INFORMANTS V. INNOCENTS: INFORMANT TESTIMONY AND ITS CONTRIBUTION TO WRONGFUL CONVICTIONS

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I. INTRODUCTION

Wrongful convictions are not an uncommon occurrence.[1] Innocent individuals spend years, sometimes decades, incarcerated for crimes that they did not commit. Some have even spent these years on death row awaiting an opportunity to prove their innocence and secure their freedom.[2]

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[1] As of April 2020, the National Registry of Exonerations lists 2,588 exonerations. NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/A47J-RZEY]. The Innocence Project lists 367 DNA exonerations. *Exonerate the Innocent*, INNOCENT PROJECT, https://www.innocenceproject.org/exonerate/ [https://perma.cc/8AFL-VGFG].

[2] There have been 156 death row inmates exonerated. *Innocence*, NAT'L COALITION TO ABOLISH DEATH PENALTY, http://www.ncadp.org/pages/innocence [https://perma.cc/J2N8-

These discoveries have paved the way for scholarly attention and criminal justice reforms that aim to lessen the potential for wrongful convictions.

False informant testimony is a leading cause of wrongful convictions.[3] Between seventeen and twenty-one percent of cases exonerated by DNA testing involved informants.[4] In fact, one scholar cited informants as "the leading cause of wrongful convictions in U.S. capital cases . . . ."[5] His analysis revealed that informants contributed in 46.0% of the 111 death row cases resulting in exonerations between 1973 and 2004.[6] In light of the prevalence of informants in wrongful conviction cases, it is important to bring attention to their potential for error.

This paper discusses the role of informants in wrongful conviction cases by reviewing legal precedent, discussing prior psycholegal research, and presenting an empirical study on their use and impact at trials. In Part II, we discuss how the courts handle informant testimony and the legal implications of this evidence. In Part III, we provide an overview of the existing psycholegal research on informants. In Part IV, we present the results of a content analysis of real-world exoneration cases that involved informants. In Part V, we discuss psychological mechanisms that could explain the persuasiveness of this unreliable testimony. In Part VI, we conclude with some implications of the present study.

37XZ] (last visited Apr. 7, 2020). The Innocence Project lists 21 DNA death row exonerations. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/YZ55-FN5R] (last visited Apr. 7, 2020).

[3] The other leading causes are eyewitness misidentification, false confessions, faulty forensic science, government misconduct, and ineffective counsel. *% Exonerations by Contributing Factor,* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/pages/exonerationscontribfactorsbycrime.aspx [https://perma.cc/4FUG-EH97] (last visited Apr. 20, 2020).

[4] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 279 (2011); Innocence Staff, *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT, https://innocenceproject.org/informing-injustice/ [https://perma.cc/QQB2-CH6W] (last visited Apr. 20, 2020).

[5] ROB WARDEN, NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 3 (2004), https://deathpenaltyinfo.org/documents/SnitchSystemBooklet.pdf [https://perma.cc/3JC7-W4T3].

[6] *Id.*

II. LEGAL BACKGROUND

Informants, in the most general sense, are individuals who provide information about criminal activity.[7] They can be paid by the government to infiltrate criminal circles and collect incriminating evidence, be planted by the government where they are likely to overhear incriminating information (e.g., prison cells), or collect incriminating evidence themselves and come forward in hopes of gaining some incentive. In this paper, we discuss the latter type of informant—that is, those who collect or encounter incriminating evidence themselves and are not paid in advance or planted by the government to collect information.[8] Testimony from these informants has been referred to as "bartered testimony" because the informant has often negotiated a deal in return for his or her testimony.[9]

This definition of informant can be further broken down into three different types: jailhouse informants, cooperating witnesses, and accomplice witnesses.[10] Jailhouse informants are individuals who gain evidence about a fellow inmate's case while incarcerated and often come forward in return for some promised incentive.[11] Jailhouse informants' testimony typically includes a secondary confession, meaning they claim to have heard the defendant confess to committing the crime.[12] Jailhouse informants have been called the most dangerous among the different types of informants,[13] namely because their claims can be entirely fabricated with no possibility of corroboration. Cooperating witnesses are citizens with incriminating

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[7] *Informant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[8] The former type of informants (i.e., those paid or planted by the government in advance of collecting information) are distinguishable because they act as government agents and therefore have more restrictions on their collection of evidence. For a discussion of how the law applies to informants who act as government agents, *see* Elizabeth A. Ganong, *Involuntary Confessions and the Jailhouse Informant: An Examination of* Arizona v. Fulminante, 19 HASTINGS CONST. L. Q. 911, 919–20, 930–31 (1992).

[9] Jeffrey S. Neuschatz, Deah S. Lawson, Jessica K. Swanner, Christian A. Meissner & Joseph S. Neuschatz, *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 L. & HUM. BEHAV. 137, 138 (2008).

[10] Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 747–48 (2016).

[11] Innocence Staff, *supra* note 4.

[12] Neuschatz et al., *supra* note 9, at 138.

[13] Stephen S. Trott, *Words of Warnings for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996).

evidence about a defendant's case but who require an incentive to testify.[14] Cooperating witnesses typically learn about the case through some connection with the defendant (e.g., his friend) or through their own experiences (e.g., as an eyewitness).[15] For example, an eyewitness may be reluctant to testify for fear of retaliation, thus a prosecutor may have to provide some type of incentive (e.g., relocation funds) to secure his or her testimony as a cooperating witness.[16] Finally, accomplice witnesses are individuals who allegedly committed the crime with the defendant and who testify against the defendant for some leniency in their own case.[17]

Informants are a unique type of witness in that prosecutors can offer incentives in exchange for their testimony in a way otherwise proscribed for witnesses.[18] Incentives generally come in the form of leniency in the informant's case, but can also be rewards such as money, food and telephone privileges for those incarcerated, or special treatment for family members.[19] These incentives might be necessary for the government to collect information about criminal activity that would be inaccessible through traditional means.[20] This "cooperation system" benefits both the informant and the prosecutor: the informant gets some leniency or benefit, and the prosecutor gets information that will help in the prosecution of other, often more culpable and dangerous, criminals.[21] Some argue that the effectiveness of the criminal justice system is dependent on the use of informants, in that many crimes would go undiscovered, unprosecuted, or both without the information that only they can provide.[22] This cooperation system also,

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[14] Roth, *supra* note 10, at 748.

[15] *Id.*

[16] *Id.* at 747.

[17] *Id.* at 751–52.

[18] *Id.* at 745.

[19] *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 16 (2001).

[20] *Id.* at 46.

[21] *Id.* at 17.

[22] *See e.g.,* Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 46 (1999) (framing an argument about informants as prosecutors "using unsavory methods in pursuit of laudable ends"); Harris, *supra* note 19, at 74.

however, creates a situation likely to elicit unreliable or fabricated information with potentially dire consequences for innocent defendants.[23]

A. Use of Informants

Informants are not new to the legal system, but they have become increasingly common in recent decades, with one scholar concluding "[c]ooperation has never been more prevalent than it is today."[24] The use of informant testimony can be traced back for centuries.[25] In fact, the Fifth Circuit remarked that "[n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."[26]

Scholars have argued that the modern prevalence of informant testimony is directly related to the introduction of Mandatory Minimum Sentencing provisions ("mandatory minimums") and the Federal Sentencing Guidelines ("guidelines").[27] Before the guidelines, judges had fairly wide discretion in imposing sentences on defendants, deciding both the length of imprisonment and the factors they would consider in imposing that sentence.[28] Since the guidelines went into effect, however, judicial discretion is more limited.[29] Their window of possible sentences narrowed and became generally more severe than the pre-guideline sentences.[30] One form of discretion that the guidelines do provide is when a defendant provides "substantial assistance in the investigation or prosecution of another person who has committed an offense . . . ."[31] Judges sentencing cooperating defendants are not

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[23] *See generally* Trott, *supra* note 13, at 1394.

[24] Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 3 (2003) (footnote omitted).

[25] Jeffrey S. Neuschatz, Nicholaos Jones, Stacy A. Wetmore & Joy McClung, *Unreliable Informant Testimony*, *in* CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 213, 214 (Brian Cutler ed., 2012) (stating "[t]he use of informants dates to at least the fourth century BCE, where the Athenian government relied upon informants to expose treasonous plots").

[26] United States v. Cervantes–Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

[27] Simons, *supra* note 24, at 7–21.

[28] *Id.* at 8.

[29] Koon v. United States, 518 U.S. 81, 96 (1996).

[30] Simons, *supra* note 24, at 9–11.

[31] U.S. SENTENCING GUIDELINES MANUAL § 5D1.2 cmt. n.3 (U.S. SENTENCING COMM'N 2016).

constrained to minimums and have wide discretion. Therefore, in the post-guideline sentencing era, substantial assistance departures become exceptionally valuable to defendants. One scholar referred to these departures as "often their only hope for a significantly reduced sentence."[32] This system has pushed some power away from sentencing judges and shifted it toward prosecutors.[33] Prosecutors can now rely on mandatory minimums and the guidelines to entice informants to provide information in exchange for leniency in their own case. In fact, one former prosecutor avowed that when offered the chance to cooperate with the prosecution, there really is no choice at all other than to cooperate.[34]

Data on the overall prevalence of informants are difficult to obtain. Calls for collection of this information have been made,[35] but thus far seem to have gone unanswered. Some estimates exist but likely underestimate true frequencies.[36] At the federal level, the U.S. Sentencing Commission reported that in 2017, 26.2% of all federal defendants received a substantial assistance departure,[37] with the rate in certain circuits reaching as high as 40.5% of defendants.[38] The size of the sentence reduction can be substantial—a median decrease of thirty-three months (49.2% lower) from

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[32] Simons, *supra* note 24, at 14.

[33] C. Blaine Elliot, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, 3 (2003) (stating that "[p]rosecutors often use mandatory minimums and the Guidelines as a tool to compel cooperation from defendants who are potential witnesses").

[34] Steven M. Cohen, *What Is True? Perspectives of A Former Prosecutor*, 23 CARDOZO L. REV. 817, 819 (2002).

[35] *See, e.g.*, Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 900 (2002) ("Unfortunately, most of the data is anecdotal because no one is systematically collecting it.").

[36] *See id.* at 901. The numbers available do not provide any information about informants who do not successfully receive compensation, who receive informal incentives, who provide information in state cases, or how often informants testify against multiple defendants.

[37] 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 62, UNITED STATES SENTENCING COMMISSION 1 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table62.pdf [https://perma.cc/DMW4-L7KD].

[38] *Id.* at 1. In the 4th Circuit, 40.5% of defendants received substantial assistance departures. *Id.* The next highest 36.3% of defendants in the 7th Circuit. *Id.* at 2.

the guideline minimum for the crime.[39] These numbers make it clear that informant testimony is not uncommon, which makes understanding this evidence all the more important.

It is well-established that evidence provided by informants is generally admissible in federal courts.[40] The Supreme Court legitimized the use of informant testimony as early as 1878,[41] and subsequent federal court decisions have continued the trend of allowing almost any form of incentivizing prosecution witnesses.[42]

In a striking deviation from this pattern, the Tenth Circuit addressed the problems that informant testimony posed to the legal system in two decisions known as *Singleton I*[43] and *Singleton II*.[44] The case involved a defendant who was convicted on money laundering and drug charges.[45] At trial, the prosecution called upon an informant who had been convicted as a co-conspirator and was presently serving a sentence.[46] The prosecution had promised the informant that, in exchange for his testimony, it would not

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[39] 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, TABLE 30, UNITED STATES SENTENCING COMMISSION 1 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table30.pdf [https://perma.cc/7QRR-KYU6].

[40] For a historical review of the use of informants in the American criminal justice system, *see* Harris, *supra* note 1922.

[41] United States v. Ford, 99 U.S. 594, 598–99 (1878) ("The Whiskey Cases").

[42] *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 293 (1966) (upholding informant testimony against Fourth, Fifth, and Sixth amendment challenges), United States v. Cervantes-Pacheco, 826 F.2d 310, 314 (5th Cir.1987) (holding that incentivized informants are not disqualified from testifying and that it is up to the jury to evaluate their testimony); United States v. Wilson, 904 F.2d 656, 656 (11th Cir. 1990) (concluding that a defendant's due process rights were not violated when informants believed they were to be compensated with immunity and up to eleven million dollars for their testimony); United States v. Dailey, 759 F.2d 192, 193 (1st Cir. 1985) (holding that a defendant's due process rights were not violated when informants were offered a plea deal contingent on cooperation that was "of value" to the government); United States v. Spector, 793 F.2d 932, 934 (8th Cir. 1986) (finding that a defendant's due process rights were not violated when informants' immunity agreement relied on the "value of [his] information and cooperation as it relates to successfully solving and prosecuting crimes").

[43] United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) [hereinafter *Singleton I*].

[44] United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999) [hereinafter *Singleton II*].

[45] *Singleton I*, 144 F.3d at 1343.

[46] *Id.* at 1344.

pursue any additional charges against him and it would notify the sentencing judge and parole board of his cooperation.[47] The informant's sentence was ultimately reduced from fifteen to five years.[48] The defense attorney objected to his testimony, arguing that it violated federal bribery statutes which proscribe offering anything of value to witnesses for their testimony.[49] In *Singleton I*, a panel of three judges held that the promises made to the informant were in clear violation of the statute in question and therefore reversed the defendant's conviction and remanded it for a new trial.[50] In finding so, it held that the government could still use information from informants in their cases, but it could not provide incentives in exchange for their testimony.[51] This precedent was short-lived, as just nine days later, after an onslaught of defense attorneys filing "*Singleton* motions" to exclude informant testimony from their cases, the court ordered a rehearing en banc.[52] In *Singleton II*, the en banc court reversed the panel's decision in finding that the federal bribery statute does not apply to prosecutors who are acting on behalf of the government.[53] The court emphasized the longstanding practice of allowing informants to testify in exchange for

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[47] *Id.*

[48] *The Case That Challenged Leniency Deals*, PUB. BROADCASTING SERV., https://www.pbs.org/wgbh/pages/frontline/shows/snitch/end/ [https://perma.cc/5RAD-FMWV] (last visited Apr. 20, 2020).

[49] *Singleton I*, 144 F.3d at 1344; 18 U.S. Code § 201(c)(2) states,

> Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom . . . shall be fined under this title or imprisoned for not more than two years, or both.

[50] *Singleton I*, 144 F.3d at 1343.

[51] *Id.* at 1355.

[52] Jeffrey M. Schumm, *Courts Rush to Extinguish Singleton, but are the Embers of the Panel's Decision Still Glowing*, 27 FLA. ST. U. L. REV. 325, 326–27, 331 (1999).

[53] *Singleton II*, 165 F.3d 1297, 1298, 1300 (10th Cir. 1999) (The *en banc* court held that "whoever" as used in the statute does not include the government and therefore does not apply to prosecutors acting on behalf of the government.).

leniency in upholding the government's prerogative to offer incentives.[54] Other circuit courts, facing similar issues, have generally sided with the *Singleton II* decision in rejecting the argument that incentivizing informants violates federal bribery statues.[55] Thus, at least in federal courts, prosecutors still have the option to gather information from incentivized informants and to rely on their testimony in mounting cases against defendants.

B. Concerns about Reliability

Courts often admit testimony from informants while also acknowledging the inherent problems that come from incentivizing a witness to testify.[56] These problems were highlighted in 1988 when a notorious informant named Leslie Vernon White appeared on *60 Minutes* and admitted to fabricating evidence against a dozen or so defendants.[57] He demonstrated the ways in which he could pose as a police officer to obtain information about his fellow inmates that he could use to barter for incentives.[58] He was able to use this information to construct plausible false secondary confessions—that is, he would claim that a defendant confessed to him while the two were incarcerated together.[59] These secondary confessions were convincing because he was able to obtain true information about the defendant's case and was also able to correctly assert that he had met the defendant while incarcerated.[60] His statements such as, "[i]f you can't do the time, just drop a dime," and "[d]on't go to the pen, send a friend," exemplified the pitfalls of the cooperation system.[61] White's public admissions sparked outrage and concern about the use of unreliable informant testimony.[62] These disclosures led to a comprehensive grand jury investigation into White's impact on the criminal justice system and the use

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[54] *Id.* at 1301–02 (acknowledging "the longstanding practice of leniency for testimony").

[55] *See, e.g.*, United States. v. Haese, 162 F.3d 359, 366 (5th Cir. 1998); United States v. Condon, 170 F.3d 687, 688 (7th Cir. 1999); United States v. Lara, 181 F.3d 183, 197 (1st Cir. 1999); United States v. Lowery, 166 F.3d 1119, 1121 (11th Cir. 1999); United States v. Ramsey, 165 F.3d 980, 987 (D.C. Cir. 1999); United States v. Ware, 161 F.3d 414, 418–19 (6th Cir. 1998).

[56] Neuschatz et al., *supra* note 25, at 231–32.

[57] Warden, *supra* note 5, at 2.

[58] Neuschatz et al., *supra* note 25, at 218.

[59] *Id.* at 218.

[60] *Id.* at 218.

[61] Warden, *supra* note 5, at 2.

[62] Neuschatz et al., *supra* note 25, at 218.

of informant testimony in Los Angeles County.[63] The grand jury revealed highly concerning behaviors on the part of the informants, the police officers who worked with the informants, and the district attorneys who relied on the informants' information to prosecute other defendants.[64] Similar investigations have ensued in other jurisdictions and have also demonstrated the abundance of issues that stem from relying on information obtained by informants.[65]

Courts have long acknowledged the likelihood that informants will provide unreliable information in exchange for a personal incentive. In *United States v. Cervantes-Pacheco*, the Fifth Circuit expressed the opinion that "[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . ."[66] Similarly, Judge Trott of the Ninth Circuit remarked that:

> [n]ever has it been more true . . . that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.[67]

He continued, "[d]efendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates

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[63] *Id.* at 218.

[64] 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) [hereinafter LOS ANGELES GRAND JURY], http://grandjury.co.la.ca.us/pdf/Jailhouse%20Informant.pdf [https://perma.cc/Z2A2-P7NK].

[65] *See, e.g.*, REPORT OF THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998); MANITOBA DEP'T OF JUSTICE PROSECUTIONS, REPORT OF THE COMMISSION OF INQUIRY REGARDING THOMAS SOPHONOW (2000). *See also* Thompson v. Calderon, 120 F.3d 1045, 1050 (9th Cir. 1997), *reversed*, 523 U.S. 538 (1998) (concluding that a prosecutor's tactics, "including the use of two highly dubious jailhouse informants,", resulted in "a fundamentally unfair trial"); Robert W. Stewart, *Jailhouse Snitches: Trading Lies for Freedom*, L.A. TIMES (Apr. 16, 1989), https://www.latimes.com/archives/la-xpm-1989-04-16-mn-2497-story.html [https://perma.cc/2HBL-ASVS].

[66] United States. v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

[67] N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

alike."[68] Statements like these, concerning the unreliability of informant testimony, are plentiful in appellate decisions across a variety of jurisdictions[69] all the way up to the Supreme Court, which recognized that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."[70] These concerns stand in stark contrast to the fact that, as discussed in the preceding section, informant testimony is admissible under most circumstances.

C. Emphasis on Safeguards

Notwithstanding concerns about reliability, courts generally admit evidence from informants under the assumption that the existing safeguards of the legal system will prevent unreliable testimony from leading to a conviction of an innocent defendant. In *Hoffa v. United States*, the Supreme Court held that although informant testimony may be unreliable, "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."[71] Therefore, in that case, although the informant might have had a motivation to lie, his testimony was admissible because he "was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored."[72] The court also emphasized the presence of jury instructions in finding his testimony admissible: "The trial

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[68] *Id.* at 1124.

[69] *See, e.g.*, United States v. Levenite, 277 F.3d 454, 461 (4th Cir. 2002) (stating that compensated testimony "create[s] fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial's legitimacy"); United States v. Bernal-Obeso, 989 F.2d 331, 334 (9th Cir. 1993) (stating that "[o]ur 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"); State v. Patterson, 886 A.2d 777, 789 (Conn. 2005) (agreeing that "an informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate the falsely accused. Consequently, the testimony of such an informant . . . is inevitably suspect"); Dodd v. State, 993 P.2d 778, 783 (Okla. Crim. App. 2000) (stating that: "[c]ourts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony.").

[70] Lee v. United States, 343 U.S. 747, 757 (1952).

[71] Hoffa v. United States, 385 U.S. 293, 311 (1966).

[72] *Id.* (footnote omitted).

judge instructed the jury, both specifically and generally, with regard to assessing [his] credibility."[73] These safeguards are often used as a basis to allow informant testimony.

Many state and federal courts have established or required special jury instructions to be administered when an informant testifies in a case. The Eleventh Circuit's pattern instructions, for example, inform jurors:

> [y]ou must consider some witnesses' testimony with more caution than others.
>
> For example, paid informants, witnesses who have been promised immunity from prosecution, or witnesses who hope to gain more favorable treatment in their own cases, may have a reason to make a false statement in order 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.[74]

Other courts also promote the use of such cautionary instructions.[75] In *Cervantes-Pacheco*, the Fifth Circuit held that, among other safeguards, trial courts should give specific instructions to the jury about the credibility of paid witnesses.[76] Subsequently, in *United States v. Villafranca*, the Fifth Circuit held that a trial court erred by only giving general instructions about weighing the credibility of witnesses rather than a more specific instruction about the suspect credibility of a witness who had been compensated for his testimony.[77] Although many courts often require trial judges to provide these special instructions, failure to do so "will generally not result in a finding of reversible error."[78]

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[73] *Id.* at 312 (footnotes omitted).

[74] 11TH CIRCUIT, S1.1 TESTIMONY OF ACCOMPLICE, INFORMER OR WITNESS WITH IMMUNITY (2019), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227 [https://perma.cc/N6U2-QJ7P].

[75] *See, e.g.*, State v. Patterson, 886 A.2d 777, 789 (Conn. 2005); United States v. Solomon, 856 F.2d 1572, 1578 (11th Cir. 1988).

[76] United States v. Cervantes-Pacheco, 826 F.2d 310, 313, 316 (5th Cir. 1987).

[77] United States v. Villafranca, 260 F.3d 374, 382 (5th Cir. 2001).

[78] Harris, *supra* note 19, at 47 (footnote omitted); *Villafranca*, 260 F.3d at 382.

Another often cited safeguard is the requirement that prosecutors disclose any incentives or leniency they offer informants in exchange for their testimony. The Supreme Court has clearly delineated this requirement in two cases. In *Giglio v. United States*, the Court held that nondisclosure of incentives that were relevant to determining a key witness's credibility violated the defendant's right to due process.[79] In *Banks v. Dretke*, the Court held that the prosecution's failure to disclose that a witness was a paid informant violated *Brady* requirements.[80] In finding such, it emphasized that the jury "did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants."[81] These cases make clear that the Court views disclosure of incentives as essential in cases involving informants.

Some additional safeguards beyond those explicitly mentioned in Supreme Court decisions have been proposed. One safeguard that scholars have proposed is the use of expert testimony in cases involving informants.[82] Experts who have "scientific, technical, or other specialized knowledge [that could] assist the trier of fact to understand the evidence" in an informant case could presumably be permitted to testify under the *Daubert* standard.[83] Allowing such expert testimony would require a judge to find that an expert has special knowledge about informants that is unknown to jurors.[84] Indeed, some courts have begun to allow expert testimony in cases involving informants, finding that evaluating informants' credibility is beyond the ken of the average juror and can help jurors in evaluating their testimony.[85]

Another potential safeguard against unreliable informant testimony is a corroboration requirement.[86] The American Bar Association urged "federal, state, local, and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated

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[79] 405 U.S. 150, 154–55 (1972).

[80] 540 U.S. 668, 689 (2004).

[81] *Id.* at 701.

[82] *See, e.g.*, Robert M. Bloom, *What Jurors Should Know about Informants: The Need for Expert Testimony*, MICH. L. REV. (forthcoming).

[83] Daubert v. Merrell Down Pharmaceuticals, 509 U.S. 579, 589 (1993).

[84] *Id.*

[85] *See, e.g.*, Williams v. Davis, 2016 WL 1254149, *20 (C.D. Cal. 2016); Larson v. State, 375 P.3d 1096,1102 n. 5 (Wash. Ct. App. 2016).

[86] Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L. J. 785, 791 n. 40 (1990).

jailhouse informant testimony."[87] The ABA reported that, at that time, eighteen states had corroboration requirements for accomplice testimony and encouraged jurisdictions to extend that requirement to cases involving informants as well.[88]

In short, courts are frequently admitting testimony from witnesses whom some have deemed "inherently unreliable"[89] with confidence that the existing safeguards are sufficient to help decision-makers reliably distinguish between accurate and inaccurate testimony. Without groundbreaking new case law, the use of informant testimony will likely remain common for the foreseeable future. Thus, it is important to understand this evidence and the impact it has on jurors' decisions; psycholegal research can provide some insight.

III. PRIOR PSYCHOLEGAL RESEARCH

Informant testimony is a relatively new area of psycholegal research.[90] Most of the research conducted to date echoes the longstanding concerns about the use of informant testimony. This research has focused on three major areas: whether incentives increase the likelihood that informants provide false information; how informants influence jurors' decisions; and whether safeguards are effective at combatting unreliable informant testimony. We discuss each of these in turn.

A. Incentives

Psycholegal research has demonstrated that incentives increase the likelihood that informants will provide false information for their own benefit. These studies generally consist of bringing a pair of participants

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[87] Am. Bar Ass'n Criminal Justice Section's Ad Hoc Innocence Comm. to Ensure the Integrity of the Criminal Process, *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, 37 SW. U. L. REV. 763, 848 (2008).

[88] *Id.* at 854 n.22.

[89] Sivak v. Hardison, 658 F.3d 898, 916 (9th Cir. 2011).

[90] Psychological research on informant testimony only goes back one decade. Neuschatz et al., *supra* note 9. In contrast, empirical research on eyewitness testimony and jury decision-making dates back to the late 19th/early 20th century. *See* BRIAN H. BORNSTEIN & JEFFREY S. NEUSCHATZ, HUGO MÜNSTERBERG'S PSYCHOLOGY AND LAW: A HISTORICAL AND CONTEMPORARY ASSESSMENT (2019); Siegfried Ludwig Sporer, *Lessons from the Origins of Eyewitness Testimony Research in Europe*, 22 APPLIED COGNITIVE PSYCHOL. 737, 737 (2008); Brian H. Bornstein & Amy J. Kleynhans, *The Evolution of Jury Research Methods: From Hugo Münsterberg to the Modern Age*, 96 DENV. L. REV. 813, 820 (2019).

into the laboratory to complete a computer task together that requires one person to type on the computer and the other person to read aloud what needs to be typed.[91] Participants are instructed not to hit the "TAB" key on the keyboard, "because doing so would result in the computer crashing and the data being lost."[92] After the participants perform the task for a period of time, the computer runs a simulated crash for all participants whether or not they hit the TAB key.[93] The experimenter then escorts the participants into separate rooms while they await the lead researcher for further directions given the computer crash.[94] Three studies using this method have shown that incentives can motivate individuals to provide false incriminating information.[95]

One study showed that individuals are "more willing to implicate others than [to implicate] themselves," especially in the face of an incentive.[96] The researchers specifically examined how incentives would affect primary confessions (i.e., those from the typist) and implicating confessions (i.e., those from the reader).[97] The experimenter told all participants that they would have to attend an additional session to make up for the data lost from the computer crash; however, to examine the impact of incentives, the experimenter also told half of the participants that if they confessed to crashing the computer, only one of the pair would be punished by requiring

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[91] Jessica K. Swanner, Denise R. Beike & Alexander T. Cole*, Snitching, Lies and Computer Crashes: An Experimental Investigation of Secondary Confessions*, 34 L. & HUM. BEHAV. 53, 56 (2010); Jessica K. Swanner & Denise R. Beike, *Incentives Increase the Rate of False but not True Secondary Confessions from Informants with an Allegiance to a Suspect*, 34 L. & HUM. BEHAV. 418, 422 (2010).

[92] Swanner et al., *supra* note 91, at 57.

[93] *Id.*; Swanner & Beike, *supra* note 91, at 420.

[94] Swanner et al., *supra* note 91, at 57; Swanner & Beike, *supra* note 91, at 420.

[95] Swanner et al., *supra* note 91, at 60, 63; Swanner & Beike, *supra* note 91, at 419.

[96] Swanner et al., *supra* note 91, at 59.

[97] *Id.* at 56. The authors use the terms "primary confessions" to refer to those from the typist and "secondary confessions" to refer to those from the reader. However, this is a different use of the term "secondary confessions" than we traditionally see used in the informant literature and than we use in this paper. We define "secondary confessions" as a claim that a defendant confessed to an informant about their participation in a crime. In this study, "secondary confessions" referred to confessions from a someone who played a role in the crime that implicate their co-perpetrator. Because these terms are distinct, for clarity, we use the terms "primary confessions" and "implicating confessions" to describe the confessions in this study.

them to complete a second session.[98] The experimenter then asked the participants a series of questions which allowed them the opportunity to confess to crashing the computer.[99] Results showed that "participants were more willing to implicate others than implicate themselves"; however, incentives increased the rate of both primary and implicating confessions.[100] When the experimenter told typists and readers that only one of them would have to return for a second session, they were both more willing to admit that the typist pressed the "TAB" key than when no such promise was made.[101] In fact, 87% of readers were willing to sign a statement implicating the typist when told that doing so would prevent them from having to return for a second session.[102] Therefore, even a minimal incentive was enough to prompt individuals to incriminate themselves or others.[103]

Another study showed that individuals are also more willing to falsely implicate others who have denied committing a transgression when promised an incentive.[104] The same researchers examined how incentives would affect implicating confessions (i.e., from the reader) in the face of a primary confession or denial of guilt (i.e., from the typist).[105] They tested this by having the typist be an undercover member of the research team (a "confederate") rather than another participant.[106] This modification allowed the researchers to control whether the typist confessed or denied hitting the "TAB" key.[107] It also allowed them to ensure that the typist did not actually hit the "TAB" key, thereby rendering all confessions demonstrably false.[108]

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[98] *Id.* at 57–58. The experimenter told the participants, "You know, when I talked to my advisor she said that there's no reason for you both to get in trouble for this. She said that only one of you two really has to come back for the second session, but that's only if you tell me what happened. So if you tell me what happened, only you will have to come back." *Id.* at 58.

[99] *Id.* at 57.

[100] *Id.* at 59, Tables 1 and 2.

[101] *Id.*

[102] *Id.* at 62, Table 3.

[103] *Id.* at 56–60.

[104] *Id.* at 60.

[105] *Id.*

[106] *Id.* (Participants were unaware that the confederate was part of the research team and instead believed him to be another participant.).

[107] *Id.* at 61 (The typist either said "I *think* I hit the 'TAB' key" (confession) or "I did *not* hit the 'TAB' key" (denial).).

[108] *Id.* at 60.

Participants were more likely to provide an implicating confession when the confederate confessed rather than denied hitting the "TAB" key; however, when the confederate denied hitting the "TAB" key, participants were more likely to provide an implicating confession if they were promised an incentive.[109] Therefore, a minimal incentive was sufficient motivation to prompt a false implicating confession even when the individual being implicated explicitly denied committing the transgression.

Finally, another study demonstrated that individuals are also more willing to falsely implicate others with whom they are interpersonally close when promised an incentive than when not provided an incentive.[110] The same researchers examined whether having an interpersonal relationship with the alleged perpetrator would mitigate the degree to which incentives brought about secondary confessions.[111] Participants completed a "get-to-know-you" task that was designed either to make them feel "close" to the confederate or like an "acquaintance" of the confederate.[112] Rather than completing the computer task together, the confederate told the participant that he was present because he had to complete an additional session to make up for an incident that happened the previous week.[113] He told the participant about the computer task and either confessed or denied that he

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[109] *Id.* at 62. The incentive was the same as used in the previous study; the experimenter told half of the participants that if they confessed to crashing the computer, only one of the pair would be punished by requiring them to complete a second session. *Id.* at 61.

[110] Swanner & Beike, *supra* note 91, at 424, Table 1.

[111] *Id. at* 420–21. This study used the term "secondary confession" in the traditional sense, meaning that the participant claimed that the confederate confessed to him or her about a transgression in which the participant played no role. *Id.* at 418. Therefore, we use "secondary confession" to describe these results.

[112] *Id.* at 421–22. Participants in the "close" condition spent thirty minutes asking and answering questions with the confederate designed to create interpersonal closeness through personal self-disclosure, such as "what is your most treasured memory?" and "when did you last cry in front of another person?" *Id.* at 420 (citing Arthur Aron, et al., *The Experimental Generation of Interpersonal Closeness: A Procedure and Some Preliminary Findings*, 23 PERSONALITY & SOC. BULL. 363, 374–75 (1997), https://journals.sagepub.com/doi/pdf/10.1177/0146167297234003 [https://perma.cc/UZJ9-Z77Y]). Participants in the "acquaintance" condition spent the same amount of time asking and answering small talk questions designed to be self-relevant but not disclosing, such as "describe the last time you went to the zoo" and "what is your favorite holiday?" *Id.*

[113] *Id.* at 422.

hit the "TAB" key.[114] After this task, the experimenter led the participant into another room alone and asked them a series of questions about whether they knew if the confederate hit the "TAB" key during their last session.[115] Results showed that incentives increased the likelihood that participants would provide a secondary confession, but only when they were made to feel close to the confederate, regardless of whether the confederate confessed or denied.[116] Therefore, a minimal incentive was enough to prompt individuals to falsely implicate someone to whom they felt interpersonally close.

Together, these studies provide empirical support for the concern that incentives will increase an individual's motivation to falsely implicate another person's guilt. These studies also complement findings from other areas of psychological research demonstrating that people will lie to gain various personal incentives.[117] Although these studies use relatively innocuous situations (i.e., confessing to crashing a laboratory computer), they provide examples of how this psychological process can occur when the stakes are fairly low. It is possible—and perhaps probable—that these effects would be even more pronounced when the stakes are much higher, such as when an informant is incentivized with his own freedom in exchange for incriminating information, as is generally the case for real informants.

B. Jurors' Decisions

Psycholegal research has also demonstrated that informant testimony is persuasive to jurors. Studies have consistently found that mock jurors are more likely to render a guilty verdict when an informant testifies in a case

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[114] *Id.*

[115] *Id.*

[116] *Id.* at 425.

[117] *See, e.g.*, Agne Kajackaite & Uri Gneezy, *Incentives and Cheating*, 102 GAMES & ECON. BEHAV. 433, 441 (2017) (showing that individuals lied while playing a game in order to gain a monetary incentive even when it came at the expense of another person); Benjamin E. Hilbig & Isabel Thielmann, *Does Everyone have a Price? On the Role of Payoff Magnitude for Ethical Decision Making*, 163 COGNITION 15, 23 (2017) (finding that some individuals will lie for practically any non-zero incentive while others are only more willing to lie when incentives increase in size).

than when they read the same case without that informant.[118] In fact, jurors are even persuaded by informants who have questionable reliability.[119]

For example, mock jurors are persuaded by informant testimony even when the informant has a motivation to lie for their own benefit.[120] Multiple studies have found that jurors are just as willing to convict a defendant based on an informant's testimony whether the informant receives an incentive for testifying (e.g., a five-year reduced sentence, a monetary award) or no incentive.[121] For example, in the first psycholegal study on informants,[122] the researchers presented mock jurors with a trial transcript based on the infamous "West Memphis Three" case[123] and varied whether there was an informant who testified for the prosecution or not and whether the informant (when present) received an incentive for testifying.[124] Results showed that mock jurors rendered more guilty verdicts when there was an informant than when there was no informant.[125] Furthermore, whether the witness was

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[118] *See* Neuschatz et al., *supra* note 9, at 146; Jeffrey S. Neuschatz, Miranda L. Wilkinson, Charles A. Goodsell, Stacy A. Wetmore, Deah S. Quinlivan & Nicholaos J. Jones, *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE & CRIM. PSYCHOL. 179, 188 (2012); Evelyn M. Maedar & Emily Pica, *Secondary Confessions: The Influence (or Lack Thereof) of Incentive Size and Scientific Expert Testimony on Jurors' Perceptions of Informant Testimony*, 38 L. & HUM. BEHAV. 560, 564 (2014); Evelyn M. Maeder & Susan Yamamoto, *Attributions in the Courtroom: The Influence of Race, Incentive, and Witness Type on Jurors' Perceptions of Secondary Confessions*, 23 PSYCHOL. CRIME & L. 361, 371 (2017).

[119] *See* Neuschatz et al., *supra* note 9, at 146; Neuschatz et al., *supra* note 118, at 189.

[120] *See* Neuschatz et al., *supra* note 9, at 146.

[121] *Id.*; Neuschatz et al., *supra* note 118, at 189. *Contra* Maeder & Pica, *supra* note 119, at 566; Maeder & Yamamoto, *supra* note 118, at 371.

[122] *See* Neuschatz et al., *supra* note 9, at 138.

[123] *Id.* at 140. The "West Memphis Three" refers to three teenagers who were accused and convicted of murdering three young boys who were found in a ditch near a creek with their clothing stripped and their limbs hogtied with shoelaces. *See West Memphis Three,* ENCYCLOPÆDIA BRITANNICA (Aug. 31, 2017), https://www.britannica.com/event/West-Memphis-Three [https://perma.cc/L25K-Z7SL]. After nearly two decades of maintaining that they were innocent, they were released as part of an *Alford* plea arrangement. *Id.*

[124] *See* Neuschatz et al., *supra* note 9, at 140.

[125] *Id.* at 146. Sixty percent of participants who heard a jailhouse informant testify about a secondary confession found the defendant guilty, whereas only 31% of participants who heard the same trial without the jailhouse informant found him guilty. *See id.* at 143.

receiving a five-year reduced sentence, a monetary reward, or nothing, mock jurors rendered just as many guilty verdicts based on his testimony.[126]

Additionally, mock jurors are persuaded by informant testimony when there are reasons beyond incentives to question its reliability. Studies have found that mock jurors' decisions are not influenced by the informant's identity (i.e., jailhouse informant, accomplice, civilian),[127] the source of the informant's information about the crime (i.e., claimed to hear the defendant confess, claimed to know the crime details from his or her own involvement),[128] or the number of times the informant testified for the prosecution in the past (i.e., never testified, testified twenty times in exchange for incentives).[129] All of these studies found that mock jurors rendered more guilty verdicts when an informant testified than when no informant testified, and that none of the additional characteristics influenced verdicts. In fact, a recent study[130] presented mock jurors with an informant who had several unreliable characteristics (i.e., provided vague testimony, received an incentive, had a criminal history, learned about the crime on the news, had a situational motivation for testifying)[131] or an informant who had several reliable characteristics (i.e., provided specific testimony, did not receive an incentive, had no criminal history, had no external sources of knowledge, had a dispositional motivation for testifying)[132] and found that mock jurors rendered just as many guilty verdicts regardless of his reliability.[133] However, they recognized that the unreliable informant was less trustworthy, less honest, and less interested in justice than the reliable informant.[134] Therefore, although they were aware of the informant's

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[126] *Id.* at 146. Sixty-five percent of participants who heard the incentivized witness testify found the defendant guilty; similarly, 65% of participant who heard the non-incentivized witness testify found the defendant guilty. *See id.* at 143.

[127] *See id.* at 145.

[128] *Id.* at 147.

[129] Neuschatz et al., *supra* note 118, at 188.

[130] Stacy A. Wetmore, Jeffrey S. Neuschatz, Melanie B. Fessinger, Jonathan M. Golding & Brian H. Bornstein, *Do Judicial Instructions Aid in Distinguishing between Reliable and Unreliable Informants?* 47 CRIM. JUST. & BEHAV. 582 (2020).

[131] *Id.* at 588, 595. Situational motivations are those that are driven by the external environment, such as receiving an incentive or feeling pressured by others. *Id.* at 584.

[132] *Id.* at 588. Dispositional motivations are those that are driven by internal factors related to a person's character, such as being an honest person or empathetic. *Id.* at 584.

[133] *Id.* at 595.

[134] *Id.* at 594–95.

questionable reliability, they were still willing to use his testimony in reaching a verdict.

Finally, informant testimony is also more persuasive than other types of incriminating evidence. In two experiments, researchers presented mock jurors with a case that included testimony from an informant, a character witness, and an eyewitness.[135] Results showed that participants rated the secondary confession evidence from the informant as "more indicative of guilt than" an eyewitness who was physically present at the crime scene or a character witness who had personal insight about the defendant and his wife.[136] Moreover, participants who rendered a guilty verdict reported that the secondary confession was more persuasive than the eyewitness or character witness.[137] In a third experiment, the same researchers compared the persuasiveness of secondary confessions (i.e., those reported by an informant) versus primary confessions (i.e., those made by the defendant directly),[138] which are often cited as the most compelling form of evidence that can be introduced against a defendant.[139] Results demonstrated that the presence of any type of confession (i.e., primary or secondary) was more likely to increase guilty verdicts when compared to other evidence conditions.[140] There were no differences between primary confessions and secondary confessions, suggesting that these types of evidence are of equivalent persuasive value and are similarly problematic.[141]

These studies together clearly demonstrate the persuasive power of informant testimony on mock jurors' verdicts. In fact, they show that informant testimony is compelling to mock jurors even when the informant has a motivation to lie. Although these studies all rely on the decisions of mock jurors, a recent meta-analysis of studies involving 17,716 total participants found little to no differences between the decision-making of mock jurors and actual venirepersons.[142] As such, it is important to examine

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[135] Stacy A. Wetmore, Jeffrey S. Neuschatz & Scott D. Gronlund, *On the Power of Secondary Confession Evidence*, 20 PSYCHOL. CRIME & L. 339, 343 (2014).

[136] *Id.* at 344.

[137] *Id.* at 345–46.

[138] *Id.* at 350–51.

[139] Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (stating that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained") (citation omitted).

[140] Wetmore et al., *supra* note 135, at 350.

[141] *Id.*

[142] *Id.* at 13, 22.

how to reduce jurors' reliance on this evidence when it is of questionable reliability.

C. Proposed Safeguards

Psycholegal research has also demonstrated that the existing safeguards may be inadequate at mitigating the impact of unreliable informant testimony. As discussed in the above sections, several potential safeguards have been proposed, including cross examination, disclosure of incentives, expert testimony, and jury instructions. Unfortunately, psycholegal research has shown limited success of all previously tested safeguards.

Cross examination and disclosure of incentives serve similar functions as proposed safeguards against unreliable informant testimony. The thought is that if jurors are aware that an informant is receiving an incentive for testifying or are aware that an informant has a questionable past, they would be more likely to discount his testimony.[143] However, as discussed previously, studies have demonstrated that jurors' decisions are not influenced by knowing that an informant is receiving an incentive to testify,[144] knowing that an informant has testified for an incentive several times in the past,[145] or knowing that an informant has a criminal history.[146]

Expert testimony is another possible safeguard against unreliable informant testimony. Experts may become increasingly helpful to jurors in the future as the psychological evidence mounts and we gain a better understanding of informant testimony.[147] Thus far, two studies have examined the efficacy of expert testimony against unreliable informant testimony. The first study presented mock jurors with an expert who was a previous informant and who testified about "the methods he has previously used to fabricate testimony . . . in multiple cases."[148] Results showed no influence of this expert on mock jurors' verdicts; whether they heard the expert testify or not, they were equally likely to find the defendant guilty on the basis of an informant's testimony regardless of whether he was receiving

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[143] Brittney P. Bate, Robert Cramer & Robert E. Ray, *Defense Responses to Jailhouse Informant Testimony*, 26 JURY EXPERT 24, 26 (2014).

[144] Neuschatz et al., *supra* note 9, at 146; Neuschatz et al., *supra* note 118, at 188. *Contra* Maeder & Pica, *supra* note 118, at 564; Maeder & Yamamoto, *supra* note 118, at 371.

[145] Neuschatz et al., *supra* note 118, at 188.

[146] Wetmore et al., *supra* note 130, at 595.

[147] Daubert v. Merrell Down Pharm., Inc., 509 U.S. 579, 588 (1993) (allows judges to admit expert testimony based on scientific knowledge under Federal Rule of Evidence 702).

[148] Neuschatz et al., *supra* note 118, at 186.

an incentive or not.[149] The second study presented mock jurors with scientific expert testimony from a social scientist who "discussed the empirical research on informant testimony," the relevant psychological mechanisms at play when evaluating informant testimony, and the statistics about wrongful convictions that involved informant testimony.[150] Results also showed no effect of the scientific expert testimony on mock jurors' verdicts; whether they heard the expert testify or not, they were equally likely to find the defendant guilty on the basis of an informant's testimony.[151] However, perceptions of the expert witness were significantly related to perceptions of the informant and verdict, such that mock jurors who rated the expert favorably were less likely to believe the informant and less likely to find the defendant guilty.[152] Therefore, expert testimony may affect jurors' decisions in a manner that is dependent on their credibility. As more psycholegal research about the issues with informant testimony accumulates—and therefore experts have more corroboration for their statements—jurors might find their testimony more persuasive and therefore might be more likely to use it when making decisions.

Finally, the Supreme Court has emphasized the safeguarding nature of having a "well-instructed jury" against unreliable informant testimony in several opinions.[153] Accordingly, some states have adopted informant-specific jury instructions to be used when an informant testifies against a defendant.[154] For example, the Connecticut Supreme Court held that informant-specific jury instructions must be used in cases where an informant testifies against the defendant.[155] The Connecticut instructions contain eight factors (e.g., the specificity of the informant's testimony and the informant's criminal record) that jurors can consider in deciding whether to rely on the testimony of an informant.[156] However, a recent study directly

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[149] Neuschatz et al., *supra* note 118, at 188.

[150] Maeder & Pica, *supra* note 119, at 563.

[151] *Id.* at 564.

[152] *Id.* at 564–65.

[153] Banks v. Dretke, 540 U.S. 668, 701–02 (2004); Hoffa v. United States., 385 U.S. 293, 311 (1966).; Lee v. United States, 343 U.S 747, 757 (1952).

[154] THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 2 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/jailhouse20snitch20testimony20policy20briefpdf.pdf [https://perma.cc/CE6W-GXTD].

[155] State v. Patterson, 886 A.2d 777, 789 (Conn. 2005).

[156] The Connecticut instructions inform jurors:

tested the efficacy of the Connecticut instructions and demonstrated that they had no impact on mock jurors' verdicts.[157] Jurors were more likely to find a defendant guilty when an informant testified in a case than when no informant testified in the case, regardless of whether they received special jury instructions patterned on the Connecticut model.[158] This was the case even when the informant admitted to learning about the crime from an external source, provided vague testimony, had a criminal history, and was incentivized for his testimony.[159] This finding is consistent with extensive psychological research that has examined the efficacy of jury instructions at combatting various kinds of unreliable evidence (e.g., eyewitness testimony) and demonstrates, by and large, a limited impact.[160] Therefore, as with the

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> A witness testified in this case as an informant. An informant is someone who is currently incarcerated or is awaiting trial for some crime other than the crime involved in this case and who obtains information from the defendant regarding the crime in this case and agrees to testify for the state. You must look with particular care at the testimony of an informant and scrutinize it very carefully before you accept it. You should determine the credibility of that witness in the light of any motive for testifying falsely and inculpating the accused.

The instructions continue with eight factors for jurors to consider in considering the witness's testimony:

> you may consider such things as: the extent to which the informant's testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record; any benefits received in exchange for the testimony; whether the informant previously has provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions.

See CONNECTICUT JUDICIAL BRANCH, CRIMINAL JURY INSTRUCTIONS 2.5-3 (2010), https://jud.ct.gov/JI/Criminal/Criminal.pdf [https://perma.cc/C2HK-FQ5D].

[157] Wetmore et al., *supra* note 130, at 594.

[158] *Id.*

[159] *Id.*

[160] Michael T. Nietzel, Denis M. McCarthy & Monica J. Kern, *Juries: The Current State of the Empirical Literature*, *in* PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 44 (Ronald Roesch, Stephen D. Hart, & James. R. P. Ogloff eds., 1999); Nancy Steblay, Harmon

other safeguards, confidence in jury instructions to safeguard against unreliable informant testimony may be misplaced.

IV. THE PRESENT STUDY

Past psycholegal research has demonstrated that incentivized informant testimony can be unreliable but persuasive to jurors even in the face of various safeguards. Therefore, important questions remain about what can be done to lessen the prevalence of this unreliable testimony and to lessen jurors' reliance on it. We conducted a content analysis of all twenty-two Innocence Record cases that involved an informant to better understand informants' role at trial, the information they provide, and the reasons why jurors may be unable to detect their deception.[161] These cases provide a critical context in which to evaluate and understand informant testimony because the informants' incriminating testimony against the defendant was demonstrably false as proven by the subsequent DNA exoneration. Although we are unable to definitively know how the jurors weighted the informant's testimony in their decision-making when other evidence was available, each of these cases provide an opportunity to understand what the informant testimony consisted of and for what reasons it might have persuaded jurors.

A. Method

We defined an informant as someone who was incarcerated and claimed to obtain evidence about the defendant's case ("jailhouse informant"), or someone who learned about the case through some connection with the defendant or through his own experiences but required an incentive to testify ("cooperating witness"). We present results combining jailhouse informants and cooperating witnesses into one general "informant" category unless otherwise indicated.[162]

M. Hosch, Scott E. Culhane & Adam McWethy, *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & HUM. BEHAV. 469, 469 (2006).

[161] The Innocence Record is a database of documents from wrongful conviction cases that have been reversed by DNA evidence. *See* INNOCENCE RECORD, https://www.innocencerecord.org [https://perma.cc/W9TC-HQ6Y] (last visited October 14, 2019).

[162] We combined results from jailhouse informants and cooperating witnesses into a single metric where the patterns across the different types of informants were similar and separately reported results where the patterns were different. Data were not available for every variable with all defendants and informants due to missing transcript pages or

We developed a coding scheme to gather information about the defendants and informants (e.g., demographics, testimony content). We also gathered information about attorneys' arguments (e.g., closing statement content). We trained research assistants to read case files and code for relevant information. At least two research assistants coded each case file. Afterward, two authors reviewed the coding and resolved any discrepancies.

B. Results

1. Demographics

There were twenty-eight defendants in the identified cases.[163] All were convicted of major crimes, including murder (14.29%), sexual assault/rape (21.43%), or both (64.29%). Defendants were all male, mostly white (60.71%), and had a mean age of 27.57 years at the time of the trial. Most defendants had a prior criminal history (82.35% of 17 available) which involved multiple prior convictions (58.82% of 17 available).

Eight trials (36.36%) had more than one informant testify for the prosecution. Five trials (22.73%) had at least one informant testify for the defense. In most cases (77.27%), the primary defense argument was that the defendant had an alibi for the time he was alleged to have committed the crime.

There were fifty-five informants in the identified cases. The majority were jailhouse informants who testified for the prosecution (61.82%), followed by jailhouse informants who testified for the defense (20.00%), and cooperating witnesses who testified for the prosecution (18.18%). Informants were mostly male (87.27%) and were an average of 28.86 years old at the time of trial. Most informants had a prior criminal history (90% of 40 available) which involved multiple prior convictions (75% of 40 available). Attorneys asked most informants (82% of 50 available) about their relationship with the defendant. They most often claimed to be acquaintances of the defendant (48.78%), followed by strangers (17.07%), friends in prison (14.63%), and friends previously (14.63%).

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inapplicable subvariables. Thus, the amount of missing data differed for each variable. We report the number that was used to calculate percentages next to each result if it is less than the total number of people in that category.

[163] The number of defendants is higher than the number of cases because several of the defendants were tried together in a single case.

2. Informant Testimony

a. Details

Jailhouse informants who testified for the prosecution and cooperating witnesses ("prosecution informants") served similar roles in the trials. The vast majority (88.37% of 43 available) testified about a secondary confession. They claimed that the defendant confessed to them without prompting (46.88% of 32 available), that they overheard the defendant confess to someone else (28.13% of 32 available), or that the defendant confessed to them after being explicitly asked (25.00% of 32 available). Their testimony contained an average of 4.65 details about the crime. Most of their details (average = 3.07, 66.02%) were corroborated by other evidence; very few of their details (average = 0.40, 8.60%) were directly contradicted by other evidence. Most jailhouse informants who testified for the prosecution (17.65% of 20 available) explicitly denied having knowledge of the crime from external sources. All cooperating witnesses (100.00% of 5 available) admitted having knowledge of the crime from alternative sources. They most often had knowledge from media (e.g., television, newspapers) or other people (e.g., friends, other inmates). Four jailhouse informants who testified for the prosecution (14.26% of 28 available) testified about non-public details, such as the location of the crime or specific acts committed by the perpetrator during the crime. Notably, most (65.79% of 38 available) prosecution informants had inconsistencies within their testimony, such as inconsistencies between their testimony and prior statements to police (20.00%), inconsistencies within their testimony (12.00%), or multiple types of inconsistencies (52.00%).

Jailhouse informants who testified for the defense ("defense informants") served a different role. Rather than testifying about a secondary confession, defense informants most often (77.78%) testified about the prosecution informants' motivation for testifying. For example, one defense informant testified that a prosecution informant told him, "this time is killing me and I'm going to set [the defendant] up . . . I'm going to get this 20 years up off me man, I can't take it."[164] Another defense informant testified that the same prosecution informant told him, "that he expected to be out of prison by October and that no matter what it took or who he had to burn that he was going to get out of prison."[165] In another

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[164] Defendant-Appellant's Brief at HUNT-000276, State v. Hunt, No. 17A91 (N.C. 1994).

[165] *Id.*

trial, a defense informant testified that he overheard the prosecution informant state, "they were going to get some of their time knocked off, they were doing something to get some of their time taken care of," and that "they were going to jump on [the defendant's] case. Which meant testify against him."[166]

b. Reasons for testifying

Much of the concern surrounding informant testimony focuses on the idea that providing incentives might yield false testimony. Importantly, the majority of attorneys questioned the informants about whether they were receiving an incentive in exchange for testifying. Prosecutors (71.40% of 28 available) and defense attorneys (75.00% of 28 available) questioned jailhouse informants who testified for the prosecution about incentives at similar rates; however, defense attorneys more often (100% of 9 available) asked cooperating witnesses whether they were receiving an incentive than prosecutors (33.33% of 9 available). When asked, the majority of informants (82.05% of 39 available) explicitly denied receiving an incentive.[167] Those who admitted receiving an incentive said they were receiving some type of leniency in their own case[168] (66.67%) or help to relocate[169] (33.33%).

If informants were allegedly not testifying in exchange for an incentive, jurors might have been left wondering why the informant would have come forward. Informants provided a range of motivations for their testimony.[170] Most informants (72.00% of 25 available) claimed to be testifying for a

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[166] Transcript of Record at HEI-001993, State v. Heins, No. 94-3965-CF (Fla. D. Ct. Dec. 16, 1996).

[167] *See infra* Supplementary Table 1 (providing descriptive information and examples of informants' testimony regarding incentives).

[168] For example, one informant testified that he was originally offered a ten-month sentence for one of his charges but that the prosecutor recommended it be reduced to six months after he agreed to testify against the defendant. Transcript of Record at RHK-014910, People v. Restivo, No. 61322 (N.Y. Dis. Ct. 1986).

[169] For example, one informant testified that he was not willing to testify unless the government helped him relocate to another neighborhood. Transcript of Record at WILLD-000206–221, People v. Rainge, No. 78-I6-5186 (Ill. Cir. Ct. Sept. 29, 1978). He later testified that the government promised him an apartment to stay in and discussed the possibility of replacing his car. *Id.*

[170] *See infra* Table 1 for descriptive information and examples of informants' testimony regarding their motivations for testifying.

dispositional reason, meaning they said they were testifying for some reason internal to their character such as wanting to do the right thing, feeling bad for the victim's family, or empathizing with the victim. A minority of informants (16.00% of 25 available) claimed to be testifying for a situational reason, meaning they said they were testifying for some external reason such as a personal incentive.

Despite their incentives and motivations, informants sometimes described (57.69%) various deterrents they faced to testifying.[171] They most often (82.35%) mentioned the threat to their personal safety posed by testifying against the defendant, followed by inconvenience (5.88%), and their relationship with the defendant (5.88%). Deterrents might have made the informants appear more credible to jurors because they highlighted that the informant was acting against their own self-interest by testifying and therefore making a personal sacrifice to deliver their testimony.

2. Attorneys' Arguments

Almost all closing statements by prosecutors (96.00% of 25 available) and defense attorneys (92.31% of 26 available) referred to at least one of the informants. Expectedly, prosecutors and defense attorneys addressed the informants very differently.

On the one hand, prosecutors used their closing statements to attempt to bolster their own informants' credibility. Their closing statements very often (76.00% of 25 available) discussed reasons that supported the truthfulness of their informants' testimony. For example, one prosecutor argued that his informant should be considered reliable because he had previously testified in several other cases, stating:

> [n]ow, [the prosecution jailhouse informant] is a bum, but he's been used in the past, too, and the information that he has provided has been very reliable, in other situations. This is not uncommon, in law enforcement, and his information, in the past, was instrumental in the prosecution of other cases to successful conclusions, and he has furnished reliable facts.[172]

Their closing statements also often mentioned the informants' reasons for testifying, often stating that they were not receiving an incentive (56.00%

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[171] *See infra* Table 1 for descriptive information and examples of informants' testimony regarding deterrents.

[172] Transcript of Record at GRAD-000305, People v. Gray, No. 78-CF-124 (Ill. Cir. Ct. Sept. 26–Oct. 2, 1978).

of 25 available) and instead focusing on the informants' stated dispositional motivation for testifying (56.00% of 25 available). They sometimes (52.00% of 25 available) brought up their informants' criminal histories. However, some attorneys used this information to mount arguments about the informants' truthfulness. For example, one prosecutor discussing his informant stated, "[h]e's a burglar. He's a criminal. Would he lie? Of course, you have reason to believe he would. The question doesn't stop there, though. Was he lying? And the answer, I submit, is no. He was very forthright in his answers about his own past."[173] The prosecutor used the fact that the informant was honest and forthcoming about his criminal history to argue that he was also being honest and forthcoming in his testimony. Prosecutors also sometimes (40.91% of 22 available) mentioned the inconsistencies within their informants' testimony. When mentioning inconsistencies, some did so to further bolster the informants' credibility. For example, one prosecutor argued, "[h]e is reciting what he was told [by the defendant] . . . if he was being told what the facts were [by the police/prosecution], his story would have been right down the line with the facts . . . ."[174]

On the other hand, defense attorneys used their closing statements to attempt to undermine the prosecution informants' credibility. They very often (92.31% of 26 available) discussed reasons that questioned the truthfulness of the prosecution informants' testimony. For example, one defense attorney argued that the prosecution informant changed his testimony after guidance from the prosecution by stating, "[a]nd before your very eyes, [the informant] under [the prosecutor's] skillful examination changed his story."[175] They often (73.07% of 26 available) mentioned potential incentives the prosecution informants were receiving in spite of their explicit denials. For example, one defense attorney noted, "[h]e's hoping to get something for it, he's hoping that if he weaves the right tale and tells these fellows what they want to hear, there will be a letter as soon as this case is over, he'll be writing to the Parole Board, boy, look what I've done . . . ."[176] They also often (69.23% of 26 available) brought up the

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[173] Transcript of Record at HERN-008418–841, State v. Hernandez, Nos. 84-CF-361-01-12, 84-CF-362-01-12, 84 CF-363-01-12 (Ill. Cir. Ct. Feb. 20, 1985).

[174] *Gray*, *supra* note 172, at GRAD-000304.

[175] Transcript of Record at CAMD-015499, State v. Camm, No. 87D02-0506-MR-54 (Ind. Sup. Ct. Feb. 27, 2006).

[176] Transcript of Record at DED-006731, State v. Dedge, No. 82-135-CF-A (Fla. Cir. Ct. Aug. 28, 1984).

informants' criminal histories as a way to question their credibility, such as one defense attorney who referred to the numerous informants called by the prosecution as "a parade of liars. A parade of admitted liars. Rapists. Burglars. Thieves. Habitual criminals. People who escape from custody . . . and [the prosecution is] asking you to subject a man to the possibility of death based on this."[177] Finally, defense attorneys often (73.91% of 23 available) called attention to the inconsistencies within the informants' testimony. One defense attorney asserted, "[t]he reason the inconsistencies are there are not because of faulty memories, [but] because of faulty stories."[178] The defense attorneys also mentioned their own informants (75.00% of 5 available) to undermine the prosecutions' informants, with one arguing, "[f]or every one of their informants, we have an informant to inform on their informants."[179]

3. Safeguards

As discussed above, courts have emphasized that the legal system has adequate safeguards to protect against unreliable informant testimony.[180] The safeguards specifically focused on by the Supreme Court in *Hoffa* were jury instructions and cross-examination.[181] These wrongful conviction cases, however, provide at least twenty-two cases in which the existing safeguards did not protect innocent defendants from wrongful convictions at least in part due to the unreliable testimony from an informant.

The safeguards could have failed to protect the innocent defendants in these cases because they were either not present or ineffective. Only about half of the trials in our study (56.25% of 16 available) included jury instructions that specifically addressed the informant's testimony. The jury instructions, when present, were brief and focused on the fact that certain witnesses had previous criminal convictions that they could consider in determining their credibility. Only one trial included jury instructions which specifically focused on the fact that the informant was receiving an incentive for his testimony:

> [y]ou have heard testimony that a witness . . . made an agreement with the prosecutor about charges against him in

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[177] Transcript of Record at WASC-002922, State v. Washington, No. 87-08-C (Tex. D. Ct. Nov. 30, 1987).

[178] *Id.* at WASC-002929.

[179] *Camm*, *supra* note 175, at CAMD-015497.

[180] Banks v. Dretke, 540 U.S. 668, 701-02 (2004); *supra* Section II.C

[181] Hoffa v. United States, 385 U.S. 293, 311 (1966).

> exchange for his testimony in this trial. You have also heard evidence that [he] faced a possible penalty of life or any terms of years as a result of those charges.
>
> You are to consider this evidence only as it relates to [his] credibility and as it may tend to show [his] bias or self-interest.[182]

In contrast, in about half of the trials, the jurors did not receive any particular guidance on how to evaluate or use informant testimony.

Moreover, most informants explicitly stated that they were not receiving an incentive in exchange for their testimony. This was despite the fact that most prosecutors (71.43% based on 28 available) and most defense attorneys (75.00% based on 28 available) specifically asked the informant whether they were receiving an incentive to testify. Additionally, most informants (73.68% of 38 available) were not asked whether they had testified for the prosecution in the past. Finally, none of the trials contained an expert witness who testified about informants. Although the prior psychological research discussed in the above section calls into question whether these safeguards are effective against unreliable informant testimony, they certainly cannot be effective when they are not present or when jurors are relying on incomplete information.

V. POTENTIAL PSYCHOLOGICAL MECHANISMS

The results of our content analysis are consistent with widespread concerns about informants as well as prior psychological research. All defendants in our sample of cases were wrongfully convicted at least in part based on informant testimony. Therefore, even when safeguards were present, they were clearly inadequate at mitigating the impact of the informant's testimony. Clearly, informant testimony is an extremely persuasive form of evidence. Questions remain about *why* jurors find this evidence so compelling, even when they are aware that the informant has an extensive criminal history or is receiving an incentive for his testimony. Below, we provide three potential explanations for jurors' reliance on this evidence despite its questionable reliability. Although we did not (and could not) test these explanations directly with the available data, past research supports these as possible explanations for jurors' reliance on informant testimony.

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[182] Transcript of Record at WYN-000434, People v. Wyniemko, No. CR-94-2001FC (Mich. Cir. Ct. Nov. 7, 1994).

A. Truth-Default Theory

Truth-Default Theory (TDT) is a psychological theory that explains how individuals process information and provides a framework in which to understand why jurors may believe informant testimony.[183] TDT posits that individuals are naturally inclined to believe the information that they hear is truthful.[184] This inclination is adaptive, as the majority of communication that individuals encounter on a daily basis is truthful.[185] Therefore, we generally believe the information we hear without question and are constantly in a "truth-default" state.[186] In order to leave the truth-default state and enter a state of suspicion—questioning the veracity of information—there needs to be a trigger or cue that suggests deception might be occurring.[187] Being in a state of suspicion does not necessarily mean that a person will be successful at detecting deception, but instead means that the person will more carefully evaluate information for deception.[188] If individuals believe they have been deceived, they will reject the information; however, if they evaluate the information and do not detect deception then they will return to the truth-default state.[189]

In informant cases, according to TDT, jurors would have to be triggered into a state of suspicion to be able to detect false testimony.[190] In the presented cases, there were several opportunities for jurors to potentially enter a state of suspicion, with information about the informants' criminal histories, inconsistencies, and potential ulterior motives. Even if jurors did enter a state of suspicion during these trials, however, it is probable that they inevitably re-entered the truth default state because they, at least in part, relied on the informants in finding the defendants guilty.

There are several reasons jurors may have ultimately believed the informants in the cases reviewed in this study. Given that trials are more complex than a single piece of evidence or testimony, it is possible that other evidence may have influenced jurors' perceptions of the informant. Thus, jurors may have entered a state of suspicion but were convinced by other

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[183] Timothy R. Levine, *Truth-Default Theory (TDT): A Theory of Human Deception and Deception Detection*, 33 J. LANGUAGE & SOC. PSYCHOL. 378, 378 (2014).

[184] *Id.* at 378.

[185] *Id.*

[186] *Id.* at 381.

[187] *Id.* at 387.

[188] *Id.* at 386.

[189] *Id.* at 387.

[190] *Id.*

evidence presented at trial to convict. However, based on TDT and the archival evidence from the present study, there are elements of the testimony provided by jailhouse informants that may have persuaded jurors that their testimony was truthful. For example, informants' testimony was mostly composed of accurate details corroborated by other evidence and sometimes even included nonpublic facts. Additionally, informants often testified that they were placing themselves in danger by testifying (i.e., fear of retribution from others for snitching) which highlighted that the informant was acting against their own self-interest by testifying. In fact, informants often claimed that their concern for their personal safety was a deterrent to testifying.[191] One scholar has argued that statements against self-interest such as these are reflexively believed, which may have led jurors to remain in the truth-default state.[192] Moreover, jurors may have maintained a truth-default state because they have an inherent trust in the legal process which we will discuss below.

B. Beliefs in the Legal System

Jurors may also have inherent trust in the legal process that could explain why they are persuaded by informant testimony.[193] They may hold the belief that a prosecutor would not allow an informant to testify if the informant was not a credible source of information—otherwise, why would the prosecutor rely on their statement to mount a case and offer them leniency?[194] This belief can be compounded with prosecutorial vouching, which is the practice of prosecutors making statements that underscore the credibility of witness.[195] Although prosecutors cannot explicitly vouch for witnesses, vouching can still be done subtly or can even be achieved just by calling the witness to the stand.[196] In fact, in the cases we reviewed, prosecutors often directly pointed to reasons why their informants were credible (i.e., lack of incentives, dispositional motivation), thereby emphasizing their own belief that the informant was telling the truth while testifying. Moreover, jurors may also expect that the prosecutor is in a better

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[191] *See infra* Table 1 for descriptive information and examples of informants' testimony regarding their motivations for testifying.

[192] Saul M. Kassin, *The Social Psychology of False Confessions*, 9 SOC. ISSUES POL'Y REV. 25, 38 (2015).

[193] Roth, *supra* note 10 at 781–82.

[194] *Id.*

[195] *Id.*

[196] *Id.*

position to determine whether the informant is telling the truth than they are. In fact, a recent survey found that the public generally believes that professionals are better than laypeople at distinguishing between true and false secondary confessions.[197] Accordingly, jurors might expect that informants brought forth by the prosecution have been properly vetted and therefore have no reason to distrust their testimony. In the parlance of TDT, jurors may not enter a state of suspicion because they already believe the informant has been vetted by the prosecutor as truthful.

Inherent trust in the legal system might also be compounded with confirmation bias to lead to jurors' reliance on informant testimony.[198] Confirmation bias occurs when one seeks information that confirms his or her existing beliefs while ignoring disconfirming information.[199] Thus, jurors that inherently trust prosecutors would evaluate subsequent evidence in a manner consistent with witnesses brought by the prosecution as being truthful and minimizing any factors that may indicate deception. Regarding informants, jurors may be more influenced by the accurate details in the testimony rather than properly evaluating any inconsistencies.

C. Fundamental Attribution Error

A third possible explanation for jurors' belief in informant testimony is that jurors focused on informants' provided motivations for testifying rather than their potential incentives. Indeed, experimental investigations indicate that evaluators do not reduce their perceptions of an informant's truthfulness even after learning about incentives earned by the informants in exchange for their testimony.[200] One reason for this apparent inability to consider the role of incentives is that people tend to focus on a narrow range of possible explanations for others' behavior.[201] Namely, people focus on explanations that derive from internal and stable characteristics of individuals, i.e., they tend to attribute behavior to *dispositional* causes.[202] In so doing, people

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[197] Kylie N. Key, Jeffrey S. Neuschatz, Brian H. Bornstein, Stacy A. Wetmore, Katie M. Luecht, Kimberly S. Dellapaolera & Deah S. Quinlinvan, *Beliefs about Secondary Confession Evidence: A Survey of Laypeople and Defense Attorneys*, 24 PSYCH. CRIME & L. 1, 8 (2018).

[198] Roth, *supra* note 10, at 781.

[199] John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20 (1983).

[200] Neuschatz et al., *supra* note 9, at 142.

[201] *Id.*

[202] *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 56–57 (2004).

often ignore external, unstable causes for individuals' behavior, i.e., *situational* causes.[203]

This tendency, termed the *fundamental attribution error*[204]*,* has been demonstrated in a range of criminal justice evaluations. For example, when mock jurors are asked to explain why an informant came forward, they overwhelmingly favor dispositional motivations over situational motivations.[205] Additionally, mock jurors' decisions tend to be consistent with their tendency to focus on dispositional motivations. For example, research has shown that mock jurors are more willing to convict a defendant even after correctly recalling that his confession was coerced in a high-pressure interrogation.[206] This pattern is consistent with the fundamental attribution error because conclusions about why the suspect confessed are driven by dispositional explanations (i.e., the suspect is guilty) rather than available alternative situational explanations (i.e., the high-pressure interrogation).[207]

The fundamental attribution error might help explain jurors' reactions to the informant testimony in the cases reviewed here. Some informants explained their decisions to testify by invoking internal, stable features of their own character, such as the ability to empathize (e.g., with the victim's family) or feeling that testifying was the "right thing to do."[208] Moreover, many informants explicitly denied receiving an incentive in exchange for their testimony,[209] thereby disregarding important external, unstable explanations for their testimony. Consistent with the fundamental attribution error, jurors might have found these dispositional explanations compelling—particularly in lieu of available alternative situational explanations (i.e., incentives). Finding the dispositional attributions credible is clearly consistent with believing the testimony itself. Therefore, the

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[203] *Id.* at 57.

[204] Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 ADVANCES IN SOC. PSYCHO. 173, 184 (1977).

[205] *See*, *e.g.*, Neuschatz et al., *supra* note 90118, (67.7% of mock jurors' explanations were solely dispositional and 85.4% were partly dispositional).

[206] *See* Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. & HUM. BEHAV. 27, 27 (1997).

[207] *See* Kassin & Gudjonsson, *supra* note 202, at 33-35, 56-57 (describing empirical evidence demonstrating the fundamental attribution error at work in perceptions of confession evidence).

[208] Heins*, supra* note 166, at HEI-001751.

[209] *See* Supplementary Table 1.

dispositional attributions provided by the informants themselves could explain why jurors believed in the veracity of the informants' testimony.

VI. CONCLUSION

Informant testimony is prevalent in both trials and wrongful convictions.[210] Past psycholegal research and the results of the present content analysis provide some insight into why this questionable evidence is so persuasive to jurors. Although the Supreme Court has emphasized the existence of several safeguards in the legal system that could combat unreliable informant testimony, past psycholegal research suggests that these safeguards may be inadequate, and the present content analysis suggests that the safeguards may often not even be present in real trials involving informants. For example, we saw that informant-specific jury instructions were only available in about half of the cases examined. Additionally, most informants explicitly denied receiving an incentive in exchange for their testimony. It is important to note that this testimony was not necessarily untruthful, because informants' deals are often contingent on providing "substantial assistance" to the prosecution, which means their leniency is not promised until after they testify in the defendant's case.[211] In fact, some legal scholars have argued that prosecutors delay informants' benefits specifically for the reason that their testimony may be more compelling if they have not received an incentive for it.[212] Therefore,

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[210] Simons, *supra* note 24, at 1; Warden, *supra* note 5, at 3.

[211] *See, e.g.*, United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (holding that "an informant who is promised a contingent fee by the government is not disqualified from testifying"); United States v. Hodge, 594 F.2d 1163, 1167 (7th Cir. 1979) (declining to adopt a *per se* rule against contingent fee arrangements with informants); United States v. Dailey, 759 F.2d 192, 195–96 (1st Cir. 1985) (holding that a defendant's due process rights were not violated when informants were offered a plea deal contingent on "cooperation that [was] of 'value' to the government"); United States v. Spector, 793 F.2d 932, 934 (8th Cir. 1986) (finding that a defendant's due process rights were not violated when informants' immunity agreement relied on the "value of [their] information and cooperation as it relate[d] to" successful investigation and prosecution of crimes).

[212] *See, e.g.*, R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1132 (2004) (stating that "[t]he Court's decision in *Giglio* has created an incentive for prosecutors to make representations to an accomplice witness that are vague and open-ended, so that they will not be considered a firm 'promise' mandating disclosure. . . . Such indefinite agreements have the added advantage of allowing prosecutors to argue to the jury that no specific promise has

although the defense attorneys in these cases questioned the informants about whether they were receiving an incentive, many of them could have truthfully testified that they *were not* receiving an incentive to testify (at the time) and jurors therefore did not have this information when making a decision. However, past research has also called into question whether having this information would even influence jurors' verdict. Despite not having information about incentives, jurors had several other markers of the informant's unreliability (e.g., inconsistencies, criminal histories), and nonetheless still convicted these innocent individuals. Perhaps the simple emphasis on dispositional motivations and the statements against self-interest explain why these false informants were believed by jurors.

Overall, courts have long been aware of the potential for incentives to motivate unreliable testimony from informants. Unfortunately, so far, research has shown that jurors do not share this concern. These Innocence Record cases provide twenty-eight examples of individuals who were wrongfully convicted at least in part due to the testimony of an informant. Without more empirical research on the topic and the development of effective safeguards, the potential for future wrongful convictions based on false informant testimony is high.

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been made to the witness"); ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 66 (2002) (citing LOS ANGELES GRAND JURY, *supra* note 64) ("To enhance the credibility of his testimony, an informant often testified that there have been no promises of benefits made to them in return for their testimony. Even though nothing may be explicitly stated, both the prosecutor and the informant knew that there will be some compensation for the testimony. 'The practice (of promising rewards) was done by a wink and a nod and it was never necessary to have any kind of formal understanding.'").

SUPPLEMENTARY TABLE

Table 1. Descriptive Information about Informants' Provided Reasons for Testifying

Variable	Categories	Percent	Example
Motivation (n = 25)			
	Situational	16%	"The police told me that originally, that I would be, you know, helped out."[213]
	Dispositional	72%	"Sir, I just thought it was the right thing to do at the time, sir."[214]
	Both	4%	
	None	8%	
Incentive (n = 39)			
	Admitted	12%	"I told them if they needed me, if I could get relocated, I might testify."[215]
	Denied	82%	"They told me that I was getting out, no matter what. They told me that I didn't have to testify…"[216]

[213] Transcript of Record at GODB-002553, Commonwealth v. Godschalk, No. 00934-87 at GODB-002553 (Montgomery Penn. C.P. May 27, 1987).

[214] Heins, *supra* note 166, at HEI-001751.

[215] Rainge, *supra* note 169, at WILLD-000201.

[216] Gray, *supra* note 172, at GRAD-000044 & 000131.

Deterrents* (n = 17)			
	Safety	82%	"I'm not doing anything but jeopardizing my life, I feel, by testifying."[217]
	Inconvenience	6%	"I'm losing gain time but I'm not getting my gain time."[218]
	Relationship to Defendant	6%	"He was a friend of mine."[219]
	Multiple	6%	

Note: Percent is based on the informants for whom we had available data and who were explicitly asked about the variable by attorneys; the number used for the denominator is indicated next to each variable.
* We only recorded deterrents for prosecution informants; therefore, deterrent results do not include information about jailhouse informants who testified for the defense.

[217] Transcript of Record at FAI-003212, State v. Fain, No. 22228 (Idaho 1986).

[218] Heins, *supra* note 166, at HEI-001795.

[219] Washington, *supra* note 177, at WASC-001391.