

CRIMINAL LAW AND PROCEDURE

BY ABRAHAM ABRAMOVSKY

Jailhouse Informants: Is It Time for Judicial Regulation?

Few if any courts have extolled the virtues of jailhouse informants. Judges, who have frequently referred to them by the colloquial term "snitch," have stated that "[t]he very nature of a jailhouse informant renders his testimony suspect." See *People v. Baca*, 2004 CalAppUnpub LEXIS 11056, *27 (Cal. App. 2004).

And, in one vehement Mississippi decision, "an increasing problem ... throughout the American criminal justice system." See *McNeal v. State*, 551 So2d 151, 158 (Miss. 1989). In opinions throughout the country, courts have repeatedly impugned the motivations and reliability of prisoners who come forward to incriminate those with whom they are incarcerated.

There are, indeed, many reasons to be wary of the testimony of jailhouse informants. Inmate informants, some of whom make a virtual career out of testifying against fellow inmates, have a self-evident motive to curry favor with prosecutors in return for a reduced sentence. The admissions allegedly made to them are almost always unwitnessed, so it's the defendant's word against theirs as to whether the statements were made — and a defendant who takes the stand to deny them opens himself up to a full spectrum of cross-examination from the prosecutor.

Moreover, as described in compelling detail by Barry Scheck and Peter Neufeld in their treatise "Actual Innocence" (2000), an inmate who knows the correctional system can easily fabricate statements that never existed. Among other things, Mr. Scheck and Mr. Neufeld give an account of a demonstration by a professional informant, who was able to make a few telephone calls, find out what trials were coming up and make a record of being in the same place with one of the defendants. Then, with a minimum amount of research on the case, the informant was able to fabricate a plausible "confession" from a fellow inmate he had never seen.

Perennial Presence

Despite their patent unreliability, jailhouse informants are a perennial presence in the criminal justice system. In some cases, inmate informants offer prosecutors testimony that they wouldn't otherwise be able to obtain, and they hold out the possibility of an "easy" conviction based on the defendant's own alleged admissions. As the New York Court of Appeals among other tribunals has stated, confessions are "supremely self-condemnatory acts [that] are almost sure to weigh most heavily with fact finders." *People v. Schaeffer*, 56 NY2d 448, 454 (1982). Even confessions to other inmates can often be plausibly rationalized as products of the defendant's desire to gain prison credibility or develop a sense of camaraderie with fellow prisoners, and can have almost as much impact on juries as confessions to police.

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With such a useful tool so readily available, it is unremarkable that jailhouse informants have become a major part of the prosecutorial arsenal.

What is remarkable is how little the courts in New York, and elsewhere in the country, have done to rein in the use of jailhouse informants. In a number of cases — including some where the defendant was convicted solely or primarily on the testimony of fellow inmates — defendants have asked the courts to hold that such testimony is inherently unreliable, but the great majority of decisions have refused to do so. In the influential decision of *People v. Alcala*, 685 P2d 1126, 1135-36 (Cal. 1984), the California Supreme Court

stated a common rationale for declining to find jailhouse informants inherently unreliable. Specifically, the court held that witnesses' credibility is traditionally for juries rather than courts to decide, and that the testimony of a particular category of witness should not be excluded or downgraded in the absence of a statutory mandate. Courts in Georgia, Illinois, Kentucky and Ohio have reached similar holdings.

'Alcala' Rule

To some extent, the *Alcala* rule is grounded in the structure of the American adversarial system. Traditionally, juries are allowed to hear witnesses and accept their testimony for what it is worth, and the credibility of such witnesses can be attacked through cross-examination. Certainly, any defense lawyer worth his salt will cross-examine jailhouse informants extensively about any deals or favors they might have received in exchange for their incriminating testimony.

The adversarial system breaks down, however, when defense attorneys lack access to the information they need to conduct effective cross-examination. Criminal discovery in New York, as in other states, is a creature of statute and is narrowly construed by the courts. Defense counsel will often be unable to find out whether a jailhouse snitch is a career informant, whether he may have told lies in other cases, or whether prison records belie his claim to have been in proximity to the defendant.

Moreover, treating a jailhouse informant like any other witness can sometimes enhance his credibility by negative inference. For instance, if a jury hears interested-witness or accomplice corroboration instructions given as to other witnesses but is given no special instruction concerning the testimony of inmate informants, the jurors may conclude that informants don't suffer from the credibility problems that plague these other categories of witness. The laissez-faire approach taken by New York courts to fellow-inmate testimony can, in practical terms, undermine rather than enhance the adversarial system.

Recently, however, some jurisdictions have begun to take innovative measures to control the unreliability of inmate-informant testimony. These measures fall primarily into four categories: prosecutorial self-regulation, discovery rules, pre-admission hearings and jury instructions. In addition, some judges — including Justice John F. Lawton of the Appellate Division, Fourth Department

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— have suggested that jailhouse informants be treated identically to accomplices, and that their testimony should not be sufficient for conviction without independent corroboration. See *People v. Pace*, 305 AD2d 984, 985-86 (4th Dept. 2003) (Lawton, J., dissenting). Any of these approaches — or a combination of them — could be useful for the New York courts in improving the fairness of criminal trials.

Prosecutors' Self-Regulation

The first approach, prosecutorial self-regulation, is used as a matter of policy by a number of American district attorneys' offices. Mark Curriden, in his article "No Honor Among Thieves," ABA Journal, June 1989, p. 51, described a policy instituted by the chief assistant district attorney for Los Angeles County for making pretrial determinations as to the reliability of jailhouse informants. The policy required prosecutors to answer a checklist including the circumstances under which the informant had contact with defendant and whether he had access to information from which he might have fabricated a confession. Mr. Scheck and Mr. Neufeld describe a similar albeit more demanding policy recently instituted in Canada, in which jailhouse snitches' testimony must be vetted by a panel of prosecutors, judges and defense attorneys before it can be used at trial.

Courts have also instituted judicial regulation of informant testimony in a number of forms. In the 2000 decision of *Dodd v. State*, 993 P2d 778, 784 (Okla. 2000), for instance, the Oklahoma Supreme Court adopted expanded discovery rules in all cases involving jailhouse informants, in order to provide defense counsel with adequate information to use in cross-examination. Noting that "[t]he judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money," see *id.* at 784 n.7, the court found that "complete disclosure" was required with respect to "all jailhouse informant testimony not specifically excluded by the United States Constitution."

The additional discovery required by *Dodd* includes: (1) the informant's complete criminal history, (2) any deal or benefit that the informant has been provided or may be provided in the future, (3) the specific statements allegedly made by the defendant and the time, place and manner in which the informant disclosed them, (4) all other cases in which the informant testified or offered to testify, (5) whether the informant recanted at any time, and (6) "all other information relevant to the informant's credibility." See *id.* at 784.

The *Dodd* court also adopted another prophylactic measure used in several states: a cautionary jury instruction. The court prescribed a pattern instruction in all cases where

jailhouse snitches' testimony is used, stating *inter alia* that such testimony "must be examined and weighed ... with greater care than the testimony of an ordinary witness." See OUII-CR 2d. 9-43. The instruction also provides jurors with specific factors to weigh in evaluating jailhouse informants' credibility, including the inducements received, any evidence that he was a "career informant" who testified in other cases, and his criminal history. See *id.*

The Mississippi and Louisiana courts have adopted similar instructions. In *McNeal v. Mississippi*, 551 So2d 151 (Miss. 1989), the Mississippi Supreme Court approved an instruction indicating that the testimony of jailhouse informants must be weighed with "caution and suspicion." *Id.* at 158; see also *Moore v. State*, 787 So2d 1282, 1287 (Miss. 2001) (finding that it is an abuse of

discretion to deny a cautionary instruction where a jailhouse snitch may have benefitted from his testimony). The Louisiana Court of Appeal in *State v. Divers*, 889 So2d 335, 352-53 (La. App. 2004), likewise approved an instruction stating that jailhouse informants' testimony must be weighed with "great caution" if it is not materially corroborated.

Judicial Reliability Hearing

Yet a fourth approach, albeit one which has thus far been rejected by the courts, is a judicial reliability hearing. Such a hearing would involve a vetting process similar to that used in Canada, except under the supervision of the courts and with defense counsel able to conduct cross-examination. In the *Dodd* case, the Oklahoma Supreme Court initially mandated such hearings, but subsequently recalled that ruling and substituted the expanded discovery rules on the basis that juries rather than courts should determine witnesses' credibility. See *Dodd*, 993 P2d at 785-786 (Strubhar, J. specially concurring). In a partial dissent, however, two judges argued persuasively that the courts already perform pre-admission "gatekeeping" functions with respect to expert witnesses, and should therefore be permitted to do so in circumstances as fraught with potential prejudice as the admission of jailhouse informants' testimony. See *id.*

Finally, some judges have analogized inmate informants to accomplices, who also have a powerful motive to curry favor with the authorities in return for lenient treatment.

In the recent Fourth Department dissenting opinion, Justice John F. Lawton argued that the New York courts should apply the same corroboration requirements to jailhouse informants as to accomplices. See *Pace*, 305 AD2d at 985-86 (Lawton, J., dissenting). Justice Lawton argued that the lack of special treatment for informant testimony is a "deficiency in the law," because jailhouse informants suffer from "the same or even greater motivating factors" that induce accomplices to lie. See *id.* at 986. Accordingly, he called upon the Legislature or the Court of Appeals to "duplicate the protection afforded a defendant from being convicted solely on the testimony of an accomplice" by deeming inmate informants' testimony insufficient to support a criminal conviction without corroboration. See *id.*

Informants, Accomplices

It should be noted that, while no court has yet adopted a per se corroboration requirement for jailhouse snitches, several have equated informant and accomplice testimony in other contexts. In the *Divers* case, for instance, the Louisiana court noted that a "great caution" instruction is to be given where the proof against a defendant consists of the uncorroborated testimony of an accomplice or an informant. See *Divers*, 889 So2d at 352-53. Mississippi also mandates a "caution and suspicion" instruction for any "state's witness who has received a reduced sentence to testify," whether that witness is an accomplice or a jailhouse informant. See *McNeal*, 551 So2d at 158-59. The same court has indicated in dicta that the testimony of either would not be sufficiently "direct" evidence to obviate the need for a special instruction where the evidence is otherwise circumstantial. See *id.* at 159. Moreover, at least one California judge has argued that the corpus delicti of an offense should not be established by the uncorroborated testimony of a jailhouse snitch. See *People v. Jones*, 949 P2d 890, 917 (Cal. 1998) (Mosk, J., concurring).

The New York courts should accordingly follow Justice Lawton's suggestion and equate the testimony of jailhouse informants with that of accomplices for corroboration purposes. In addition, New York should consider adopting some or all of the regulatory measures instituted in other states, such as expanded discovery, reliability hearings or special jury instructions. In this way, the "increasing problem [of jailhouse informants] throughout the American justice system" can be alleviated in New York.

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