

iii. **Cal. Penal Code § 1042** is titled "Adverse Order or Finding: Open Court and in Camera Hearings; Excision and Disclosure orders:"

> (a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order of finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

iv. "It is of course, the defendant who bears "the burden...to make a sufficient showing that the unnamed informer does have information which would be material to the defendant's guilt. [Citations.] This burden is met only where the defendant demonstrates through `some evidence' [citation] that there exists a `"reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration"'" (**People v. Hardeman,** 137 Cal.App.3d 823, 828, 187 Cal.Rptr. 296 (1982), italics omitted.) *See also* **People v. Borunda**, 11 Cal.3d 523 (1974); **People v. Goliday**, 8 Cal.3d 771 (1973).

b. Reveal the Informant (Federal)

i. **Roviaro v. United States**, 353 U.S. 53, 60-61 (1957): A further

limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity *or the contents of this communication*, is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way. (Emphasis added.)

ii. **United States v. Ordonez,** 737 F.2d 793, 808-09 (9th Cir. 1984); **United States v. Tham**, 665 F.2d 855, 859 (9th Cir. 1981); **Lopez-Hernandez v. United States**, 394 F.2d 820, 821 (9th Cir. 1968.) If the informant's probable testimony "would bear a direct relationship on the defendant's asserted defense" disclosure is compelled. **United States v. McDonald,** 935 F.2d 1212 (11th Cir. 1991.)

iii. The duty extended "not only to matters of substance, but to matters relating to the credibility of government witnesses" (**United States v. Gerard**, 491 F.2d 1300, 1302 (1974), citing **Giglio v. United States**, 405 U.S. 150, 154 (1972); *accord* **United States v. Bagley**, 473 U.S. 667 (1985).) *See also* **United States v. Butler**, 885 F.2d 885, 889 (9th Cir. 1978) (prosecution revealed some but not all of the benefits witness was to receive for testimony); **United States v. Isgro**, 974 F.2d 1091 (9th Cir. 1992) (prosecutor withholds damaging transcript of a key witness' prior testimony).

iv. Request to have the confidential informant produced for an interview. **United States v. Montgomery** 998 F.2d 1468 (9th Cir. 1993). Government failed to produce informant prior to trial; conviction reversed where testimony was material and favorable to entrapment defense.

v. The in camera hearing must be fair. **Insyxiengmay v. Morgan,** 403 F.3d 657 (9th Cir. 2005)(in the state murder trial, the trial judge held an in camera hearing on a defense motion to disclose the confidential informant. The court excluded the defense counsel and defendant, and heard only from the police officer handler of the

informant. Further, the defense was not allowed to submit questions and the defense was precluded from mentioning the informant. The Circuit remanded for an evidentiary hearing holding the procedure employed was error.)

2. BACKGROUND OF THE INFORMANT

a. **People v. Cooper**, 94 Cal.App.3d 672 (1979) (failure to move for disclosure of informant's identity is ineffective assistance.)

b. In **United States v. Perdomo**, 929 F.2d 967, 969 (3rd Cir. 1991), an order denying a new trial was vacated because the prosecutor failed to disclose an informant's criminal record -- even though jury had "ample opportunity to evaluate the informant's credibility from other damaging testimony that had been elicited during trial concerning [his] receipt of government payments and his prior drug usage."

c. In **United States v. Sanfilippo**, 564 F.2d 176 (5th Cir. 1977), a conviction was reversed when the prosecutor failed to disclose the complete plea bargain for a witness' cooperation: "the government argues that [the witness'] prior convictions sufficiently impeached his credibility so that the plea agreement would add nothing. The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony. A jury may very well .... have reached a different decision as to whether [the witness] had fabricated testimony in order to protect himself against another criminal prosecution." (**Id**. at 178.)

d. In **United States v. Butler**, 885 F.2d 885, 889 (9th Cir. 1978), prosecutor held to have erroneously revealed some but not all of the benefits a witness was to receive for his testimony.

e. In **United States v. Brumel-Alvarez**, 976 F.2d 1235 (9th Cir. 1992), the drug conspiracy convictions of seven co-defendants were reversed because the government failed to disclose an internal DEA memorandum which showed that one of its agents thought the key informant was unreliable.

f. Prosecutor must make effort to find out impeaching information in possession of other agencies and can't turn a blind eye to what others know about the informant. In **Giglio v. United States**, 405 U.S. 150 (1972), the Supreme Court reversed a conviction where the prosecutor failed to disclose that a key witness had been promised he would not be prosecuted for his own crimes if he testified for the government. The prosecutor who had promised the witness immunity was not the one who actually tried the case. "Whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes to the Government [cite omitted]. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." (**Id.** at 154.)

See also **Santobello v. New York**, 404 U.S. 257, 262 (1971) ("inadvertence" no excuse for prosecutor's breach of plea agreement, because staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right had is doing' or has done.) *See also* **United States v. Partida-Parra**, 859 F.2d 629 (9th Cir. 1988) (guilty plea to misdemeanor entered after agreement with prosecutor who stood in for another prosecutor cannot be vacated simply because first prosecutor only offered a felony). The Court held that the failure of the original prosecutor to inform his superiors of the deal was irrelevant to the due process analysis.

g. **In re Jackson**, 3 Cal.4th 578 (1992): "Although the prosecutor testified at the reference hearing that at the time of trial he was personally unaware of the promises of assistance that had been made to the [informant] by members of the sheriff's and police departments, the governing federal decisions establish that the trial prosecutor's lack of personal knowledge of the false and misleading nature of a prosecution's testimony is not controlling."

h. In **Saulter v. Municipal Court**, 75 Cal.App.3d 231 (1977), the court of appeal held that the trial court erred in finding that federal

records were "unavailable" to a state prosecutor who had neither requested nor subpoenaed the materials. Whether this holding can withstand the newer California discovery statute, Penal Code section 1054 et seq, is open to question. See **People v. Superior Court (Barrett),** 80 Cal.App.4th 1305 (2000) (for in prison offenses, DA must obtain from the prison all materials related to the offense and **Brady** material; as for other matter in the possession of the prison, that may be obtained only through use of subpoena).

i. Other law enforcement agency files: Information in the hands of "closely connected" investigative agencies are imputed to the prosecutor as well. In **United States v. Bryan**, 868 F.2d 1032, 1036 (9th Cir. 1989), the defendant was the subject of a nationwide investigation by the Internal Revenue Service. The trial court refused to require the prosecutor to produce documents that were outside the District of Oregon. The appellate court held that a "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." The appellate court held it was unfair to deny the defendant documents which were accessible to the prosecution and remanded the case for a determination of materiality. Accord, **Kyles v. Whitley,** 514 U.S. 419, 437 **.** (1995); **In re Brown,** 17 Cal.4th 873, 879 (1998) (prosecutor is responsible for obtaining discovery and **Brady** material in the hands of the investigating agencies)

"[E]xtensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [the defendant's] lawyer was paid from state funds must be imputed to the federal team. We have little difficulty in concluding that the state investigators functioned as agents of the federal government [per **Giglio**]." (**United States v. Antone**, 603 F.2d 566, 570 (5th Cir. 1979)).

"If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This we decline to do." (**United States v.**

Auten, 632 F.2d 478 (5th Cir. 1980)).

"There is no suggestion in **Brady** that different 'arms' of the government, particularly when so closely connected as this one for the purposes of this case, are severable entities ..." (**United States v. Deutsch**, 475 F.2d 55, 57(5th Cir. 1973)).

j. **United States v. Brooks**, 966 F.2d 1500, 1502 (D.C. Cir. 1992): "In extending the **Brady duty to searches for evidence**, the 5th Circuit framed the matter as one of incentives for the government, arguing that without the extension "we would be inviting and placing a premium on conduct unworthy of representatives of the United States government. The 7th Circuit [**Carey v. Duckworth**, 738 F.2d 875, 878 (7th Cir. 1984)] has sounded a similar note, warning that a 'prosecutor's office cannot get around **Brady** by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.' The 3rd Circuit ... did not refer to incentives directly, although its observation that the U.S. Attorney's failure to check an obvious database for a key witness' criminal convictions `amounted to conduct unworthy of the United States Attorney's Office', **United States v. Perdomo**, 929 F.2d 967, 970-71 (3rd Cir. 1991).... "

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995) is the final word: The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

k. **No Ostrich Defense:** "Allowing the government to absolve itself on the basis of its counsel's asserted ignorance of the facts -- ignorance prompted by the government lawyers closing their eyes to facts which should have prompted them to investigate -- would be akin to allowing criminal defendants to avoid guilty knowledge by means of the ostrich defense [see **Jewell** instruction]. The same principle applies here to the government counsel's conduct, which is subject to a higher standard than that applicable to a criminal defendant." (**United States v. Burnside, et al.,** 824 F.Supp. 1215 (N.D. Ill. 1993); **United States v. Boyd**, 833 F.Supp. 833 (N.D. Ill 1993.)

People v. Martinez (2002) 103 Cal. App. 4th 1071; 127 Cal. Rptr. 2d 305 (Defendant worked in a lawyer's office and was convicted of embezzling funds he received from a client while the lawyer and the office manager were on vacation. Held: the prosecution failed to disclose that the manager had a criminal history, which included three felony convictions and a pending spousal abuse charge. Had the prosecution fulfilled its obligation at any stage of the proceedings, the pending charges against the manager would have been discovered and presented to the jury. Although the prosecution argued it did not know the manager had a record, the very same office was prosecuting him at the very same time the statement was made. Not only did the manager have criminal charges pending against him, but also his employer lawyer was representing him in that litigation until just before defendant's trial. Reversed.)

Prosecutors must Do More than Disclose Exculpatory Information – They must Fully Investigate Whether the Exculpatory Information Proves Their Snitches Are Indeed Lying to Save Themselves.

Commonwealth of Northern Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001). It's not enough for prosecutors to turn over exculpatory evidence without thoroughly investigating whether their witnesses are telling the truth. In this case the defendant was convicted of murder based on testimony of several accomplices. Prior to trial, a jailor found an unsigned handwritten note in the possession of one of the accomplices that said he was the true culprit and instigator of a plot with the other accomplices to frame the defendant. The prosecutor turned the letter over to the defense but did not determine who wrote the note and/or whether it was true. Even though defendant introduced the letter during his trial his conviction was reversed on due process grounds.

It Is Not Enough to Concede in Closing Argument That a Snitch Lied after Being Impeached by the Defense – Prosecutors Have a Duty to Correct Those Lies up Front. "All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, prosecutor, or

defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial .... the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false. Where the prosecutor knows that his witness has lied, he has a constitutional duty to correct the false impression of the facts ... By contrast, in this case, the prosecutor sat silently as his witness lied and sat silently as his witness evaded defense counsel's ineffectual cross-examination .... because the prosecutor delayed the correction until rebuttal argument, the defense could no longer explain why the lie .... was important." **United States v. LaPage,** 231 F.3d 488, 492 (9th Cir. 2000).

l. "When a police statement misleads the defense into believing that evidence will not be favorable, the State cannot thereafter argue that it was a waiver not to request it. A defendant cannot have waived more than what he knew existed." (**Freeman v. State of Georgia**, 599 F.2d 65, 71-72 (5th Cir. 1979)).

m. Nor is the prosecutor absolved of the responsibility to turn over material favorable evidence if the defendant might have uncovered it through independent sources. (*See* **United States v. Shaffer**, 789 F.2d 682, 690 (9th Cir. 1986) (tapes disclosed to co-defendant were not "effectively" disclosed to defendant because "trial strategies of co-defendants often conflict" and government may not "satisfy its due process requirements to each of several defendants by merely giving exculpatory evidence to one defendant".)

n. "The fact that the government seeks in bad faith to suppress certain evidence indicates that such evidence may indeed be material. We are doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial. In short, the existence of bad faith is merely a factor a court may consider in making its materiality determination." (**United States v. Jackson**, 780 F.2d 13051, 1311, n 4 (7th Cir. 1986).)

o. **Carriger v. Stewart**, 132 F.3d 463 (9th Cir. en banc 1997) (denial of fair trial for the State to put on witness who was a career burglar, six time felon

with long record and not to turn over all information bearing on the credibility of the witness.)

p. **U.S. v. Sudikoff,** 36 F.Supp.2d 1196 (1999) (excellent summary of pre-trial discovery right to gain access to all information concerning the deal and proffers between the government and the cooperating witness.)

II. WHAT TO DO WHEN YOU KNOW HE/SHE IS A SNITCH

A. GETTING EVERY SCRAP OF INFORMATION

Get everything and don't throw anything away even if it doesn't seem helpful at first. Documents will become significant later on when you start putting everything together.

B. COLLECTING IMPEACHMENT INFORMATION: PUBLIC RECORDS

1. Rap sheets -- the demise of PC 11105(b)(8) (Request for Criminal History Information From the AG.)
See also **People v. Roberts**, 2 Cal.4th 271, 307-08 (1992).

2. Checking court records: Court files of cases are always available unless destroyed. Thus, probation reports are open public records of a limited period of time; thereafter, may be obtained by motion pursuant to Penal Code § 1203.05(b.) And be sure to check out the 1203.01 recommendation of the DA and Judge which is sent to CDC within a few weeks of sentencing. It may be illuminating to show the temporal differences in attitude of the DA toward the informant (i.e., pre- and post-snitching).

a. **Millaud v. Superior Court**, 182 Cal.App.3d 471, 476-77, 227 Cal.Rptr. 222 (1986) (defendant has a right to discover the *probationary status* of prosecution witnesses in order to reasonably prepare a defense.)

b. In **United States v. Strifler**, 851 F.2d 1197 (9th Cir. 1988), the court held that a "defendant is entitled to material in a probation file that bears on the credibility of a significant witness in the case." (**Id.**

at 1201.) The probation file in question contained not only information with which the defendant could have cross-examined the witness, but the witness' complete criminal record. The court held that "the criminal record cannot be made unavailable by being made part of the probation file." (**Id.** at 1202.) See also **United States v. Alvarez,** 358 F.3d 1194 (9th Cir. 2004) (accord, remand for in camera inspection.)

c. *See also* **Moore v. Kemp**, 809 F.2d 702 (11th Cir. 1987) (the prosecutor declined to disclose informant's probation file claiming it was "confidential." Because this file contained the informant's entire criminal history which had not otherwise been disclosed, the court ordered habeas evidentiary hearing on **Brady/Giglio** issue.)

3. Interviews with arresting law enforcement officers, jail and prison guards.

a. Prior unreliability as an informant is admissible to attack the informant's credibility. (**People v. Mickle,** 54 Cal.3d 140, 168(1991).) See **United States v. Brumel-Alvarez**, 976 F.2d 1235 (9th Cir. 1992) (reversing for failure to turn over such impeaching evidence); **In re Pratt,** 69 Cal.App.4th 1294 (1999) (favorable suppressed evidence included impeaching information pertaining to police informant who testified against the defendant and denied his extensive informant role).

4. What the Agents Have on the CI That Won't Be Disgorged Voluntarily. Whether the witness was a professional police informant, even if considered reliable: **In re Pratt** (1999) 69 Cal.App.4th 1294 [Habeas petition granted when prosecution failed to disclose key witness' informant status with the police. Witness' informant status would have provided "potentially devastating cross-examination" by exposing "possibly more significant motivations" for the informant to "to identify Pratt as the killer, such as a desire to extricate himself from his own legal difficulties and/or to *ingratiate himself with prosecution and law enforcement agencies in Los Angeles on an ongoing basis for his own personal benefit*." (**Id.** at 1311, emphasis added.)]

a. **The Informants File** May Contain: pay records, notes on deals,

dates of cooperation, cooperation agreements, notes on his/her lack of credibility (lies, *etc.*)

i. **United States v. Deutsch,** 475 F.2d 55, 58 (5th Cir. 1973) (compelled disclosure of postal employee's personnel file where evidence failed to negate his disciplinary problems); **United States v. Garrett**, 542 F.2d 23, 26 (6th Cir. 1976) (reversing conviction for failure to allow examination of agent's disciplinary records.)

ii. *Caveat:* The payment may be "off the books," or the informant may get money for work which, although on the books for another case, is in actuality on the present case. The ways the informant's benefits can be "laundered" are almost limitless so be imaginative in discovery and investigation.

iii. In **Barbee v. Warden, Maryland Penitentiary**, 331 F.2d 842 (4th Cir. 1964), the court held that the prosecution is liable for the nondisclosure of exculpatory evidence in the hands of the police. "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. `The cruelest lies are often told in silence.'" (**Id.** at 846.)

iv. In **United States ex rel. Smith v. Fairman**, 769 F.2d 386, 391 (7th Cir. 1985), a new trial was granted after the prosecutor failed to disclose a police officer's firearm report which showed the defendant's gun was inoperable, thus casting doubt on the credibility of two other police officer witnesses. The prosecutor claimed to be ignorant of the report, but the court held "[w]e believe the purposes of **Brady** would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are

responsible for the nondisclosure."

v. **Killian v. Poole,** 282 F.3d 1204 (9th Cir. 2002) (undisclosed letters, one that showed the chief prosecution witness may have lied to protect his wife, another admitting he was "lying his ass off" for the prosecution, and a third sealed letter from the prosecutor to the court that was to sentence the prosecution witness asking for leniency as reward for cooperating, constituted exculpatory evidence that should have been disclosed.)

5. School records (may be privileged; interviews)

6. Employment records (Subpoena & interviews)

7. Health Records

a. Evidence of mental health problems should be discoverable since it goes to credibility (**United States v. Lindstrom**, 698 F.2d 1154 (11th Cir. 1983.) *But see* the **People v. Hammon**, 15 Cal. 4th 1111 (1997), which states there may be no right to *pre-trial* discovery of the material (as opposed to a showing at the trial.)

b. It's a privilege to be overcome. Even where statutory privileges have appeared to prevent discovery, the right to due process and a fair trial has been held to outweigh the privileges involved. In **Hammarley v. Superior Court**, 89 Cal.App.3d 388 (1979), these rights outweighed the newsman's privilege (Evid. Code, § 1070). In **United States v. Nixon**, 418 U.S. 683 (1974), such rights were held to outweigh a claim of executive privilege. **People v. Reber**, 177 Cal.App.3d 523, 530-533 (1986),[7] certain types of mental disorders are highly probative on the issue of a witness' credibility" may overcome psychotherapist-patient privilege. Also crime/fraud exception to any privilege which could be argued as when the snitch's statements are in furtherance of a crime (perjury, obstruction of justice), *see generally* **United States v. Zolin**, 105 L.Ed.2d 469 (1989). In **Vela v. L.A. Superior Court**, 208 Cal.App.3d 141 (1989),

[7] To the extent these cases permit unconditional *pre-trial* reviews, they are overruled by **People v. Hammons,** 15 Cal. 4th 1117, 1123-1128 (1997).

two murder suspects' rights to confrontation were held to outweigh a city attorney's privilege not to reveal statements made by percipient witness city police to the city's investigators.

8. Family history and records (Subpoena & interview)

a. Spouses, and particularly ex-spouses may be sources of valuable information.

b. Check court records for divorce file.

9. Financial Records (*caveat:* some are privileged)
Tax records (informers claim)

10. Neighbors, friends and acquaintances (Interviews)

11. Computer Data Base Investigation of Public Records

a. Records of: property ownership; worker's compensation; criminal history; corporate records, Uniform Commercial Code Claims, tax liens, partnership filings, fictitious owner records.

b. In **United States v. Perdomo,** *supra*, 929 F.2d 967, 970 (prosecutor cannot claim ignorance of informant's criminal record by declining to check local records which are not contained in the NCIC. "The prosecutor was obliged to produce information concerning [the informant's] background because such information was available to him.")

12. State Public Records Act & FOIA

a. Its preamble declares "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov't Code § 6250.) **Times Mirror Co. v. Superior Court**, 53 Cal.3d 1325 (1991).

b. The Act was modeled on its federal predecessor, the Freedom of Information Act (5 U.S.C. § 552 et seq.; FOIA). But in **Williams v. Superior Court**, 5 Cal.4th 337 (1993), the Court limited access to law enforcement investigatory files even following the termination of the investigation.

13. Previous court testimony

a. **Bagley v. Lumpkin,** 798 F.2d 1297, 1301 (9th Cir. 1986) ("lies under oath to conceal bias and prejudice raise the impeachment evidence to such a level that it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial.")

b. The importance of discovery of such statements cannot be underplayed and prosecution "failure to disclose the witnesses statement operated as a deprivation of due process requiring that the charges be dismissed." (**People v. Mackey**, 176 Cal.App.3d 177, 187 (1985).)

c. **United States v. Cohen**, 888 F.2d 770,776-777 (11th Cir. 1989) (conviction reversed due to trial court's exclusion of Fed. R. Evid. 404(b) evidence that informant concocted previous fraudulent scheme.)

d. **Pickard v. Department of Justice,** 653 F.3d 782 (9th Cir. 2011). DEA could not refuse to confirm or deny the existence of records on a CI during a FOIA request proceeding because his identity as a CI had been "officially confirmed" within the meaning of FOIA. DEA had "officially confirmed" the CI's role when the government elicited testimony from him about his status in "open court in the course of official and documented public proceedings."

14. Prosecution records of previous cases involving the informant.

a. These should be subject to the subpoena power. *See, e.g.,* **Shepherd v. Superior Court**, 17 Cal.3d 107 (1976). **Shepherd** is a civil case involving a wrongful death action against the city of

Emeryville and certain police officers. The Alameda District Attorney attempted to resist a plaintiff's subpoena for information dealing with his own investigation of the shooting. The Supreme Court found there was no: "authority holding that a public prosecutor -- having completed his investigation and having announced, after failing to obtain an indictment, that no further action would be taken by him -- is entitled to rely upon the work product doctrine when the fruits of his investigation become relevant to civil litigation to which he is not a party. The district attorney is not an `attorney' who represents a `client' as such. He is a public officer, under the direct supervision of the Attorney General . . . . the extent to which the fruits of his investigation are entitled to confidentiality is governed entirely by provisions governing official information. (at 122.)[8] But see **People v. Superior Court (Barrett)** (2000) 80 Cal.App.4th 1305 (Penal Code section 1054 seems to make discovery motion the vehicle to obtain information from DA files).

15. Cellmates: past and present (Interview)

16. Civil Suit followed by depositions: *E.g.*, False Claims Act (31 U.S.C. §3729), or *qui tam* suits: Is there such a "**whistleblower** suit" These are allowed to be filed "under seal" by the whistleblower until the Government investigates the claim to determine if it wishes to take it over. Such a suit could make the "informant" witness a direct financial beneficiary on the outcome of the case. This area poses special problems when several whistleblowers combine in an agreement so that only one sues (who the Government does not call as a witness) but where there is an agreement to share in proceeds.

---

[8] The Court, at page 123, went on to point out that Evidence Code section 1040 is the exclusive means by which a public entity may assert a claim of privilege based on the necessity for secrecy (citing **Pitchess v. Superior Court, supra** at 540). The Court then suggested that upon a claim of official privilege, the trial court assess whether any of the information was acquired in confidence which may subject it to section 1040; all items not falling into this category should be ordered produced; those items which were obtained in confidence must then be examined to determined if their disclosure is against the public interest. If not, they too should be disclosed. (See 17 Cal.3d. 128).

17. Forfeiture- Monetary Benefits. There are statutes which give direct financial benefits to informants. *E.g.*, 19 U.S.C. 1619, says that the informant can receive up to 25% of seized goods value on a U.S. Customs bust. This is an area of inquiry since the value of informing can at times be tremendously lucrative.

Note: It is against the law in California for law enforcement to give money (over $50) to an in-custody informant. Penal Code § 4001.1 states:

(a) No law enforcement or correctional Official shall give, offer, or promise to give any monetary payment in excess of fifty dollars ($50) in return for an in-custody informant's testimony in any criminal proceeding. Nothing contained herein shall prohibit payments incidental to the informant's testimony such as expenses incurred for witness or immediate family relocation, lodging, housing, meals, phone calls, travel, or witness fees authorized by law, provided those payments are supported by appropriate documentation demonstrating that the money was used for the purposes for which it was given.

18. Performance Bonus Following Testimony. In **U.S. v. Cuellar**, 96 F.3d 1179 (9th Cir. 1996), the court upheld a conviction despite the snitch being given an enormous $400,000 payment bonus after he testified. He got $180,000 prior to trial. The court held that the jury knew about the first payment, but said that the snitch did not know how much he was going to be given after trial so it could not have been a big deal with the jury. The court also held that paying an informant based on a "bounty" (a percentage of laundered funds he helped find or for "results") was not outrageous government conduct.

19. Immigration Benefits: the permanent residence bonus
"S" Visas are given to persons illegally here for cooperation. The visa gives them three years to be here. If the cooperation is good enough, the government can give permanent residence. *See* Crooker, "The `S` Stands for Snitch," p. 29, November 1997 NACDL **Champion.** *See* **U.S. v. Blanco,** 392 F. 3d 382 (9th Cir. 2004) (failure to disclose snitch's immigration status and benefit warrants remand).

20. The Snitch's Attorney Discussions? **People v. Mincey** (1992) 2 Cal.

4th 408, 463:“To the extent defense counsel's questions related to Sandra B.'s understanding or state of mind [based on discussions with her attorney about deals], the trial court erred in upholding her assertion of the attorney-client privilege. Such questions are properly addressed to bias, because a witness's belief that his or her testimony will result in a lenient sentence is relevant to the witness's credibility.” See also **Vela v. Superior Court** (1989) 208 Cal. App. 3d 141, 150-151: “Here, the City seeks to protect from disclosure written statements of the very police officers whose trial testimony will be necessary to prove the criminal charges filed against the defendants. In such circumstances adherence to a statutory attorney-client privilege must give way to pretrial access when it would deprive a defendant of his constitutional rights of confrontation and cross-examination.”

C. INVESTIGATE THE PROSECUTOR'S CONDUCT WITH THE SNITCH (AND PAST DEALINGS WITH SNITCHES)

1. You can be sure that YOUR interaction with a government snitch will be subjected to the most intense scrutiny (a matter discussed *infra*), especially if the snitch recants to you. By the same token, you must investigate the prosecutor's interaction (present and past) with the snitch(es) to determine if there was misconduct with the snitch in your case or if there is a pattern of **Brady** violations or other misconduct with snitches.

2. A public prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done .... [i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." **Berger v. United States**, 295 U.S. 78, 88 (1935).

3. Only has **qualified immunity** for participating in a criminal investigation because no longer acting as an advocate, **Buckley v. Fitzsimmons,** 509 U.S. 259 (1993). If the prosecutor is directly involved in recruiting, helping snitch to fabricate evidence, this

exposes him or her to civil liability.

4. **Circumstantial evidence** may be used to prove misconduct: "We are hesitant to accept the categorical assertion that the existence of such misconduct will always be so manifested ... [T]here is contemporaneous evidence of prosecutorial interference. It is true that the record contains no direct evidence. The absence of such evidence is not crucial: **it is likely that on at least some occasions a prosecutor who engages in such misconduct does so -- either by chance or by design -- off the record ....** But even though the record contains no direct contemporaneous evidence of prosecutorial interference, it does contain circumstantial evidence -- *i.e.*, evidence from which the existence of such misconduct can be inferred." (**In re Martin**, 44 Cal.3d 1, 33 (1987).)

5. "We have decided on balance not to prohibit, as some have suggested, the practice of rewarding self-confessed criminals for their cooperation, or to outlaw the testimony in court of those who receive something in return for their testimony. Instead, **we have chosen to rely on the integrity of government agents and prosecutors, not to introduce untrustworthy evidence into the system."** If an evidentiary hearing reveals "egregious wrongdoing by government" with respect to the informant, the district court is not foreclosed from "dismissing the indictment for outrageous government conduct." (**United States v. Bernal-Obeso**, 989 F.2d 331 (9th Cir. 1993).)

6. "As a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information. **The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment.**" (**Imbler v. Pachtman**, 424 U.S. 409, 431, n.34 (1976).)

7. General areas of inquiry -- by interviews, motions, or informal letter.
a. How often does this prosecutor employ jailhouse snitches or other type informants?
b. What type of training in handling snitches?
c. Did the prosecutor meet with the snitch alone?

d. What about prosecutor's agents -- are they big on informants as well?
e. Any State Bar complaints with respect to witnesses in past?

III. DEALING WITH THE SNITCH -- CAVEAT: PROTECT YOURSELF

Anytime a case involves a snitch, one level of the trial will be matching the integrity of the defense with the depth to which the prosecution will sink in order to get a conviction. This is a battle in which the defense must seek to capture and maintain the moral high ground. Therefore, in these cases, perhaps more than any other, the defense must at all times be very sensitive to insuring that it is not only doing the right thing, but appears to be doing the right thing as well. This is not easy when dealing with a snitch.

A. Professional ethics: If the snitch is currently being represented by a lawyer, ethical rules forbid communication with the witness **about the particular matter he is being represented for** (Rule 4.2 of the ABA "Model Rules of Professional Conduct and Code of Judicial Conduct"). *See* Rule 2-100 of the California Rules of Professional Conduct (similarly worded).

1. "In the matter." Obviously, the snitch is either not represented by a lawyer, or if he is, it does not concern the matter you are investigating. So if the snitch is being represented for, say, drunk driving, and you want to discuss a homicide, you may question him/her without violating the ethical code. *Compare* **U.S. v. Balter**, 91 F.3d 427 (3rd Cir. 1996), and **U.S. v. Powe**, 9 F.3d 68 (9th Cir. 1993), both holding that prosecutors may interview represented witnesses in cases which are pre-indictment without running afoul of ethical rules because there is no "matter." The same should apply to the defense interviews. *See* **Grievance Committee v. Simels,** 48 F.3d 640 (2nd Cir. 1995)(reversing a censure order by narrowly construing "represented party in the matter")

2. In the interview, do not give legal **advice.**

3. Note: if you contact the snitch's attorney, don't hesitate to interview him or her about the facts of the case. You have a right to interview all relevant witnesses and the snitch's attorney may provide

helpful information. *See* **Wharton v. Calderon**, 127 F.3d 1201 (9th Cir. 1997) (holding that a district court has no power to stop witness interviews by attorneys for one side or the other -- there, the State wanted to interview previous defense attorneys for the capital defendant then pursuing habeas corpus on an ineffective assistance of counsel claim.). **United States v. Cadet**, 727 F.2d 1453, 1469 (9th Cir. 1984) ("Witnesses . . . are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.")

B. Recantations will be officially viewed as highly suspicious; you also might find yourself in the no win position of trying to show the snitch is a pathological liar yet simultaneously telling the truth in his recantation. A recantation can, of course, be used to show that the snitch is inherently unreliable -- if he's willing to change his story he's not trustworthy and you can never tell when he's telling the truth.

C. Big concern: **Protect yourself** when you obtain a statement, be it a recantation or just a revelation about undisclosed benefits.

☞ **Never ever interview a snitch by yourself** (various professional standards caution, for good reason, attorneys from interviewing witnesses alone. *See* **Maniscalco v. Superior Court**, 234 Cal.App.3d 846, 850, fn. 9 (1991) ("...that a defense attorney in a capital case would confide her client's life to her own imperfect and mortal memory is truly astonishing .... Moreover, when an attorney interviews someone alone without a tape recorder, she is in the intolerable position of being unable to impeach the witness without facing potential recusal. Thus, Harrold appears to have unconscionably risked Maniscalco's defense and the public's investment in her efforts.") *See also* **People v. Jackson**, 187 Cal.App.3d 499, 509-510, 231 Cal.Rptr. 889 (1986).

☞ Every snitch knows that if you talk to him/her **alone** you are either very naive or a fool. This rule holds true even if the snitch is just being consulted as an expert and had nothing to do with your particular case. They will burn you later and it will be your word against the snitch. Some judges may believe the snitch.

D. There is a great danger that after giving a statement to you, the prosecution will go after the witness and intimidate him or her to "roll over" and deny the *bona fides* of the statement given to your investigators -- or worse yet claim that you bribed and/or threatened the snitch to make the statement. You must protect yourself and the credibility of the statement taken by showing that your team took every measure to insure it was honestly given by the witness. Also, you must show that the statement you are taking is reliable so that if the snitch later takes the Fifth Amendment when called to testify, you can use the previous statement against interest. *See* **Luna v. Cambra**, 306 F.3d. 954, 965 (9th Cir. 2002). Some suggestions on the *ideal* approach follow.

1. Send two investigators to conduct the interview. They should be well prepared on the case and reminded to be candid about their role in the case in dealing with the informant.

2. If you go, be with one of the above.

3. Put the informant's statement in writing on the spot.

4. Have the witness initial every ¶.

5. Put in a ¶ that the witness is of sound mind, not on drugs or alcohol, is speaking freely and voluntarily, and that no rewards or promises have been offered or given, and no threats made.

(*And this all better be true.*)

6. As this is being written, have one investigator make notes of the informant's behavior that demonstrate sobriety, lack of fear, and the truthfulness of the witness's statement.

7. Just prior to the witness signing, pull out a tape recorder, and state: "to protect us both as to the accuracy of this, I want to tape our going over it." Then tape it and get him to speak as much as possible to show the voluntariness and the truthfulness of the statement.

8. At the end of the meeting, following the signature, the witness

should be committed to his statement. Suggest that it may be necessary to take a more official statement again with a court reporter.

9. Try to arrange that interview on the spot for the next day, or as soon as possible.

10. Take a video court reported statement as soon as possible.

E. No Duty to Warn: Counsel have a duty not to mislead a witness so as to obstruct justice (18 U.S.C. sections 1503-1512), or to advise a witness to leave the area or pay for testimony (**California Rules of Professional Responsibility,** Rule 5-310), but have **no** affirmative duty to advise as to constitutional rights prior to or during an interview. (**De Luca v. Whatley**, 42 Cal.App.3rd 574 (1972).) In fact, so advising a witness may be contrary to the client's interest and would place defense counsel in the impossible position of owing conflicting duties to his or her client *and* any witness who might have helpful evidence for the client (but adverse evidence as to himself). *See* **California Rules of Professional Conduct,** *Rule* 3-300 (re Avoiding Adverse Interests) and Rule 3-310 (Avoiding the Representation of Adverse Interests). See article discussing this issue in detail in **CACJ Forum,** Sevilla, "Defense Counsel Has No Duty to Destroy Evidence of His Client's Innocence," Vol. 22, No. 4 (1995).

IV. COLLATING THE INFORMATION FOR AREAS OF ATTACK

A. NINE GENERAL AREAS TO IMPEACH THE INFORMANT:

1. His memory (does he have a bad memory?)

2. His perception of events (under the influence of drugs at the time?) (Government was required to disclose that a cooperating witness failed a drug test shortly before testifying. **United States v. Simmons**, 964 F.2d 763 (8th Cir. 1992)). *See also* **Burnside, supra** at 129, relying on **Jacobs v. Singletary**, 952 F.2d 1282, 1289 (11th Cir. 1992)) (evidence of drug usage "would have provided the defense with more than merely insignificant supplemental support for cross-examination.")

3. His ability to communicate what he recalled perceiving (mistaken interpretations, inarticulate during testimony but written report of agent has him being extraordinarily eloquent)

4. His competency (no personal knowledge, mental defect, disorder or insanity)

5. **Bias, interest, prejudice** (the motherlode of cross-examination)

"The district court's refusal to permit cross-examination of the [government's witness] on his alleged post-plea drug activities deprived the jury of important information on [his] possible bias." **United States v. Ray**, 731 F.2d 1361,1365 (9th Cir. 1984) (reversal for abuse of discretion). *See also* **United States v. Atherton**, 936 F.2d 728, 733 (2d Cir. 1991) (quoting **United States v. Schwab**, 886 F.2d 508, 511 (2nd Cir. 1989)) ("It is true that when evidence of a witness' prior misconduct is properly offered to show bias, that evidence 'is not limited by the strictures of Rule 608(b)'.") *See also* **United States v. Costa**, 947 F.2d 919 (11th Cir. 1991); **United States v. Calle**, 822 F.2d 1016 (11th Cir. 1987).

United States v. Schoneberg, 396 F.3d 1036 (9th Cir. 2005)(defense not allowed to cross-examine former co-conspirator and cooperator about effect of a possible sentence reduction after he testified violated Sixth Amendment right to cross-examine, requiring reversal. See especially Judge Kleinfeld's comments about the “two trials” that go on when a cooperator testifies for benefit – one trial for the defendant before the jury, and the other before the prosecutor for the cooperator.)

6. Prior inconsistent statements

7. Prior convictions (**People v. Wheeler** (1992) 4 Cal.4th 284 (right to impeach a witness with evidence of misdemeanor conduct); **People v. Steele** (2000) 83 Cal. App. 4th 212, 222 (Court should have allowed impeachment of prosecution witness with prior misdemeanor conduct of providing false information to the police).

8. Negative character for truthfulness

9. Bad acts showing lack of truthfulness

B. MOTIVATION TO MAKE A CASE: His/her criminal exposure & the "deal" or for money or other rewards (percentage of seized goods, being on the government payroll, avoiding forfeiture of property) or bias against the defendant.

1. *Getting the Full Understanding:* The "wink and nod" understanding is not okay (some prosecutors may try to get around **Giglio** this way); try to elicit informant's expectations even if no official deal; also ask on discovery if policy of prosecutor's office is not to make deal until after witness has testified.

"[I]t is the witness' subjective expectations, not the objective bounds of prosecutorial influence, that are determinative. Impeachment by showing improper motive depends on the witness state of mind; the actual power of the authorities to aid or harm him is not conclusive." **People v. Coyer**, 142 Cal.App.3d 839, 843 (1983); *see also* **People v. Ruthford**, 14 Cal.3d at 493-404 (1975) (implied promises must be revealed not just explicit promises).

2. In **Campbell v. Reed**, 594 F.2d 4 (4th Cir. 1979), and **Wilhoite v. Vasquez**, 921 F.2d 247 (9th Cir. 1990), the informants were deliberately kept ignorant of what the prosecutor would actually do for them prior to testifying. The practice was condemned in both cases as a violation of the constitutional mandate of **Giglio:**

"The fact that [the informant] was not aware of the exact terms of the plea agreement only increases the significance for purposes of assessing credibility, of his expectation for favorable treatment ... a tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor." (**Campbell v. Reed,** *supra* at 7-8).

"Prosecutors must not do indirectly what the law absolutely forbids them to do directly, *i.e.*, dress up a witness with false indicia of credibility. This is inconsistent with a system of justice that expects

integrity from prosecutors, not cheap tricks designed to skirt clear responsibilities. I see no possible permissible purpose to be served by secret side deals with witnesses' attorneys. If we were to sanction such a practice, its existence quickly would become known, and it might become widespread. Eventually it could become internalized. A prosecutor's whisper to a witness' attorney might become a wink to the witness. Witnesses might testify safe in the knowledge they could receive more than promised, and defendants could systematically be deprived of a basis for impeachment." (**Wilhoite v. Vasquez**, *supra* at 251, Trott concurring.)

3. People v. Phillips, 41 Cal.3d 29, 47-48 (1985) (failure to specify benefits to be received before a criminal witness testifies deprives the jury of critical information needed to evaluate credibility. Additionally, the witness "may be so influenced by his hopes an fears that he will promise to testify to anything desired by the prosecution" in order to obtain the desired benefit.) *See* **Phillips v. Woodford,** 267 F.3d 966 (9th Cir. 2001) discussing prosecutorial hiding the ball on the "deal" with the snitch and criticizing the snitch defense attorney if she did not communicate a deal to the snitch so that the latter could have "denialability" on the witnesses stand.

C. UNDERMINING HIS/HER CREDIBILITY

1. **Reputation as a liar.** **Mesarosh v. United States**, 352 U.S. 1 (1956) (convictions reversed when it was revealed that government informant told numerous lies about his background in subsequent trials; United States Supreme Court said that informant's reputation as a liar "tainted" any conviction obtained with his testimony):

"The question of whether his truthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to

accord petitioner a new trial. (**Id.** at 9.)

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions . . . the government of a strong and free nation does not need convictions based upon such testimony." (**Id.** at 14).

Accord, **Communist Party of U.S.A. v. Subversive Activity Control Board**, 351 U.S. 115, 124 (1956):

"[I]t does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceeding, their testimony in this proceeding is inevitably discredited ...."

2. Prior Bad Acts (perjury, false claims, thefts, betrayal); keep in mind that after **People v. Wheeler**, 4 Cal.4th 284 (1992), any bad act reflecting dishonesty is useful for impeachment.

D. CROSS-EXAMINATION AND PROP. 8

1. Cal. Const., art. I, §28, subd. (d)), the "Right to Truth in Evidence" provision of Prop. 8 passed in June of 1982, effected a *pro tanto* repeal of a number of Evidence Code sections which formerly excluded relevant evidence. Included in this category were sections 786, 787 and 790, which were deemed nullities, at least to the extent they excluded evidence of a witness's conduct offered to attack or support the credibility of the witness. **(People v. Harris**, 47 Cal. 3d 1047 (1989).)

2. This eradication of several Evidence Code exclusionary rules opens the door even wider to attacking the bad character of the informant either in cross or in putting on affirmative bad character evidence. In **People v. Wheeler**, 4 Cal.4th 284, 291 (1992), the Court made it clear that all relevant evidence is admissible and that the statutory and judge-made exclusionary rules were repealed by

Proposition 8:

"We and the Court of Appeal have consistently held that in criminal proceedings, section 28(d) supersedes all California restrictions on the admission of relevant evidence except those preserved or permitted by the express words of section 28(d) itself. (**People v. Mickle** (1991) 54 Cal.3d 140, 168; **People v. Harris,** supra, 47 Cal.3d 1047, 1080-1082, 1090-1091; **People v. Taylor** (1986) 180 Cal.App.3d 622; see **In re Lance W.** 1985) 37 Cal.3d 873.)"

Harris and **Mickle**, both *supra*, employed this reasoning to conclude that statutory prohibitions on impeachment with conduct evidence other than felony convictions (see Evid. Code, §§ 787, 788) no longer apply in criminal cases. In **Harris**, we held that section 28(d) renders evidence of prior reliability as a police informant admissible to attack or support a witness's credibility. (47 Cal.3d at pp. 1080-1082) In **Mickle,** we noted that a jailhouse informant's threats against witnesses in his own case implied dishonesty and moral laxity. Hence, we ruled, the threats were relevant and admissible to impeach him under section 28(d) (54 Cal.3d at p. 168.)"

V. GROUNDS FOR DISMISSAL

A. THE SPY IN THE DEFENSE CAMP:

1. **Barber v. Municipal Court**, 24 Cal.3d 742 (1979), discusses the appropriate sanction when law enforcement agents secretly operated in an undercover capacity to invade confidential attorney-client meetings.

a. In **Boulas v. Superior Court**, 188 Cal.App.3d 422, 233 Cal.Rptr. 487 (1986), the court held that the district attorney's intentional tampering with the defendant’s right to counsel of choice was highly improper, and presumptively a prejudicial denial of a fundamental right. The court further held that dismissal was the only remedy to effectively serve as a deterrent against such conduct by government authorities in the future, and that mere suppression of evidence would, in addition to being ineffective as a deterrent, also not serve to cure

the potential prejudice to petitioner's rights. *See also* **Morrow v. Superior Court**, 30 Cal.App.4th 1252, 36 Cal. Rptr. 2d 210 (1994) (DA eavesdropping on A-C conversation cause for dismissing the prosecution); se*e also* **People v. Moore**, 57 Cal.App.3d 437, 441 (1976) (upholding dismissal for prosecution interference with attorney-client relationship).

2. The spy may be a co-defendant: In **United States v. Levy**, 577 F.2d 200 (3rd Cir. 1978), the Court of Appeal faced a situation in which one of two co-defendants in the case was a government informant who secretly revealed confidential information to DEA Agents. In searching for an appropriate remedy for this Sixth Amendment violation where confidential information was disclosed, the court found dismissal the only appropriate sanction to remedy the violation: "Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society" (**id**. at 208-209); **United States v. Peters**, 468 F.Supp. 364, 366 (S.D. Fla. 1979).)

a. *But see* **United States v. Lopez,** 4 F.3d 1455 (9th Cir. 1993)(to justify dismissing a valid indictment when prosecution had contact with defendant without counsel's knowledge, "the government's conduct must have caused substantial prejudice to the defendant and been flagrant in disregard for the limits of appropriate professional conduct.")

b. Prophylactic measures

i. The joint defense conference contract and litany.

ii. The motion to prevent exploitation of cooperating co-defendants by the Government.

B. OUTRAGEOUS GOVERNMENT MISCONDUCT OR ENTRAPMENT

1. "[O]utrageous prosecution misconduct," when found would, according to then-Justice Rehnquist in **United States v. Russell**, 411

U.S. 423, 431-2 (1973), "absolutely bar the Government from invoking judicial processes." The sanction would be dismissal of the indictment prior to trial. It is to be distinguished from dismissals based upon the court's inherent supervisory power (*see* distinction noted in **United States v. Simpson,** 813 F.2d 1462, n. 2 (9th Cir. 1987)(use of female "undercover" informant to develop sexual affair against defendant not "outrageous" enough to warrant dismissal).

2. "The Due Process Clause' inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express notions of justice .... so rooted in the traditions and conscience of our people as to be ranked as fundamental .... [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is **conduct that shocks the conscience**." (**Rochin v. California**, 343 U.S. 165 (1952)).

3. "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." (**United States v. Bogart**, 783 F.2d 1428, 1436 (9th Cir. 1986), quoting **Olmstead v. United States**, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

4. In **Bogart** the Ninth Circuit held that the indictment should be dismissed if, after an evidentiary hearing, it was proven that the government engaged in a vindictive and deliberate scheme to secure

the defendant's conviction at any cost. The court also noted that in "each of the cases in which an outrageous conduct defense has succeeded, the government essentially manufactured the crime by using informants to entrap unwary and otherwise law abiding citizens," (**Id.** at 1436, *see e.g.*, **Green v. United States**, 454 F.2d 783 (9th Cir. 1971); **United States v. Twigg**, 588 F.2d 373 (3rd Cir. 1978); and **United States v. Batres-Santolino**, 521 F. Supp. 744 (N.D. Cal. 1981)).

5. Prosecutor's false statement in closing argument regarding an informant [and supervisor's failure to acknowledge falsehood] might be grounds to "dismiss the indictment with prejudice as a sanction for the government's behavior." (**United States v. Kojayan,** 8 F.3d 1315 (9th Cir. 1993).

6. In **United States v. Cuellar,** 96 F.3d 1179 (9th Cir. 1996), the court upheld the paying of a contingent fee of laundered money to an informant for making cases as not being outrageous conduct. This case was aggravated because after he testified and the defendant was convicted, the informant received a $400,000 bonus for his cooperation (after receiving $180,000 prior to testifying). The court held that the jury knew he would get a bonus of some sort, although not how much. This was "good enough."

7. The California standard of objective entrapment law established in **People v. Barraza,** 23 Cal.3d 675 (1979), sets forth a form of equitable estoppel in that the Government is precluded from convicting based upon its offensive behavior in luring the otherwise law-abiding citizen into criminal behavior. The focus here is on the police behavior which lures a person into committing a criminal offense.

C. ACCOMPLICES -- CORROBORATION REQUIRED AND NOW REQUIRED FOR SNITCH TESTIMONY

Under California law defendants cannot be convicted on word of accomplices alone (**Penal Code § 1111**). There must be corroborating evidence. Such evidence must do more than raise a suspicion of guilt; it must implicate the defendant (**People v. Perry** 103 Cal.Rptr. 161, 167 (1972) directly and immediately to the crime (**People v.**

Falconer, 248 Cal.Rptr. 60, 62, citing **People v. Shaw** 17 Cal.2d 778, 803-804 (1941). The court must instruct that their testimony must be viewed with care and caution. **(People v. Guinan,** 18 Cal. 4th 558 (1998).)

But see **People v. Allen** (1986) 42 Cal.3d 1222, 1251-1252, "[A] defendant is denied a fair trial if the prosecution's case depends substantially on accomplice testimony and the accomplice witness is placed, either by the prosecution or by the court, under a strong compulsion to testify in a particular fashion."

Penal Code § 1111.5 became law in 2011. San Francisco State Senator Mark Leno drafted SB 687 which changed the rules as to jailhouse snitches. Now, if an inmate testifies that a cellmate confessed to a crime, prosecutors are required to corroborate that testimony. Gov. Arnold Schwarzenegger vetoed the same proposal at the urging of the California District Attorneys Association, which opposed to the bill ostensibly because judges already tell juries to use caution when considering an informant's testimony. The statute states:

1111.5. (a) A jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant. The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant shall not be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony.

(b) As used in this section, "in-custody informant" means a person, other than a codefendant, percipient witness, accomplice, or coconspirator, whose testimony is based on statements allegedly made by the defendant while both the defendant and the informant were held

in within a city or county jail, state penal institution, or correctional institution. Nothing in this section limits or changes the requirements for corroboration of accomplice testimony pursuant to Section 1111.

D. MAKING IMMUNITY GRANT ABUSE WORK FOR THE DEFENSE

In **United States v. Straub**, 538 F.3d 1147 (9th Cir. 2008), the Ninth Circuit held that use immunity must be offered a defense witness when relevant (*i.e.*, would impeach the prosecution witness granted immunity) and where the prosecution has offered it to its witnesses. Because such an unfair distribution of immunity distorts the fact-finding process, immunity must be given the defense witness. *See* **U.S. v. Westerdahl**, 945 F.2d 1083, 1087 (9th Cir. 1991) (if the prosecution intentionally causes a witness to invoke the Fifth Amendment, the law compelled a grant of use immunity); **U.S. v. Lord,** 711 F2d 887 (9th Cir. 1983): Cocaine case and conviction where the prosecutor told a witness (Cook) that whether he would be prosecuted depended on what he would say. (Cook was vulnerable to prosecution given that he helped Lord delivered drugs, *i.e.*, he could have been a "target" and the prosecutor told him that while he viewed his role as "minor," he would prosecute depending on his testimony). The prosecution's notion of fairness was that if Cook testified for the government, that was truthful testimony and he would be okay. The case was remanded for a hearing for clarification of what the prosecutor told Cook. If the prosecutor's statements to Cook pressured him to invoke the Fifth (and thus deny Lord favorable evidence) then a sanction would be in order. *See also* "The State of Federal Prosecution: The Defense Witness Immunity Doctrine: The Time Has Come to Give it Strength to Address Prosecutorial Overreaching," 43 Am. Crim. L. Rev. 1189 (2006).

VI. THE JAIL HOUSE INFORMANT: SPECIAL PROBLEMS

A. PROTECTING YOUR CLIENT FROM HARM

1. Counseling the Client. BEWARE.

2. Handing Out "I will not speak about my case" cards.

3. Having cell-mates sign a declaration stating the defendant never talks about his case with anyone; thus, they have never talked to him about the case.

4. Filing a "Notice of Invocation of Right to Counsel and Right to Remain Silent on Behalf of Client" pursuant to **McNeil v. Wisconsin**, 501 U.S. 171, 111 S.Ct. 2204 (1991); see also **Texas v. Cobb**, 532 U.S. ; 121 S.Ct. 1335; 149 L.Ed.2d 321 (2001) (Sixth Amendment invocations covers the offense charged and any same offense under the same elements test; it does not cover other offenses that are merely "close related" or "inextricably intertwined" with the charged offense.

a. "The rule of [**Edwards v. Arizona**, 451 U.S. 477 (1981)] applies only when the suspect 'ha[s] expressed' his wish for the particular sort of lawyerly assistance that is the subject of **Miranda.** [Citation.] It requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." (**McNeil**, *supra*, 115 L.Ed.2d at pp. 168-169, 111 S.Ct. at p. 2209, original italics.) Quoted in **People v. Lispier**, 4 Cal.App.4th 1317, 1323 (1992).)

5. Service on prosecutor and relevant investigating agencies.

B. IS THE INFORMANT A PLANT?

1. **MASSIAH-HENRY** MOTION

a. Investigating (*see* § II *supra*.)

2. The Federal Law: **Massiah v. United States**, 377 U.S. 201 (1965); **United States v. Henry,** 447 U.S. 264 (1980); **Maine v. Moulton**, 474 U.S. 159 (1985); **Kuhlman v. Wilson**, 477 U.S. 436, 459 (1986) (must show the "police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks)."

3. The State Law: **In re Neely**, 6 Cal.4th 901 (1993) (use of co-defendant to extract statements from defendant; IAC found for

counsel's failure to pursue this issue); **In re Wilson**, 3 Cal.4th 945 (1992) (IAC for failure to pursue this issue); **In re Jackson**, 3 Cal.4th 578 (1992); **People v. Whitt**, 36 Cal.3d 724, 741-742 (1984).

Note: Under California Penal Code §4001.1, it is against state law for officers to plant an informant in a cell for the purposes of eliciting statements:

"(b) No law enforcement agency and no in-custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks." *See also* 18 U.S.C. 1821(f), which prohibits witness fees or allowances for the testimony of an incarcerated witness.

C. THE INFORMANT'S JAIL HOUSE CONFESSION ISN'T ENOUGH: SEE NEW PENAL CODE SECTION 1111.5 SUPRA

1. Bring a Penal Code § 995 and argue that the preliminary hearing or indictment resulted from the false testimony of the informant. Penal Code §1487(7) specifically makes discharge by way of habeas corpus proper: "Where a party has been committed on a criminal charge without reasonable or probable cause." *See* **In re Bell**, 19 Cal.2d 488, 494 (1942). Also, there is no question but that a defendant out of custody on bail may bring a habeas action. (**In re Peterson**, 51 Cal.2d 177, 181 (1958).)

2. "It has long been the rule that the *corpus delicti* of a crime must be proved independent of an accused's extra-judicial admissions [citations]." (**People v. Alcala**, 36 Cal.3d 604, 625 (1984).) After Prop 115, this rule no longer applies to felony-based special circumstances.

3. CALJIC 2.70 and CALJIC 2.71: "Evidence of an oral [confession/admission] of the defendant should be viewed with caution."

4. Evidence Code § 410: "Except where additional evidence is required by statute, the direct evidence of one witness *who is entitled*

to full credit is sufficient for proof of any fact." Because Penal Code §1127a, subds. (a), (b), informs juries to consider informant testimony with caution, the informant's testimony should not be sufficient alone to prove any fact.

5. In August 2011, Gov. Brown signed into law a bill preventing convictions solely on the basis of a jail house informant's uncorroborated testimony. (Penal Code § 1111.5 enacted into law effective 1/1/12.)

6. Note the limitation on informant instructions: in a case where numerous witnesses were prison inmates (because the charged crime was a killing an prison inmate by another), the defense wanted a jury instruction based on Penal Code § 1127a, which tells the jury to be skeptical of testimony by in-custody informants. The Supreme Court distinguishes between in-custody informants and in-custody inmates who are percipient witnesses. An instruction based on § 1127a must be given where there are in-custody informants, but not in-custody percipient witnesses. (People v. Bivert (2011) 52 Cal.4th 96.)

D. PRE-TRIAL MOTION TO EXCLUDE THE INFORMANT UNDER EVIDENCE CODE § 352

1. Credibility of the informant is so dubious that the prejudicial effect of the testimony outweighs its probative value. The testimony is simply untrustworthy.

2. Evidence Code § 352 allows evidence be excluded if the probative value of the evidence "is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time **or** (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury."

3. The motion should be based upon the dubious nature of the testimony and the extraordinary time consumed in dealing with its veracity. California courts have long recognized that a prosecution witness may offer testimony so uncertain, physically impossible, conflicting or inherently suspect in content that no matter how sincerely it was delivered, it would not inspire the confidence of a

reasonable trier of fact (**People v. Lange**, 11 Cal.3d 134, 139 (1974); **People v. Headlee**, 18 Cal. 266, 267-68 (1941) ("to be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed".) This could be said of all jailhouse informer testimony in most serious criminal cases. *See, e.g.*, **People v. Federico]**, 127 Cal.App.3d 20, 28 (1981) (where trial judge held such a hearing pre-trial to test the informant's credibility under 352 before permitting his testimony before the jury). In **Vorse v. Sarasy**, 53 Cal.App.4th 998 (1997), the court held that a judge may not disbelieve a witness and use 352 to strike the witness's testimony unless the testimony is either physically impossible to be true or its falsity is apparent without resort to inferences and deductions; ***accord*** **People v. Chandler**, 56 Cal.App.4th 703 (1997) (court cannot exclude witnesses based on its assessment of credibility); **People v. Riel** (2000) 22 Cal.4th 1153 (Accomplice with many prior inconsistent statements and admitted lies about the case is *not* disqualified from testifying pursuant to a pleas agreement).

4. On this issue, judges should follow the wisdom of Justice Frankfurter -- allowing such testimony to infest the courtroom under the usual restraint that only the jury will assess the credibility of the witness is, "To ignore as judges what we know as men" (**Watson v. Indiana**, 338 U.S. 49, 52 (1949)).

5. Permitting a lying snitch to testify at trial guarantees lengthy post-conviction litigation on the introduction of false testimony. *E.g.*, Penal Code §1473(b)(1) states that a defendant may bring a petition for writ of habeas corpus when there has been false evidence presented at any hearing relating to incarceration.

E. POLYGRAPHING THE DEFENDANT CONCERNING CONTACTS WITH THE INFORMANT.

1. Consider polygraphing the client on the issue of whether he or she ever talked to the snitch. Evidence Code §351.1, states that in criminal cases, a stipulation is necessary. In **McMorris v. Israel**, 643

F.2d 458 (7th Cir. 1981), the court held that such a stipulation could not be withheld from by the DA solely on tactical reasons. **People v. Morris**, 53 Cal.3d 152, 193 (1991), citing **People v. Harris**, 47 Cal.3d. 1047, 1094-95 (1989), suggest a showing of validity might overcome foundational objections.

2. If the matter is on habeas corpus, Evidence Code § 351.1's language is inapplicable since it only applies to "criminal" cases. It has long been stated that "habeas corpus [] is a civil, and not a criminal, proceeding" (**Fisher v. Baker**, 203 U.S. 174, 181 (1906); **Harris v. Nelson**, 394 U.S. 281, 293 (1969).)

3. **France v. Superior Court**, 201 Cal. 122, 127 (1927), states: "habeas corpus . . . is not a proceeding in that [criminal] prosecution, but, on the contrary, is an independent action instituted by the appellant...."

4. The United States Supreme Court held the **Frye** rule was superseded by the Federal Rules of Evidence (specifically, rule 702), where there is no requirement of general acceptance in the scientific community. (**Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579,125 L.Ed.2d 469, 113 S.Ct. 2786 (1993).) Under federal law, if a witness qualifies as an expert, the court may not play censor. The merits and demerits of a particular scientific test, approach, or procedure are simply matters for the jury to sort out. (In **People v. Leahy**, 8 Cal.4th 587 (1995), the California Supreme Court reaffirmed its adherence to the **Kelly-Frye** rule.)

5. A breakthrough in polygraph technology has come from the Applied Physics Laboratory Government funded research at Johns Hopkins University. This sophisticated computer scoring technique eliminates examiner bias and intuition from scoring, and provides a mathematical model for interpreting results backed by reputable scientific research.

6. Caveat: these tests can be unreliable; no client should be offered to a *stipulated* exam until after he or she has passed a privileged

examination on the target question.

7. In **United States v. Scheffer**, 523 U.S. 303 (1998), the U.S. Supreme Court decided the issue of whether the Court of Military Appeals erred in holding a rule, Military Rule of Evidence 707, which prohibited polygraph evidence on a *per se* basis, was unconstitutional. At Scheffer's court marshal hearing for using methamphetamine, he denied he had ever used drugs in the Air Force and passed a service-run polygraph on that issue. It was excluded at the trial and that decision was reversed on appeal, the court holding that such a *per se* ban on polygraph evidence was an unconstitutional denial of the right to present evidence. The U.S. Supreme Court reversed. It held that the *per se* rule of prohibition was not unconstitutional, but it did not tamper with rules of jurisdictions which permit polygraph evidence on a discretionary basis; rather, it held that a rule of prohibition is not unconstitutional: "Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted."

8. In **United States v. Cordoba,** 104 F.3d 225 (9th Cir. 1997), the court held that polygraphs *may be* admitted over objection. **United States v. Posado**, 57 F.3d 428 (5th Cir. 1995), the court held polygraph may be admitted at motion to suppress hearing after **Daubert** rule. *Accord* **United States v. Piccinonna**, 885 F.2d 1529 (11th Cir. en banc 1989); United States v. Cordoba, F.3d (9th Cir. 1997). In **United States v. Crumby**, 895 F. Supp. 1354(D.C. Ar. 1995), the district court accepted the notion that a defendant may introduce polygraph evidence that he passed to counter an attack on his credibility. The court was impressed with the statistics that polygraph evidence clearing a subject (i.e., showing no deception -- a "pass"), is much more accurate than tests which show deception. But later Ninth Circuit cases have diminished the opportunity to introduce the evidence: **United States v. Campos** (2000) 217 F.3d 707 (Unstipulated polygraph evidence which shows defendant lacks knowledge constitutes expert witness evidence on mental state, which is forbidden by Fed. R. Evid. 704(b), and therefore district court properly excluded it. No other findings under other provisions were necessary.) **United States v. Benavidez-Benavidez** (2000) 217 F.3d

720 (Rule 403 is absolute & once the evidence is so excluded, court does not have to make findings under any other provision.)

VII. EXPERT WITNESSES

An expert can be anyone experienced in dealing with snitches or the snitch system: *e.g.*, a lawyer or a former snitch (be careful and corroborate as much as you can, but some of these former informants are good expert witnesses because they are smart and convincing to a jury -- remember the jury that convicted your client believed them). Perhaps best would be a former law enforcement officer who knows what goes on and is willing to testify to it. Using experts with an arguable bias is not recommended (*e.g.*, defense attorneys).

Of course, any attempt to admit this type of expert testimony will meet stiff judicial resistance. Courts will find it almost impossible to resist saying (as one opinion did): "This allegedly expert opinion evidence often is simply an argument of counsel dressed up in the pseudoscientific language of expert opinion. We agree that trial courts need not, and in most cases should not, tolerate such a practice." (**People v. Johnson**, 19 Cal.App.4th 778, 786-787 (1993).)

On the other hand, the courts have permitted police gang experts to testify that a gang member witness will lie for his gang or others. **People v. Roberts**, 55 Cal.App.4th 1073 (1997) (DA allowed to call a gang expert to testify that gang members lie for non-gang members. Held not an abuse of discretion.)

A. ON THE CULTURE OF INFORMANTS: REWARDS FOR LIES.

1. Fed. Rule of Evidence 702 states that if specialized knowledge would be helpful to the jury to understand the evidence or to determine a fact in issue, a qualified expert may so testify. *See also* Cal. Evid. Code 801.

2. The argument here for expert testimony is that police informants, particularly jailhouse informants, have their own culture with a separate language, customs, and are typified by a psychopathic lack of

concern for the harmful consequences of their perjury on others. *See* **Report of the 1989-1990 Los Angeles County Grand Jury,** June 1990, "Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County," noting the argot of the jailhouse informant, *e.g.*, terms such as "booking" (informing on), "getting in the car" (one inmate joining the conspiracy to commit perjury by corroborating another.)[9]

a. "Informants do not tend to follow mores. According to one informant, `in the old days' informants abided by a rule not to act as an informant against other informants, but presently informants `will even book their own mother.'

This disinclination to follow societal rules extends to their willingness to defile an oath. Informants testified before the Grand Jury to repeated instances of perjury and providing false information to law enforcement. With one exception, each informant who testified claimed he himself had committed perjury or provided false information incriminating another inmate one or more times." (**Id.** at 16.)

b. In **People v. Mroczko**, 35 Cal.3d 86, 96 n. 8 (1983), a case in which inmate witnesses testified against one another in a death penalty case, the court noted: ""What emerges from the murky record with striking clarity is that the inmate witnesses -- both defense and prosecution -- were generally unreliable. The transcript reveals that prison life is fraught with animosities and alliances motivated in ways that the uninitiated could scarcely imagine."

3. In **Mak v. Blodgett**, 754 F.Supp. 1490, 1499 (W.D. Wash. 1991), *affirmed and remanded without opinion*, 972 F.2d 1340 (9th Cir. 1992), the district court held defense counsel's failure to present the

---

[9] "[T]he courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in such (informant) testimony because of the strong inducements to lie or shade testimony in favor of the prosecution" (**Report**, at 11).

mitigating testimony of cultural experts on the effects of cultural conflicts on young Chinese immigrants including an apparent lack of emotion constituted ineffective assistance of counsel.

4. In **Dang Vang v. Vang Xiong X. Toyed**, 944 F.2d 476, 481-82 (9th Cir. 1991), the district allowed a cultural expert to testify to the submissive nature of Hmong women, and that they are raised to respect and obey men. The court held that such testimony need not meet the standards of scientific evidence, *i.e.*, **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923) (general acceptance in the field to which it belongs).

a. In **United States v. Beltran-Rios**, 878 F.2d 1208 (9th Cir. 1989), a DEA agent was permitted to testify regarding the drug profile of a typical "mule" after the defendant opened the door by placing emphasis on his poverty as proof he was not part of a drug smuggling operation. (**Id.** at 1212.)

b. In **United States v. Patterson**, 819 F.2d 1495 (9th Cir. 1987), a police officer was allowed to testify as an expert on "criminal narcotics distribution organizations and how they operate" (**Id.** at 1507.)

c. In **United States v. Shirley**, 884 F.2d 1130 (9th Cir. 1989), the appellate court upheld the admission of testimony by a DEA agent, as well as charts compiled by the agent based upon previously admitted evidence, used to "establish a relationship between various telephone numbers associated with" the defendants in the case (**Id.** at 1133.) The court noted that the charts were based upon admissible evidence, and that "the district court specifically instructed the jury that the charts were not evidence but were only used for convenience." (**Id.** at 1134.)

d. **United States v. Espinosa**, 827 F.2d 604 (9th Cir. 1987), upheld admission of a detective's summary testimony that the defendant was using an apartment as a "stash pad" for drugs and drug money, the pay/owe sheets found in the apartment contained the names of the

defendant's buyers, and the exchange of packages on a specific date was an exchange of drugs for money. (**Id.** at 611.)

5. The expert could be qualified based upon experience as a lawyer handling cases involving informants, either representing them or facing them in trial; he or she could base opinions on discussions with these informants. *See* **People v. Gamez**, 235 Cal.App.3d 957, 967-968 (1991) (allowing street gang experts to testify on gang activity, and base opinions in part based upon statements made to the expert by the gangsters.)

a. In **People v. Harvey**, 233 Cal.App.3d 1206, 1226-29 (1991), the court allowed a narcotics officer to give expert testimony on such topics as: a trip made by a suspect was consistent with the activity of a person involved in a Colombian cocaine distribution cell; that a meeting of suspects was a cocaine trafficking meeting; that another meeting involved a transfer of proceeds from cocaine sales; and that he believed each defendant fell within the hierarchy of the Colombian cocaine distribution cell. (**Id**. at 1226.)

B. ON THE SOCIOPATHY OF THIS PARTICULAR JAILHOUSE INFORMANT: PUTTING ON THE PSYCHOLOGIST.

1. The prosecution often uses expert psychological testimony to *rebut* defense evidence in a variety of ways such as by showing that the defendant is a psychopath, and as such, displays those features which counter the benign picture portrayed by the defense. *See, e.g.,* **People v. Daniels**, 52 Cal.3d 815, 882-883 (1991) (to show inability to change criminal behavior); **People v. Harris**, 28 Cal.3d 935, 961 (1981) (to show defendant's lack of remorse); *see also* **Barefoot v. Estelle**, 463 U.S. 880 (1980) (to show dangerousness.)

2. Many jailhouse informants would fit the criteria for anti-social personality disorder under the DSM IV (section 301.7, American Psychiatric Association 1994). The traits of this disorder include being a chronic liar. Since the prosecution will call the informant and portray him as a truth-teller, it would be fair rebuttal to call an expert

to opine that the informant meets the criteria for the disorder and, as such, it is in his character disorder to lie and manipulate.

3. The criteria for the disorder are:

Antisocial Personality Disorder (301.7) [APA DSM IV CRITERIA are as follows):

a. Current age at least 18.

b. Evidence of conduct disorder onset before 15.

c. A pervasive pattern of disregard for and violation of the rights of others occurring since age 15, as indicated by *three* of the following:

1. Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;

2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

3. Impulsivity or failure to plan ahead;

4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults;

5. Reckless disregard for the safety of self or others;

6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;

7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated or stolen from another;

d. Occurrence of antisocial behavior is not exclusively during the course of schizophrenia or a manic episode.

4. A persuasive use of the expert is to first determine how severely psychopathic the informant is. This can be done in a scientifically reliable way by the expert's use of a psychopathy checklist originated by Dr. Hare. This could bypass the need for a clinical interview (which the informant is highly unlikely to give). This testimony can be very persuasive. *See* Hare, R. (1991) **Manual for the Psychopathy Checklist**- Revised, Toronto: Multi-Health Systems.[10]

5. To lay foundation for expert testimony, move the court to have the informant examined by a psychologist or psychiatrist under Calif. Evidence Code, §§ 780 and 730, [see also Code of Civil Procedure, § 2032 and § 187]. If the informant refuses the interview, comment can be made on this; if he/she agrees to be interviewed, so much the better.

6. The expert should be given all the information (discovery, police reports, rap sheets, probation reports, prison records, interview results, etc.) available on the informant. Most important, the expert should be pointed to areas where the informant has lied in the past -- these are the matters the expert will be able to rattle off the stand as examples of the informant's past pervasive mendacity -- an excellent predictor of his current behavior.

VIII. JURY INSTRUCTIONS

---

[10] *See* Meloy, J. Reid, The Psychopathic Mind: Origins, Dynamics, and Treatment (1988 Jason Aronson, Inc.). See also, Meloy, "Antisocial Personality Disorder, in G. Gabbard, Ed., Treatments of Psychiatric Disorders, 2nd ed. (Wash. D.C. American Psychiatric Press 1995). Dr. Meloy has been called as an expert in such cases.

A. The California Supreme Court, while noting the ". . . jailhouse informant's motive to lie. . . ." (**People v. Alcala**, 36 Cal.3d 604, 623 (1984), rejected the assertion that such informant testimony requires corroboration akin to accomplice testimony.) *But see* new Penal Code § 1127a, informing juries to view their testimony with caution.

B. Federal: *See e.g.,* Devitt and Blackmar, Federal Jury Practice and Instructions, § 17.02 (3d Ed. 1977); *see also* cases reversing convictions for failure to give such an instruction: *e.g.,* **United States v. Patterson**, 648 F.2d 625, 631 (9th Cir. 1981); **Guam v. De la Rosa**, 644 F.2d 1257, 1260 (9th Cir. 1981.)

1. **United States v. Swiderski**, 539 F.2d 854, 859-860 (2d Cir. 1976) (general instruction to jury that it "might also think about whether [the informer] had an interest in testifying" was inadequate to cure omission of informer instruction); **United States v. Garcia**, 528 F.2d 580, 588 (5th Cir. 1976) (drug conviction reversed when failure to give informer instruction sua sponte held to be plain error); **United States v. Lee**, 506 F.2d 111 (D.C. Cir. 1974) (cautionary instruction required when little or no corroboration exists.)

C. State: By statute effective January 1, 1990, the trial court **must instruct on request** that the testimony of an "in-custody informant" should be viewed with "caution and close scrutiny" in light of the possibility that the testimony was influenced by receipt or expectation of benefits. (Penal Code §1127a, subds. (a), (b), Stats. 1989, ch. 901, § 1.)

D. Other Instructions: Always seek instruction that the jury should view the witness' testimony with distrust if it is:

1. in other parts false
2. given under terms of immunity
3. given for leniency or hoped for benefit
4. given for financial or other reward
5. given influence of drugs or alcohol (**People v. Barnett**, 54 Cal.App.3d 1046, 1052 (1976).)

a. *See* **In re Wilson**, 3 Cal.4th 945 (1992), involving a "jailhouse informant whose testimony was inherently suspect" -- unanimous reversal for ineffective assistance of counsel for failing to object to **Massiah/Henry** violation; another jailhouse informant also testified to having overheard a confession but California Supreme Court said his status as a jailhouse informant rendered his testimony "suspect" and therefore prejudice still flowed from 6th Amendment violation.

E. Other states: Numerous state courts have long required the giving of informant cautionary instructions where factually appropriate: (*See e.g.*, **People v. Atkins**, 243 N.W.2d 292, 294 (Mich. 1976); **Fresneda v. State**, 483 P.2d 1011, 1013 (Alaska 1971); **People v. Bazemore**, 182 N.E.2d 649 (Ill. 1962); State v. Bruns, 146 N.W.2d 786 (Neb. 1966); **Crowe v. State**, 441 P.2d 90 (Nev. 1968); **State v. Logner**, 256 S.E.2d 166 (N.C. 1979); **Roquemore v. State**, 513 P.2d 1318 (Okla. 1973); **Commonwealth v. Donnelly**, 336 A.2d 632 (Pa. 1975); **State v. Marshall**, 264 N.W.2d 911 (S.D. 1978).

F. SAMPLE INFORMANT INSTRUCTION[11]

YOU ARE INSTRUCTED THAT THE TESTIMONY OF **[MR. ____]** SHOULD BE VIEWED WITH CARE, CAUTION AND CLOSE SCRUTINY IN LIGHT OF THE POSSIBILITY THAT HIS TESTIMONY WAS INFLUENCED BY THE RECEIPT OF, OR EXPECTATION OF, BENEFITS. HIS TESTIMONY SHOULD ALSO BE VIEWED WITH CAUTION, CLOSE SCRUTINY AND DISTRUST IF YOU FIND THAT HIS TESTIMONY WAS: **1.** IN OTHER PARTS FALSE

2. GIVEN UNDER TERMS OF IMMUNITY FROM PROSECUTION

---

[11] Penal Code §1127a, subds. (A), (b), added by stats. 1989, Ch. 901, § 1, states that the first paragraph must be given on request as to in-custody informants. See also new Penal Code §1111.5.

3. GIVEN FOR LENIENCY OR HOPED FOR BENEFIT[12]

4. GIVEN FOR FINANCIAL OR OTHER REWARD

5. GIVEN UNDER THE INFLUENCE OF DRUGS OR ALCOHOL

6. GIVEN BY A DRUG ADDICT.

7. GIVEN BY A MENTALLY DISORDERED PERSON SUCH AS A PSYCHOPATH.

IX. POST CONVICTION MOTIONS

A. Penal Code § 1473(a) provides as follows:
"Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint."

1. The falsity must be on a point which is substantially material or probative on the issue of guilt or punishment and there need be no showing that the prosecutor was aware of the falsity. *See* **In re Hall**, 30 Cal.3d 408, 424 (1981); **People v. Wright**, 78 Cal.App.3d 788, 807-808 (1978).

B. Motion for New Trial and sentencing. We "also conclude that McGowan's right to due process was violated when the district court relied on unreliable, unsubstantiated allegations in imposing his sentence." [A snitch whose statements at sentencing were unverified, uncorroborated and unconfronted].

United States v. McGowan, 2012 U.S. App. LEXIS 1424 (9th Cir. Cal. Jan. 26, 2012).

C. Habeas Corpus

1. The traditional federal rule for perjured testimony, now under erosion, requires "knowing use" by the prosecutor of the false

---

[12] "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence." **United States v. Cervantes-Pacheco,** 826 F.2d 310, 315 (5th Cir. 1987).

testimony in order to have a constitutional violation (**Napue v. Illinois,** 360 U.S. 264 (1959.)) In **Pyle v. Kansas** 317 U.S. 213 (1942), the Kansas Supreme Court's denial of writ of habeas corpus was reversed where petitioner alleged his imprisonment resulted from perjured testimony coerced by the prosecutor. The court held that if on remand these allegations are proven, the petitioner would be entitled to release from custody. **Killian v. Poole,** 282 F.3d 1204 (9th Cir. 2002) (prosecutor's reliance on perjured testimony (whether knowing or not) required that conviction be set aside. (See **United States v. Agurs** 427 U.S. 97, 103 (1976).)

a. *See* **Sanders v. Sullivan**, 863 F.2d 218 (2nd Cir. 1988) (discussing lack of need to show knowing use of perjury by prosecutor. In **United States v. Wallach**, 935 F.2d 445 (2d Cir. 1991), the conviction was reversed after finding that "the perjury of one of the government's key witnesses infected the trial proceedings and interfered with the jury's ability to weigh his testimony (**id.** at 473), relying on **Sanders v. Sullivan,** "even assuming that the government had no knowledge of the perjury at the time of trial, we believe that reversal would still be warranted." (**Id.** at 458). *See also* **United States v. Young**, 17 F.3d 1201, 1204 (9th Cir. 1994) ("[E]ven false evidence presented in good faith, hardly comports with fundamental fairness").)

b. "`A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury'" **(United States v. Bagley**, 473 U.S. 667, 678 (1985), quoting **United States v. Agurs**, 427 U.S. 97, 103 (1976).) See also: **Imbler v. Craven**, 298 F. Supp. 795 (C.D. Cal. 1969), *aff'd*, **Imbler v. California**, 424 F.2d 631, 807-808 (9th Cir. 1970)): "While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequences."

c. **Jones v. Commonwealth of Kentucky**, 97 F.2d 335, 338 (6th

Cir. 1938) (conviction reversed when evidence surfaced after conviction that principal prosecution witness had lied):

"If the concept [of due process] .... condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured .... `fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but unfortunately not too late, its falseness is discovered ... the appellant is not to be sacrificed upon the altar of formal legalism too literally applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional rights may be perceived, and the door to clemency is closed."

2. Actual Innocence Entitles One to a Hearing on His Claims. See **Majoy v. Roe**, 296 F.3d 770 (9th Cir. 2002) (At trial, petitioner was identified as the lookout for the killers by both an eyewitness and the snitch. Later, the eyewitness identified the photos of the snitch as the lookout, and the snitch recanted his testimony, and denied petitioner was involved in the crime. The court found that this new evidence, if credible could support a claim of actual innocence to overcome the petitioner's procedural obstacles, meeting the standard that no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. **Schlup v. Delo,** 513 U.S. 298 (1995). The case was remanded the case for an evidentiary hearing.)

X: NOTES ON KYLES V. WHITLEY, 514 U.S. 419, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995). In **In re Sassounian,** 9 Cal.4th 535 (1995), the California Supreme Court abandoned its own line of cases defining "materiality" as evidence which would be helpful to the defense, and adopted the narrower federal definition of **United States v. Bagley** *supra.* Fortunately, following **Sassounian,** the U.S. Supreme Court decided **Kyles v. Whitley,** a case which not only put meaning behind the "materiality" definition, but provided a series of favorable quotes for future informant litigation.

A. Detailed Appellate Review Required: Justice Stevens stated:

> Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law.... Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis." **Kyles v. Whitley,** 514 U.S. 419, 115 S.Ct. 1555, 1576 (1995) (concurring).

B. If there is Reason to Question the Lower Court Application of the Test, Reverse. In **Kyles**, the Supreme Court reversed a "materiality" determination because there was "reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard." **Id.** at 422, 115 S.Ct. 1555, 1561. The **Kyles** opinion, at 514 U.S. 434, 115 S.Ct.1566, emphasizes that the "materiality" test is **not** one of sufficiency of the evidence (*i.e.*, would the evidence produce a different result -- an acquittal). The test asks whether the error undermines the court's confidence in the outcome. See subsection D.

C. Prosecutorial Trial Characterizations and Later Concessions are Important: The prosecutor's comments to the jury are normal indicia of the importance of evidence to the State. Thus, for example, the Court stated: "The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses." **Kyles v. Whitley,** *supra*, 514 U.S. 444, 115 S.Ct. 1571. The court also observed that post-conviction concessions by prosecutors and law enforcement agents are highly relevant for obvious reasons. *See* **Kyles v. Whitley,** *supra*, at 1572.

D. Prosecutor Is Charged With What the Police Know. **Kyles** makes it clear that the prosecutor is responsible for turning over such information, and the duty falls to the State even if the police keep **Brady** information secret from the prosecutor. The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. 448, 115 S.Ct. at 1567.

E. The Proper Test ON HABEAS REVIEW: a "reasonable probability" of a different result, and the adjective is important. The proper test does not focus on a different result. It does not simply subtract the offending evidence and remeasure

the case to determine sufficiency (*i.e.*, whether a different "result" is probable).

In **Kyles**, to analyze the materiality of the **Brady** material withheld from the defendant, the United States Supreme Court reviewed that material **and its potential impact given the facts of the case as they were presented to the jury** in order to determine whether the error undermined the defendant's right to a fair trial. *See, e.g,* **United States v. Steinberg,** 99 F.3d 1486 (9th Cir. 1996), reversing where prosecution discovered **Brady** material after trial (the snitch was committing serious crimes while "cooperating"), and this was found material enough to reverse in a close case. *But see* **Thompson v. Calderon,** 86 F.3d 1509 (9th Cir. 1996)(holding defense counsel's failure to impeach snitch with available material not prejudicial under the facts of the case.)

As the **Kyles** court stated, "The question is not whether the defendant would more likely that not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. 434, 115 S.Ct. 1566.[13]

F. The Coaching Factor -- this too is Brady Material: "a substantial implication that the prosecutor had coached him to give it." **Kyles v. Whitley**, *supra* at 443, 115 S.Ct. at 1570.

G. Sloppy, one-track police investigation is Brady Material: This evidence ... "revealed a remarkably uncritical attitude on the part of the police." **Kyles v. Whitley,** *supra*, 514 U.S. at 445, 115 S.Ct. 1571. As **Kyles** states, this is probative in itself: showing that the police "either knew that it was inconsistent with their informants second and third statements...or never even bothered to check the informant's story against known fact. Either way, the defense would have had further support for arguing that the police were irresponsible in relying on Beanie [the informant] ...." **Id.** at 450, 115 S.Ct. at 1574. "When, for example, the

---

[13] But see the simplistic application of "materiality" in the more recent 5-4 case of **Wood v. Bartholomew**, 516 U.S. 1 (1995), reversing the Ninth Circuit's grant of habeas relief upon a finding that the prosecution has not turned over a failed polygraph examination of its key witness. This case turned upon the fact that the parties all agreed that the withheld evidence, the polygraph results, would not have been admissible as evidence.

probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. " **Id.** at 446, n. 15, 115 S.Ct. at 1572. This, in turn, is relevant to also show the lack of "integrity of the investigation." **Kyles v. Whitley,** *supra*, at 514 U.S. 447, 115 S.Ct. 1573.

1. In **U.S. v. Sager** (2000) 227 F.3d 1138, 1145, the court said, relying on **Kyles:** "We agree with Sager that the district court committed plain error and abused its discretion by instructing the jury not to "grade" the investigation. In one breath, the court made clear that the jury was to decide questions of fact, but in the other, the court muddled the issue by informing the jury that it could not consider possible defects in Morris's investigation. To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information.")

2. A sample instruction to proffer:

DEFENDANT'S PROPOSED INSTRUCTION

"The defense has presented evidence that the prosecution's investigation of this case has been negligent, or purposefully distorted, and not done in good faith. For example, there has been testimony about [list the problems developed in the testimony concerning certain evidence]. With respect to these items of evidence, the probative value of that evidence depends on the circumstances in which it was [or was not] obtained [tested] [maintained]. If the circumstances raise a reasonable belief of bad faith, fraud or negligence, you may consider that in determining the credibility of the witnesses and the weight, if any, that you chose to give that evidence.

Remember, under the instructions I have given you, if the evidence permits two reasonable interpretations, you must adopt that interpretation which favors the defendant.

3. Final Argument: the Jury Must Find for the Defendant

Given the evidence of negligent police work and the above instruction,

counsel can take the facts related to the sloppy investigation and argue to the jury that with respect to any evidence related to the sloppy, negligent or bad faith investigation, the jury MUST make inferences which favor the defense version. This is because **Kyles** and **Sager** say you are entitled to such an instruction permitting the inferences, and CALJIC 2.02 says that if inferences about a fact point in two equally reasonable directions, the jury MUST find for the defense.

XI. MISCELLANY: OTHER USEFUL QUOTES

☞ **United States v. Filemon Bernal-Obeso,** 989 F.2d 331, 333 (9th Cir. 1993): "The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and thus of which we can take judicial notice. Fed. R. Evid. 201(b)(2); *cf.* **Hudson v. Palmer,** 468 U.S. 517, 526-27 (1984) (illegal activities of prisoners subject to judicial notice.) By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. As Justice Jackson said forty years ago, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are `dirty business' may raise serious questions of credibility." **On Lee v. United States,** 343 U.S. 747, 757 (1952.) A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. *See* **United States v. Wallach,** 935 F.2d 445 (2d Cir. 1991) (convictions reversed because government should have known witness was committing perjury.) Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by **Giglio** to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility. **Shaffer,** 789 F.2d at 689.

Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison. As an example from our own circuit, one need only recall the widely publicized Leslie Vernon White saga in Los Angeles, California, which resulted in the reinvestigation of over 100 felony cases by the Office of the District Attorney of Los Angeles County involving alleged jailhouse confessions brought to the attention of the authorities by cellmates. White, a frequent witness for state prosecutors, is now in state prison for perjury. The White revelations also triggered an investigation of the use of such informants by the Los Angeles County Grand Jury which issued an eye-opening report on June 26, 1990. In this report, the Grand Jury makes this telling observation:

> Informants do not tend to follow mores. According to one informant, "in the old days" informants abided by a rule not to act as an informant against other informants, but presently informants "will even book their own mother."

> This disinclination to follow societal rules extends to their willingness to defile an oath. Informants testified before the Grand Jury to repeated instances of perjury and providing false information to law enforcement. With one exception, each informant who testified claimed he himself had committed perjury or provided false information incriminating another inmate one or more times.

Report of the 1989-90 Los Angeles County Grand Jury, June 26, 1990, at 16. See also Mark Thompson, **The Truth About the Lies,** Cal. Law., Feb. 1989, at 15; Mark Curriden, **No Honor Among Thieves,** *A.B.A.J.*, June 1989, at 52.

Criminals caught in our system understand they can mitigate their own problems with the law by becoming a witness against someone else. Some of these informants will stop at nothing to

maneuver themselves into a position where they have something to sell. It is no accident that some federal jury instructions regarding an immunized witness warn jurors that such a witness "has a motive to falsify." **United States v. Hernandez-Escarsega,** 886 F.2d 1560, 1574-1575 (9th Cir. 1989), *cert. denied,* 497 U.S. 1003 (1990). A pattern jury instruction puts it this way:

> ACCOMPLICE-INFORMER-IMMUNITY
>
> The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because he wants to strike a good bargain with the Government.
>
> So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Criminal Cases, Special Instruction No. 1.1 (1985.) The searing fires of experience have forged these wise admonitions. See also Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff and Kevin F. O'Malley, Fed. Jury Prac. & Instr., 476-509 (1992).

☞ **People v. Mason**, 132 Cal.App.3d 594, 597 (1982): "Unlike the citizen informant the criminal informant provides his information to the police usually for ulterior reasons other than good citizenship, and thus his information is viewed with suspicion."

☞ **People v. Scoma** (1969) 71 Cal.2d 332, 340, quoting Justice Tobriner when writing for the Court of Appeal: **Ovalle v. Superior Court** (1962) 202 Cal.App.2d 760, 763: " The vice of the police action lies not in the kind of information procured but in the unreliability of the source. The quantification of the information does not necessarily improve its quality; the information does not rise

above its doubtful source because there is more of it."

☞ "All familiar with law enforcement know that the tips they [informers] provide may reflect their vulnerability to police pressure or may involve revenge, brag-gadocio, self-exculpation, or the hope of compensation" (**People v. Kurland**, 28 Cal.3d 376, 393 (1980).)

☞ In **People v. Mroczko**, 35 Cal.3d 86, 96 n. 8 (1983), a case in which inmate witnesses testified against one another in a death penalty case, the court noted: "What emerges from the murky record with striking clarity is that the inmate witnesses - - both defense and prosecution -- were generally unreliable. The transcript reveals that prison life is fraught with animosities and alliances motivated in ways that the uninitiated could scarcely imagine."

☞ **United States v. Wallach**, 935 F.2d 445, 473 (2nd Cir. 1991): "the perjury of one of the government's key witnesses infected the trial proceedings and interfered with the jury's ability to weigh his testimony."

☞ **People v. Ruthford**, 14 Cal.3d 399, 405 (1975), "... it is common practice for law enforcement officers or prosecutors to offer certain inducements for the testimony of prosecution witnesses...."

☞ **Arizona v. Fulminante**, 111 S.Ct. 1246, 1257-8 (1991):

> "A confession is like no other evidence. Indeed, `the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' **Bruton v. United States**, 391 U.S., at 139-140, 88 S.Ct., at 1630 (White, J., dissenting) . . . . [A] full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. . . . [T]he risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless."

☞ In **People v. Westmoreland**, 58 Cal.App.3d at 43, 129 Cal.Rptr. 554 (1976), the court held:

> [P]rosecutorial authorities not only must disclose to the defense and to the jury any inducements made to prosecution witnesses for favorable testimony, but they are also under a duty to correct any false and misleading testimony pertaining to such inducements.

☞ **People v. Gonzales**, 51 Cal.3d 1179 (1990), the California Supreme Court stated that it would "expect and assume that if the People's lawyers have such information [concerning informant perjury or undisclosed benefits] in this or any other case, they will disclose it promptly and fully" (**id**. at 1261.) *See also* **People v. Garcia**, 17 Cal.App.4th 1169 (1993) (finding **Brady** violation for failure of DA and AG to reveal impeaching information, received post-conviction, about the validity of prosecution expert's testimony.)

☞ **Imbler v. Pachtman**, 424 U.S. 409, 427, n. 25 (1976) (noting continuing ethical prosecutorial duty to disclose after-acquired information that "casts doubt upon the correctness of the conviction".) *See also* **Thomas v. Goldsmith**, 979 F.2d 746 (9th Cir. 1992) (prosecution duty to turn over possible exculpatory evidence on federal habeas to allow defendant to show colorable claim of innocence to defeat bar of procedural default.)

☞ In **Napue v. Illinois**, 360 U.S. 264, 269 (1959), the court stated: "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, **Mooney v. Holohan,** 294 U.S. 103 .... The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.") * * * * *

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." **(Napue**, *supra*, 360 U.S. at p. 269.)

☞ In **United States v. Banks**, 383 F.Supp. 389 (W.D.S.D. 1974), *appeal dismissed* 513 F.2d 1329 (8th Cir. 1975), the district court, using its supervisory powers, dismissed very serious charges against Dennis Banks and Russell Means, defendants in the famous Wounded Knee trials of American Indian Movement members. One reason was the lack of prosecution investigation into the unbelievable story of its major witness (**id**. at 394); another was the prosecution suppression of evidence (**id**. at 395.) "The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case." (**Id**. at 397.)

☞ "Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and doublecrossing anyone with whom they come into contact, including -- and especially- -- the prosecutor. A drug addict can sell out his mother to get a deal; and burglars, robbers, murderers and thieves are not far behind. They are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom `truth' is a wholly meaningless concept. To some, `conning' people is a way of life. Others are just basically unstable people. A `reliable informant' one day may turn into a consummate prevaricator the next." **Prosecution of Public Corruption Cases** (Dept. of Justice Feb. 1988), pp. 117-118.

☞ "[T]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are `dirty business' may raise questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross examination and to have the issues submitted to the jury with careful instructions." **On Lee v. United States**, 343 U.S. 747, 757 (1952).

☞ "[A] witness who realizes that he can procure his own freedom by incriminating another ... therein lies the motivation to falsify." **United States v. Leonard**, 494 F.2d 955, 961 (D.C. Cir. 1974).

☞ "[N]arcotics addicts who are paid informers for the government with criminal

charges pending against them -- we must recognize that there is a special danger that such government informers will lie." **United States v. Kinnard**, 465 F.2d 566, 572 (D.C. Cir. 1972).

☞ An "informant is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well." **Johnson v. Brewer**, 521 F.2d 556, 559 (8th Cir. 1975).

☞ **People v. Morris**, 53 Cal. 3d 152, 192; 807 P.2d 949, 971 (1991);
n5 Defendant admonishes us to heed the lessons of history by eschewing the "corrupt bargain" that produces accomplice testimony. He invokes vintage authority with the observation: **"Truly it would be hard to take away the life of any person upon such a witness that swears to save his own." (1 Hale, Pleas of the Crown (1680) p. 305.)**

☞ "One of the basics of our jurisprudence is the search for truth, and by this is meant not the purchased truth, the bartered-for truth, but the unvarnished truth that comes from the lips of a man who is known for his integrity.... It may be that we must live with informers. It may be that we must live with bargained-for pleas of guilty. But we do not have to give a receipt stamped `paid in full for your damaging testimony" or 'you will be paid according to how well you can convince the jury even though it may be in the face of lies'.... Trustworthiness is a keystone and a hallmark of any juridical system that seeks recognition for its role in a civilized society. The time has come to announce boldly and firmly that our juridical search for truth cannot be reconciled with the virtual purchase of perjury." **U.S. v. Cervantes-Pacheco,** 800 F.2d 452, 460-61 (5th Cir. 1986) (criticizing contingent fee arrangement with informant and reversing conviction).

☞"In this case we primarily consider whether the Fifth and Sixth Amendments require federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose 'impeachment information relating to any informants or other witnesses.' App. to Pet. for Cert. 46a. We hold that the Constitution does not require that disclosure." **United States v. Ruiz**, 536 U.S. 622, 625 (2002).

☞ "A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to

recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony." (**Phelps v. United States** (5th Cir. 1958) 252 F.2d 49, 52.)

XII. OTHER REFERENCES

A. **Report of the 1989-1990 Los Angeles County Grand Jury,** June 1990, "Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County," reporting on "how and why the system [of justice in Los Angeles] went wrong,...."[14]

"The willingness of many informants to perjure themselves, and otherwise lie, will prevent these informants from acknowledging their roles in eliciting information from a defendant." 1990 LACGJ Report, p. 27.

"[T]he courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness which is inherent in such (informant) testimony because of the strong inducements to lie or shade testimony in favor of the prosecution" (**id**. at 11.)

"[J]ailhouse informants want some benefit in turn for providing testimony." (**Id**. at 11.) The report discusses various benefits received by informants including, transfer to cells with televisions, coffee pots or other amenities, release from custody on furloughs without posting bail, the payment of witness protection money to relatives, reduction of sentence, postponement of sentencing, cash, being taken to lunch outside jail facilities, and receiving thousands of dollars and expenses, free rent money, etc. (Id. 12-15.)

The Grand Jury heard testimony about "an appalling number of instances of perjury" described by informants. (**Id.** at 18.) The report described a pattern of favors given by the District Attorney's Office to informants including writing letters to parole boards, some of which were dictated by the inmate informants (**Id.**

---

[14] At the time in question, 1979-1988, "various residents of the Los Angeles County Jail developed successful schemes for fabricating jail house confessions by other inmates, and that these practices were ignored or even encouraged by the authorities" **(People v. Gonzales**, 51 Cal.3d 1179, 1259 n. 54 (1990)).

at 77, 78), postponing cases and reducing charges, arranging for releases of informants who commit repeated crimes, *etc.* (**Id.** at 74-96)

The Grand Jury concluded that for ten years prior to the Los Angeles informants scandal surfacing in a public manner, the District Attorney's office knew of perjury and did little to stop it. No central file was established by the district attorney's office, "based on the belief that some or all of the contents of an informant file would become discoverable by defendants, the administrator advised recording only the minimum of information. . . ." (**Id.** at 113.) "Opinions and characterizations should be avoided." (**Id.** at 113.) As District Attorney memoranda warned, "regardless of the amount and type of information recorded, its discovery by the defense may lead to evidence which could impeach the informant." (**Id.** at 114.) As the Grand Jury report also concluded, "one of the aspects of the problem with the defendant's discovery of information in the informant index was the time consumed in fighting discovery motions.'" (**Id.** at 115.)

The 1990 **Grand Jury Report** noted that, "juries might consider informants who testify for the prosecution inherently more credible than those called by the defense. The jury perceives the prosecutor's purpose in calling his witnesses to be only to seek the truth" (**1990 LACGJ Report,** p. 146.)

B. **Psalms** 55:12-14

It is not an enemy who taunts me--
then I could bear it;
it is not an adversary who deals insolently with me,
I could hide from him.

But it is you, my equal,
my companion, my familiar friend.
We used to hold sweet conversation together;
within God’s house we walked in fellowship.

Let death come upon them;

let them go down to Sheol [*hell*][15] alive;
let them go away in terror into their graves.

[15] Translated as "grave", "pit", or "abode of the dead", the Old Testament/Hebrew Bible's underworld, a place of darkness to which those outside of faith in a coming Messiah go, a place of stillness and darkness cut off from God. The inhabitants of Sheol were the "shades" (rephaim), entities without personality or strength, cut off from God. http://en.wikipedia.org/wiki/Sheol.