

**CALIFORNIA COMMISSION  
ON THE FAIR ADMINISTRATION OF JUSTICE**

**REPORT AND RECOMMENDATIONS  
REGARDING INFORMANT TESTIMONY.**

The California Commission on the Fair Administration of Justice was established by California State Senate Resolution No. 44 “to study and review the administration of criminal justice in California, determine the extent to which that process has failed in the past,” examine safeguards and improvements, and recommend proposals to further ensure that the administration of criminal justice in California is just, fair and accurate.

This Report will address the use of testimony from informants who are themselves in custody or facing criminal prosecution. The motivation for such testimony is frequently the expectation of some reward in the form of reduction of charges, eligibility for bail, leniency in sentencing, or better conditions of confinement. In a report by the Northwestern University School of Law Center on Wrongful Convictions, the use of such informants was identified among the three most prevalent factors in the wrongful convictions of death row inmates. After a review of the cases of 111 persons released from the nation’s death rows after they were exonerated, from 1973 through 2004, the Center found use of false testimony from informants in 45.9% of the cases. That made false informant testimony the leading cause of wrongful convictions in U.S. capital cases – followed by erroneous eyewitness identifications (25.2% of the cases), and false confessions (14.4% of the cases). Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, p. 3 (2005).

While none of the 111 cases in the Center on Wrongful Convictions report took place in California, the frequent use of informant testimony in capital cases appears in California capital cases as well. Michael Laurence, the Director of the California Habeas Corpus Resource Center, explained to the Commission the reasons for the high prevalence of the use of arrested or charged informants in capital cases. In his opinion, while they are rarely needed to supply evidence of the defendant’s guilt of the underlying crime, they often provide crucial testimony to prove the alleged special circumstances which make the defendant eligible for the death penalty, or to provide evidence of aggravation to persuade the jury to select death as the

appropriate penalty. State Public Defender Michael Hersek reported to the Commission that of the 117 death penalty appeals currently pending in his office, seventeen featured testimony by in-custody informants, and another six included testimony by informants who were in constructive custody. Thus, confidence in the reliability of the testimony of arrested or charged informant witnesses is a matter of continuing concern to ensure that the administration of justice in California is just, fair and accurate.

The Commission conducted a public hearing in Redwood City, California on September 20, 2006. Among the witnesses who testified at the public hearing was Dennis Fritz, a former junior high school teacher from Ada, Oklahoma. Mr. Fritz told the Commission that he and a codefendant named Ron Williamson were convicted of the rape and murder of Debra Sue Carter six years after the murder took place. The principal testimony against them came from in-custody jail informants. Based on this testimony, with little corroboration, Williamson was sentenced to death, and Fritz was given a life sentence. Five days before his scheduled execution, Williamson won a new trial. In preparation for the retrial, DNA testing was finally done. It resulted in a match to one of the informants, and exonerated both Williamson and Fritz. They were released after twelve years in prison. The informant was subsequently convicted of the murder, and is now serving a life sentence. Further information about this case can be found at *Williamson v. State*, 812 P.2d 384 (Okla. Ct. Crim. App. 1991); *Williamson v. State*, 852 P.2d 167 (Okla. Ct. Crim. App. 1993); *Williamson v. Reynolds*, 904 F.Supp. 1529 (E.D. Okla. 1995); *Williamson v. Ward*, 110 F.3d 1508 (10<sup>th</sup> Cir. 1997); *Fritz v. State*, 811 P.2d 1353 (Okla. Ct. Crim. App. 1991); *Gore v. State*, 119 P.3d 1268 (Okla. Ct. Crim. App., 2005). See Grisham, *The Innocent Man* (2006). Compare Letter of District Attorney William N. Peterson to Commissioner Greg Totten [Available at [www.ccfaj.org/rr-use-fed.html](http://www.ccfaj.org/rr-use-fed.html) ].

### **The Los Angeles County Experience.**

In 1989, the exploits of Leslie Vernon White, a Los Angeles jail inmate who demonstrated on national television how easy it was for prisoners to gather information about the pending cases of other prisoners and fabricate testimony that might gain them greater lenience in their own cases, led the Los Angeles County Grand Jury to convene a comprehensive investigation of the use of in-custody informants. The grand jury heard the testimony of 120 witnesses, including six self-professed jail house

informants. The report made recommendations for both the L.A. County District Attorney and the L.A. County Sheriff's Department with respect to the handling of informants in jail and their use as witnesses in criminal cases. See Report of the 1989-90 Los Angeles County Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County (1990). In response to this report, the Los Angeles County District Attorney's office adopted policy guidelines to strictly control the use of jailhouse informants as witnesses. The policy requires "strong corroborative evidence," consisting of more than the fact that the informant appears to know details of the crime thought to be known only to law enforcement. A deputy wishing to use a jailhouse informant as a prosecution witness must obtain the prior approval of a Jailhouse Informant Committee headed by the Chief Assistant District Attorney. The office maintains a Central Index of jailhouse informants who have offered to be, or who have been used as witnesses. All records of jailhouse informants are preserved, including notes, memoranda, computer printouts, records of promises made, payments made, or rewards given, as well as records of the last known location of the informant and records relating to cell assignments. See Los Angeles County District Attorney's Office, Legal Policies Manual, Chapter 19, Jailhouse Informants, pp. 187-190 (April, 2005) [Available at [www.ccfaj.org/rr-use-expert.html](http://www.ccfaj.org/rr-use-expert.html)].

John Spillane, who currently serves as Chief Assistant District Attorney in Los Angeles County, and heads the Jailhouse Informant Committee, informed the Commission that the Committee rarely approves the use of in-custody informants as witnesses. None has been approved during the past twenty months, and only twelve in the past four years. Throughout the 1990's, the annual number of approvals averaged less than six. Mr. Spillane informed the Commission that the office also requires that interviews of in-custody informants by attorneys or investigators from the District Attorney's office must be tape recorded.

The Los Angeles District Attorney's Office also offers training sessions to its deputies to acquaint them with the risks and perils of using informants as witnesses. In recent years, the training has been conducted by Judge Stephen S. Trott of the U.S. Court of Appeals for the Ninth Circuit. See Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings Law Journal 1381 (1996). The Commission recommends that all prosecutors, defense lawyers, judges and police investigators in

California receive training with respect to the perils of using arrested or charged informants as witnesses.

The Commission undertook to ascertain whether the best practices exemplified by the Los Angeles County District Attorney were being implemented by other District Attorneys throughout the State of California. A letter was sent to each of the fifty-eight County District Attorneys in the State, inquiring whether they had office policies governing the use of in-custody informants, and requesting a copy of that policy if it was in writing. The letter also inquired as to how many cases included testimony of in-custody informants during the past five years. We received nine responses. Four of the five largest counties had written policies similar to the Los Angeles County policy, requiring supervisory approval before the testimony of an in-custody informant could be utilized.<sup>1</sup> None of the four smallest counties had written policies, but three indicated that supervisory approval is required.<sup>2</sup> The Santa Clara County and Orange County District Attorneys were the only offices whose policy requires the maintenance of a central file of all informant information. The survey suggests that the use of the testimony of in-custody informants is rarely approved by any of the responding offices.

The Commission recommends that the following best practices be implemented whenever feasible. The Commission recommends that each District Attorney's office in the State of California adopt a written policy which requires:

- (1) The decision to use the testimony of an in-custody informant be reviewed and approved by supervisory personnel other than the deputy assigned to the trial of the case;
- (2) The maintenance of a central file preserving all records relating to contacts with in-custody informants, whether they are used as witnesses or not;
- (3) The recording of all interviews of in-custody informants conducted by District Attorney personnel;

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<sup>1</sup> Orange, San Bernardino, Santa Clara and Ventura Counties have written policies; Sacramento does not..

<sup>2</sup> Monterey, Placer and Solano Counties all require supervisory approval. The District Attorney for Yuba County declined to disclose his policy.

- (4) The corroboration of any testimony of an in-custody informant by evidence which independently tends to connect the defendant with the crime, special circumstance or circumstance in aggravation to which the informant testifies.

The 1989 Los Angeles grand jury inquiry also led the California State Legislature to enact Section 1127a of the California Penal Code, which currently requires that, upon the request of a party, the judge instruct the jury in any case in which an in-custody informant testifies that the testimony should be viewed with caution and close scrutiny, and the jury should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This instruction is now contained in CALCRIM No. 336, the recommended jury instructions approved by the Judicial Council of California. Penal Code Section 1127a also requires the prosecutor to file a written statement with the court, contemporaneous with the calling of an in-custody informant as a witness in any criminal trial, setting out any and all consideration promised to, or received by the in-custody informant. Monetary payments to in-custody informants for testimony by law enforcement or correctional officials are limited to \$50 by California Penal Code Section 4001.1.

### **Corroboration Requirements.**

At present, California law does not directly require the corroboration of the testimony of an in-custody informant. The Commission was informed by Professor Ellen Yaroshefsky of the Benjamin N. Cardozo School of Law that seventeen states now require the corroboration of in-custody informants.

The only corroboration requirement currently embodied in California law is the requirement of corroboration of the testimony of accomplices, contained in Penal Code Section 1111:

1111. A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is

given.

CALCRIM No. 335 is currently used to instruct juries of the accomplice corroboration requirement. While the instruction requires supporting evidence independent of the accomplice's testimony that tends to connect the defendant to the commission of the crime, it adds:

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact . . . about which the accomplice testified.

The instruction also informs the jury that accomplices may not corroborate each other:

The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice.

The Commission considered whether California should have a statutory requirement of corroboration for the testimony of in-custody informants, and whether that requirement should track the current requirements for accomplice testimony. The Commission concluded that the testimony of in-custody informants potentially presents even greater risks than the testimony of accomplices, who are incriminating themselves as well as the defendant. Using the language of the accomplice corroboration requirement, however, would not address the frequent use of in-custody informants in death penalty cases to prove special circumstances or provide evidence for aggravation of the penalty. In such cases, there will invariably be some supporting evidence tending to connect the defendant to the commission of the crime. The jury should be instructed that a finding of a special circumstance, or a finding of a circumstance of aggravation, may not be based solely upon the uncorroborated testimony of an arrested or charged informant, and the corroboration should independently tend to connect the defendant with the special circumstance or circumstance of aggravation. And just as with accomplices, in-custody informants should not be permitted to corroborate each other. The jury should not be instructed that corroborating evidence "may be slight." A statutory requirement embodying these suggestions is included among the Commission's recommendations.

## **Arrested or Charged Informants Who Are Not in Custody.**

The Commission considered whether the prosecutorial policies governing the use of in-custody informants and the statutory requirement of corroboration should be extended to *all* informants, whether they are in actual custody at the time they allegedly acquire information concerning the case of another accused, or are at liberty either because they have not yet been arrested on pending charges or have been freed on bail or recognizance pending resolution of the charges against them. Here, grave concerns were expressed to insure that “informant testimony” is not defined so broadly that it encompasses citizen informants, or those responding to offers of rewards. Nor should it reach the use of informants used to supply probable cause for arrests or searches, but who never testify at trial. Not every witness who testifies to hearing a statement made by the defendant should be included, simply because they may have some expectation of benefit from their testimony. But the peculiar risks created by informants who may have some expectation of leniency or reward from their testimony are similar, regardless of whether the accused and the informant are both in custody at the time of the alleged statements. Therefore, the Commission recommends that, whenever feasible, an express agreement in writing should describe the range of recommended rewards or benefits that might be afforded in exchange for truthful testimony by an arrested or charged informant, whether the informant is in custody or not. A minority of the Commissioners would also support an expansion of the definition of the informants included in Penal Code Sections 1127a, 1191.25 and 4001.1, to include all arrested or charged informants, and an extension of the requirement of corroboration to all arrested or charged informants.<sup>3</sup>

## **RECOMMENDATIONS**

(A) The California Commission on the Fair Administration of Justice recommends that, whenever feasible, an express agreement in writing should describe the range of recommended rewards or benefits that might be afforded in exchange for truthful testimony by an arrested or charged informant.

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<sup>3</sup> Commissioners Bellas, Hersek, Hing, Judge, Laurence, Ridolfi and Streeter.

(B) The California Commission on the Fair Administration of Justice recommends that, wherever feasible, California District Attorney Offices adopt a written internal policy to govern the use of in-custody informants. The policy should provide:

- (1) The decision to use the testimony of an in-custody informant be reviewed and approved by supervisory personnel other than the deputy assigned to the trial of the case;
- (2) The maintenance of a central file preserving all records relating to contacts with in-custody informants, whether they are used as witnesses or not;
- (3) The recording of all interviews of in-custody informants conducted by District Attorney personnel;
- (4) The corroboration of any testimony of an in-custody informant by evidence which independently tends to connect the defendant with the crime, special circumstance or circumstance in aggravation to which the informant testifies.

(C) The California Commission on the Fair Administration of Justice recommends the enactment of a statutory requirement of corroboration of in-custody informants, similar to the current requirement of the corroboration of accomplices contained in Penal Code Section 1111.

The statute should provide:

A conviction can not be had upon the testimony of an in-custody informant unless it be corroborated by such other evidence as shall independently tend to connect the defendant with the commission of the offense or the special circumstance or the circumstance of 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 cannot be provided by the testimony of another in custody informant.

An in-custody informant is hereby defined as a person, other than a codefendant, percipient witness, accomplice or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

A jury should be instructed in accordance with the language of this statute. A jury should not be instructed that corroborating evidence may be slight, as in CALCRIM No. 335.

(D) The California Commission on the Fair Administration of Justice recommends that training programs for California prosecutors, defense lawyers, judges and police investigators include a component addressing the use of arrested or charged informants as witnesses.

Respectfully submitted,

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