UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF SAINT THOMAS AND SAINT JOHNS

___________________________________X

UNITED STATES OF AMERICA,

vs. CRIM. NO. 18-30 (CVG/RM)

GIRARD et al,

Defendant.
___________________________________X

INTRODUCTION:

Shaquan Prentice, by and through his attorneys, respectfully moves, pursuant to Federal Rules of Evidence 104, 403, and 701, to exclude the testimony of cooperating witnesses because their testimony is unreliable and their probative value is substantially outweighed by the danger of unfair prejudice. Mr. Prentice alternatively requests that the Court hold a pre-trial hearing to determine the reliability of these witnesses. In support of this motion Mr. Prentice alleges as follows:

1. The prosecution against Mr. Prentice is rife with uncorroborated informant testimony. Based upon discovery thus far provided to Mr. Prentice, the bulk of the evidence that the government has against Mr. Prentice is from informants who have much to gain from blaming Mr. Prentice. Upon information and belief, informants who themselves face criminal liability, have cooperated with the government against Mr. Prentice. In contrast to Mr. Prentice, the government has considerable evidence connecting the informants to the crimes listed in the indictment, adding more incentive for the

informants to shift their culpability onto someone else to gain leniency from the government.

2. In exchange for having incriminated Mr. Prentice, the cooperators have received, or will receive, compensation from the government in the form of charging and sentencing consideration. It is not known whether they also received other benefits. Their anticipated testimony is also self-serving, as it reduces their own culpability while inculpating Mr. Prentice. In view of the self-serving nature of their testimony and the compensation that the cooperating witnesses have received (and may expect to receive) in exchange for implicating Mr. Prentice, their testimony is biased and inherently unreliable.

3. Their testimony will be extremely difficult to disprove because there is almost no physical evidence linking Mr. Prentice to any of the crimes in the indictment. Cross-examination may be an insufficient tool to establish the veracity of these unverifiable statements.

4. In a serious case where the possible sentence is life imprisonment, it undermines the basic premise of reliability for the jury to depend in whole, or in part, on the testimony of one or more witnesses whose evidence has been "purchased" by the government. Mr. Prentice objects to testimony from any witness for the government who has received payments from the government, and other financial consideration including payments to relatives, relocation assistance, as well as plea or charge bargains. The objection also covers witnesses who were assisted by state and local law enforcement with or without the knowledge, or at the request of, the United States Attorney.

5. Mr. Prentice is denied equal protection and due process when the government is allowed to call witnesses that it has materially assisted while it is impossible for Mr. Prentice to pay a witness as the government does (for example, by making a lump

sum payment to the witness). Mr. Prentice is denied due process and equal protection because he cannot legally offer witnesses that he wishes to call financial consideration, leniency, or immunity in the same way the government can and does. As a result, the Court should prohibit the government witnesses who have been paid and/or assisted by a combination of payment and other consideration from testifying.

6. At a minimum, Mr. Prentice requests that the Court hold a pre-trial reliability hearing at which the cooperators shall be made available for examination by counsel, to permit the Court to decide whether their testimony is sufficiently reliable, and therefore sufficiently probative, to be admissible under Federal Rule of Evidence 403. Several courts have held that pre-trial reliability hearings are appropriate where unreliable cooperating witnesses are propounded as witnesses. In this case, a hearing is especially important, because the main component of the government's case against Mr. Prentice rests on cooperating informant testimony.

7. Mr. Prentice further requests that the government immediately disclose impeachment information, to allow Mr. Prentice time to investigate. Disclosing information close in time before trial as "3500 material" violates Mr. Prentice's right to effective assistance of counsel, and due process.

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I. FACTS

The government charged Mr. Prentice, along with ten codefendants, with membership in the "Paul Girard Criminal Enterprise." The indictment alleges that the members engaged in acts of violence, controlled substance distribution and money laundering in a superseding indictment on April 25, 2019.

II. ARGUMENT

Alarms have sounded across the country about the unreliability of informant testimony. According to the Center on Wrongful Convictions, false testimony by informant witnesses is the leading cause of wrongful convictions in death penalty cases in the United States. The Center reviewed 111 capital cases of persons released from death row after their exonerations between 1973 and 2004. They found false testimony in 45.9% of the cases.[1]

Even in non-capital cases, informant testimony is a problem. A study that examined more contemporary DNA exonerations noted "a *surge* in cases involving informant testimony."[2] In more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant in the original trial. A review of these cases revealed that innocent people have been wrongfully convicted in cases where informants have been paid to testify, have testified in exchange for release from prison, or have testified in multiple cases that they have evidence of guilt in the form of an overheard

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[1] Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, p. 3 (2005), available at https://www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf

[2] Brandon Garrett, *Convicting the Innocent Redux,* in Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent 40 (D. Medwed ed. 2017) (citing a substantial rise in both murder convictions and informant testimony when comparing 330 recent DNA exonerations to the first 250 DNA exonerations) (emphasis added).

confession or personal witnessing of the crime.[3] Testifying falsely in exchange for an incentive may be the last resort for a desperate inmate. Providing informant testimony may be the only option for those who are not in prison but want to avoid being charged with a crime. Informant testimony at trial is therefore notoriously unreliable.[4]

The statistics reported above likely underestimate the prevalence of false informant testimony, because they include only cases in which the defendant has been exonerated, and primarily those where there has been DNA evidence. This does not include the majority of cases where a defendant pleads guilty, or cases where DNA testing is not available/was not part of the crime. Reviews of plea deals are extremely rare; Judges reject them in only 2% of cases;[5] most plea agreements contain a waiver of appeal clause. Considering that 97% of cases in the federal system are resolved through a plea agreement, many of the cases go unreviewed.[6] Thus, the statistics cited are only the tip of the iceberg.

Often, statements from people with incentives to testify are the central evidence in convicting an innocent person. This incentive is often either money or a sentence reduction. In some cases, an "informant's whims or even personal vendettas might lead him to implicate one person as opposed to another." This is a "milder form of a more dangerous problem: that an informant will use the police to target criminal rivals, so that he can commit his own crimes. Whitey Bulger's achievement of murderous impunity through his relationship with FBI agents is a notorious, but sadly not unique, example of this

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[3] Incentivized Informants, The Innocence Project, https://www.innocenceproject.org/causes/incentivized-informants/.

[4] *See* Brief of the ACLU as Amicus Curiae, Van De Kamp v. Goldstein (U.S. September 4, 2008) (No. 07-854).

[5] Dervin, Lucian and Edkins, Vanessa: *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, Journal of Criminal Law and Criminology, Vol. 103, Issue 1, Article 1, Winter 2003, p. 6, fn. 30 (internal citations omitted).

[6] United States Sentencing Commission, 2017 Sourcebook of Federal Sentencing Statistics, Figure C, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf.

pathology."[7] Informant testimony is commonplace[8], and heavily relied upon by the government. "Since the inception of the FBI in 1908, informants have played major roles in the investigation and prosecution of a wide variety of federal crimes."[9]

As investigating police increasingly rely on criminal informants, prosecutorial reliance on criminal informant testimony also increases. Prosecutors themselves are often the first to complain about this dynamic, commenting that:

> [t]hese [drug] cases are not very well investigated . . . our cases are developed through cooperators and their recitation of the facts. Often, in DEA, you have agents who do little or no follow up so when a cooperator comes and begins to give you information outside of the particular incident, you have no clue if what he says is true.[10]

Courts, legislatures, Governor's Commissions, police departments, and public defenders have begun instituting measures to prevent convictions based upon unreliable testimony by informants. These measures, including a pre-trial reliability hearing, a requirement that police departments record interviews with an informant, and a requirement that there should be sufficient corroboration of informant testimony before it

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[7] Daniel Richman, *Informants and Cooperators,* in Reforming Criminal Justice, A Report of the Academy for Justice, Vol. 2, 10/11/2017. Can be found at: http://academyforjustice.org/wp-content/uploads/2017/10/11_Reforming-Criminal-Justice_Vol_2_Informants-and-Cooperators.pdf (citing J. Mitchell Miller, *Becoming an Informant,* 28 JUST. Q. 203, 214 (2011), an empirical study of informants finding that "Inequitable drug deals, reactions to rumors that the target tried to snitch on a friend, scorned partners in intimate relationships, and competition elimination are but a few of the more typical situations that motivate revenge seeking informants"); Dick Lehr & Gerard O'Neill, Black Mass: The True Story of an Unholy Alliance Between the FBI and the Irish Mob (2001); United States v. Flemmi, 195 F. Supp. 2d 243, 247–48 (D. Mass. 2001); United States v. Flemmi, 225 F.3d. 78 (1st Cir. 2000); HOUSE COMM. ON GOV'T REFORM, EVERYTHING SECRET DEGENERATES: THE FBI'S USE OF MURDERERS AS INFORMANTS, 3RD REPORT, H.R. REP. NO. 108-414, at 454 (2004), https://www.gpo.gov/fdsys/pkg/CRPT-108hrpt414/html/ CRPT-108hrpt414-vol1.htm.).

[8] *See* Alexander Bunin, *The Case Against Informants,* 34 Crim. Just. 4 (2019) ("The practice is prevalent enough that it has names like 'testi-lying' or joining the liars club."); *see also* Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts,* 76 Fordham L. Rev. 1413, 1419 (2007) ("Don't go to the pen, send a friend and if you can't do the time, just drop a dime," quoting Leslie Vernon White, an informant who appeared on 60 Minutes in 1989 and admitted to multiple acts of lying as an informant).

[9] The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines, Special Report, September 2005, available at https://oig.justice.gov/special/0509/final.pdf.

[10] Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 FORDHAM L. REV. 917, 943-44 (1999).

is admitted in court, should at a minimum be adopted here. However, Mr. Prentice submits that these reforms, while necessary, are not sufficient. All informant testimony should be excluded when it is not sufficiently corroborated by sources other than more unreliable informant testimony.

A. Courts Have Deemed Informant Witnesses Unreliable And Subject To Additional Judicial Scrutiny

The Supreme Court "has long recognized the 'serious questions of credibility' informers pose." *Banks v. Dretke*, 540 U.S. 668, 701 (2004) (citing *On Lee v. United States*, 343 U.S. 747, 757 (1952). In *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Supreme Court explained that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *See also United States v. Agurs*, 427 U.S. 97, 103 (1976) (stating that "the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair"). "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . ." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987). In *Wearry v. Cain*, 132 S.Ct. 1002 (2016), the Supreme Court overturned the defendant's conviction because impeachment information about an informant was withheld. The Court characterized the government's evidence as "resembl[ing] a house of cards, built on the jury crediting [prisoner-informant] Scott's account...." *Id.* at 1006. Even though the informant's credibility was "already impugned by his many inconsistent stories," the Court found that his credibility would have been further diminished with additional information that the government did not disclose. *Id.* at 1006-07. The Court held that the

additional evidence, even "of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 1007. The Third Circuit has long "recognized that testimony of accomplices and informers raises particular credibility problems since these witnesses have strong incentives to fabricate or mold their testimony as the government desires in order to escape prosecution, lighten their sentences, obtain remuneration or receive protection." *United States v. Isaac,* 134 F.3d 199, 204 (3d Cir. 1998).

The Second Circuit has noted that "numerous scholars and criminal justice experts have found the testimony by 'jail house snitches' to be highly unreliable." *Zappulla v. New York*, 391 F.3d 462, 470, n.3 (2d Cir. 2004) (citation omitted). Although the Court spoke about jailhouse informants, the same problem exists with the cooperators and informants involved in this case: "[s]everal reports have found that jailhouse informants have a significant incentive to offer testimony against other defendants in order to curry favor with prosecutors and that the proffered testimony is oftentimes partially or completely fabricated." *Zapulla*, 391 F.3d at 470. Jailhouse or not, it is undeniable that cooperators and informants in this case also have "a significant incentive to offer testimony against other defendants in order to curry favor with prosecutors." *Id.* The Court went on to state that "the use of jailhouse informants to obtain convictions may be 'one of the most abused aspects of the criminal justice system.'" *Id.* (citing Jana Winograde, Comment, *Jailhouse Informants And The Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL L. REV 755, 756 (1990)).

Other Circuits have also recognized problems with the reliability of compensated informant witnesses. The Fourth Circuit has prescribed procedural guarantees that the government must adhere to where compensated informant witnesses are contemplated. Before such testimony will be permitted: (1) the compensation arrangement must be

disclosed to the defendant, (2) the defendant must have the opportunity to cross-examine the witness, and (3) the jury must be instructed to engage in heightened scrutiny of the witness. Finally, where the compensation is:

> contingent on the content or nature of the testimony given, the court must ascertain (1) that the government has independent means, such as corroborating evidence, by which to measure the truthfulness of the witness's testimony and (2) that the contingency is expressly linked to the witness testifying truthfully. Moreover, when a witness is testifying under such a contingent payment arrangement, the government has a duty to inform the court and opposing counsel when the witness' testimony is inconsistent with the government's expectation.

United States v. Levenite, 277 F.3d 454, 462-63 (4th Cir. 2002). The Fourth Circuit has expressed its deep concern over the use of compensated informant testimony and its reluctance to admit such testimony absent stringent judicial controls. Compensated testimony "create[s] fertile fields from which truth-bending or even perjury could grow, threatening the core of a trial's legitimacy." *Id.* at 462. Such testimony "may be approved only rarely and under the highest scrutiny." *Id.*[11]

Similarly, the Ninth Circuit has "recognized the unreliability of jailhouse informants—who are themselves incarcerated criminals with significant motivation to garner favor." *Maxwell v. Roe*, 628 F.3d 486 (2010), *cert. denied, Cash v. Maxwell*, 565 U.S. 1138 (2012).[12] Again, although the Court speaks of "jailhouse informants," the identical problem presents itself with the informants and cooperators in Mr. Prentice's case.

The Eighth Circuit in *United States v. Cammisano*, 917 F.2d 1057 (8th Cir. 1990) vacated a sentence because the trial court relied on unreliable testimony from informants

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[11] While *Levenite* concerned a witness who was testifying in exchange for money, the same concerns arise whether the compensation consists of money or reduced criminal sanctions. Indeed, the promise of a reduced sentence or the elimination of the capital sentencing option may be far more valuable to a defendant than cash. *See United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (same analysis applies to informant compensation whether it be money or lenience).

[12] Justice Sotomayor wrote an opinion agreeing with the Ninth Circuit's decision about the unreliability of the informant. *Id.* at 1139-1141.

that the defendant was involved in organized crime. The Court's decision was based on U.S.S.G. 6A1.3, which states that out-of-court statements by unidentified informants must have sufficient corroboration to be used against a defendant in sentencing. The Court found it unpersuasive that multiple informants corroborated each other, rejecting the government's argument that multiple informants corroborating one another made "it unlikely that this [was] just a mere fantasy of the government or just total speculation on behalf of these confidential sources." *Cammisano*, 917 F.2d at 1062. The Court found the informant testimony unreliable because it was "merely 'hearsay upon hearsay upon hearsay' and [did] not 'constitute sufficiently reliable or credible evidence to support the conclusion that defendant was connected to organized crime.'" *Id.* (citing *United States v. Cortina*, 733 F. Supp. 1195, 1202 (N.D. Ill. 1990)); *see also United States v. Ortiz*, 993 F.2d 204, 208 (10th Cir. 1993).

Courts, recognizing the inherent unreliability of compensated informants and those who minimize their own culpability, have gone so far as to take judicial notice of their tendency to lie. "The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. This hazard is a matter 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned' and thus of which we can take judicial notice." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) (citation omitted). "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *Id.* Another court has noted 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." *Commonwealth of the Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001). Indeed, long before snitching became a pervasive aspect of the criminal justice system, the Supreme Court 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." *On Lee*, 343 U.S. at 755.

The legislative and executive branches have also recognized problems with informant testimony, and yet hearings and proposed reforms have proved inadequate, and the problem persists. In 2005, well after reforms were supposed to have been made, the Justice Department's inspector general, Glenn Fine, analyzed 120 FBI informant files from around the country. Fine found that FBI Agents violated procedures in 87 percent of the cases, or 9 out of 10 cases. Fine said in a statement, "We found significant problems with the FBI's compliance with the attorney general's guidelines on confidential informants. We are concerned that the FBI has not taken the necessary steps to ensure that FBI agents and their supervisors adhere to these important requirements."[13]

On July 19, 2007, the House Judiciary Committee held a hearing dealing with the unreliability of informants. Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security Robert C. Scott acknowledged the lack of safeguards in place: "despite the impact informants have in the criminal justice system, their use has been subject to scant oversight.... Without increasing supervisory personnel and enhancing internal controls, departmental oversight of informants and rogue police officers will not be sufficient." Scott, Robert C. Statement to the House, Judiciary Committee. *Law Enforcement Confidential Informant Practices*, Hearing, July 19, 2007 (Serial 110-112).

Ten years later, on April 4. 2017, the House Committee on Oversight and Government Reform was still discussing the problems associated with the use of government informants. Chairman of the Committee, Jason Chaffetz, acknowledged that the oversight and safeguards in place have not been adequate in curtailing major issues related to use of informants: "there's an inherent risk in signing up criminals to help bring down other criminals. Keeping those risks in check requires significant oversight. Again, that's what the committee is about. It is part of the duty--the role and duty of the United States Congress. We authorized it. We appropriated it. We allowed them to engage in it, but we also have to have some oversight. And there have been some ups--well, you could call them mistakes, but there have been some significant problems." Chaffetz, Jason Statement to the House Committee on Oversight and Government Reform, *Use of Confidential Informants at ATF and DEA,* Hearing, April 4, 2017 (Serial 115-21). Some of the "significant problems" that the Chairman was referring to were brought to light in a 2016 audit of the informant programs of the DEA and ATF performed by the Department of Justice. Inspector General Michael Horowitz testified to the Committee that: "Our September 2016 audit of DEA's confidential source program found insufficient oversight and controls related to DEA's establishment, use, and payment of confidential sources, in particular subsources and limited-use and DEA intelligence-related sources. For example, we found that DEA files did not document all source activity, impacting DEA's ability to examine a source's reliability and to determine whether the source provides useful information and whether the information DEA agents acted upon resulted in identifying individuals involved in illegal activity or, instead, caused DEA to approach innocent civilians." Horowitz, Michael, Statement to the House Committee on Oversight and Government Reform, *Use of*

Confidential Informants at ATF and DEA, Hearing, April 4, 2017 (Serial 115-21).[14] Results were similar with the ATF, where the audit found that the informant program "required significant improvement, especially its management of relevant confidential informant information, tracking of payments to confidential informants, and oversight of higher risk confidential informants." Id.

A growing body of literature documents the inherent unreliability of compensated witnesses, cooperating co-conspirators, "jailhouse snitches," and other types of informants. Numerous horror stories of wrongful convictions based on perjurious informant testimony have emerged, and they have prompted official review of the practice of permitting compensated informant testimony. The following list contains just a few of the efforts to document and control informant unreliability:

1. The founders of the Innocence Project discovered that twenty-one percent of innocent defendants on death row were placed there by false informant testimony.[15]

2. The Illinois Governor's Commission on Capital Punishment unanimously concluded that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant."[16] The Commission recommended the holding of reliability hearings to mitigate the chances of perjury, and the state legislature subsequently passed a law adopting the Commission's recommendation. Ill. Comp. Stat. ch. 725, s. 5/115-21c.

3. Bedau and Radelet discovered in their comprehensive historical study of 350

[14] "The Inspector General's Office also found that the DEA relies heavily on independent tipsters, known as, quote, `limited-use informants,' who receive little to no agency supervision and whose reliability is highly questionable." Cummings, Elijah, Statement to the House Committee on Oversight and Government Reform, *Use of Confidential Informants at ATF and DEA,* Hearing, April 4, 2017 (Serial 115-21).
[15] Barry Scheck, Peter Neufeld, & Jim Dwyer, Actual Innocence 126-57 (Doubleday 2000).
[16] Illinois Governor's Commission on Capital Punishment, Chapter 8 (April 2002).

erroneous convictions that one-third were due to "perjury by prosecution witnesses," twice as many as the next leading source – erroneous eyewitness identification – and stemming in large part from the prevalence of co-conspirator testimony.[17]

4. On July 19, 2007, the House Judiciary Committee held a hearing on law enforcement confidential informant practices. The Chairman of the Subcommittee on Crime, Terrorism and Homeland Security stated that "perhaps most disturbing is the effect the false testimony has in death sentences. One study has shown that almost half of the documented wrongful capital convictions have included false information from an informant." Scott, Robert C. Statement to the House, Judiciary Committee. *Law Enforcement Confidential Informant Practices*, Hearing, July 19, 2007 (Serial 110-112).

5. A Report by the National Registry of Exonerations detailed the circumstances of a comprehensive review of 873 individual exonerations in the United States.[18] The authors found that perjury and false accusation accounted for 66% of the exonerations in homicide cases, 72% in drug cases, and 19% in robbery cases, averaging 53% for all cases, including sexual assault, child sexual assault, and non-violent cases. The study found that homicide cases produce the most errors of perjured testimony or lying witnesses. This is because: "Co-defendants, accomplices, jailhouse snitches and other police informants can all hope for substantial rewards if they provide critical evidence in a murder case – even false evidence – especially if the authorities are desperate for leads. The police themselves may be tempted to cut corners and falsify evidence to convict a person they believe committed a terrible murder. The net result is that exonerations in homicide cases include

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[17] Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21, 173 (1987).

[18] Gross, Samuel R. and Shaffer, Michael, Exonerations in the United States, 1989–2012 (June 25, 2012). U of Michigan Public Law Working Paper No. 277; 7th Annual Conference on Empirical Legal Studies Paper. Available at: https://ssrn.com/abstract=2092195 or http://dx.doi.org/10.2139/ssrn.2092195

comparatively few eyewitness errors, substantially more deliberate misidentifications, and a high proportion of cases with perjury or false accusations by other types of witnesses." (citation omitted) *Id.* at 55.

6. The American Bar Association passed a resolution urging governments to identify and attempt to eliminate the causes of erroneous convictions in all capital and non-capital cases, including by specifying the types of information important in assessing "snitch" credibility, mandating prompt disclosure of that information, requiring cautionary jury instructions on reliability, and foregoing prosecution in all cases based solely upon the uncorroborated "snitch" testimony.[19]

7. A thorough analysis of the psychological research into why informant testimony is unreliable, and the inability of jurors to detect that unreliability, can be found in this article: Jeffrey Neuschatz, Nicholoas Jones, Stacy A. Wetmore, and Joy McClung, *Unreliable Informant Testimony*, Ch. 10 in *Conviction of the Innocent, Lessons from Psychological Research*, ed. Brian Cutler [Washington D.C.: A.P.A. Press, 2012: 212-238].

8. Members of Congress have put forth legislation to protect against the abuses of informant testimony, including the 2017 Confidential Informant Accountability Act, H.R. 1857, 115th Cong. (which would require all federal investigative agencies to report serious crimes committed by their informants to Congress) and No More Tulias: Drug Law Enforcement Evidentiary Standards Improvement Act of 2017, H.R. 1979, 115th Cong.

9. In recent years, systemic problems with federal law enforcement agencies' handling of informants have also come to light, driving attempts to reform and regulate the practice. The FBI regularly reports to the Department of Justice the total "Otherwise Illegal Activity" (OIA) that it authorizes its informants to engage in. Due to an error, in the FBI's

[19] 18 A.B.A. Resol.108B, House of Delegates (Feb.14, 2005).

most recent report, some of that data was missing: the total was down from 5,261 crimes to 381. The FBI explained that "When the FBI submitted 2016 data to the Justice Department regarding the Confidential Human Source Program one tier of data accidentally was not submitted." Presumably the FBI omitted Tier 2 crimes—the less serious tier.[20] The 2017 Confidential Informant Accountability Act was put forth in Congress to expand the FBI's reporting requirement and require more oversight. Under H.R. 1857, The FBI (and all other federal investigative agencies) would have to report to Congress, not just the Department of Justice, and it would have to report not only the crimes it authorized its informants to commit, but all the serious crimes that it has reason to believe that its informants committed while working for the agency.[21]

When the Office of the Inspector General audited the DEA, it found that more than 9,000 law enforcement sources had been paid a total of $237 million for information or services. Yet the DEA did not "adequately" oversee the money flowing to its more than 18,000 sources between Oct. 2010 and Sept. 2015. This lack of oversight:

> exposes the DEA to an unacceptably increased potential for fraud, waste and abuse, particularly given the frequency with which DEA offices use and pay confidential sources. For example, while DEA policy prohibits paying deactivated sources who were deactivated because of an arrest warrant or for committing a serious offense, we found two concerning instances of payments to previously- deactivated sources. In one case, the DEA reactivated a confidential source who previously provided false testimony in trials and depositions. During the approximate 5-year period of reactivation, this source was used by 13 DEA field offices and paid $469,158. More than $61,000 of the $469,158 was paid after this source was once again deactivated for making false statements to a prosecutor.
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> This was not the only confidential source who received payments after having been deactivated. Based on our review of DEA's confidential source data, we estimated

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[20] Dell Cameron, *FBI Severely Underreported How Many Times It Authorized Informants to Break the Law [Updated]*, Gizmodo, September 19, 2017, available at https://gizmodo.com/fbi-severely-underreported-how-many-times-it-authorized-1818517490

[21] "Rep. Lynch Introduces Confidential Informant Accountability Act," April 4, 2017, available at https://lynch.house.gov/press-release/rep-lynch-introduces-confidential-informant-accountability-act

> the DEA may have paid about $9.4 million to more than 800 deactivated sources between fiscal years (FY) 2011 and 2015. While we describe in this report some concerns about the accuracy and completeness of the available DEA data, and while we did not review the circumstances of all of these payments in depth, from available information it appears that paying deactivated sources is common enough to justify much closer managerial oversight and review of such payments.[22]

Problems with law enforcement's use of confidential informants and cooperators are thus various and widely recognized.

The Court has its own responsibility to ensure due process and fundamental fairness for the accused in a criminal case. Legislative, appellate or executive oversight have proven ineffective, slow and inadequate. This Court, at the trial level, is in a unique position to ensure that Mr. Prentice is not convicted on unreliable testimony. Such endemic problems support Mr. Prentice's argument that the government's mere disclosure of any potential impeachment material in this case is insufficient. A pretrial reliability hearing, providing the defense an adequate opportunity to conduct its own investigation into the informants, is crucial to ensuring that a defendant's right to due process and effective assistance of counsel are protected.

B. Cross Examination Is An Insufficient Guarantee Of Reliability In This Case

Despite the recognized unreliability of compensated informant witnesses, courts have traditionally permitted them to testify on the assumption that cross-examination will adequately test an informant's truthfulness. *See, e.g., Hoffa v. United States*, 385 U.S. 293, 311 (1966). In *Hoffa*, the Supreme Court upheld the use of a compensated informant, holding that his testimony did not violate the defendant's right to due process, in large part because of the availability of cross-examination, reasoning that "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-

[22] OIG Report, Audit of the Drug Enforcement Administration's Management and Oversight of its Confidential Source Program.

examination, and the credibility of his testimony to be determined by a properly instructed jury." *Id.* at 311; *see also Cervantes-Pacheco*, 826 F.2d at 315 (procedural protections of discovery, cross-examination, and jury instructions regarding informants satisfy due process).

However, studies of juries' reactions to cooperators' testimony shows that jurors tend to believe cooperators.[23] The reason for this is that criminal informants are highly incentivized to convince the government of their lies, and therefore, they must convince juries too. Otherwise, the compensated informant will not receive what they were promised in exchange for their testimony.

While no disrespect is meant to the individual prosecutors in this case, it is true that because of the way the system has been established, prosecutors rely too heavily on criminal informants.[24] This is problematic because prosecutors usually do not have firsthand knowledge about the information given from criminal informants, which makes it difficult for them to discern when informants are lying. [25]The typical pattern of the transaction—an informant obtains a benefit and the prosecutors receive inculpatory information—creates little incentive for the information obtained to be critically examined (as it would be if subjected to an adversarial process, with a fair opportunity to investigate). While the prosecutors undoubtedly feel comfortable in the reliability of their witness, our system is one where all evidence has to be subjected to the adversarial process, because even the most well-meaning advocate may only see their side, and may see what they want to see. The process must be a fair one. Moreover, jurors are inclined to believe this

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[23] *See* Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making,* 32 L. & Hum, Behav. 137 (2008) (concluding that attribution error led to information about the cooperating witness' incentives not effecting participants' verdict decisions).

[24] *See Alexandra Natapoff,* Beyond Unreliable: How Snitches Contribute to Wrongful Convictions, 37 GOLDEN GATE U. L. REV. 107 (2006).

[25] *Id.* at 108.

testimony, despite the unreliability.[26]

This last point is worth highlighting, as most courts presume that an instruction to jurors guarding against the credibility of informants is sufficient. Researchers conducted a study about unreliable informant testimony, examining both the tendency of people to lie when faced with threats or incentives, and the likelihood of jurors to believe them. Manipulating for the source being a jailhouse informant, an accomplice witness, a witness who received an incentive for testifying, and a witness who had no incentive, the authors found that jurors did not see an incentive as a reason to doubt the validity of the testimony, regardless of the source or the cooperating witness' potential motivation. Nor did the fact that the witness had a history of testifying affect the jurors' determination of their credibility.[27] Juries often afford undue credibility to criminal informant testimony on the assumption they have "inside knowledge" about the crime. Such assumptions, which may operate on a subconscious level, are not easily dispelled by cautionary instructions. Juries who place undue weight on the testimony of compensated informants are a major factor contributing to the prevalence of wrongful convictions.[28]

Wrongful convictions attributable to this practice continue because insufficient procedural safeguards exist to regulate the use of compensated informant testimony. Police and prosecutors are not obligated to maintain a central file system that tracks an informant's record of informing. Courts do not mandate pre-trial hearings during which the truthfulness of criminal informants can be examined prior to trial. Critical background information about informants is not given until right before trial, with no time to investigate

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[26] *Id.*

[27] *See* Jeffrey Neuschatz, Nicholoas Jones, Stacy A. Wetmore, and Joy McClung, *Unreliable Informant Testimony*, Ch. 10 in *Conviction of the Innocent, Lessons from Psychological Research*, ed. Brian Cutler [Washington D.C.: A.P.A. Press, 2012: 212-238].

[28] George C. Harris, Testimony for Sale: The Law and Ethics of Snitches and Experts, 28 PEPP. L. REV. 1, 49-58 (2000).

(and while a flurry of other activity is happening, including filing and responding to motions, investigation, preparing witness lists, exhibits, and trial examinations. Ensuring that a witness testify under penalty of perjury is not a sufficient safeguard. The oath has its limits when it comes to extracting truthful testimony from those deeply involved in criminal conduct. "Perjury cases are rarely brought, hard to prove, and unlikely to add much time to sentences that have already been or will be imposed for serious crimes."[29] Perjury prosecutions are so rare that it is almost impossible to "generate any meaningful statistics."[30] Uncorroborated informant testimony is allowed to be the basis for a conviction.

Cross-examination will be further hampered because the defense lacks pre-trial access to many of the cooperators. However, the government has unfettered access to the cooperators, and the cooperators have had multiple opportunities to hone their version of events in preparation for court. This combination of one-sided access and government preparation will render these witnesses overly prepared and difficult to examine at trial.

Finally, unlike uncharged lay witnesses, the cooperators have compelling incentives to pin responsibility on Mr. Prentice. The more culpable they make Mr. Prentice, the less culpable they are.[31] Their future literally hangs in the balance, based on their ability to maintain a consistent story. For all these reasons, in-trial cross-examination may be insufficient to determine whether the cooperators are being truthful.

Professor George Harris has analyzed the difficulty of cross-examining informants whose compensation depends on their usefulness to the prosecutor. As Professor Harris explains:

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[29] Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 294 (1996).

[30] James B. Stewart, Tangled Webs: How False Statements are Undermining America (2011).

[31] "Trading plea concessions for information [also] means giving the biggest breaks to the worst actors." William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow,* 117 HARVARD L. REV. 2548 (2004).

> Paradoxically, the more a witness's fate depends on the success of the prosecution, the more resistant the witness will be to cross-examination. A witness whose future depends on currying the government's favor will formulate a consistent and credible story calculated to procure an agreement with the government and will adhere religiously at trial to her prior statements.[32]

In this case, the motivations of the cooperators are precisely those described by Professor Harris. Years of their lives literally depend on the success of this prosecution, and therefore they will be more resistant to cross-examination than the typical witness.

For these reasons, the Court should not rely on defense counsel's eventual cross-examination of these witnesses to establish their truthfulness, but rather should have the opportunity, unfettered by the rules of evidence and the presence of the jury, to determine for itself whether the testimony of these witnesses bears sufficient indicia of reliability to permit its presentation at trial. The sufficient indicia of reliability should be independent of any other informants' statements. The prosecution should not be allowed to buttress one informants' unreliable, honed and prepared statement with another's.[33]

C. Informants Should Only Be Allowed To Testify If There Is Additional Evidence Corroborating Their Testimony

Because of the inherent unreliability discussed above, any conviction of a defendant solely by an informant's testimony violates due process. Corroboration of an informant's testimony is recommended in reforms to address the unreliability of informant testimony. It is also required in other legal doctrines, for example, when police use information obtained from an informant, anonymous or known, to support an application for a search or arrest warrant or to justify a warrantless search or arrest. *See, e.g. Alabama v. White*, 496

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[32] George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 54 (2000).

[33] Arthur L. Sr. Burnett, *The Potential for Injustice in the Use of Informants in the Criminal Justice System*, 37 SW. U. L. REV. 1079, 1085 (2008) ("A citizen must have the right to a hearing to endeavor to convince the decision maker that his apprehension and detention is the result of mistaken identity or outright fabrication and falsehood by one or more confidential informants in the intelligence gathering process.").

U.S. 325, 332 (1990); *Illinois v. Gates*, 462 U.S. 213 (1983). In those legal postures, even with a much lower burden, a court will inquire into the informant's reliability and the extent to which the information he provides is corroborated.[34]

Several jurisdictions have enacted or proposed legislation requiring corroboration. Texas passed a law in 2001 requiring corroboration of all informant testimony to secure a drug conviction. The enacted law reads:

> A defendant may not be convicted of an offense under [Texas' Health and Safety Code, which criminalizes drug activities] on the testimony of a person who is not a licensed peace officer or a special investigator but who is acting covertly on behalf of a law enforcement agency or under the color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient for the purposes of this article if the corroboration only shows the commission of the offense.[35]

California's Penal Code states that:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
> An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given[36].

Alaska passed legislation that reads:

> A conviction shall not be had on the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.[37]

For corroboration required of informant and cooperator testimony, the Innocence Project recommends that "[t]he substance of testimony provided by the witness must be

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[34] For the limitations of this oversight, *see, generally,* Mary Bowman, *Full Disclosure: Cognitive Bias, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431 (2013).

[35] Tx. Art. 38.141.

[36] Cal. Penal Code § 1111.

[37] AS § 12.45.020.

corroborated by other evidence that connects the defendant with the commission of the crime… In weighing the substance of the corroborated testimony the fact finder should consider the reliability of the witness along with… whether the informant led to discovery of new evidence previously unknown to the police… [and] whether the informant's statement included an accurate description of the details of the crime that are not easily guessed, have not been reported publicly and can be independently corroborated."[38]

Mr. Prentice proposes a similar framework for this case. Only if there is sufficient corroboration of the informant's proposed testimony should the informant be allowed to testify concerning the defendant's role in the offense. The following section proposes a procedure to determine if there is sufficient corroboration and reliability.

D. The Government Has An Obligation To Establish The Reliability Of Its Cooperating Witnesses

If the government is going to be permitted to introduce informant testimony, the government has special obligations when it comes to their cooperating informants. The Court also has an obligation to ascertain whether the government can corroborate the cooperators' truthfulness, the nature of the contingency arrangement, and how the government intends to assure that the cooperators testify truthfully.

Courts have established that a "prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system [and courts] expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery." *Commonwealth of the Northern Mariana Islands*, 236 F.3d at 1089; *see also Levenite*, 277 F.3d at 459-62. The obligation of the government to ensure the reliability of its cooperators and informants

[38] Innocence Project, *The Use of Incentivized Testimony*, August 2013, can be found at: https://www.innocenceproject.org/wp-content/uploads/2016/04/Incentivized-Testimony-Fact-Sheet.pdf

stems from two sources: first, the government enlists, controls, and rewards its informants and is therefore in a unique position to evaluate their reliability; second, the prosecutor, as the representative of the sovereign, has an ethical obligation to ensure that the defendant is given a fair trial. *See Commonwealth of the Northern Mariana Islands*, 236 F.3d at 1089 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Unfortunately, because of the dynamics of this case, the government is in a weak position to guarantee the reliability of the cooperators' testimony. From the inception of this case, the cooperators have been well aware that any hopes of lenience rested on their ability to provide the government with useful information. The government is thus the primary target of the cooperators' efforts to escape punishment, and if the cooperators are lying, they will presumably be particularly careful not to reveal it to the government.[39]

The Ninth Circuit addressed these issues of reliability and government obligations in *Commonwealth of the Northern Mariana Islands*. There, three co-conspirators were charged with murder and kidnapping. There was some evidence that two of the three conspired to pin the murder on the third. The government's failure to fully investigate the possibility of collaborative perjury caused the Court to reverse the conviction. In its decision, the Court noted that when the government makes a deal with an informant, "each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government." *Commonwealth of the Northern Mariana Islands*, 236 F.3d at 1095. The Court concluded that "rewarded criminals represent a great threat to the

[39] "[Informants'] willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor." Judge Stephen S. Trott (9th Cir.) *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996)

mission of the criminal justice system." *Id.*

Barry Tarlow, a former prosecutor, has likewise documented the significant difficulties that prosecutors experience in holding their criminal informants accountable.[40] Tarlow explains that prosecutors may be drawn in by informants who have strong motivations to pin responsibility on others, and notes the heavy pressures on prosecutors to rely on unreliable compensated witnesses when others are unavailable.

Given the inherent "peril" of rewarded testimony and the government's heavy reliance on it in this case, the government should not be permitted merely to proffer its good faith belief in the reliability of its witnesses. The usual line of direct testimony with a cooperator is that no promises have been made, and only if the cooperator tells "the truth" will the government agree to write a letter to the Court for sentencing. The prosecutor emphasizes that only the Court has the ultimate say over the sentence. These leaves out of course that is the prosecutor who determines what "the truth" is. Although that is an acceptable line of cross-examination, it is woefully inadequate. It is rather appropriate to hold a hearing to establish the reliability of the witnesses through adversarial questioning and a neutral evaluation by the Court, before it is determined that an informant can testify to a jury.

E. A Pretrial Reliability Hearing Is Required To Test The Informant's Reliability Outside The Presence Of The Jury

Where the unreliability of a particular type of witness is so well-established, it is appropriate for the court to take protective steps to guarantee the integrity of the process. *Cf. Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993) (court to act as "gatekeeper" to ensure reliability of scientific evidence).

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[40] *See* Barry Tarlow, *Perjuring Informants Brought to the Bar*, RICO Report, CHAMPION 33-40 (July 2000).

1. The Court has the Authority and Obligation to Conduct a Reliability Hearing Under the Federal Rules of Evidence

In this case, the interests of justice and a fair trial require a pretrial reliability hearing to permit the Court to ascertain the reliability and probative value of the cooperators' testimony. The Court has clear authority to hold such a hearing pursuant to Federal Rule of Evidence 104(c), which provides: "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require . . . ."

The rules of evidence likewise obligate the Court to screen out unfairly prejudicial, harmful, confusing, or otherwise unhelpful evidence. Federal Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Likewise, Federal Rule of Evidence 701, limits lay witness testimony to testimony that is "helpful" to the trier of fact.

At least two courts have ordered reliability hearings whenever incarcerated informants ("jailhouse snitches") are proposed witnesses. *See Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. of Crim. App. Jan. 6, 2000) (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to *Daubert* hearing); *D'Agostino v. State*, 107 Nev. 1001, 823 P.2d 283 (Nev. 1992) (holding that before "jailhouse incrimination" testimony is admissible the "trial judge [must] first determine[] that the details of the admissions supply a sufficient indicia of reliability"). Illinois, by statute, requires reliability hearings whenever incarcerated informants are offered as witnesses in capital cases.[41] These

[41] Ill. Comp. Stat. ch. 725, s. 5/115-21(d) ("The court shall conduct a hearing to determine whether the

recommendations apply here with equal force.

2. The Principles of *Daubert* Support the Holding of a Reliability Hearing

The law's treatment of expert witnesses further supports the holding of a reliability hearing in this instance. In *Daubert*, the Supreme Court determined the need for a special mechanism to evaluate the reliability of expert witnesses because experts pose thorny problems of cross-examination and persuasion. Experts, for example, rely on specialized information that is not directly available to the jury. *Daubert*, 509 U.S. at 592. The court held that the concerns underlying Rule 403 are preeminent because expert witnesses can have such a potent effect on juries:

> Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 [] exercises more control over experts than over lay witnesses.

Daubert, 509 U.S. at 595. Moreover, as Professor Harris has noted, expert witnesses are compensated, violating the usual presumption against the use of paid testimony.[42] The suitability of compensated expert testimony is thus determined in part by pre-trial judicial examinations of reliability.

Informants pose many of the same special concerns as expert witnesses. Unlike typical lay witnesses, they are compensated, they have personal interests in the outcome of the case, their testimony is difficult to test on cross-examination, and they are selected and controlled by the propounding party.[43] Like experts, moreover, informant testimony can be "powerful and quite misleading." At least one court has expressly extended the principles

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testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors enumerated in subsection (c) as well as any other factors relating to reliability.").

[42] *See* Harris, *Testimony for Sale,* 28 Pepp. L. Rev. 1 at 1-5.

[43] *See* Harris, *Testimony for Sale*, at 49-59.

of *Daubert* to cover informants, imposing a "reliability hearing" requirement whenever the testimony of a so-called "jailhouse snitch" is involved. *Dodd v. State*, 993 P.2d 778, 784 (Ok. Ct. of Crim. App. Jan. 6, 2000) (Strubhar, J., concurring) (approving lower court imposition of "reliability hearing" comparable to *Daubert* hearing).

In this case, the cooperators are the sole witnesses to the crime and their version of the story will carry heavy weight with the jury. In the same way that courts act as "gatekeepers" with respect to experts, it is appropriate for this Court to ensure that unreliable informant testimony does not taint the jury.

3. A Reliability Hearing is Warranted on the Facts of this Case

In this case, the cooperators' testimony presents a substantial danger of "unfair prejudice" because it is the government's primary evidence against Mr. Prentice, because the cooperators have overwhelming motivations to lie and their testimony is therefore highly unreliable, and because their testimony cannot be disproved. Their testimony may not be helpful to the trier of fact if it is so biased and unverifiable that no trier of fact can conclusively determine whether it is truthful or not.

It is particularly important that the cooperators' reliability be tested prior to trial outside the presence of the jury. The cooperators' reliability, their incentives to fabricate, the details of the crime, and their relationship to the defendant, are matters which may only be susceptible to penetration through the more informal inquiries permitted under Rule 104, where the rules of evidence do not apply. Moreover, the Court is better suited to recognize reliability and credibility concerns that may elude the jury. The inquiry into such matters also could be highly prejudicial if heard by a jury and incurable by subsequent jury instruction.

Finally, as noted above, the procedural requirements set forth in *Levenite* can best

be met at a preliminary hearing. At such a hearing, the informant will be subject to cross-examination, and the government can provide to the Court and counsel any corroboration it might have and provide assurances that the arrangement with the witnesses indeed protects against perjurious testimony.

F. Early and Thorough Discovery Should Be Ordered for Any Information Related to Informants

Because of the potential for unreliability in the informants' testimony, the defendants should be given immediate access to all of the information in the government's possession, or deemed to be in the government's possession, related to the informants. This information includes, but is not limited to:

1. The name reported to police, and any other name known to the government, of the informant, or cooperating witness;

2. Any and all representations or promises made by the government, or its Agents and Investigators, including any Virgin Islands Police Department Officer, to the informant or cooperating witness bearing on any immunity, consideration, inducement, leniency, sentencing consideration, preferential treatment, custodial housing, out of custody housing, including inducements made to the informant, or confidential witness, concerning his or her family members, as part of this case or as part of any other case in which the informant or confidential witness has provided information;

3. Any proffer agreement, proffer letter, or proffer related writing read to, reviewed by, or signed by the informant or confidential witness as part of the investigation of this case, or any other case pending during the investigation of this case in which the informant or confidential witness has provided information;

4. Any plea agreement, memorandum or letter confirming a plea agreement, transcript of a change of plea to a guilty or 'no contest' plea reflecting or containing a plea agreement that discusses, sets forth, refers to, or otherwise describes the agreements made by or naming the informant or cooperating witness, including plea agreements, or change of plea transcripts, in federal, state, military and any other court;

5. A description and record of any payment of currency, funds, or other monetary consideration to the described informants, or cooperating witnesses, or to their families or associates, in connection with this case or any other case pending at the time of the investigation of this case, including, but not limited to, the record of which agency made the payments and what prosecutor (if any) authorized them;

6. A description of any promises or representations of payment, loans, or monetary consideration to be provided in the future made either in writing, or verbally, to any informant, or cooperating witness, or their families or associates, as part of this, or any other, case in which the described informant or cooperating witness has provided information;

7. Any writing, memorandum, plea agreement, letter, or memorandum containing or describing any promises or agreements relevant to the informant or cooperating witness in this case, or in any other case pending at the time of the investigation of this case, or in any other federal investigation in which the informant, or cooperating witness, acted as an informant or confidential source of information. The writings sought in this section of this motion include, but are not limited to, writings confirming or promising payment, remuneration, immunity, 'pocket immunity', preferential treatment, or other inducements;

8. All information, evidence, or records pertinent to any described informant's prior testimony in this or any other proceedings in which he/she has acted as a witness and/or informant;

9. Any records, evidence, or information pertinent to the informant or cooperating witness' psychological or psychiatric treatment if any, or pertinent to the informant or cooperating witness's addiction or propensity to use or abuse controlled drugs or substances;

10. Any informant file specific to the disclosed informant, or cooperating witness, including: a copy of the informant or cooperating witness's agreement to cooperate and/or testify; any debriefing report, or notes of debriefings; any outline of the information from the law enforcement agency producing the file that the informant or cooperating witness can provide; the informant's personal and criminal history; a register, record, or entries describing any monies paid to the informant, including monies left on his books for information, expenses, or discretionary spending; any promises, or discussions that may lead to the informant (or cooperating witness) believing that there is an expressed or implied promise regarding potential sentencing in a criminal case;

11. Any internal memoranda, either as part of the informant file, or as a 'stand-alone' document, written by law enforcement officers, or government lawyers, including state, local, or federal prosecutors, regarding the informant's credibility. These memoranda may include such information as misconduct by the informant or cooperating witness, or information regarding the informant's termination as a source of information, or 'deactivation';

12. In addition to the above, disclosure of any forms (such as DEA, or FBI, confidential source, or cooperating witness forms) relevant to the named informant or cooperating witness; and

13. Any further information subject to disclosure under the United States Supreme Court's decision in *Roviaro v. United States*, 353 U.S. 53 (1957) and its progeny.

Although the government has disclosed some Rule 16 material in the "Jencks binders," there is additional information that is required to be disclosed in order to ensure due process. Mr. Prentice requests that the government disclose this information immediately, rather than wait until close in time before trial, to allow the defense to thoroughly investigate the reliability of the informants. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Wearry v. Cain*, 136 S. Ct. at 1006 (quoting *Brady*, 373 U.S. at 87). In *Giglio*, the Supreme Court made clear that *Brady* applies not only to "exculpatory evidence" but also "[i]mpeachment evidence." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Evidence is material under *Brady* and *Giglio* only if it has "a reasonable probability of changing the outcome of the proceedings." *United States v. Coppa*, 267 F.3d 132, 144 (2d Cir. 2001); *accord United States v. Douglas*, 525 F.3d 225, 245 (2d Cir. 2008).

G. Lack of Symmetry Violates Due Process and Requires Exclusion of Cooperating Witnesses

Some Circuits have clearly expressed concern about the nature of a process that tolerates a gross lack of symmetry in the development and presentation of evidence in part because the defense cannot match the government's power and resources in cultivating

witnesses. Increasingly, the government is empowered to provide forms of consideration to witnesses that the defense does not have at its disposal—and in some cases that would be illegal for the defense to try to provide.

The Ninth Circuit in *United States v. Straub*, 538 F.3d 1147 (9th Cir. 2010) reversed a conviction, finding that a defense witness should have been granted use immunity. Reiterating the test laid forth in *Diaz v. Woodford*, 384 F.3d 567 (9th Cir. 2004), the Court said that in order for a defense witness to be granted immunity, the witness' testimony would have to be relevant, and the prosecution's refusal to grant the witness use immunity was deliberately intended to distort the fact-finding process. *Id.* at 1157 (citing *Diaz*, 384 F.3d at 600). In *Straub*, the prosecution offered immunity to many of its witnesses, but refused to offer immunity to a defense witness. The defense did not argue that the prosecution acted with deliberate intent to distort the fact-finding process, but that the prosecution's selective use of immunity had the effect of distorting the fact-finding process. The Court held that this violated due process, and adopted the "effects test": "one may prove that the prosecution acted with a certain purpose merely by demonstrating that the prosecution committed a set of acts (the selective denial of use immunity described) that had the effect of distorting the fact-finding process." *Id.*

While Mr. Prentice will certainly request use immunity when and if he determines it is necessary, nonetheless, this does not resolve the issue of fairness for the defense. Even assuming witnesses may be granted immunity when testifying for the defense, this only deals with the situation of testifying. The defense will need to interview witnesses to determine what they have to say. This can be impossible without the power to grant immunity. Witnesses are intimidated even by the fear of criminal culpability. Witnesses' reluctance and the defense's total inability to shield them from the oppressive weight of the

government have hindered the defense efforts to adequately present a defense from the start of the case. Thus, with respect to some witnesses, the defense will not be in a position to even request immunity, for it will not even be able to speak to a witness to know what the witness would say. For some witnesses, a grant of immunity at trial will be too little, too late.

On the flip side, the government has been at a huge advantage over the defense in its choice of mechanisms through which to cultivate potential witnesses. This case presents examples of virtually every tool available to the government to pursue and acquire witnesses, and to make a case. Here, with the blessing of relevant case law, the government, Federal and/or State, with the knowledge of Federal authorities, either has, or may have:

(1) plea and charge bargained with individuals who either were, or could have been, targeted directly or indirectly
(2) provided non-prosecution agreements to obtain statements or other evidence
(3) provided assistance for the families of some of its witnesses;
(4) communicated with state and local agencies in relation to some of its witnesses;
(5) relocated pre-trial witnesses; and
(6) provided payment for certain of its "sensitive witnesses"

Thus, even if the Court does not question the propriety, or legality, of the payments that have been made to prospective witnesses in this case, it remains that the consideration and assistance "packages" provided to the sensitive witnesses expose the systemic imbalance between the prosecution and defense in certain sorts of cases.

H. Due Process and Equal Protection Considerations

There is nothing in the constitutional architecture of the criminal court system that provides the foundation for what has become the historical toleration of significant imbalances between prosecution and defense functions, particularly at the trial stage of criminal proceedings. While it may be true, as noted above, that our legal system

"inherited" the concept of allowing witnesses afforded leniency the opportunity to testify for the prosecution, historically there was no witness relocation and/or protection program, no budget that permitted payments to witnesses, no multi-agency working agreements that permitted effective "wink and nod" agreements for leniency to be provided to government witnesses in the way that such arrangements can be made today.

On occasion, the lack of symmetry between the government and defense has been ground for reversal of convictions. For example, in *Washington v. Texas*, an accused tried for murder had sought the testimony of a co-defendant on the basis that the co-defendant had shot the victim, and that this former co-defendant would testify that the current defendant had tried to prevent the shooting. *Washington* v. *Texas,* 388 U.S. 14, 17-19 (1967). Relying on a state statute, the prosecution successfully objected to the testimony of the former co-defendant on the basis that Texas law prevented a participant accused of the crime from testifying for a co-participant--though the statutes permitted such a person to testify for the prosecution. The Supreme Court reversed the conviction, noting:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.

Id. at 19-20.

In the court's view, there was historical evidence that "the Framers of the Constitution felt it necessary to specifically provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." *Id.* at 20-21. This was true even though, historically, the common law included some limitations on the defense's ability to call

witnesses. In *Washington* v. *Texas,* the court specifically held that where the government "arbitrarily denied [the accused] the right to put on the stand a witness who is physically and mentally capable of testifying to events that he had personally observed . . ." there was a violation of the Sixth Amendment. *Id.* at 23.

A few years later, the state of Texas was again the before the United States Supreme Court defending a judgment in a burglary case. There, the accused had attempted to summon his only witness, who had a prior criminal record and was serving a prison term at the time. The trial judge admonished the witness that there would be a series of potential adverse consequences if he did go forward to testify. The defense objected, noting that none of the witnesses for the State had been similarly admonished. Hearing the colloquy between the court and counsel "the witness then refused to testify for any purpose and was excused by the court." *Webb* v. *Texas,* l409 U.S. 95, 96-97 (1972). Citing *Washington* v. *Texas, supra,* 388 U.S. 14 at 19, the Supreme Court found the judge's admonishment of the witness to have deprived the accused of his right to due process, and reversed. It has since generally been deemed that the accused's ability to offer testimony as part of his defense is an accepted Sixth Amendment right. *See Taylor* v. *Illinois,* 484 U.S. 400, 409 (1988); *In re Oliver,* 333 U.S. 257, 273 (1948).

Mr. Prentice understands that, notwithstanding the above-described authority, there is no specific ruling, or statute, that requires that the defense be provided with exactly the same testimony-inducing arsenal that the government has available.

Under Virgin Islands Rule of Professional Conduct, 211.3.4(b), it is not proper (meaning either legally or ethically) for a lawyer to offer money to a witness in return for testimony. Thus, defense counsel offer "payment" to witnesses at their peril. Certainly, any

offer of a financial "bonus" for signing up to cooperate in the defense of the case would be viewed as improper, and tainting of the witness and lawyer.

In addition, the defense has no power to (a) immunize witnesses or seek their immunity in the absence of stringent conditions precedent; (b) no way of relocating witness, or obtaining the logistics for their relocation; (c) no way of matching the government in the panoply of consideration that can be offered. The defense cannot legally offer a witness the combination of tangible and intangible benefits that the government can, and does, offer its witnesses. Because of the inherent inequity between the defense's ability to present witnesses in his defense and the multitude of resources available to the government, which cannot be cured, Mr. Prentice requests that the testimony of any witnesses who have been offered any consideration by the government be excluded.

III. CONCLUSION

For all these reasons, Mr. Prentice moves to exclude the testimony of the informants. The Court should find that any witness who has been received compensation, in sentence reduction or otherwise paid in connection with his or her cooperation and testimony in this case should not be permitted to testify, due to the great systemic imbalance. Alternatively, the Court should exclude any informant testimony that does not have independent corroboration, corroboration that does not depend upon another informant. At a minimum, Mr. Prentice moves for a pretrial reliability hearing to evaluate the reliability and probative value of the cooperators' testimony, the ability to offer immunity to a witness (and to do so *ex parte,* subject to later disclosure along the same timeline and circumstance as the government, if the defense chooses to call the witness at trial), and moves for immediate disclosure of all information related to informants in this

case.

At New York, New York, on this 6th day of August, 2021.

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I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.