

The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence

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Fabricated testimony by informants often plays an important role in convictions of the innocent. In this article, I examine the particularly problematic situation of defendants who are innocent of the particular crime charged but are not strangers to crime. As to such defendants, potential informants abound among crime associates, and they have a ready story line that authorities are preconditioned to accept. Independent proof, which could be an antidote, will predictably be lacking. Indeed, that the informant has exclusive, critical knowledge often leads the prosecution to offer particularly tempting deals.

I focus on the case of Lee Wayne Hunt, a likely innocent man condemned to spend his life in a North Carolina prison. Hunt, who was the head of a local marijuana distribution ring, was convicted of apparently drug-related murders exclusively by the testimony of informants. The strong reason to believe he is innocent comes from confession of sole guilt by an alleged co-participant made to his lawyer before his own trial for the murders, a confidential communication revealed only after the client’s suicide. Remarkably, relief has been refused.

To reduce the dangers of fabricated informant testimony, I propose requiring the recording of “first drafts” of informant stories and documenting the full extent of promises made or assumed. Procedures should also be developed for independent prosecutorial review before trial in all cases that depend critically on informant testimony and for independent review of such cases after conviction when facially credible claims are made that would establish a reasonable likelihood of innocence if substantiated.

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I. INTRODUCTION

The Duke Lacrosse Case and the disbarment of the Durham District Attorney Mike Nifong occupied media attention for over a year from the spring of 2006 until the summer of 2007. As I have written, the prosecution was a fiasco,¹ but in the end, justice was done. North Carolina Attorney General Roy Cooper not only dismissed charges but also declared the three players who had been charged with rape innocent, and the North Carolina State Bar disbarred the prosecutor for his misconduct.²

Unfortunately, Lee Wayne Hunt's case, which received far less national press,³ has not reached a similarly just result in my judgment. Hunt was tried for his life in 1986 for the murder of Roland and Lisa Matthews, which he allegedly masterminded and committed with three other individuals. He was convicted of two counts of first degree murder and conspiracy to commit murder. While spared the death penalty, he remains in prison serving two consecutive life terms plus twenty years.⁴

According to evidence recently revealed by the former defense attorney for Jerry Dale Cashwell, an alleged co-participant who was convicted in a separate trial for the murders and committed suicide in 2002 while in prison, Hunt is innocent. That attorney, Staples Hughes, who is presently the Appellate Defender for the State of North Carolina, has testified that Cashwell admitted to his solitary guilt in a conversation with Hughes and his co-counsel soon after his arrest for the murders, repeating and never contradicting that account throughout the representation even though his account was extremely damaging to defense efforts.

¹ Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337, 1337 (2007) (quoting F. Lane Williamson, chair of the Disciplinary Hearing Commission panel).

² I have discussed the Duke Lacrosse Case in connection with other recent North Carolina prosecutions, which showed the importance of full open-file discovery to correcting injustices in death penalty cases and in producing the dismissal of the Duke Lacrosse Case. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *GEO. MASON L. REV.* 257 (2008).

³ In a report that aired on CBS *60 Minutes* in November 2007, Hunt's case was highlighted for the misuse of forensic evidence that has been shown to be invalid. See *60 Minutes: Evidence of Injustice* (CBS television broadcast Nov. 18, 2007), available at 2007 WLNR 22912469. Now repudiated scientific evidence was admitted that allegedly linked the bullets that killed the victims on the basis of their composition to a box of ammunition obtained from Jerry Cashwell, which indirectly corroborated the prosecution's case. *Id.* In Hunt's post-conviction challenge to his conviction, the State stipulated that the testimony offered at trial "can no longer be scientifically supported and relied upon." See Stipulation, at 2, Amendment to Motion for Appropriate Relief, *State v. Hunt*, 85 CRS 16651-54 (Jan. 8, 2007) (on file with author). I do not focus on this questionable evidence because, regardless of its accuracy, it provided no direct link to Hunt and is fully consistent with Cashwell's sole responsibility for the crime.

⁴ Motion for Appropriate Relief, at 3, *State v. Hunt*, 85 CRS 16651-54 (Dec. 30, 2004) [hereinafter Hunt MAR] (on file with author).

Hughes revealed this information to Hunt's lawyers only after Cashwell committed suicide and developments both in the Rules of Professional Responsibility and in the North Carolina Supreme Court's interpretation of the attorney-client privilege provided potential grounds for both revealing the information and admitting it in evidence. Nevertheless, the trial court that heard Hunt's motion for a new trial denied relief. Indeed, it refused even to consider Hughes' testimony and moreover reported him to the North Carolina State Bar for an ethics violation in disclosing the former client's secret. The North Carolina appellate courts declined review of the denial of relief to Hunt and to the important legal issue of whether the attorney-client privilege barred receiving this exculpatory evidence from a deceased client.

I am convinced of Hunt's innocence,⁵ and I question both the failure of the North Carolina Attorney General's Office to undertake an independent review to assess carefully the possibility of Hunt's innocence in the wake of Hughes' disclosure and the refusal of the appellate courts in North Carolina to review the trial court's rulings. The Attorney General's Office admirably and effectively undertook a review in the Duke Lacrosse Case to investigate potential injustice, but it appeared interested only in thwarting inquiry into possible error in Hunt's case. The North Carolina Supreme Court's failure to rule on whether the trial court's refusal to receive Hughes' testimony was justified is equally puzzling and particularly unfortunate since that court has the responsibility to declare major

⁵ My personal conviction, which need affect no one else, is based on two points. First, my careful examination of the record demonstrates to me that there is no competent evidence outside of two informants' testimony to link Hunt to the murder, and the statement of one of those informants is not directly incriminating. Second and more importantly, I know and respect Staples Hughes. No human is a lie detector, but Hughes is a savvy seasoned defense attorney. He has seen the worst in humanity, and when it comes to the conduct and motivation of criminal defendants, he is nobody's fool. As he stated in his letter to the North Carolina State Bar when an ethics charge was raised against him:

I now have been a criminal defense lawyer for over twenty-five years. I am not given to illusions about the capacity of human beings for evil. I understand that motivation and behavior can be complex and tangled. I know that people lie. At this point, more than twenty years after Jerry's initial disclosure, I believe and know that Lee Wayne Hunt is an innocent man.

Letter from Staples Hughes to Margaret T. Coultier, Staff Attorney, North Carolina State Bar, at 4 (Mar. 30, 2007) [hereinafter Hughes Response Letter] (on file with author).

Hughes is convinced to a moral certainty that his client's statement to him of his sole involvement was absolutely true. It was confirmed by all he saw in the case and was contradicted by nothing. He has thought of this case thousands of times in the intervening years. Hughes repeatedly turned in his mind to the Hunt because he was convinced of the injustice to a man whom he recognizes to be no angel but was uninvolved in these murders. To the skeptic, I suggest one read the North Carolina Supreme Court opinion affirming Hunt's conviction, looking for incriminating evidence. *See State v. Hunt*, 381 S.E.2d 453 (N.C. 1989). The incriminating evidence is extraordinarily unimpressive, and it is completely clear that there is no independent evidence of guilt beyond informers' testimony and indeed little beyond the testimony of one man, Gene Williford, Jr., who was given total immunity for his testimony for clear criminal conduct independent of anything implicating Hunt.

developments in the law, which the legality of this revelation clearly represents. Hopefully, some other body will carefully examine the facts and if merited, as I believe, correct the injustice of Hunt's continued imprisonment.

Although this essay focuses principally only on the facts of one case, that of Lee Wayne Hunt, the reader should view the facts as more universal because they present a classic example of one of the most difficult and dangerous situations for wrongful convictions. That is the situation of a defendant who is, or may be, innocent of the particular charged crime, but who lacks general innocence in having some past or present involvement in crime,⁶ and who is accused only by informants whose testimony is secured by the prosecutor's powerful promises, typically of freedom in exchange for incriminating testimony.

The Duke Lacrosse Case stands in stark contrast. But for tawdry behavior in hiring strippers for a team party and for minor infractions, the defendants were not only innocent of the charges brought against them but also young men with basic innocence. The charged players were clearly all strangers to the world of serious criminal conduct. Potentially more importantly, the other team members and their friends were also young men of basic innocence.

Why those who manifest general innocence differ from Lee Wayne Hunt's prosecution and conviction revolves around one type of evidence in the prosecution's arsenal: informants.⁷ Their absence in one prosecution and presence in the other is one of the important divides between the two cases and explains much about the gulf between outcomes.

In this discussion of "incentivized witnesses," I will uniformly use the term informants rather than the more colloquial and sometimes more appropriate term "snitches." I do that purposefully. This "bought" testimony is undeniably problematic and troubling.⁸ However, I believe that "snitch," though sometimes

⁶ Scholars are beginning to note that miscarriages involving innocence is most likely among those who lack generic innocence. Professor Josh Bowers laid out why arrest bias, charging bias, dismissal aversion, and trial biases against the "usual suspects" are far more likely to produce convictions among those with substantial contacts with law enforcement—colorfully terms the "usual suspect" than among those that are strangers to criminal conduct. See Josh Bowers, *Convicting the Innocent*, 156 U. PA. L. REV. 1117, 1124–32 (2008). Professor John Blume has written more specifically about the impact of the threat of impeachment with their prior convictions on the type of defendants that I focus on here—a threat that frequently causes such defendants not to testify and contributes to their wrongful convictions. See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record: Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477 (2008).

⁷ I use the term informant relatively broadly to include those who receive benefits for their testimony. Some authors create other distinctions. See, e.g., Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 1 n.2 (2003) (distinguishing informants who typically provide information for financial compensation from cooperating witness, who are involved individuals who receive leniency with regard to their criminal involvement).

⁸ In this article, I principally focus on the incentive of leniency. Sometimes, however, the testimony of the informant is "bought" with cash as occurred in the conviction of Levon "Bo" Jones, who was released in May 2008 when charges were dismissed after spending thirteen years on North Carolina's death row. See Mandy Locke, *Death Row Inmate to Go Free*, NEWS & OBSERVER

appropriate, lacks a sense of reality. Incentivized witnesses sometimes/often tell the complete truth, and they are important to many just outcomes. Although the criminal justice system likely relies too heavily on informants, I have no proposal to remove them from the system, doubt such a proposal is reasonable, and know it is not realistic.

The evidence that convicted Hunt—the only real evidence of guilt—came from a group of informants, which numbered between two and four. The principal evidence came from another alleged co-participant in the crime, Gene Williford, Jr., who received full immunity not only for the alleged murders, but significantly for numerous other independent crimes for which he faced prosecution. Another informant, Jeffrey Dale Goodman, came from the particularly suspect category of “jailhouse informants.”⁹ He testified to statements made to him by Hunt that, if accurate, demonstrated Hunt’s substantial knowledge of the crime from which guilt could strongly be inferred, but Goodman never claimed that Hunt directly acknowledged his personal involvement.¹⁰ The testimony of another jailhouse informant, Samuel Thompson, was admitted despite the fact that he never claimed that Hunt talked to him and instead only claimed to have talked to Cashwell while in jail with him. Thompson’s testimony was received under a theory of impeaching Cashwell’s admissions of solitary guilt that Hunt offered in his trial.¹¹

Although the jury heard none of his testimony, a fourth informant, Kenneth West, should be acknowledged since I argue Hunt’s innocence. West, the fourth alleged co-participant, entered a combination of “no contest” pleas and guilty pleas to accessory after the fact to murder in exchange for a sworn proffer of evidence and an agreement to testify in post-conviction proceedings. His version of the

(Raleigh), May 2, 2008, at A1. The informant repudiated her trial testimony, stating that “much of what [she] testified to . . . was told to [her]” by a member of the sheriff’s office. Affidavit of Lovely Lorden at 3, *State v. Jones*, 02 CRS 4389–91 (Dec. 5, 2007) (on file with author). This same law enforcement officer delivered a reward of \$4,000 to the informant after the completion of her testimony, and the informant stated that she knew of this reward before trial. *Id.* See also Shaila Dewan, *Releases from Death Row Raise Doubts Over Quality of Defense*, N.Y. TIMES, May 7, 2008, at A1, A17 (noting that Lorden was a frequent police informant and that the knowledge of the reward before trial was not disclosed in testimony at trial).

⁹ This concept is discussed later in the essay, see *infra* Part III.C.3.a. The classic jailhouse informant gives testimony along the following basic lines: “I had nothing to do with the crime. I just happened to be in the cell with the defendant and he said that he ‘robbed the First National Bank.’” This class of informants is distinguished from other informants in my judgment as a matter of degree. However, they are generally different from co-participant informants in that they (1) do not admit criminal responsibility; (2) are potentially numerous because they include everyone who plausibly had a conversation with the defendant; (3) usually make the first contact the authorities to peddle their information; and (4) are in jail and have the obvious incentive of gaining their release.

¹⁰ See *Hunt*, 381 S.E.2d at 456 (describing the testimony of Jeffrey Dale Goodman).

¹¹ *Id.* (describing the testimony of Samuel Thompson offered in rebuttal that related what Cashwell told him about the involvement of Cashwell, Hunt, and a third person, Kenneth West, in the murders).

facts, while significantly different than the State's star witness, Williford, clearly implicated Hunt in the murders.

The incentives given to all four witnesses were quite substantial, and liberty for each was achieved immediately or within short order. One, Williford, was released on bond immediately upon reaching an agreement to testify and served no more time; the two jailhouse informants were released within three months of their testimony; and the fourth, West, faced a maximum of two weeks in jail once his agreement was reached and plea entered.¹²

Of course, one might say that no informants offered evidence against the Duke Lacrosse defendants because the charged players were not guilty. However, innocent defendants and incriminating informants are not incompatible when the informants give false testimony, and the innocent and informants are hardly strangers in documented cases of injustice. Examination of the causes of error in the first two hundred DNA exonerations shows that false informant testimony was involved in eighteen percent of those cases.¹³ Clearly, the fact the Duke Lacrosse defendants were innocent made it far less likely there would be informant testimony. It no doubt also helped that no rape, indeed no sex, took place, and the allegations were based on either a hoax or a delusion. However, probably more important was that none of the other individuals who were in a position to claim to have at the party "seen something" supporting the rape or to have later heard an incriminating statement from the defendants had any, let alone substantial, criminal

¹² Under the agreement, West received a three-year sentence and was given 447 days credit for time already served against the sentence. His sentence was to be served in the Cumberland County jail, a local facility. See Transcript of Guilty Plea and Judgment of Proceedings at 7, 15, State v. West, 85 CRS 16643-44, 87 CRS 6442-43 (Feb. 26, 1987) [hereinafter West Tr.] (on file with author). The Department of Corrections has no record that West served any time under the three-year sentence, likely because it was to be served locally. Unfortunately, Cumberland County jail records do not exist for that period of time. Thus, no records show his actual date of release.

West was likely immediately eligible for community service parole. See N.C. GEN. STAT. § 15A-1380.2(h) (2007). At most, he was in jail a little less than two weeks after this plea was entered. On March 11, 1987, legislation to reduce overcrowding in North Carolina prisons and jails became effective, which *required* that prisoners both be paroled and supervision simultaneously terminated 270 days before the end of the maximum sentence. See N.C. GEN. STAT. § 15A-1380.2(c) (2007). With time-served credit and with "credit for good behavior" reducing his maximum term one day for every day served without major infraction, see N.C. GEN. STAT. § 15A-1340.7(b) (2007), West had to be released when that legislation became effective less than two weeks after his plea and sentencing. Samuel Thompson's experience of parole within three months with less time served on a similar three-year sentence, see *infra* note 83 and accompanying text, confirms this calculation.

¹³ See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76, 87-88 (2008). See also BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 246 (2001) (finding informants involved in twenty-one percent of the sixty-two exonerations examined); Samuel R. Gross et al., *Exonerations in the United States: 1989-2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543 (2005) (describing the role of false testimony by both those who claimed involvement in the crime and by others who did not, chiefly jailhouse informants). Erroneous eyewitness testimony was found in the largest number of cases. See Garrett, *supra*, at 76 (finding erroneous eyewitness testimony in 77 percent of the cases); see also, SCHECK ET AL., *supra*, at 361 (finding such testimony in over 80 percent of the cases).

law exposure that the police and/or prosecution could hold over them or use as strong inducements. As examined briefly in Part I, the approximately forty other men at the party were potential alibi witnesses for the three indicted players; they would have been potential informants if the three had, like Hunt, associated with criminally exposed individuals.

After setting up a contrast with true innocents in the Duke Lacrosse Case in Part II, I examine the Hunt prosecution and its weaknesses in Part III along with Staples Hughes' disclosure of his client's confession of solitary guilt that completely exculpates Hunt. In Part IV, I set out some of the lessons learned about the abuses of informants and their role in convicting the innocent. In Part V, I examine the major reforms that have been proposed. In Part VI, I propose a set of four central components of the remedy to the abuses of informants. The first two are procedural proposals that concretely fulfill constitutional disclosure responsibilities that the Supreme Court has imposed on the prosecution but currently are frequently unsatisfied because the information is inaccessible. The evidence produced by these requirements will provide the jury with a better basis to determine the truth and protect the innocent. The final two are proposals first for pre-trial internal but independent prosecutorial re-evaluation of the prospect of innocence and post-trial when new information supporting innocence comes to the prosecution in those cases where informants provide the only direct evidence of guilt.

II. INFORMANTS THAT WEREN'T: THE DUKE LACROSSE CASE, WITH NO CRIME AND NO LEVERAGE

The Duke Lacrosse Case began with the fateful decision to hire two "exotic dancers" for the 2006 Lacrosse team party held at a house near Duke's East Campus where three of the captains lived, including one of the men ultimately charged. Approximately forty others, most but not all of whom were Lacrosse team members, attended the party. The dancers arrived at the house shortly before midnight, received payment, and after a short period of dancing, the performance ended unhappily and the dancers left to an exchange of taunts.

Police first came in contact with the alleged victim, Crystal Mangum, in response to a 9-1-1 call regarding her condition and found her passed out in the other dancer's car. She was taken to an organization that offers assistance for substance abuse where Mangum stated that she had been raped, and a criminal investigation began.¹⁴ However, the real turning point came when Durham County District Attorney Michael B. Nifong became personally involved in the case. Probably for political benefit in a closely contested primary for election, he chose to publicize the case and push the prosecution with great zeal.¹⁵

¹⁴ See Mosteller, *supra* note 1, at 1342-46.

¹⁵ *Id.* at 1348-57.

The exact nature of Nifong's motivation is of no consequence to this essay, but the great intensity of his interest is. He vigorously pursued the prosecution, and it is clear that he would have obtained incriminating evidence from those at the party and those with close contact with team members if he could have done so. Indeed, a major component of his publicity blitz was explicitly an effort to secure testimony of an insider:

There are three people who went into the bathroom with the young lady, and whether the other people there knew what was going on at the time, they do now and have not come forward. I'm disappointed that no one has been enough of a man to come forward. . . .¹⁶

My guess is that some of this stonewall of silence that we have seen may tend to crumble once charges start to come out.¹⁷

Moreover, the prosecution appears not to have been above putting pressure on witnesses. This is shown by the arrest of the cab driver who provided a ride and therefore an alibi to Reade Seligmann when he left the Lacrosse party relatively early and apparently before the time of the alleged rape. After the defense presented the prosecution with the cab driver's affidavit supporting Seligmann's alibi defense, the cab driver, Moezeldin Elmostafa, was arrested on a three-year old warrant for shoplifting. While Nifong denied that he was doing anything other than following standard practice of checking all witnesses for warrants,¹⁸ the arrest gave the opportunity for pressuring this witness.

The members of the Duke Lacrosse team had only minor contacts with the law before the rape allegations. Over the previous three years, sixteen of the players on the team had been charged in local courts with minor alcohol and disorderly conduct offenses, which included public urination, underage possession of alcohol, and helping a minor get a mixed drink.¹⁹ These minor offenses

¹⁶ Amended Complaint, para. 19, at 3, N.C. State Bar v. Nifong, No. 06 DC 35, Disciplinary Hearing Comm'n of the N.C. State Bar (Jan. 24, 2007) (on file with author); Viv Bernstein & Joe Drape, *Rape Allegation Against Athletes Is Roiling Duke*, N.Y. TIMES, Mar. 29, 2006, at A1.

¹⁷ Amended Complaint, *supra* note 16, para. 16, at 3; Nifong Bar Stipulation, para. 16, N.C. State Bar v. Nifong, No. 06 DC 35, Disciplinary Hearing Comm'n of the N.C. State Bar (June 12, 2007) (on file with author); Darla Miles, *DA: Alleged Rape May Have Racial Angle* (ABC 11 TV News broadcast Mar. 27, 2006). *available at* <http://abclocal.go.com/wtvd/story?socal&id=4029749>.

¹⁸ See Samiha Khanna, Joseph Neff & Benjamin Niolet, *Arrest No Ploy, DA Says*, NEWS & OBSERVER (Raleigh), May 12, 2006, at B1. The case was taken to trial, and Elmostafa was acquitted. See Benjamin Niolet, *Cabbie in Lacrosse Case Acquitted in Shoplifting*, NEWS & OBSERVER (Raleigh), Aug. 30, 2006, at B3. Kim Pittman, the second dancer, was also arrested on a probation violation immediately after she gave a statement to investigators. See Benjamin Niolet & Joseph Neff, *Rape Case Witness Has Court Date*, NEWS & OBSERVER (Raleigh), Aug. 15, 2006, at B1.

¹⁹ In addition, one of the defendants, Collin Finnerty, had been arrested the preceding fall in Washington, D.C. on simple assault charges. See Jim Nesbitt, Benjamin Niolet & Lorenzo Perez, *Team Has Swaggered For Years*, NEWS & OBSERVER (Raleigh), Apr. 9, 2006, at A1.

provided no real leverage to coerce cooperation and certainly not enough to tempt anyone to perjure himself by incriminating one of the charged players.

Moreover, many, if not all, of the players relatively quickly acquired assistance of defense counsel, albeit joint representation in some cases.²⁰ In any case, no one who attended the party apparently ever told the police that he had witnessed criminal or questionable behavior, and no teammate, friend, or associate of the three charged players ever stated that any of them made even arguably incriminating statements. Finally, because the defendants were released immediately on bond, there was no opportunity for an unattached jailhouse informant to claim to have heard an admission by one of them.

As a result of the players' general innocence and lack of association with those involved in crime, there were no informants' claims to help sustain the case when questions grew about the charges and physical evidence not only failed to incriminate but revealed foreign DNA that supported exoneration,²¹ and it totally collapsed under independent scrutiny of the Attorney General's review. In this way, as in many others, the Duke Lacrosse case was atypical. The Hunt prosecution to which I now turn is much closer to the norm of prosecutions involving the innocent both in their criminal history²² and the fact that DNA evidence is not available for potential proof of innocence.²³ Moreover, I suggest it is the paradigmatic case for the special dangers of informants to innocent defendants because they are not innocents.

²⁰ See, e.g., Letter from Robert C. Ekstrand, Attorney, to Michael B. Nifong, Durham County Dist. Attorney at 1–3 (Apr. 6, 2006), Exhibit 206, N.C. State Bar v. Nifong, No. 06 DC 35, Disciplinary Hearing Comm'n of the N.C. State Bar (on file with author) (indicating that Ekstrand represents thirty-three of the players).

²¹ See Mosteller, *supra* note 2, at 288–89 (describing the foreign DNA as only supporting rather than proving innocence because of its ambiguous character and its failure to identify any other potential suspects for the specific conduct charged).

²² For example, of the twenty-eight DNA exonerations first examined by the National Institute of Justice, the police knew over half the defendants, generally through their prior criminal records. See EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA TO ESTABLISH INNOCENCE AFTER TRIAL 14 (1996). See also Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1352 n.124 (1997) (examining this dimension of the report).

²³ See Garrett, *supra* note 13, at 73 (noting that unsurprisingly 70 percent of the first 200 cases of exoneration were rape cases because biological material is particularly likely in those cases).

III. INFORMANTS THAT WERE: THE LEE WAYNE HUNT CASE WITH PAST CRIMES AND LEVERAGE FOR A DOUBLE MURDER CONVICTION

A. *The Crime, the Incriminating Informant Testimony and Evidence, and the Hunt Prosecution*

On March 7, 1984, Roland “Tadpole” Matthews and his wife Lisa were found dead in their home in Fayetteville, North Carolina, with their two-year-old child unharmed in a bedroom. Both victims had been shot and stabbed.²⁴ The record is not clear exactly why, but Jerry Cashwell and Lee Wayne Hunt were quickly identified as suspects in the murders. Their fingerprints were submitted less than a week after the murders for comparison with prints lifted at the crime scene, but they did not match.²⁵

We know that Hunt ran a marijuana distribution ring. At trial, Gene Williford testified that Hunt was in charge of a drug operation in that area.²⁶ Hunt acknowledges as much.²⁷ It is clear that Cashwell directly participated in this operation, and Kenneth West, a next door neighbor to Hunt, and Williford had some involvement. The victims, Roland and Lisa Matthews, also had contact with the group.

A few months after the murder, a newspaper article suggested the reason for the focus on Hunt and Cashwell. The article indicated that investigators believed the murder was related to the Matthews’ involvement in drugs and stated that the community believed the murders were tied to a drug group in an area of East Fayetteville “off Sapona Road.”²⁸ Another newspaper article describing the arrest of Hunt, Cashwell, and West, stated Hunt lived “near . . . Sapona Road” and further stated that the area was known as “‘Ft. Apache’ by neighbors and law officers.”²⁹ The “Fort Apache” reference was apparently to lawlessness, to the high fence constructed around Hunt’s home and that of some of his relatives,³⁰ and

²⁴ See *State v. Cashwell*, 369 S.E.2d 566, 567 (N.C. 1988); see also *Hunt*, 381 S.E.2d at 455.

²⁵ See *Hunt* MAR, *supra* note 4, app. D (North Carolina State Bureau of Investigation Laboratory Report, Mar. 13, 1984).

²⁶ See Transcript, *State v. Hunt*, Nos. 85 CRS 16551-54, at 314–18 (Oct. 6–13, 1986) [hereinafter *Hunt Tr.*] (on file with author).

²⁷ See John Solomon, *The End of a Failed Technique—but Not of a Prison Sentence*, WASH. POST, Nov. 18, 2007 at A15 (stating that Hunt readily admits that he once was a major marijuana dealer).

²⁸ Pat Reese, *Murders Remain Unsolved*, FAYETTEVILLE OBSERVER, June 8, 1986, at A2.

²⁹ Tom Krisher, *Deputies Arrest Three in Double Homicide*, FAYETTEVILLE OBSERVER, Apr. 17, 1985, at 1A.

³⁰ See Pat Reese, *Drug Kingpin Faces Charges in Death Case*, FAYETTEVILLE OBSERVER, Apr. 16, 1985, at 1A (stating that area residents named the Hunt enclave, which was enclosed by a seven-foot-high wooden fence, as Fort Apache); Solomon, *supra* note 27 (describing Hunt’s home as fortified).

to Hunt being Native American.³¹ It was not explained further at trial, but the prosecution did, over defense objection, elicit the Fort Apache name for the area from Williford in his testimony in the Hunt trial.³²

More in dispute than his drug dealing but apparently clearly believed by the community and the authorities was that Hunt had a substantial role in violence in the community. Although not presented to the jury at trial, Hunt introduced evidence at a hearing on his unsuccessful motion for change of venue that people in the community believed that he had links to several unsolved killings.³³ A local newspaper article announcing his arrest called him a “Drug Kingpin” in its headline, discussed a part of Fayetteville that had “been gripped in a reign of terror during recent months,”³⁴ described word of Hunt’s arrest rippling through that community to the relief of parents, and listed a group of deaths that were suggested to be related.³⁵ The article strongly suggested the link between these community beliefs and the arrests, indicating that detectives had been “working for more than a year to nail Hunt and his associates.”³⁶

The belief of Hunt’s links to drug dealing and to violence was no doubt the reason for the early focus on Hunt and his associate Cashwell. Within a month to six weeks after the murders, a sheriff’s deputy also contacted Williford, asking him if he had any knowledge regarding the murders.³⁷ According to Williford’s testimony, the deputy told him that his car had been seen on River Road, the road

³¹ The term would be imprecise since Hunt is not an Apache but is instead a Lumbee Indian. The Lumbees are a Native American tribe found principally in the southeastern part of North Carolina, where Fayetteville is located. In addition to Hunt, Kenneth West is a Lumbee. See N.C. Dep’t of Corrections Records (on file with author) *available at* <http://webapps6.doc.state.nc.us/apps/offender/offend1?DOCNUM=0197893&SENTENCEINFO=no&SHOWPHOTO=no>. Cashwell, Williford, and the Matthews were white. See Notes of March 2008 conversation between Staples Hughes and author (on file with author).

³² See Hunt Tr., *supra* note 26, at 313. The trial court overruled the objection for the inexplicable reason that it was received “solely for the purpose of identification of a given place and for no other purpose.” *Id.*

³³ In an affidavit present in connection with a change of venue motion, Pat Reese, staff writer for the Fayetteville Observer stated that prior to Hunt’s arrest, “it was widely believed throughout the community where he lived that he was a volume dealer in narcotics and was responsible for several violent deaths.” Affidavit of Pat Reese, Staff Writer, Fayetteville Observer at 1 (Sept. 20, 1985) (on file with author). Reese indicated that he learned this information through conversations with people who lived and worked in that community. *Id.*

³⁴ Reese, *supra* note 30, at 2A.

³⁵ See *id.*

³⁶ *Id.* at 1A. Information is not available regarding the perception of investigative authorities on Hunt’s responsibility for violence, but their actions suggest that they shared the community view.

³⁷ See Hunt Tr., *supra* note 26, at 373.

leading to the Matthews' home.³⁸ Williford testified that he was not arrested or given his *Miranda* warnings, and he testified he gave the deputy no information.³⁹

The important developments in the case occurred later in 1984 as Williford, who was on probation for robbery,⁴⁰ picked up criminal charges, faced growing legal problems, and experienced incarceration. First, in mid-November 1984, Williford was involved in an altercation in which he hit a man with his gun, which resulted in his arrest for aggravated assault and liability for possession of a weapon by a felon.⁴¹ In December, Williford's lawyer set up a meeting between Williford and law enforcement personnel in the lawyer's office.⁴² There is some indication in Williford's testimony at Cashwell's trial that he may have intimated some knowledge or involvement in the murder during that conversation, but it is clear that he did not directly implicate Hunt, Cashwell, or West.⁴³

Later in December 1984, Williford's home was searched by his probation officer accompanied by law enforcement officers. In the search, drug paraphernalia, cocaine, and marijuana were found.⁴⁴ Unlike when he was arrested previously, Williford's family did not post his bond, and he remained in jail between a week and two weeks before his girlfriend (he was separated from his wife) paid the bond.⁴⁵ At the end of January 1985, Williford assaulted his wife,⁴⁶ and shortly thereafter he was arrested on a warrant for that offense and also for violation of the terms of his probation. Bond was set at \$25,000, which Williford was unable personally to post, and his family once again declined to post it for him.⁴⁷

On February 22, 1985, while still in jail, Williford made a lengthy statement to the police, which implicated Hunt, Cashwell, and a man he called Skip.⁴⁸ A

³⁸ See *id.* at 375. He identified the deputy as Jimmy Cook. *Id.* However, no witness was produced at trial indicating that Cashwell's car had been seen at that location.

³⁹ See *id.* at 373. Williford testified that he could remember no contacts with law enforcement officers regarding the murder between the contact with Cook about a month after the murder and December 1984. See *id.* at 437.

⁴⁰ See *id.* at 385; see also Transcript of Record at 48, *State v. Cashwell*, Nos. 85 CRS 16547-50 (May 12-21, 1986) [hereinafter *Cashwell Tr.*] (on file with author). The conviction for robbery occurred in 1981. See *id.*

⁴¹ See *Hunt Tr.*, *supra* note 26, at 383; see also *Cashwell Tr.*, *supra* note 40, at 48.

⁴² See *Hunt Tr.*, *supra* note 26, at 381. Major Charles Smith, Detective Bruce Daws, and Billy Van Story from the District Attorney's Office were present. *Id.*

⁴³ At the Cashwell trial, Williford stated that he admitted his involvement in a "roundabout way," but that he did not tell the truth. "I didn't implication [sic] what I should have. I didn't say much about it." *Cashwell Tr.*, *supra* note 40, at 47.

⁴⁴ See *id.* at 49-50. Williford's attorney was also present. *Id.* See also, *Hunt Tr.*, *supra* note 26, at 386.

⁴⁵ See *Hunt Tr.*, *supra* note 26, at 386-87.

⁴⁶ See *id.* at 388.

⁴⁷ See *id.* at 389.

⁴⁸ See *id.* at 391-93. The statement was given to Sergeant Jack Watts and Major Charles

month later, with at least eight contacts by the police recorded in jail logs in the intervening period,⁴⁹ Williford altered the statement to change Skip to Kenneth West.⁵⁰ Williford later explained that after a conversation with his lawyer he realized that at some point—five months or five years from then—he might be charged with the murder for his involvement. He testified that this realization, which may have been suggested by his lawyer, caused him to speak to the authorities.⁵¹

In exchange for his testimony, the prosecution agreed to drop all pending charges from the murder and the string of arrests in late 1984 and early 1985, except the misdemeanor domestic violence charge, which he was to resolve for himself. The dismissed charges included possession of a firearm by a felon, felonious possession of cocaine with intent to sell, and misdemeanor possession of marijuana and drug paraphernalia. The State also agreed that Williford's probation would not be revoked, and instead he would remain on probation.⁵²

Formal negotiations resulted in a written agreement between Williford and the prosecution,⁵³ and he was released from jail in April 1985 when his family posted bond.⁵⁴ Based on Williford's statement and cooperation, Hunt, Cashwell, and West were arrested and indicted. Williford was free the next year when he testified first against Cashwell and then against Hunt, and he remained free thereafter.

The prosecution proceeded first to trial against Cashwell. In a capital trial conducted in May 1986, Cashwell was convicted of two counts of first degree murder, but he was acquitted of two additional charges of conspiracy to commit murder.⁵⁵ At the death penalty phase of the trial that followed his conviction, the

Smith. *See id.* at 391.

⁴⁹ Williford was asked by defense counsel about being signed out of custody on the following dates in 1985 with investigative officers: February 28 with Detective Jack Watts and Major Charles Smith, Hunt Tr., *supra* note 26, at 473, Cashwell Tr., *supra* note 40, at 1462; March 1 with Detective Bruce Daws, Cashwell Tr. at 1463; March 6 with Major Charles Smith, Hunt Tr. at 484, Cashwell Tr. at 1464; March 7 with Detective Jack Watts, Hunt Tr. at 484, Cashwell Tr. at 1466; March 8 with Detective Bruce Daws, Hunt Tr. at 485, Cashwell Tr. at 1466; March 14 with Detective Bruce Daws, Hunt Tr. at 486, Cashwell Tr. at 1467; March 16 with Detective Jack Watts, Hunt Tr. at 486–87, Cashwell Tr. at 1467; March 21 with Detective Jack Watts, Cashwell Tr. at 1468. He was uncertain when and with whom he met. The questions mentioned specific time periods and were apparently based on jail records.

⁵⁰ Hunt Tr., *supra* note 26, at 394–95. Williford testified that he named Kenneth West after West pointed a weapon at him while he was in a visiting area at the jail. *Id.* at 410–12. This statement was given to Detective Bruce Daws and Detective Robert L. Bittle. *Id.* at 413.

⁵¹ *See* Hunt Tr., *supra* note 26, at 414; Cashwell Tr., *supra* note 40, at 76.

⁵² *See* Hunt Tr., *supra* note 26, at 395; Cashwell Tr., *supra* note 40, at 98–99 (giving terms of written agreement).

⁵³ *See* Hunt Tr., *supra* note 26, at 430; Cashwell Tr., *supra* note 40, at 97.

⁵⁴ *See* Hunt Tr., *supra* note 26, at 453. He was released on bond on April 16, 1985. *Id.*

⁵⁵ *See* Hunt MAR, *supra* note 4, at 4.

jury determined that he should be sentenced to life imprisonment rather than being executed.⁵⁶

Hunt was next tried, his trial taking place in October 1986. As in Cashwell's trial, Williford provided the principal evidence against Hunt.

Williford testified that on the morning of March 6, 1984, in a meeting with Cashwell, West, and Williford, Hunt described a plan to get back at Roland Matthews for stealing ten to fourteen pounds of marijuana from him. Cashwell was to meet Matthews as he left his place of work and go home with him. Williford, following the plan, returned to Hunt's home in the early morning hours of March 7 and drove Hunt and West to the Matthews house.

Williford testified that he waited in his car nearby and subsequently picked the men up. West was carrying a trash bag, which Williford later saw contained marijuana. Williford testified that he did not know in advance that the Matthews would be murdered nor did he immediately learn of the murders when the men returned to the car. However, he said that he saw what appeared to be blood on the men.⁵⁷ Later he learned in the newspaper about the murders.⁵⁸ Williford testified that he learned more about the events when, in Hunt's presence, West spoke of the ease with which the marijuana had been recovered, and, referring to Lisa Matthews' murder,⁵⁹ he said: "Yeah, that fat bitch begged us not to kill her too."⁶⁰

Another person who offered incriminating information against Hunt was Jeffrey Dale Goodman, a classic jailhouse informant who had served as an informant previously.⁶¹ His testimony was that, while he and Hunt were incarcerated together, Hunt made incriminating statements regarding the crime.⁶² Goodman testified that Hunt stated that the police lacked direct evidence against him of the murders and recounted their sequence and some details regarding the victims' reactions. These statements were inferentially quite incriminating. They showed substantial inside knowledge of the crime and suggested guilt. Other

⁵⁶ See Hunt MAR, *supra* note 4, app. E (Sentencing Recommendations), at 6.

Cashwell's convictions were reversed on appeal. See *State v. Cashwell*, 369 S.E.2d 569, 576–80 (N.C. 1988) (reversing conviction because jailhouse informant Samuel Thompson was permitted erroneously to recount that Cashwell said he was in jail for attempting to kill his girlfriend). On remand, he entered pleas of guilty to two counts of second degree murder and was sentenced to life imprisonment plus fifty years. See Hunt MAR, *supra* note 4, at 4.

⁵⁷ See Hunt Tr., *supra* note 26, at 320–48 (relating the crime narrative). Williford indicated that West and Hunt were each armed with a gun and a knife when he saw them on the morning of March 6 but he did not notice whether they were armed when he drove them to the Matthews house that night. *Id.* at 338–39.

⁵⁸ See *id.* at 349.

⁵⁹ See *id.* at 368–69.

⁶⁰ *Id.* at 368.

⁶¹ See *id.* at 954–56 (Sgt. H.M. Flowers of the sheriff's office in Hillsborough County, Florida describing aid Goodman gave for benefit regarding one case in 1976 and further aid in three other cases extending to 1983, the information in the later cases allegedly provided without any reward).

⁶² See *id.* at 551–61.

statements indicated that Hunt was concerned about the possibility of one person “turning State’s evidence against him.”⁶³ However, assuming Goodman’s account of Hunt’s statements are accurate, Goodman did not claim that Hunt ever said he was present or directly involved in the murders.⁶⁴ Goodman indicated that he understood the killing was “over drug money.”⁶⁵

Goodman relayed his information to a State Bureau of Investigation (SBI) investigator, whom he had contacted about another matter. The SBI investigator subsequently brought a detective involved in the Matthews investigation to talk to Goodman, and on December 9, 1985, Detective Robert Bittle of the Cumberland County Sheriff Department took a written statement from Goodman.⁶⁶

At trial, Goodman testified that he was arrested in February 1985 and was serving a ten-year sentence for breaking and entering, on which he would be eligible for parole consideration in August 1987. In exchange for his testimony, the State agreed he would not be placed back into the North Carolina prison system but would be housed in a local jail facility and that his name would be submitted for possible commutation of his sentence and parole.⁶⁷ On December 16, 1986, two months after his testimony against Hunt, the deal paid off. Goodman’s sentence was commuted, and he was released.⁶⁸

After the defense put on evidence from Hunt and witnesses associated with him that Cashwell said he alone did the murders,⁶⁹ the State called Samuel Thompson in rebuttal. Thompson’s testimony was received “for the limited purpose of impeaching Mr. Cashwell’s hearsay statements [offered by defense

⁶³ Hunt Tr., *supra* note 26, at 564.

⁶⁴ *See id.* at 560–64.

⁶⁵ *Id.* at 561.

⁶⁶ *See id.* at 564–65, 602. The written statement is included in the record. *See id.* at 599–602.

⁶⁷ *See id.* at 566, 568. A written statement setting out these terms was signed on October 8, 1986. *See id.* at 567–68.

⁶⁸ *See* N.C. Dep’t of Corr., Jeffery Dale Goodman, Offender ID 0149722 (showing “Conditional Commutation”) (on file with author) *available at* <http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0149722&searchOffenderID=0149722&listurl=pagelistoffendersearchresults&listpage=1>.

⁶⁹ Hunt testified that Cashwell told Hunt that he (Cashwell) committed the murders, indicating in his testimony that Cashwell had first suggested that he was involved in a conversation with Kenneth Womble, who then mentioned the conversation to Hunt. Hunt Tr., *supra* note 26, at 137. Kenneth Womble testified that Cashwell asked Womble to give him an alibi (that they had been together at a bar) and Womble told Hunt that Cashwell had told him that he, Cashwell, did “something he shouldn’t have done.” *Id.* at 91–92. Danny Morrison testified that Cashwell told him and Hunt that he, Cashwell, had killed the Matthews after an argument. *Id.* at 109–10. Glenn Maynor testified that Cashwell told him that he killed the Matthews and wanted Maynor to take him to River Road to retrieve his knife and gun. *Id.* at 118. Victor Rhone testified that Cashwell had asked him to take him to River Road to get his gun and knife, but that Cashwell decided to have Maynor take him. *Id.* at 103. Hunt was clearly self-interested and the other witnesses were friends and associates of Hunt. As a result, their claims are all subject to a heavy discount.

witnesses but was] not received for any substantive purpose.”⁷⁰ Thompson was another classic jailhouse informant. He testified to statements by Cashwell that incriminated Cashwell and Hunt. Thompson testified that Cashwell described how he shot and stabbed Roland Matthews, Hunt shot Lisa Matthews twice in the head, and West cut her up.⁷¹ Thompson said the reason Cashwell gave for the murders was because “Roland Matthews was a backstabbing son of a bitch”⁷² and because Hunt, Cashwell, and West were concerned that Roland was going to give information to the authorities about their drug-selling operation.⁷³

Thompson was in jail charged with two counts of armed robbery.⁷⁴ He came to the attention of the authorities in Hunt’s case when he wrote a letter to the Attorney General’s office offering information against Hunt.⁷⁵ After receiving news of the letter, Sergeant Jack Watts and Detective Robert Bittle, who also took the statement from Goodman, visited Thompson in August 1985 in the local jail and took his oral statement, which was reduced to writing and signed in March 1986.

Under an agreement formally reached in May 1986,⁷⁶ Thompson’s two armed robbery charges were reduced to common law robbery, with the State recommending that the sentences be consolidated into a single three-year term to be served in a local jail facility.⁷⁷ Shortly after the Cashwell trial, Thompson entered his guilty pleas and received the agreed-upon sentence.⁷⁸ He was paroled in August 1986, within three months, meaning that he was free on unsupervised parole when he testified against Hunt.⁷⁹

⁷⁰ Hunt Tr., *supra* note 26, at 868.

⁷¹ *Id.* at 875.

⁷² *Id.* at 874.

⁷³ *See id.*

⁷⁴ *Id.* at 869 (acknowledging the two armed robbery charges). These charges arose out of two separate incidents, a little more than a week apart, in which Thompson allegedly robbed convenience store operators at gun point. *See id.* at 891 (discussing robbery of Quick Stop in Spring Lake, North Carolina using a gun on May 7, 1985); *id.* at 893 (discussing robbery of another Quick Stop in Hope Mills, North Carolina using a gun on May 16, 1985).

⁷⁵ *Id.* at 880–81.

⁷⁶ *See id.*

⁷⁷ *See id.* at 885–86.

⁷⁸ *See id.* at 887. The guilty plea was entered on May 29, 1986. *See* N.C. Dep’t of Corrections Records (on file with author).

⁷⁹ *See* Hunt Tr., *supra* note 26, at 907, 913.

Thompson was arrested for these offenses on May 27, 1985. *Id.* at 893. He, thus, had been in jail almost exactly a year when he entered his guilty plea on May 29, 1986. *See supra* note 78. When he was released on unsupervised parole a few months later in August 1986, he had spent roughly the same amount of time in jail—fourteen to fifteen months—toward the same three-year sentence under the same laws and confined in the same local institutions as West had when he entered his guilty plea on February 26, 1987.

The final informant, who provided no direct or indirect evidence against Hunt at his trial but whose “testimony” should be considered on the issue of whether Hunt is innocent, is the alleged co-participant, Kenneth West. On February 26, 1987, West entered guilty pleas to two counts of accessory after the fact to murder and no contest pleas to two counts of conspiracy to commit murder. In exchange, the State agreed that two of the convictions would be consolidated into a single presumptive sentence of three years and that the other two would be consolidated into a ten-year sentence, with the State recommending that the ten-year sentence be suspended for a period of five years of probation.⁸⁰ Under the agreement, West was required to affirm under oath a statement of the facts in the Matthews’ case,⁸¹ and, among other terms, he agreed to testify truthfully at any time within the next five years against Cashwell and Hunt on any new trial motion or motion for appropriate relief they might file.⁸² After this plea, West had less than two weeks until release.⁸³

The facts in the proffer read by the prosecutor differed in several important aspects from Williford’s testimony. For example, the date of the conversations setting up the trip to the Matthews’ home and the time of the fateful trip were different,⁸⁴ and the role West played changed. Williford’s testimony put West inside the Matthew’s house during the murders where he could hear Lisa Matthews beg for her life. In contrast, in West’s sworn proffer, he assumed the role of lookout, remaining outside the Matthews’ house while Hunt and Cashwell went inside where the murders occurred. This meant he could not have heard Lisa Matthews plead that her life be spared.⁸⁵ Also, the proffer stated that the reason for the fateful visit was that “Roland Matthews, and Lisa Matthews owed him money. Lee Wayne told us that he was going to go up there the next night; and that if they did not have his money, that he was going to take care of them.”⁸⁶

⁸⁰ See West Tr., *supra* note 12, at 5–6.

⁸¹ *Id.* at 8, 13–14.

⁸² See *id.* at 7.

⁸³ West had every reason to believe liberty was at the doorstep, and although the records showing that fact are not available today, he was legally entitled to release in less than two weeks, if not immediately. See *supra* note 12.

⁸⁴ Williford testified that the conversation setting up the trip took place on the morning of March 6, 1984 before he went to work and that he returned to pick up Hunt and West sometime after midnight on what was then March 7, varying that time to much earlier in the morning of either 3:00 a.m. or 4:00 a.m. in his statements on February 22, 1985 and March 22, 1985. See Hunt Tr., *supra* note 26, at 321–39, 471. By contrast, West’s sworn proffer was that the meeting setting up the trip to the Matthews’ home occurred on Monday, which was March 5 and, therefore, a day earlier than Williford testified. See West Tr., *supra* note 12, at 9. Also, in his proffer, West arrived at Hunt’s house at 8:00 p.m. on the night of the trip and a little while later Williford arrived, not the seven to eight hour delay of Williford’s time line. See *id.* at 9–10.

⁸⁵ See West Tr., *supra* note 12, at 9–13.

⁸⁶ *Id.* at 9. West never indicated that he saw or knew that marijuana was in the trash bag carried from the Matthews’ home. See *id.* at 11.

B. *The Extraordinary: Defendant Cashwell's Statements of Hunt's Innocence*

In 1985, Staples Hughes, who is currently head of the North Carolina Appellate Defender Office, was working as an assistant public defender in Fayetteville. He was representing Jerry Dale Cashwell on the charge of assaulting his girlfriend when new charges were brought against Cashwell for the Matthews murders. Hughes began representing Cashwell on the new charges, teamed with the head of the public defender office.⁸⁷

Hughes was soon confronted with a very difficult quandary for a defense attorney. During a conference early in the representation, Cashwell stated that he alone had killed Roland and Lisa Matthews in a fit of rage, a set of facts completely at odds with the prosecution's theory and the evidence it subsequently presented at trial. By contrast to Cashwell's account, Williford's version gave Cashwell an argument to avoid the death penalty. Williford cast Hunt as the originator and mastermind of the plot to kill the Matthews couple, and indeed, the jury in the death penalty phase of Cashwell's trial found Hunt's role as mastermind was a mitigating circumstance for Cashwell.⁸⁸

Hunt subpoenaed Cashwell as a witness at his trial, but Cashwell refused to testify on Fifth Amendment grounds.⁸⁹ Hughes acknowledges that he advised Cashwell not to testify because his conviction was then on appeal and a retrial was quite possible.⁹⁰ Despite providing sound legal advice to Cashwell to protect his interests, Hughes was nevertheless much relieved when Hunt's jury decided that he should be sentenced to prison and spared him from the possibility of execution.⁹¹

After his conviction was overturned on appeal, Cashwell pled guilty to two counts of second degree murder and was sentenced to life plus fifty years.⁹² In Hughes' opinion, placing sole responsibility for the murders on Cashwell would have eliminated all hope of his release on parole, even as an elderly man. Accordingly, Hughes never considered disclosing Cashwell's confession to him while Cashwell was alive.⁹³

⁸⁷ See Transcript of Trial at 7, 30, State v. Hunt, Nos. 85-CRS 16551-54 (Jan. 8, 2007) [hereinafter Transcript of Hearing on Hunt MAR] (on file with author).

⁸⁸ See Hunt MAR, *supra* note 4, app. E (Sentencing Recommendations) at 4.

⁸⁹ See Hunt Tr., *supra* note 26, at 657-60 (showing Hughes' advice that Cashwell should assert the Fifth Amendment's privilege against self-incrimination, Cashwell's assertion of the privilege, and the trial court's acceptance of it, all transpiring in front of the jury).

⁹⁰ Affidavit of Staples S. Hughes at 4 (Dec. 6, 2004) [hereinafter Hughes Affidavit] (on file with author); Hunt MAR, *supra* note 4, at 12 app. B. In fact, the conviction was reversed by the North Carolina Supreme Court. See *Cashwell*, 369 S.E.2d at 569.

⁹¹ See Conversation with Staples S. Hughes (Mar. 2008) (on file with author); E-mail from Staples S. Hughes, Appellate Defender, to Robert Mosteller, Chadwick Professor of Law, Duke University School of Law (May 21, 2008) (on file with author).

⁹² Hunt MAR, *supra* note 4, at 4.

⁹³ See Hughes Response Letter, *supra* note 5, at 3.

Despite understanding as a lawyer the legal soundness of his position, Hughes was deeply troubled by keeping Cashwell's revelation confidential through the years,⁹⁴ as Hunt, a man Hughes firmly believed to be innocent, remained in prison.⁹⁵ Then, starting in 2002, a series of events began that ultimately led Hughes to reveal his secret to an attorney representing Hunt and to attempt to present his testimony about that statement in a post-conviction proceeding seeking Hunt's release. The first of these events was Cashwell's suicide while in prison in August 2002. Next, in March 2003, the North Carolina State Bar amended Rule 1.6(b)(3) of the Rules of Professional Conduct to state that a lawyer may reveal confidential client information to the extent the lawyer reasonably believes it necessary "to prevent reasonably certain death or bodily harm."⁹⁶ Finally, the North Carolina Supreme Court in 2003 and 2004 decided two cases (*Miller I & II*) regarding the attorney-client privilege in criminal cases where the client was deceased. Although dealing with a different set of facts, these cases ruled that the privileged information could in some criminal cases be revealed after the client's death.⁹⁷

⁹⁴ See *id.* (describing his frequent thoughts about the case and recounting a recurring dream of being imprisoned that always evoked thoughts of Hunt's imprisonment).

⁹⁵ See *id.* at 4–6.

⁹⁶ See N.C. REVISED RULES OF PROF'L CONDUCT R. 1.6(b)(3).

⁹⁷ The Court decided two cases: *In re Miller*, 584 S.E.2d 772 (N.C. 2003) (*Miller I*), and *In re Miller*, 595 S.E.2d 120 (N.C. 2004) (*Miller II*). The litigation that led to the decisions in *Miller I* and *Miller II* involved disclosures by a lawyer of his client's privileged statement regarding the criminal liability of an additional party in the crime rather than incrimination of the client. The North Carolina Supreme Court ruled, however, that the privilege was not absolute after the death of the client as it was before death.

In *Miller I*, it stated:

When a client retains an attorney for legal advice in regard to an ongoing criminal investigation, the client's desire to keep the communication confidential is premised upon three possible consequences in the event of disclosure: (1) that disclosure might subject the client to criminal liability; (2) that disclosure might subject the client, or the client's estate, to civil liability; and (3) that disclosure might harm the client's loved ones or his reputation. See *Swidler [& Berlin v. United States]*, 524 U.S. [399], 407 [(1998)] Therefore, in determining whether the reasons for the privilege still exist after the client is deceased, the trial court should consider the *Swidler* factors. In the instant case, the trial court should consider whether these possible consequences would apply to, or would have any negative or harmful effect on, [the client's] rights and interests if the State was permitted to obtain the information communicated between [the client] and respondent. In the event the trial court, upon in camera review, should conclude that any of these consequences still apply to any portion of the communications, they should remain undisclosed. If, on the other hand, the trial court should determine that the communications asserted to be privileged would have no negative impact on [the client's] interests, the purpose for the privilege no longer exists. When application of the privilege will no longer safeguard the client's interests, no reason exists in support of perpetual nondisclosure.

Miller I, 584 S.E.2d at 790.

By contrast with the *Miller I* possibility of an exception to the attorney-client privilege in the specific context of evidence incriminating a third party sought by the prosecution, the rule in federal

These events caused Hughes to reveal the confidential information from Cashwell that he alone killed the Matthews couple.⁹⁸ Hughes disclosed the information to Hunt's attorney and provided an affidavit, which recounted that in the initial conversation with Cashwell, he denied any participation. The most significant parts of Hughes' affidavit, which recounts the key facts as he saw them, are set out below:

4. Our next interview with Cashwell occurred a few days later, at the jail. Ms. [Mary Ann] Tally⁹⁹ told Cashwell that Hunt was saying that he had nothing to do with the killings—that Cashwell did them alone. She asked Cashwell why Hunt would say that. Cashwell at first said nothing—he just hung his head. And then he said “I guess because I did it.”
5. Cashwell then told us, in great detail, what had happened at the Matthews' house. My memory is that Cashwell told us that he and the Matthews' were watching the television, and there was some

court under *Swidler* is that the attorney-client privilege remains in full force despite the death of the client. *Swidler*, 524 U.S. at 410–11 (concluding that the general common law rule has been for a century that the privilege continues after the client's death and that the Independent Counsel do not make a sufficiently compelling case to overcome that body of law). In dissent, Justice O'Connor argued that exceptions should be recognized upon the death of the client in criminal prosecutions where the interest in obtain evidence unavailable by other means outweighs the potential disincentive that disclosure would cause to forthright client communication. She specifically noted that in addition to “a compelling law enforcement interest,” *id.* at 416, such an exception should be granted “[w]here the exoneration of an innocent criminal defendant . . . is at stake.” *Id.* (O'Connor, J., dissenting). The majority noted that the Petitioner, who supported maintenance of the privilege, conceded that disclosure might be required to avoid violation of a defendant's constitutional rights for exculpatory information, but in the present circumstances, it did not need to reach that issue. *Swidler*, 524 U.S. at 408 n.3. The majority presumably was referring to the recognition by Petitioner in its brief of the need recognized by a number of courts to disclose privileged information if such information was exculpatory evidence needed to free the innocent. Brief for Petitioners at 29, *Swidler*, 524 U.S. 399, *Petitioners v. United States*, No. 97-1192 (Apr. 29, 1998).

⁹⁸ In his letter to the North Carolina State Bar in support of Hughes, Professor Ken Broun argued a connection between the rationale of *Miller II* and the appropriate interpretation of the ethics rule:

The *Miller* case deals with the attorney-client privilege rather than the confidentiality provisions of Rule 1.6. Nevertheless, the Court's holding in *Miller* . . . says a great deal about how this state and its courts view the confidential relationship between lawyer and client. The Court held that the attorney-client privilege survived the death of the client. However, it also clearly stated that the privilege would not be enforced if “the disclosure does not expose the client's estate to civil liability or likely result in additional harm to loved ones or reputation.” *In re Miller*, . . . 595 S.E.2d at 122.

Letter from Kenneth S. Broun to the North Carolina State Bar Grievance Committee 2 (Apr. 2, 2007) (on file with author).

⁹⁹ Mary Ann Tally was the head of the public defender office where Hughes worked, and Hughes tried the case as co-counsel with her. See Hughes Affidavit, *supra* note 90, at 1; Cashwell Tr., *supra* note 40, at 7, 30.

argument about turning the volume up—Cashwell had serious hearing problems. Cashwell told us he just “lost it.” He went up behind one of the victims and shot that person from the rear. He then shot the other, who had jumped up. He then cut them with a knife. Cashwell never could give us a good reason for the killings—he just “lost it” and they happened. Cashwell also gave us a very detailed account of what he did right after the murders. I remember that Cashwell told us that he walked to his mother’s house in East Fayetteville, and that he asked his mother to put his blue-jean jacket into the dryer because it was wet from the rain.

6. We specifically asked Cashwell if Lee Wayne Hunt was involved in any way, and he told us that Hunt had nothing to do with the murders.
7. Ms. Tally, Cashwell and I discussed the crime at various times during the course of our representation of Cashwell. He never varied in any material way from the version he gave us that day: he killed the Matthews’, and he did it alone.
8. I had no doubt then, and I have no doubt now, that Cashwell was telling us the truth when he said that he acted alone. Cashwell was not boasting when he told us what happened—it obviously pained him to recount the killings to us, at least the first time. What Cashwell told us was consistent with everything I knew about how the killings happened. It was also consistent with what I knew about Cashwell. He was volatile and dangerous, and was apt to lose control and assault people in a rage. It was this sort of uncontrolled rage that underlay, as I remember it, the assault against [his girlfriend on which Hughes first represented Cashwell]. This rage was also consistent with another incident which we discovered, in which Cashwell had lost control and had badly damaged a girl’s car with an ax or a hatchet.
9. Cashwell’s version only hurt him—it was totally against his interest. It made things very difficult for us as his defense lawyers, and Cashwell knew that. Among other things, it made it almost impossible for us to negotiate a plea bargain. I remember going to the Raleigh office of one of the prosecutors in the case, William Farrell, to get some discovery. I asked Mr. Farrell if there was a chance for a plea, and he told me that the prosecutors would be very interested in what Cashwell had to say. Given what Cashwell had told us, the plea option quickly died.

10. At Cashwell's trial, we knew Williford, who testified to both Cashwell and Hunt's involvement in the Murder, was lying. However, we could not attempt to prove that by putting Cashwell on the stand. Fortunately for Cashwell, Williford's concocted story made Hunt the chief villain, so we were able to argue at sentencing that, according to the state's evidence, Hunt was the mastermind. But, given what Cashwell had told us, we could not, and did not, put up any independent evidence to support that theory.
11. Hunt's lawyers subpoenaed Cashwell as a defense witness at Hunt's trial. Cashwell refused to testify, resting upon his Fifth Amendment right not to incriminate himself. Cashwell did not want to help Hunt. Cashwell believed that Hunt was responsible for Cashwell getting arrested on these charges. Knowing that a retrial of Cashwell's case was possible, Ms. Tally and I also advised Cashwell not to testify. . . .
13. As I understood the Disciplinary Rules of the North Carolina State Bar, I was absolutely bound to keep my client's confidences absent his consent to reveal them. I also knew that it was totally against Cashwell's interests for his admissions to get out. I therefore revealed what Cashwell had told us only to my wife and to some of the fellow attorneys in the Public Defender's office . . . [and perhaps] Cashwell's appellate lawyer
15. I remained deeply troubled about my silence over the years. I knew that my silence had helped put an innocent man in prison for life. I know that Cashwell eventually also became troubled by what he had done, or had failed to do, although to my knowledge he never did anything to rectify the situation¹⁰⁰

The response of the State of North Carolina to Hughes' affidavit was curious. At least in its public presentation, it was not to inquire seriously as to whether this potentially important revelation by a respected public official was perhaps true. It was also not the careful independent inquiry that the Attorney General's Office has rightfully received praise for in the Duke Lacrosse Case.¹⁰¹

¹⁰⁰ Hughes Affidavit, *supra* note 90, at 2–5.

¹⁰¹ One clear difference between these two cases is that the Attorney General's Office stood independent of District Attorney Nifong's conduct in the initial investigation and prosecution of the Duke Lacrosse Case. By contrast, lawyers from the Attorney General's Office served as special prosecutors in the Cashwell and Hunt cases. The Cumberland County District Attorney's Office asked for this assistance because Gene Williford's cousin was a prosecutor in that office. *See* Cashwell Tr., *supra* note 40, at 1442 (describing Mike Williford, a member of the district Attorney's office as Gene Williford's cousin), Conversation with Rich Rosen (Apr. 2008) (on file with author);

Instead, the State first moved to strike the affidavit because the revelation violated the deceased defendant's attorney-client privilege and also to request that the trial court report Hughes to the North Carolina State Bar for violating the North Carolina Rules of Professional Conduct.¹⁰² At the hearing on the Motion for Appropriate Relief, the trial judge interrupted Hughes' testimony to admonish him that the information he was about to disclose was confidential under North Carolina ethics rules and that, if he provided the testimony, the trial judge felt duty bound to report him to the North Carolina State Bar.¹⁰³

Although the trial court subsequently ruled that Hughes' testimony was inadmissible because of the attorney-client privilege,¹⁰⁴ the court permitted the defense to question Hughes and record his sworn testimony.¹⁰⁵ In that testimony, Hughes reiterated and expanded on the facts in his affidavit and on the impact that his silence and Hunt's continued incarceration had on him.¹⁰⁶

In an order denying relief, the trial court ruled that the evidence offered by Hughes violated the attorney-client privilege, potentially violated the North Carolina ethics rules, and was inadmissible hearsay.¹⁰⁷ Defendant Hunt sought review in the North Carolina Court of Appeals, but relief was denied without hearing.¹⁰⁸ Hunt then filed a Motion for Appropriate Relief, citing Rule 2 of the North Carolina Rules of Appellate Procedure, which allows the state supreme court

E-mail from Staples S. Hughes to author (May 2008) (on file with author). Thus, in its reaction to the possibility of earlier error by the prosecution, the Attorney General's Office in the Hunt case did not stand separate and independent.

¹⁰² See State's Answer to Defendant's Motion for Appropriate Relief at 12–13, *State v. Hunt*, Nos. 85 CRS 16551-54 (Oct. 13, 2005) (on file with author).

¹⁰³ See Transcript of Hearing on Hunt MAR, *supra* note 87, at 11–12.

Later in the proceeding, the defense asked for a ruling that the privilege no longer existed after the death of the client under the facts of the case and the rulings of the North Carolina Supreme Court in the *Miller* cases, but the trial court denied the request, ruling that in his opinion the privilege remained intact. *See Id.* at 43–47.

¹⁰⁴ *See id.* at 47.

¹⁰⁵ *See id.* at 17.

¹⁰⁶ *See id.* at 17–43.

¹⁰⁷ *See Order*, at 7–16, paras. 3–32 (Apr. 23, 2007), *Hunt*, Nos. 85-CRS 16551-54 (denying Motion for Appropriate Relief) (on file with author).

In his order, the trial judge stated that, even if he considered the affidavit and testimony of Hughes, he would not grant relief under the standards for newly discovered evidence. *Id.* at 16–17, para. 35. However, in this hypothetical evaluation, the judge could not take into account the testimony of attorneys Mary Ann Tally and Stephen Freedman, who were called to testify further about Cashwell's communications but refused to testify because of the court's ruling that to do so would violate Cashwell's attorney-client privilege, or the affidavits of their intended testimony, which were provided to the court but sealed and therefore unavailable. *See Transcript of Hearing on Hunt MAR, supra* note 87, at 47–59. Moreover, in this discussion of the inadequacy of the showing of the "newly discovered" evidence, the trial judge continued not to consider Hughes' evidence fully but instead relied on the determination that it was inadmissible hearsay. *See id.* at 18–19, para. 39.

¹⁰⁸ *See Order, State v. Hunt, COAP07-567*, (Aug. 14, 2007) (denying petition without comment on the merits) (on file with author).

to decide a question of exceptional importance and to correct a manifest injustice.¹⁰⁹ The petition included the signature of former Chief Justice I. Beverly Lake, Jr.,¹¹⁰ who both wrote the majority opinion in *Miller I*¹¹¹ and spearheaded the creation of the North Carolina Commission on Actual Innocence.¹¹² Nevertheless, the North Carolina Supreme Court denied the request for review without hearing and without substantive comment.¹¹³

The next arenas of hope for Hunt are the North Carolina Commission on Actual Innocence¹¹⁴ and the federal courts, primarily under a claim of actual innocence.¹¹⁵

Attorney Staples Hughes fared far better in resolving his legal conflict than Hunt did with his effort to secure a new trial. In February 2007, Hughes received a “Substance of Grievance” letter from the North Carolina State Bar asking him to respond to allegations that he violated North Carolina’s ethics rules.¹¹⁶ In his reply, Hughes gave a further and more substantial statement of the ethical dilemma and the human conflict that this revelation caused: “Tragically, my decision to delay my disclosure until after Jerry’s death may have helped condemn an innocent man to prison for the rest of his life. So much of the information that might have helped free Mr. Hunt is now out of reach.”¹¹⁷

In support of his position that he acted ethically, Hughes subsequently submitted to the Bar three affidavits from authorities on professional ethics: Professor Bruce A. Green, Stein Professor of Law at Fordham Law School; Professor Nancy J. Moore, Nancy Barton Scholar at Boston University School of Law; and John Wesley Hall, Jr., President-Elect of the National Association of Criminal Defense Lawyers.¹¹⁸ In his affidavit, Professor Green concluded that

¹⁰⁹ See Petition Requesting Review under Rule 2, at 1 (Nov. 27, 2007), *Hunt*, 85 CRS 16651-54 (on file with author).

¹¹⁰ See *id.* at 30.

¹¹¹ See *Miller I*, 584 S.E.2d at 776.

¹¹² See Titan Barksdale, *A Powerful Voice Joins Hunt Defense*, NEWS & OBSERVER (Raleigh), Dec. 1, 2007 at B1.

¹¹³ See *State v. Hunt*, 659 S.E.2d 6, 6 (2008) (considering the petition for review under Rule 2 as a petition for certiorari and denying it).

¹¹⁴ The North Carolina Innocence Inquiry Commission was created by the General Assembly in 2006. See N.C. GEN. STAT. §§ 15A-1460–15A-1470 (2007). The Commission is charged with providing an independent and balanced truth-seeking forum for credible claims of innocence in North Carolina. The Commission reviews, investigates, and hears post-conviction innocence claims if new evidence of innocence has come to light.

¹¹⁵ See Steve Ford, *Years in Prison—But Is He a Killer?*, NEWS & OBSERVER (Raleigh), Feb. 10, 2008, at E6 (noting the denial of review by the North Carolina Supreme Court and stating that unless Hunt is successful in his claim in federal court he is likely to remain in prison).

¹¹⁶ See Substance of Grievance at 1, N.C. State Bar v. Hughes, No. 07G0139 (Feb. 6, 2007) (on file with author).

¹¹⁷ Hughes Response Letter, *supra* note 5, at 8.

¹¹⁸ Professors Kenneth S. Broun and Richard Rosen of the University of North Carolina Law

Hughes had discretion under the rules of ethics to reveal the confidences of his deceased client.¹¹⁹ He relied upon ethical decisions in other jurisdictions,¹²⁰ and although he drew no firm conclusion regarding the meaning of Rule 1.6(b)(3), he saw its adoption by North Carolina as reflecting “the societal importance of protecting third parties from significant physical harm.”¹²¹ He suggested that many would regard life imprisonment of an innocent individual as the equivalent of “bodily harm,” but even if this provision were read not to include an innocent individual’s incarceration within the meaning of “bodily harm,” he believed it “anomalous to deprive a lawyer of discretion to prevent a harm, namely, lifetime deprivation of liberty that is comparable to bodily harm, when the former client is deceased and will not be prejudiced by the disclosure.”¹²² Green also relied on the North Carolina Supreme Court’s decision in *Miller I*, which made it “reasonable for Hughes to conclude that he had discretion to disclose Cashwell’s confidences posthumously to free an innocent man.”¹²³

Professor Moore reached the same conclusion.¹²⁴ Indeed, she concluded that Hughes “properly and admirably exercised his right under the current North Carolina Rules to voluntarily reveal Cashwell’s confession in order to prevent the continuing incarceration of an innocent man condemned to life imprisonment.”¹²⁵ In reaching this conclusion, she relied principally on North Carolina Rule 1.6(b)(3), concluding that a sentence of life imprisonment constituted “serious bodily harm” under that provision and permits a lawyer to disclose a confidential communication.¹²⁶

School, who also represent Hunt, wrote letters defending Hughes’ conduct. See Letter from Kenneth S. Broun to Grievance Comm., N.C. State Bar (Apr. 2, 2007) (on file with author); Letter from Richard Rosen to Grievance Comm., N.C. State Bar (April 2, 2007) (on file with author). In his letter, Rosen argued, *inter alia*, that it would be ironic if the Bar punished a lawyer “whose only concern was that justice be done.” *Id.* at 2.

¹¹⁹ See Affidavit of Bruce A. Green at 3–9, *In re Staples Hughes*, Bar File No. 07G0139 (Mar. 26, 2007) (on file with author).

¹²⁰ *Id.* at 3–5 (citing *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976) & *Morales v. Portuondo*, 165 F. Supp. 2d 601 (S.D.N.Y. 2001)).

¹²¹ *Id.* at 6.

¹²² *Id.*

¹²³ *Id.* at 8.

¹²⁴ See Affidavit of Nancy J. Moore at 4–5, *In re Hughes*, Bar File No. 07G0139 (Mar. 26, 2007) (on file with author). See also Colin Miller, *Ordeal By Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 395–403 (arguing that the exception to the requirement of confidential in disciplinary rule 1.6 for “substantial bodily injury” can and should be interpreted to be satisfied by wrongful incarceration). Cf. Peter Joy & Kevin McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46, 46–49 (Summer 2008) (describing proposed amendment to Model Rule 1.6 that would permit disclosure by defense attorneys of confidential information from a client exculpating another).

¹²⁵ Affidavit of Moore, *supra* note 124, at 5.

¹²⁶ *Id.* at 3–4.

In his affidavit, Hall indicated that he was a “practitioner’s expert” rather than an “academic expert,” providing affidavits and testimony in numerous cases on attorney-client privilege, confidentiality, and related issues.¹²⁷ Relying principally on Rule 1.6(b)(3), Hall opined that before Cashwell’s death Hughes appropriately kept the confidence, but after his client’s death he had discretion to make the disclosure.¹²⁸ He concluded that Hughes exercised reasonable discretion in disclosing the confidence as required by the rules,¹²⁹ and he acted “thoughtfully, ethically, morally, and lawfully.”¹³⁰

On January 25, 2008, Hughes was sent a letter by James R. Fox, Chair of the North Carolina Bar Grievance Committee. The letter stated: “The Committee determined that there was not probable cause to believe that you violated the Rules of Professional Conduct and dismissed the grievance.”¹³¹

The ethical issues that Hughes faced are extraordinarily significant. However, the focus of this article is the impact of informants on Hunt’s case and others in his situation and reforms designed to limit the damage informants may inflict on the innocent. It is to those subjects that I now turn.

C. The Expected, the Curious, and the Missing

In the Hunt case, the extraordinary development is the evidence that Jerry Cashwell admitted to sole responsibility for the murder. This occurred early in the case, to his attorneys, and with a version of the event that is virtually impossible to square with Hunt’s guilt. The case involved other features, which are not so extraordinary, but which are quite notable.

1. The Expected

A completely unexpected aspect of Cashwell’s statement to Hughes was that he killed Roland and Lisa because he became enraged—“lost it”—over the incredibly trivial matter of the TV volume exacerbated by his sensitivity over a progressive hearing loss. The four other versions of the motive for the killing were each different and were entirely predictable if one were picking from a list possible motivations. I accept that the expected is often the truth, but at least the expected versions should be consistent.

¹²⁷ See Affidavit of John Wesley Hall, Jr., at 3–4, In re Grievance against Hughes, Grievance No. 07G0139 (Dec. 4, 2007) (on file with author).

¹²⁸ See *id.* at 6, 8.

¹²⁹ See *id.* at 9.

¹³⁰ *Id.* at 10.

¹³¹ Letter from James R. Fox, Chair, Grievance Comm. of the N.C. State Bar, to Staples S. Hughes, Attorney at Law (Jan. 25, 2008) (on file with author).

Williford claimed that the motive was the theft of ten to fourteen pounds of marijuana by the Matthews.¹³² This version is not corroborated by external sources or the other witnesses who testified in favor of the government. It apparently is either the standard assumption about presumed drug murders in the locality or is the common practice. In the same article that recounted the arrests of Hunt, Cashwell, and West, the writer notes that, in another murder in the same area, “[a] source said [the victim] was killed in a dispute over a large bag of marijuana that [the accused] believed he had stolen.”¹³³

The other incriminating informants provided different motives than Williford’s. Kenneth West, who would appear as knowledgeable as or more knowledgeable than Williford, swore that the reason for the visit to the Matthews was that “Roland Matthews . . . and Lisa Matthews owed him money. Lee Wayne told us that he was going to go up there the next night; and that if they did not have his money, that he was going quote to take care of them.”¹³⁴ Goodman’s version squares with West’s that the killing was “over drug money.”¹³⁵ Thompson said they were killed because Roland Matthews was a “backstabbing son of a bitch”¹³⁶ and because Hunt, Cashwell, and West were concerned that Roland was going to give information to the authorities about their drug-selling operation.¹³⁷

While each explanation could have been true, they were inconsistent, and all were explanations one would pick from a story board on the reasons for a drug-related murder. If false, both the ordinariness of the explanations and the variances among them would be predictable. Cashwell’s explanation certainly stands out and would not be expected. Presumably, a liar would not select a version so apparently far-fetched.

2. The Curious

Why the State of North Carolina gave Kenneth West such a “sweet deal”¹³⁸ is quite curious. According to the testimony of Thompson and Williford, upon whom the State relied, West was not only present when the killing took place but also played an active role in it and mocked the victim. Thompson’s version was that West participated in the act of murder by cutting up Lisa Matthews.¹³⁹

¹³² Hunt Tr., *supra* note 26, at 368–69.

¹³³ Krisher, *supra* note 29, at 5A.

¹³⁴ West Tr., *supra* note 12, at 9. West never indicated that he saw or knew that marijuana was in the trash bag carried from the Matthews’ home. *Id.* at 11.

¹³⁵ Hunt Tr., *supra* note 26, at 561.

¹³⁶ *Id.* at 874.

¹³⁷ *See id.*

¹³⁸ He pled to charges that gave him a three-year active sentence, which with time already served meant that he would be released no more than two weeks after the plea was entered and be placed on probation under a suspended sentence. *See* discussion *supra* note 12.

¹³⁹ *See id.* at 875.

Williford stated he said: “Yeah, that fat bitch begged us not to kill her too.”¹⁴⁰ Although it is only one side of a bilateral communication, the letter from West’s attorney, Marland Reid, to the prosecutors indicated the prosecutors’ perception of real weakness in the case against West.¹⁴¹ The letter corresponds with the light sentence West received, but not with the clear guilt of Hunt, which depended on statements by the same witnesses who also supported West’s heavy involvement in the murders.

3. The Missing

The piece of evidence so clearly missing in this case is the initial story told by Williford, the key witness/informant to the authorities, what I call in the title of this essay his “first draft.”¹⁴² The story line the prosecution supported in the Hunt case is that the murders were the work of the drug gang run by Hunt, with Cashwell as his employee and others assisting. Another story, which had a *very* substantial

¹⁴⁰ Hunt Tr., *supra* note 26, at 368.

¹⁴¹ Letter from Attorney Marland C. Reid, Counsel for West, to Jim Coman and William N. Farrell, Jr., Office of the Attorney General (Nov. 19, 1985) (on file with author). In this letter, Reid stated:

My position was that the first time I discussed this case with you by phone, you expressed reservations about Kenny West’s guilt, you acknowledged you had problems with Gene Williford’s veracity and you inquired whether Kenny West was willing to take the polygraph test.

. . . Kenny was polygraphed on September 17, 1985, and I furnished those polygraph results to you by letter dated September 17, 1985. When I visited you in your office on October 1, 1985, and advised you that Kenny had passed the polygraph test administered by the State, you again stated you would have to take another close look at the State’s case against Kenny.

Therefore, during our conversation on October 31, 1985, I anticipated there was a real possibility the State would dismiss the charges against Kenny although, as I advised you, I realized the implications that would have on the State’s case against the two remaining defendants. . . . You advised me if in the course of the trial against Lee Wayne Hunt and Jerry Cashwell no evidence came forward to implicate Kenny West, you would then do the obvious thing. By implication, I naturally inferred you would voluntarily dismiss all charges against Kenny, although you did not put it in those words.

Id. at 1–2.

¹⁴² The Alan Gell case is a well-known North Carolina death penalty case that sparked both ethics reform regarding the scope of the prosecution’s duty to examine its files for exculpatory evidence and helped usher in the state’s full open-file discovery law for all felony cases. Gell involved the disclosure of exculpatory evidence, which resulted in the granting a new trial and Gell’s acquittal on retrial when all the evidence was presented. *See* Mosteller, *supra* note 2, at 262–76 (describing both the case and its impact on changes in the ethics responsibilities of prosecutors and enactment of North Carolina’s full open-file discovery law). Part of the critical exculpatory disclosure in the Gell case was one of these “first drafts.” In it, Crystal Morris, an involved informer, told her then boyfriend in a secretly taped telephone conversation that she needed to “make up a story” to tell the police. Joseph Neff, *Lawyers Put Focus on Agent*, NEWS & OBSERVER (Raleigh), May 22, 2004 (noting the critical value of the taped conversation for the jury). *See also* Answer, at 7, N. C. State Bar v. Hoke, 04 DHC 15 (Apr. 23, 2004) para. 8(a), (on file with author).

sponsor in Cashwell, is that he, although admittedly an employee of Hunt's drug-selling operation, killed the Matthews couple because of his irrational, uncontrollable rage, which was entirely unrelated to the drug operation.

According to Hunt's witnesses, Cashwell was making statements in the community about his own guilt.¹⁴³ If the version that identified Cashwell as the lone murderer who acted for independent and irrational reasons was ever provided by any of the witnesses to investigators, one would expect the police to push back. The story is both apparently implausible and would disappoint their perhaps soundly-based interest in ending Hunt's drug business by putting him behind bars.

We have the "first draft" of only one jailhouse informant, Samuel Thompson, who mailed his information to the authorities in order to get their attention. Williford had contact with the police within a month or so of the murders, and he met with the police and a prosecutor in his lawyer's office in December 1985, when he stated that he admitted his involvement in a "roundabout way."¹⁴⁴ His statement "I didn't implicate [sic] what I should have"¹⁴⁵ is particularly tantalizing. Does he mean that he did not implicate those that he should have, meaning those he was expected to implicate? Williford also was taken out of jail confinement by the police numerous times between his February and March versions of the story¹⁴⁶ (although admittedly in the February version he implicated Hunt). None of Williford's "drafts" of his story during these police contacts are available.

During the Motion for Appropriate Relief proceedings, Hunt's counsel filed a Motion for Production of Exculpatory Evidence.¹⁴⁷ The State responded that "The prosecution files pertaining to the prosecutions of defendant and his co-defendant[s] were archived. A search of archived files has failed to locate any pertinent files."¹⁴⁸ The State cannot find any records! The discovery rules were

¹⁴³ As noted earlier, *see supra* note 69, Hunt and several other witnesses associated with him testified that Cashwell said he (Cashwell) committed the murders. Because of their interest, their testimony was subject to a heavy discount. Cashwell statements to Hughes would have given them substantial corroboration. In his response to the ethics complaint, Hughes stated: "Jerry [Cashwell] hated Mr. Hunt because he believed that Mr. Hunt had been responsible for Jerry's arrest for the murders. He believed that Mr. Hunt had spread the word in the community that Jerry had admitted to Mr. Hunt that he, Jerry, had killed Mr. and Ms. Matthews." Hughes Response Letter, *supra* note 5, at 2.

¹⁴⁴ *See* Cashwell Tr., *supra* note 40, at 47.

¹⁴⁵ *Id.* This wording is not repeated in the Hunt trial. There he stated he told the police "[n]ot very much of nothing because I wasn't truthful with them." Hunt Tr., *supra* note 26, at 381. Note, however, that he does not say he told them nothing; rather "[n]ot very much of nothing." *Id.*

¹⁴⁶ *See supra* note 49.

¹⁴⁷ *See* Motion for Production of Exculpatory Evidence at 3-5, State v. Hunt, 85 CRS 16651-54 (June 3, 2005) (on file with author) (requesting, *inter alia*, evidence impeaching Williford).

¹⁴⁸ State's Answer to Defendant's Motion for Production of Exculpatory Evidence at 1, State v. Hunt, Nos. 85 CRS 16551-54 (Aug. 8, 2006) (on file with author). The motion had attached a two sentence letter from the Sheriff of Cumberland County indicating that he could not locate the files

different at the time the case was tried than they are today in North Carolina and so is the level of concern with convicting the innocent, but the constitutional standard has remained constant. The fact that no records allegedly survive is at least troubling and certainly very unfortunate.

IV. THE NATURE AND SCOPE OF THE INFORMANTS CHALLENGE TO THE JUSTICE SYSTEM

A. *The Unusual Nature and Inherent Dangers in the Incentives Given for Informer Testimony*

As I noted in the Introduction, informant testimony plays a significant role in prosecution of criminal cases in the United States, and, in many of those cases, it is critical to the prosecution securing a conviction. Yet that reality of need does not lessen the problematic nature of such testimony.¹⁴⁹ The testimony has been gained by the prosecution through explicit promises to benefit the informant if he or she testifies in support of the prosecution's case.¹⁵⁰ Except for the fact that such practice is historically accepted and commonplace in modern prosecutions, it could on its face seem extraordinary in that it incentivizes the informant to tailor his or her testimony to satisfy the wishes of a party, the prosecution, to achieve a conviction.

The inherently suspect nature of purchased informer testimony can be seen in the Tenth Circuit case of *United States v. Singleton*,¹⁵¹ where a three-judge panel ruled the bargain to constitute a violation of the federal bribery statute, a decision that was promptly reversed by an en banc decision.¹⁵² The statute punishes “[w]hoever . . . 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”¹⁵³ The en banc court ruled that

and two affidavits from summer interns that on one day they search the criminal files in two locations and found nothing related to Hunt, Cashwell, and West. *Id.*, Exhibits 1–3.

¹⁴⁹ See George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1 (2000) (arguing that, while payments to witnesses in return for testimony is generally considered unethical and illegal, it is permitted for informers and cooperating witnesses and for experts, and despite the frequency of use of such witnesses, these incentives create particular problems that deserve special scrutiny).

¹⁵⁰ Of course, the government routinely requires that the testimony be truthful, but practically that means testifying consistently with what the government believes to be the truth, which is usually well known to the informant by the time testimony is given. See, e.g., *United States v. Spriggs*, 996 F.2d 320, 323–24 (D.C. Cir. 1993) (allowing admission of cooperation agreements, which state that the government will impose a sanction if the witness lies, and noting that nothing in such agreements “enhance the Government’s ability to detect whether [the cooperating witness] is in fact lying”).

¹⁵¹ 144 F.3d 1343, 1358 (10th Cir. 1998).

¹⁵² See *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 527 U.S. 1024 (1999).

¹⁵³ 18 U.S.C. § 201(c)(2) (2006).

“whoever” did not include the United States when acting in its sovereign capacity.¹⁵⁴ The court also noted the long-standing historical practice of the sovereign granting leniency in exchange for testimony against the witness’s confederates and others involved in crime.¹⁵⁵

Deeming such bargains bribery may also seem wrong-headed because the government is presumably not making the offer for a corrupt purpose, and indeed if the prosecutor has behaved ethically, such testimony will only be secured in situations where the prosecutor has reached a personal conviction of the defendant’s guilt.¹⁵⁶ However, the lack of a corrupt motive and a personal belief in the merits of the case do not excuse any other party who offers specific rewards for factual testimony supporting its position at trial. Moreover, a prosecutor’s belief in guilt obviously does not guarantee that the defendant is guilty. There is nothing in the historical practice of the sovereign offering incentives to cooperating witnesses and informers that suggests the government possesses a special ability to discern the truth.

Finally, the incentives offered are frequently extraordinarily powerful. The principal incentive is a promise of liberty. The offer may be made to someone who is presently confined or faces potential incarceration, and the promise of liberty may be immediate and full or it may instead shorten what would have been a longer period of confinement. Other incentives may be included, such as contacts with family and friends or monetary rewards.¹⁵⁷ However, the most frequent incentive is liberty, and that promise is incredibly powerful.

B. Empirical Evidence Suggesting the Broad Scope of the Problem of Inaccurate Informant Testimony

As noted earlier, a study of the first 200 DNA exonerations revealed that false informant testimony was involved in eighteen percent of those cases.¹⁵⁸ In an earlier study, Barry Scheck and his colleagues found that false testimony from informants was involved in twenty-one percent of the sixty-two cases they examined where convicted individuals were exonerated by DNA.¹⁵⁹ In their study of 340 exonerations from 1989 through 2003, Professor Sam Gross and his

¹⁵⁴ See *Singleton*, 165 F.3d at 1300–01.

¹⁵⁵ *Id.* at 1301–02.

¹⁵⁶ See Mosteller, *supra* note 1, at 1365–70 (discussing various formulations of how the prosecutor’s duty to do justice translates into an assessment of the defendant’s guilt and noting that while many prosecutors operate under the principle that the evidence must convince them of the guilt of the defendant, a lesser standard is permitted).

¹⁵⁷ See *supra* note 8 (describing repudiated testimony by an informant who received a substantial financial reward). Cf. Shaila Dewan & Brenda Goodman, *As Prices Rise, Crime Tipsters Work Overtime*, N.Y. TIMES, May 18, 2008 at A1 (describing increase in crime solving tips apparently in response to a downturn in the economy and the tipsters’ need for funds).

¹⁵⁸ See Garrett, *supra* note 13.

¹⁵⁹ See SCHECK ET AL., *supra* note 13.

colleagues did not examine the issue of informants separately. However, their data revealed the important role of jailhouse informants in these convictions. In ninety-seven of the cases, a civilian witness who claimed no direct involvement in the crime, usually a jailhouse informant or another witness who stood to gain from testifying, gave false testimony.¹⁶⁰ In addition, false testimony was given in a number of murder cases, mostly by individuals who participated or claimed to have participated in the crimes, and presumably, they were testifying in response to inducements by the prosecution.¹⁶¹

In an investigative story, the *Chicago Tribune* found that informants or “incentivized witnesses” were involved in thirty-eight of the ninety-seven death penalty cases where defendants were released or exonerated (39.2%). This was the second most frequent factor in these cases, following incorrect or perjured eyewitness testimony (53.5%). Of these thirty-eight cases, sixteen involved “jailhouse informants,”¹⁶² who, in the main, appear simply to have fabricated confessions by the defendant, and the other twenty-two provided other types of testimony.¹⁶³

Finally, although not an analysis of general causes of wrongful convictions, the revelations surrounding jailhouse informant Leslie Vernon White in Los Angeles, California, is perhaps the best known of the class of individual informant abuse cases.¹⁶⁴ White admitted to numerous acts of perjury in the form of fabricated confessions of fellow prisoners, which he exchanged for benefits. He repeatedly peddled false confessions, which he created by a practiced scheme of engaging fellow prisoners in conversation about the charges pending against them and then through a ruse learning key details from police records to give the

¹⁶⁰ See Gross et al., *supra* note 13.

The well known North Carolina case of Darryl Hunt illustrates the role of a fabricated incriminating statement allegedly made by the defendant in the conviction of an innocent man. Hunt was exonerated after eighteen years in prison for rape and murder when DNA evidence led authorities to the real perpetrator, who confessed. See Richard Willing, *Suspects Get Snared by a Relative's DNA*, USA TODAY, June 8, 2005, at 1A. Despite his innocence, an informant who was at the time of the crime a fourteen-year-old prostitute, testified that Hunt told her of his involvement in the crime. See *State v. Hunt*, 457 S.E.2d 276, 284 (N.C. 1995). The informant's motivation for providing this false confession is unclear although her first conversation with the police occurred while she was being detained and tried for prostitution, see *State v. Hunt*, 378 S.E.2d 754, 756 (N.C. 1989) which placed her in immediate need of lenient treatment.

¹⁶¹ See Gross et al., *supra* note 13, at 543.

¹⁶² This category is discussed below. See *infra* Part IV.C.3.i.

¹⁶³ John T. Rago, *A Fine Line Between Chaos and Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 WIDENER L. REV. 359, 439 (2006) (citing report by Ken Armstrong and Maurice Possley).

¹⁶⁴ See REPORT OF THE CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 65 (Paul Giannelli & Myrna Raeder eds., 2006) [hereinafter ABA REPORT] (describing the White case as “[o]ne of the most notorious examples” of the abuses of jailhouse informants).

confession the appearance of inside knowledge.¹⁶⁵ A related grand jury investigation revealed many other acts of perjury by other informants and abuses and laxity in the handling and use of informants by police and prosecutors in Los Angeles.¹⁶⁶

C. The Multiple Elements of the Problem with the Accuracy of Informant Testimony

1. The Inherent Forces that Produce both the Need and the Incentives for Falsity in Informant Testimony

With the demonstrated unreliability of informants, an obvious thought might be to eliminate them from the prosecutorial arsenal, but elimination is unfortunately impractical. Informants are particularly needed to prosecute “victimless crimes,” such as drug selling where there is no unhappy outsider to the transaction—a victim—who readily hails the police and reveals all he or she knows. Also, criminals of all types do not voluntarily reveal their criminality, and they often go to great lengths to disguise and conceal their actions. To solve and prosecute many cases, the police often need the help of insiders who inform on the activities and who testify against those in the enterprise.

The inducements to informers may be justified on several grounds. One justification is to overcome the informant’s fear of retribution. Major criminal figures obviously do not want their criminality revealed and may be expected to use violence against those who would inform. Thus, someone revealing information about a powerful and dangerous criminal may demand physical protection and also require a positive inducement in order to endure the anticipated costs of testifying.

For informers who are also targets of prosecution, the incentives must outweigh the consequences of providing self-incriminating information. The informant must calculate that the threat to liberty is reduced by cooperation, which often requires the dismissal of a large number of potential charges in exchange for admission of involvement in some criminal acts.

The size of the incentive also often relates to the value of the information provided to the prosecution’s case. Prosecutors “pay” more for information perceived as highly valuable, and one key ingredient of value is the prosecutor’s need for the evidence.¹⁶⁷ This presents one of the inherently problematic features

¹⁶⁵ See ROBERT M. BLOOM, RATting 64–65 (2002) (describing White’s scheme).

¹⁶⁶ See ABA REPORT, *supra* note 164; BLOOM, *supra* note 5, at 65–66; 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, 1448–49 (2007).

¹⁶⁷ Other components besides need can also go into the prosecutor’s calculation of the value of the testimony. For example, witnesses who are more deeply involved in the crime can often provide more extensive and therefore more valuable information than those at the periphery. See Nekima Levy-Pounds, *From the Frying Pan Into the Fire How Poor Women of Color and Children are*

of informant testimony. If prosecutors and police could prove the charges against their target without the informant, they would have no need to “pay” at all and certainly no need to provide strong incentives. Thus, the evidence the informant can provide must be additional to the evidence available to the prosecution without the informant. Here we have the reason why corroboration and independent proof are often lacking and why such a corroboration requirement has its limits. The informant is most needed when he or she is providing otherwise unprovable facts, which thus cannot be corroborated.

Prosecutorial authorities may lack independent knowledge or evidence of a portion of the critical events or actors, but they likely have a version of these facts that they believe or expect to be true. The most readily accepted information will be that which is consistent with the facts already known or assumed. Informants have a clear interest in pleasing those who control their freedom, and if they can discern the expectations and needs of the authorities, their self-interest mandates that they tailor their stories along the anticipated and desired lines. Strong incentives lead to risks of distorted information and false testimony. In particular, there is clear potential for these incentives to produce false evidence implicating those “believed” to be guilty of the crimes and for informants to embellish the responsibility of those they implicate.

2. Important But Limited Prosecution Tools to Guard Against False Informant Testimony

The tools at the prosecutor’s disposal to protect against misuse of informant testimony are important but limited.¹⁶⁸ They start with the fundamental requirement of good motivation—to do justice—by the prosecutor, which is essential if the justice system is to have any reasonable prospect of reaching accurate outcomes in difficult cases. However, such motivation must be in one respect quite specific: it must be not only to do justice in general, but also to convict only those guilty of the particular crime at issue.

As a matter of utilitarian calculus, one might argue that it is not clearly wrong to convict a generally dangerous criminal for a specific crime that he or she happened not to commit. Developing all the arguments against such a position is

Affected by Sentencing Guidelines and Mandatory Minimums, 47 SANTA CLARA L. REV. 285, 313 (2007) (noting that sometimes those with greater involvement can reap larger benefits in terms of leniency because of their more extensive and therefore more valuable information).

¹⁶⁸ In particular, one of the critical protections in the current system (and two of my proposals for reform) relies on prosecutors to determine that the informant is not credible. Unfortunately, even professionals who typically make truth-determination judgments are not particularly accurate. See Paul C. Giannelli, *Brady and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 602–03 (2007) (discussing study results that accuracy rates range from 52.8% for college students to 64% for Secret Service agents in separating true from false stories).

not the burden of this paper.¹⁶⁹ However, I believe three major reasons demand a contrary position. First, ours is a nation of laws with many detailed specifications of that basic concept found in procedural protections such as the jury trial right and the requirement of proof beyond a reasonable doubt. These guarantees depend upon the specification in advance of a crime and the requirement of proof that the defendant committed it. Second, what we “know” to be generally true about an individual, for example about his dangerous character, may not be true at all. The requirement that the government prove a specific act done at a specific time by a specific individual helps to limit reliance on assumption, stereotyping, and rumor. Third, often, as in the Hunt case, orders of magnitude separate what is generally “known”—that he was a marijuana dealer—and what is presumed—that he masterminded the murder of two people. Spending one’s natural life in prison is an appropriate sentence for a double murder, but it is far out of proportion for marijuana dealing.¹⁷⁰

If the motivation is to convict a person who the prosecutor believes is guilty of some or many crimes but not necessarily guilty of the crime at issue, the system breaks down. Likewise, the prosecutor may not fully test evidence of guilt on a particular case because prior crimes and reputation create an assumption of guilt. For a case like Hunt’s, where the investigative authorities apparently strongly believed he was both a major drug dealer and deeply involved in violence, the danger of lessened scrutiny about the merits of the murder charges was very real.

The next tool is the good judgment of prosecutors in combination with their skill and experience in assessing accurately informants’ assertions.¹⁷¹ Informants are highly motivated to help themselves; they are frequently substantial criminals who lack normal compunctions against lying; and they may be experienced in

¹⁶⁹ See D. Michael Risinger, *Innocent Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 763–68, 794–99 (2007) (describing the debate between those who consider wrongful convictions rare and resist reforms that might reduce the rate of convicting the innocent, because of its potential impact also to free the guilty and those who place special weight on the horror of convicting the innocent and attempting to develop methodology for evaluating the tradeoff inherent in reforms).

¹⁷⁰ Professor Risinger speculates that the public would react strongly against convicting those who are not innocents when the crime for which they were erroneously convicted is much more severe than the crimes they have committed previously but not be much bothered where the defendant has committed similar crimes. *Id.* at 792–94.

¹⁷¹ Unfortunately, as noted earlier, *see supra* note 168, most humans are relatively inept at determining deception. Moreover, prosecutors’ assessments are typically affected by a range of factors that tend to cause them to accept informant stories even when unreliable. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 942–48, 950–52, 962–63 (1999) (describing results of a study based primarily on interviews about the cooperation process with former assistant federal prosecutors and defense attorneys, which revealed a number of impediments to accurate assessment including unwarranted trust, development of a rigid concept of the case, cultural barriers, and lack of training). See also Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809 (2002) (describing various problems with human detection of deception, including false confidence and reliance on erroneous cues).

deception. As will be discussed later, while the prosecutor has the responsibility to exercise good judgment regarding the informant, he or she is not acting alone. Police and other investigative authorities are often intermediaries between the prosecutor and informants. Those intermediaries are no doubt often greatly helpful in securing justice in individual cases, but they can also act in extremely detrimental ways at times. Therefore, the prosecutor must be motivated figuratively “to look a gift horse in the mouth” when dealing with informants, and he or she must have the skill and the perseverance sometimes to overcome hindrance by the investigators who likely had primary initial contact with the informant.

Finally, the prosecutor must exercise due diligence in the search for corroborating evidence. Such corroboration provides the most powerful protection against erroneous informant testimony—information or evidence that either verifies or contradicts the informant’s version. In some cases, adequate corroboration will be available. For example, the prosecutor may have learned that the defendant committed a murder from numerous uninvolved eyewitnesses who are unwilling to testify because of fear of retribution.¹⁷² Unfortunately, however, in many of the most problematic situations, full corroboration will be unavailable, and, as developed above, this state of affairs is almost an inherent part of the informer problem. Prosecution need is not always related to a lack of corroborating information, but the most substantial incentives will often be given to informants where corroboration of a critical link—was this particular defendant involved in this particular transaction or involved as the leader rather than as a participant—is lacking. Thus, in some especially problematic cases, the danger remains that this highly incentivized testimony from undependable criminals will be uncorroborated and false.

3. Types of Informants

Informants are usefully divided into two categories. In one group are jailhouse informants; the second includes all other informants, who are most commonly co-participants in the crime or other members of the suspect’s criminal group.

¹⁷² Also, corroboration, although not necessarily something that would be admissible evidence, can come from other credible sources such as frequently accurate informants. Sometimes such informants are the source of vindication of an innocent person when an informant, who has no interest in the case, reveals information that another person committed the crime. *See, e.g.*, Edmund H. Mahony, *Judge Frees Man in '60s Mob Case*, HARTFORD COURANT, Jan. 6, 2001, at A1 (describing how the discovery of an informant’s statements that another man committed the murder for which several men had been confined for decades led to a new trial, a motion supported by the prosecution).

i. Jailhouse Informants

The typical story from a jailhouse informant is that, while in custody, the defendant made an incriminating statement to the informant. Judge Stephen Trott of the Ninth Circuit, writing from his experience as a prosecutor said, “Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air”¹⁷³

Although sharing similarities with other informants, jailhouse informants generally present the dangers at a consistently higher degree. They are by definition incarcerated (hence the term “jailhouse”), and as a result, all such informers have a strong interest in securing their freedom, which is in the government’s control. Probably more important to their suspect classification is the high degree of difficulty in most cases of corroborating or refuting the truth of what such informers claim they were told. The role is an easy one to play in that virtually anyone could invent a plausible story.

Moreover, these informers typically self-identify from what is often a relatively large group that is limited only by those who plausibly were in contact with the defendant. Pretenders can be weeded out based on giving an implausible account of an incriminating statement, but this limitation is often more apparent than real. The informant can always say that the defendant said “he is guilty” or some other conclusory statement, to the effect “he did it.”

The more detail in the incriminating statement allegedly made by the target, the greater the chance for contradiction by the real facts of the case. As a result, detailed jailhouse confessions have some controls on accuracy. However, making sure that a highly motivated informant did not have alternative sources of information is often a daunting task. This has been shown by individual cases of admitted informants,¹⁷⁴ and certainly the source of the information is becoming more difficult to identify in some cases because details of the crime, which were previously known only to a few, are now available through the internet.¹⁷⁵

ii. Informants Drawn from Crime Co-Participants or Members of the Suspect’s Criminal Group

One important difference between jailhouse informants and other types of informants is that the latter is limited to a smaller, more selective group of crime associates and that limitation provides at least some indirect support for the

¹⁷³ Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996).

¹⁷⁴ See *supra* accompanying text notes 164–66 (discussing Leslie Vernon White case)

¹⁷⁵ See Valerie Alter, *Jailhouse Informants: A Lesson in E-Snitching*, 10 J. TECH. L. & POL’Y 223, 228–31 (2005) (demonstrating in well-publicized trial information, availability of details of the crime on the internet, which would have provided apparent confirmation for the truthfulness of the informant because of his extensive knowledge of the crime).

informant's basic story. Their ranks are restricted to a small number of individuals who can plausibly claim that they had contact with the crime suspect while he was engaged in crime. Moreover, these other informants do not typically self-identify and seek out the authorities but instead attempt to avoid exposure because it may lead to their own prosecution.

This class of informants also differs in that their stories are not as frequently entire fabrications. Instead, when lies are told, they more commonly fit into a pattern of the informant describing a crime largely accurately but changing the roles or identities of the individuals who committed crime. One of the most common alterations is for an involved informant to describe a crime accurately but to diminish his or her own role and enhance that of others. Such stories nicely mesh with the prosecution's typical goal of gathering evidence against a "big fish" by securing the testimony of "little fish," whose criminal liability they reduce or extinguish. One major fault line for prosecutors, which reveals that the process has been subverted, is when they turn out to have made a deal with a "big fish" to secure the conviction of those lower down in the operation.¹⁷⁶

Unfortunately, if the informant was involved in the crime or has talked with those who were, then he or she has the information to present or to reformulate to fit the needs of the situation. The prosecutor is generally not in a position to know how the informant may have altered the facts and thus can be misused by the informant. Prosecutors can also be misled by the police. Because investigators rather than prosecutors generally have the initial contact with the individuals who become informants, critical alterations in the informants' stories may occur without the prosecutor's knowledge, which effectively hides from the prosecutor's scrutiny key data for evaluating informants' veracity.

As noted above, if it were practically possible, informants should only be used when their stories are fully corroborated. Also, if it were possible, a procedural protection might be used to partially compensate for the lack of corroboration: those having contact with the informant, like the investigator in a "double blind" experiment, would not know what response is desired.¹⁷⁷

Yet the world of informants is not "blind" in the experimental sense at all. Instead, those who have first contact with the informant—the police or other investigative personnel—sometimes have personal relationships with the informant. Quite often they have preconceptions and/or some knowledge of how the crime occurred. Also, they will generally have a sense who the "bad actors" in

¹⁷⁶ In his well received article, Judge Stephen Trott of the Ninth Circuit writes from his experience as a prosecutor in dealing with informants. He argues persuasively for the importance of only dealing with "small fish" to get "big" ones and both to drive a hard deal and to be sure that the prosecutor stays in control. See Trott, *supra* note 173, at 1392–94.

¹⁷⁷ In some jurisdictions, an aspect of the "double blind" experimental regime is being brought into criminal law investigation in eyewitness identification procedures. See Mosteller, *supra* note 1, at 1392 (discussing the set of reforms in identification procedures). Among these is the mandate that the officials who administer the identification procedure, if possible, lack knowledge of which of the individuals appearing in the procedure are suspect(s). *Id.*

the community are and the “usual suspects” for the type of crime at issue. Accordingly, those having contact with the informant typically have both the ability and some inclination to help the informant shape the story line in a particular direction. They may act inadvertently in supplying information, but they may also push the informant to tell what they believe is the accurate version of events. In either situation, one source of data in the informant’s story may be investigating officers who sought to “turn” into a cooperating witness a person who likely began by denying any knowledge or involvement and only gradually moved to recite the version that the investigator believed all along to be the truth.

I accept that the source of the informant’s information is not likely controllable and that it is not realistic to substitute the rules of scientific inquiry for the multi-dimensional role of crime investigator. However, when the informant’s story has changed after contact with government agents, efforts should be made to preserve the remnants of the story’s transformation to help sort truth from lies and inaccuracies produced by the distorting effect of powerful incentives.

4. Constitutional Doctrines Particularly Relevant to Informants

The chief constitutional provisions that may be violated by informants and their testimony are of two types, which sometimes overlap. First, if the testimony is perjured and is either the responsibility of the prosecution or known to it, due process is violated under the Supreme Court’s ruling in *Napue v. Illinois*.¹⁷⁸ However, if the perjury is entirely the work of a private individual, it is generally covered only under the concept of newly discovered evidence or more broadly a claim of actual innocence, which may face special procedural hurdles.¹⁷⁹

Second, if the prosecution fails to disclose the existence of inducements offered to obtain the informants testimony or misreports the extent of those inducements, due process is also violated under the Court’s ruling in *Giglio v. United States*.¹⁸⁰ This error may overlap with the first and also become a *Napue* violation if the informant and/or the police not only fail to report but also falsely testify about the inducement offered.

¹⁷⁸ 360 U.S. 264 (1959). See *infra* note 208 for a discussion of whether the prosecutor must know of the perjury rather than another government agent.

¹⁷⁹ Also, a limited and somewhat uncertain constitutional doctrine applies to actual innocence claims in death penalty cases. See *House v. Bell*, 547 U.S. 518 (2006) (ruling that petitioner “made the stringent showing required by the actual-innocence exception” to the procedural bar rule and that his federal habeas case could therefore proceed).

¹⁸⁰ 405 U.S. 150 (1972). *Giglio* held that failure to provide information regarding an agreement with the government regarding future prosecution was important to credibility and failure to produce it violated due process. *Id.* at 153–55 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). In *United States v. Bagley*, 473 U.S. 667, 676 (1985), the Supreme Court characterized its ruling in *Giglio* to be that “[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule,” rejecting a distinction between exculpatory evidence and impeachment evidence.

V. PROPOSALS FOR REFORM

In *Achieving Justice: Freeing the Innocent, Convicting the Guilty*,¹⁸¹ the ABA Criminal Justice Section sets out a number of proposals relevant to the use of informants: (1) prosecutorial screening of informant's reliability;¹⁸² (2) imposing a

¹⁸¹ See ABA REPORT, *supra* note 164.

¹⁸² A Canadian Commission investigating the wrongful conviction of Guy Paul Morin (cleared by DNA evidence) based on his alleged confession to a murder made to a jailhouse informant and supposedly overheard by a second informant provided the following list of factors that should comprise the prosecutor's review:

- (1) The extent to which the statement is confirmed . . . ;
- (2) The specificity of the alleged statement. For example, a claim that the accused said "I killed A.B." is easy to make but extremely difficult for any accused to disprove;
- (3) The extent to which the statement contains details or leads to the discovery of evidence known only to the perpetrator;
- (4) The extent to which the statement contains details which could reasonably be accessed by the in-custody informer, other than through inculpatory statements by the accused [The prosecutor] should be mindful that, historically, some informers have shown great ingenuity in securing information thought to be unaccessible to them. Furthermore, some informers have converted details communicated by the accused in the context of an exculpatory statement into details which purport to prove the making of an inculpatory statement;
- (5) The informer's general character, which may be evidenced by his or her criminal record or other disreputable or dishonest conduct known to the authorities;
- (6) Any request the informer has made for benefits or special treatment (whether or not agreed to) and any promises which may have been made (or discussed with the informer) by a person in authority in connection with the provision of the statement or an agreement to testify;
- (7) Whether the informer has, in the past, given reliable information to the authorities;
- (8) Whether the informer has previously claimed to have received statements while in custody. This may be relevant not only to the informer's reliability or unreliability but, more generally, to the issue whether the public interest would be served by utilizing a recidivist informer who previously traded information for benefits;
- (9) Whether the informer has previously testified in any court proceeding, whether as a witness for the prosecution or the defence or on his or her behalf, and any findings in relation to the accuracy and reliability of that evidence, if known;
- (10) Whether the informer made some written or other record of the words allegedly spoken by the accused and, if so, whether the record was made contemporaneous to the alleged statement of the accused;
- (11) The circumstances under which the informer's report of the alleged statement was taken (*e.g.* report made immediately after the statement was made, report made to more than one officer, etc.);
- (12) The manner in which the report of the statement was taken by the police (*e.g.* through use of non-leading questions, thorough report of words spoken by the accused, thorough investigation of circumstances which might suggest opportunity or lack of opportunity to fabricate a statement);
- (13) Any other known evidence that may attest to or diminish the credibility of the informer, including the presence or absence of any relationship between the accused and the informer;
- (14) Any relevant information contained in any available registry of informers.

Fred Kaufman, Ont. Ministry of the Attorney Gen., Report of the Kaufman Commission on

requirement that the informant's evidence must be corroborated;¹⁸³ (3) enhanced discovery of any deals, both explicit and implicit, reached with the informant;¹⁸⁴ and (4) a carefully crafted cautionary instruction for the jury.¹⁸⁵ This is a helpful summary list, which others have embellished and modified.¹⁸⁶

Professor Alexandra Natapoff, an insightful critic of informant abuses, argues for increased openness of three types: (1) greater discovery regarding the background of the informant and the details of any prior versions; (2) holding reliability hearings comparable to *Daubert*¹⁸⁷ hearings to help determine the likelihood of fabrication and whether the testimony is so unreliable that it should be excluded;¹⁸⁸ and (3) providing for pre-trial depositions of such witnesses.¹⁸⁹

Proceedings Involving Guy Paul Morin: Recommendations 13–15 (1998), http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf (Recommendation No. 41). Recommendation 39 states: "Confirmation should be defined as *credible* evidence or information, available to the Crown, *independent of the in-custody informer*, which *significantly supports* the position that the inculpatory aspects of the proposed evidence were not fabricated. One in-custody informer does not provide confirmation for another." *Id.*, Recommendation No. 39.

Professor Raeder argues for the need for vigorous screening of jailhouse informants by the prosecution. She notes that such a process was undertaken by the Los Angeles prosecutor's office after a scandal and investigation regarding a particularly effective and nefarious informant, Leslie Vernon White and that similar and even more extensive reforms were undertaken in Canada after a similar experience with wrongful convictions. See Raeder, *supra* note 166, at 1448–50.

¹⁸³ Professor Raeder argues that as to jailhouse informants, empirical evidence indicating their unreliability means that the burden of proving truthfulness should be on the prosecution. She appears to support the adoption of an ethical standard for a corroboration requirement, but more clearly supports the adoption of an internal review process by the prosecutor's office, which she notes resulted in Los Angeles in a dramatic cut in jailhouse informant use. See Raeder, *supra* note 166, at 1437–38.

¹⁸⁴ The Oklahoma Court of Criminal Appeals, in *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000), adopted a particularly robust set of special discovery rules for jailhouse informant cases. See also Giannelli, *supra* note 168, at 604–09 (discussing various discovery proposals in the jailhouse informant context).

¹⁸⁵ ABA REPORT, *supra* note 154, at 67–77. See also Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 760–61 (2002) (describing use of "clear and sharp" warning in Canadian courts).

¹⁸⁶ See generally Symposium, *The Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 CARDOZO L. REV. 747 (2002). One specific proposal that could have been implicated by the Hunt case but was not because of the jury's decision not to recommend the death penalty is the elimination of the death penalty option when it would rest upon the testimony of informants. See Steven Clark, *Procedural Reforms in Capital Cases Applied to Perjury*, 34 J. MARSHALL L. REV. 453, 462–63 (2001) (proposing that life be the maximum sentence when testimony of informants must be relied upon).

¹⁸⁷ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (requiring federal judges to function as "gatekeepers" to prevent admission of scientific expertise that lacks scientific validity and therefore evidentiary reliability).

¹⁸⁸ The type of reliability hearing that she suggests generally be applied to informants has been adopted by Illinois through legislation dealing with jailhouse informants. See Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV.

She supports other additional measures, which she characterizes as increasing democratic accountability. These include providing public information about informant uses and activities¹⁹⁰ and restricting the rewards available to informants.¹⁹¹

Within these proposals are a number of important measures. For my treatment of them, I distill them into two basic categories: (1) revealing the content of the informant's testimony, including the conversations with the informant and variations in the informant's story and (2) the nature of the deal, including details of all promises made and inducements offered to informants.

A. *The Content of the Informant's Testimony*

In various ways, scholars have argued for documentation of the meetings held with informants, the evidence received, and benefits promised.¹⁹² A frequent suggestion is that “[i]nterrogations of informants by investigators should be recorded—preferably videotaped, but if that is not possible, audio taped—and the tapes should be accessible to the defense under normal discovery rules.”¹⁹³ Professor Bennett Gershman identifies three classes of witnesses as particularly

107, 112–15 (2006) citing 725 Ill. Comp. Stat., 5/115-21 (2003).

¹⁸⁹ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 698–700 (2004).

¹⁹⁰ Others have recommended creation of national and local registries of informants and for the potential to “black list” and monitor “recidivist” informants. See Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 367 (2006). Alexandra Natapoff argues in general for more prosecutorial oversight of the process of creating or “flipping” an informant. See Natapoff, *supra* note 189, at 674–76.

¹⁹¹ Natapoff, *Supra* note 189 at 700–02. She also argues for public debate and legislative involvement in the use of informants. *Id.* at 703.

¹⁹² See Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 140 (1994).

¹⁹³ Rago, *supra* note 163, at 438. See also Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 861–62 (2002); George C. Harris, *supra* note 149, at 62; Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 888 (2002) (proposing that “the information proffered by the defendant and defense counsel should be the subject of accurate and intelligible notes by the prosecutor or agent present”); Jannice E. Joseph, Article, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33, 48 (2004) (proposing “memorialization of witness rehearsal sessions”); Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 287–302 (2005) (proposing reform through disciplinary rule).

Judge Trott argues for recording, but counsels care in the method. He argues that the full extent of the preliminary understanding be put in writing and signed by the informant and that the prosecutor should probe for “‘side-deals’ with the police.” See Trott, *supra* note 173, at 1402–03. On the other hand, he argues for care in drafting the agreement document, because it “may come back to haunt [the prosecutor] if it badly drafted,” and he gives a disappointingly weak justification for not recording the negotiation: “Do not negotiate on tape. Transcribing the tapes may drive you to distraction. At the same time, do not try to hide anything.” *Id.* at 1402.

vulnerable to coercive or suggestive interviewing techniques,¹⁹⁴ but considers the cooperating witness “the most dangerous prosecution witness of all.”¹⁹⁵ This is because the witness is both subject to manipulation but also often eager to lie or embellish on his or her own and is frequently capable of both developing and testifying to a convincing fabricated story.¹⁹⁶ He contends that conversations with informants should be videotaped.¹⁹⁷

Professor John Rago has also argued that sworn statements should be taken from prospective informants so that when shown to be false, independent special prosecutors could be appointed to prosecute the informant for perjury.¹⁹⁸ Others argue that informants should be required by the prosecution to undergo lie detector testing.¹⁹⁹

B. *The Nature of the Deal*

Professor Michael Cassidy examined another part of the problem: the purposeful vagueness of inducements either as a way to claim disclosure is unnecessary because no real promise of leniency was made or to reduce the effectiveness of defense impeachment because the inducement revealed is indefinite and arguably less powerful.²⁰⁰ He notes that while *Giglio v. United States*²⁰¹ requires the disclosure of a promise, reward, or inducement to a government witness under the Due Process Clause as exculpatory evidence, the exact dimensions of when non-explicit promises are covered has not been clearly established.²⁰² On the one hand, in *Boone v. Paderick*,²⁰³ the Fourth Circuit ruled that

rather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its

¹⁹⁴ See Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 844 (2002) (including children, eyewitnesses, and cooperating witnesses). As noted below, I accept that taping the audio portion of the transaction is sufficient because of the law enforcement concerns that informants will be identified through misuse of videotape contacts. See *infra* note 218.

¹⁹⁵ *Id.* at 847.

¹⁹⁶ See *id.* at 848.

¹⁹⁷ See *id.* at 861–62. But see *infra* note 218 (accepting that audio taping is sufficient).

¹⁹⁸ See Rago, *supra* note 163, at 438.

¹⁹⁹ See Aaron M. Clemens, Note, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIPIAC L. REV. 151, 234–42 (2004). Professor Raeder notes that the California Department of Justice Division of Criminal Law policy is that passing a polygraph test is a factor in determining whether to employ a jailhouse informant. See Raeder, *supra* note 166, at 1449.

²⁰⁰ See R. Michael Cassidy, “Soft Words of Hope:” *Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1169 (2004).

²⁰¹ 405 U.S. 150 (1972).

²⁰² See Cassidy, *supra* note 200, at 1151.

²⁰³ 541 F.2d 447 (4th Cir. 1976).

relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced [and] the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.²⁰⁴

On the other hand, numerous decisions from other lower federal courts have found that failure to reveal such vague promises does not violate *Giglio*.²⁰⁵

Cassidy argues for three reforms: (1) a broad interpretation of *Giglio* to include such implied inducement; (2) amending the Rules of Professional Conduct to include the broader *Giglio* obligation in an ethical rule; and (3) an expanded on the record inquiry with cooperating accomplice witnesses at the time their guilty pleas are entered.²⁰⁶ As to the ethical rule, he proposes to add the requirement that the prosecution disclose “all promises, rewards and inducements made by agents of the government to government witnesses” and that “inducements” be defined as “any statement which reasonably implies that the government is likely to confer or withhold future advantages depending on the witness’s cooperation.”²⁰⁷ Cassidy accepts that this disciplinary rule would not reach the conduct of the police directly and would not require the prosecutor to conduct an inquiry of the police as to whether such inducements were offered.²⁰⁸

In order to help eliminate post-conviction disputes as to whether *Giglio* was violated, he also supports a requirement that prosecutors be required to formalize their inducements with cooperating witnesses in writing.²⁰⁹ He argues such a

²⁰⁴ *Id.* at 451.

²⁰⁵ See Cassidy, *supra* note 200, at 1152. Cassidy contends that unlike the *Giglio* prohibition, which applies to promises by all government agents regardless of the prosecutor’s specific knowledge of those promises, the prohibition against presentation of false testimony under *Napue* applies only if “the prosecutor knows the testimony is false”. See *id.* at 1163 (citing *Napue v. Illinois*, 360 U.S., 269). Perhaps Cassidy is making the narrow point that some government agent must know of the perjury, but if perjury is known to a government agent, such as a police officer rather than a prosecutor, due process should still be violated. See, e.g., *Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975) (stating in dicta that it is sufficient for habeas corpus relief if “the prosecutor or other government officers knew the testimony in question was false”).

²⁰⁶ See Cassidy *supra* note 200 at 1166.

²⁰⁷ *Id.* at 1171.

²⁰⁸ See *id.* at 1171 n.232. He argues that until the ethical rules require that “reasonable efforts” be made to ensure that evidence negating guilt generally be discovered by the prosecutor, no such requirement should be imposed in this area. Such a requirement of reasonable inquiry has been recommended by Professor Stanley Fisher, see Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *FORDHAM L. REV.* 1379, 1424 (2000), and that general requirement of “diligent inquiry” has been incorporated into the North Carolina ethics rules. N.C. REVISED RULES OF PROF’L CONDUCT R. 3.8(d) (2006).

²⁰⁹ Cassidy, *supra* note 200, at 1172–73. Such a requirement of formal statement is supported by the Illinois GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, Report rec. 50, at 120 (2002); FRED C. KAUFMAN, Q.C., REPORT OF THE COMM’N ON PROCEEDINGS INVOLVING GUY PAUL MORIN rec. 43, at 608–09 (Ontario commission report). Cf. CAL. PENAL CODE § 1127a (West 2004) (requiring

requirement would avoid the confusion that occurs when the prosecutor contends no inducement was made but the cooperating witness believes there was an agreement.

Finally, Cassidy argues that when a guilty plea is entered the court should, “on the record and under oath,” determine whether any promises or inducements were made to the witness by government agents. He proposes a standard two-part inquiry: first whether the witness has been called or anticipates being called by the government as a witness in any criminal case, and if so, whether anyone from the government has made any representations to the defendant regarding possible leniency on the charges?²¹⁰ If none are disclosed, he contends the prosecution’s position would be strengthened in any subsequent *Giglio* inquiry. If it turns out that promises had been made and they were not fully divulged in any earlier proceeding where the informant testified, both legal remedies for the defense and disciplinary actions could be pursued.²¹¹

VI. THE CRITICAL IMPORTANCE OF “INDEPENDENT” EVIDENCE OF GUILT OR AT LEAST INDEPENDENT REVIEW OF INFORMANT DOMINATED CASES

In *Achieving Justice*, the ABA Criminal Justice Section adopted the resolution that “no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.”²¹² The resolution applies only to jailhouse informants, but independent evidence of guilt is important for any conviction that critically depends on informer’s testimony. The difficulty is how to make a corroboration requirement work in a real world that has practical need to convict the guilty as well as protect the innocent. The ABA resolution reduces the challenge to effective prosecution, which often must depend on informers for some critical element of proof, by limiting its reach to arguably the most problematic cases.

For all informers, I suggest four remedies. While substantial, these proposals are more modest than many of the suggested remedies made by academics and critics for two reasons. First, I have chosen to deal with a difficult class of cases: ones where the defendant may well have committed some criminal acts and non-jailhouse informers testify. Second, the literature on informants is rich and has identified a wide range of promising reforms. The challenge is not to identify promising ideas and indeed sound remedies but with making them manageable and getting them implemented. The misuse of informants is a major threat to justice that is not easily remedied. It is time to start moving forward with concrete reforms, and my proposals are pitched to be both helpful and realistic.

prosecutors to file with the court a “written statement setting out any and all consideration promised to, or received by,” jailhouse informants, which does not include witnesses who witnessed and/or participated in the crime).

²¹⁰ *Id.* at 1174–76.

²¹¹ *See id.* at 1176.

²¹² ABA REPORT, *supra* note 164, at 63.

My four proposals are to require the following: (1) documenting of all conversations by government agents with potential informants through at least substantial notes, and mechanical recording of all conversations with jailhouse informants and conversations with all other informants once they have agreed to cooperate; (2) both producing a written statement of all promises and inducements of whatever type from all governmental agents and conducting an on-the-record judicial inquiry before the informant testifies to confirm the accuracy of the written form as to agreements and/or expectations of leniency; (3) developing a mechanism in each prosecutor's office for independent review of all cases where informant testimony of whatever type provides the only direct evidence of a defendant's guilt;²¹³ and (4) in this same group of cases, providing an independent prosecutorial review of post-conviction claims of innocence when fact-based claims of innocence are made that are facially plausible and if verified would create a reasonable likelihood of innocence.

The above proposals are of two types: further discovery and disclosure, which merely but importantly develops and reveals information that in the main is already constitutionally required but presently is too frequently not provided to the defense because it is unavailable, and two occasions for additional review by independent prosecutorial agents of the likelihood of the defendant's guilt. The first type of proposals is specific and largely statutory, encompassing disclosure of information about the development of the informant's story and the details of the inducements promised and perceived.²¹⁴ The Constitution recognizes that substantially inconsistent versions of an important prosecutorial witness' incriminating claims must in fairness be disclosed. More specific to the informant's situation, due process also recognizes that the strong inducements involved in procuring much of

²¹³ I define the group as those where the only direct evidence of guilt comes from informants, which may be too narrow. Perhaps it should be those cases where the primary evidence of guilt comes from informants. I do not think I mean it to be quite that broad because it will likely water down the intensity of the review, which should be a searching inquiry because the case is in an especially suspect group. However, at the same time I intend the class of cases subject to review to be relatively narrow; a case should not be excluded simply because there appears to be some minor corroborating evidence. Corroboration often is apparent rather than real or may not be truly independent of the informant's information, and so the presence of any corroborating evidence should not be sufficient to eliminate review.

²¹⁴ It is useful to note that the other area in which witnesses are paid, expert testimony, has long been subject to enhanced disclosure requirements in criminal cases. See 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.3(f) (3d ed. 2007) (describing generally applicable criminal discovery procedures that include experts). The principal justifications for disclosure were not related to the payment but because the expert's testimony was presumed not likely to be swayed by being disclosed in advance of trial to the opponent and because advanced disclosure is necessary to effectuate cross-examination of the expert. However, in pre-*Daubert* days, those who criticized the excesses of expert testimony under the "junk science" label argued for greater discovery and in particular more information about the experts and their compensation agreements. See Paul C. Giannelli, "Junk Science": *The Criminal Case*, 95 J. CRIM. L. & CRIMINOLOGY 105, 125 (1993) (quoting from an argument by Vice President Dan Quayle that appeared in *Criminal Justice Reform*, 41 AM. U. L. REV. 559, 566 (1992), an article focused on discovery of experts in civil litigation).

this testimony may affect the testimony and require their disclosure.²¹⁵ The statutory disclosure provisions I propose concretely develop and record the information already constitutionally required. Also, they focus on providing that disclosure in time for presentation to the jury. My proposals means that the constitutionally required information would be recorded when it is most available and delivered when it is most needed to arrive at a correct verdict rather than resting on attempts to remedy failures of justice long after an erroneous conviction from evidence that may no longer exist.

The second type of proposals requires special prosecutorial review at two points in some cases involving informants. For those who would ask why informant cases deserve independent review, the justifications are two-fold.²¹⁶ The first rests upon the extraordinary nature of the inducements given in this class of cases for testimony reaching the result supported by investigative and/or prosecutorial authorities. This is “purchased” testimony from largely unreliable individuals. The second is empirical. Studies of cases of demonstrated innocence have shown that fabricated testimony by informants played a role in a substantial percentage of these miscarriages of justice. The protections available to the prosecution—good motives, good judgment, and corroboration—all have limited effectiveness in ensuring such testimony is accurate, and they almost inevitably are dependent upon the reviewing authority’s subjective perception. The least the system of justice should demand is a separate judgment beyond those in the midst of “the often competitive enterprise of ferreting out crime.”²¹⁷ For those who would ask why other types of cases should not also be included, such as eyewitness identification cases, I do not argue against the reviews of other cases—only that review is clearly necessary in the subclass of informant cases where the only direct evidence of guilt comes from the testimony of informants.

A. Recording of “First Drafts” of the Informant’s Story

For practical reasons, the first versions of some informant’s stories will not be available. That may be because informers produce these “drafts” without the involvement of government agents or they are unwilling to have them recorded.

I start with the easier case—jailhouse informants who approach government agents with information. These prospective witnesses have singled themselves out. They are seeking favors. They also do not risk self-incrimination from presentation of truthful information, as do co-participants. From the very

²¹⁵ See *supra* Part IV.C.4, which describes the command of *Giglio v. United States*, 405 U.S. 150 (1972), that inducements to informers must be revealed, and the impact of *Napue v. Illinois*, 360 U.S. 264 (1959), which makes failure of prosecutors to reveal lies that they recognize their witnesses have told, including lies regarding the nature of the inducements, a violation of due process.

²¹⁶ These arguments are set out in *supra* Part IV.

²¹⁷ *Johnson v. United States*, 333 U.S. 10, 14 (1948) (giving this as the justification for the bedrock principle that independent review by magistrates of a warrant is superior to reliance on the judgment of the police).

beginning, the audio portion of all conversations with self-identified jailhouse informants seeking leniency should be mechanically recorded.²¹⁸

As to informants who have potential criminal liability, mechanical recording of initial conversations would clearly be preferable from the perspective of an accurate record. However, I accept that such a requirement may be too much to ask for two reasons. First, determining as to which conversations the requirement applied could be problematic. Initial police contact with individuals who ultimately become informants often is indistinguishable from ordinary investigative conversations. Strict compliance with a mechanical recording requirement for potential informants thus would require recording of large numbers of police conversations with suspects. Mechanical recording may well be an appropriate general requirement for investigative conversations, but if so, it needs to be adopted in its own right rather than by indirection to satisfy the requirement of recording first drafts of conversations with potential informants. Second, requiring mechanical recording before the potential informant has broached the subject of cooperating or has made a positive response to a law enforcement suggestion of cooperation will be too threatening for some potential informants. As a result, I refrain from proposing recording of initial conversations but only in recognition of that likely impact on effective law enforcement. A mechanical recording of the very words of the informant is by far the preferable form for later evaluation of the truth of the informant's ultimate allegations and as a potential guard against governmental manipulation.²¹⁹ Because mechanical recording is far preferable to note taking, it should be required as soon as concern for effective law enforcement will allow.

I begin with a clearly inferior requirement, but one that should be imposed without exception—the requirement that all law enforcement personnel and prosecutors prepare, retain, and produce substantially verbatim notes of their contacts with potential informants.²²⁰ I am here discussing contacts with prospective witnesses, who will also frequently be potential suspects. Good police work should mandate careful recording of all statements of such individuals, and as a result, the needs of effective investigation are not compromised by this

²¹⁸ By mechanical recording, I mean recording on audio or video tape. I recognize that because of its potential for use in identifying informants if mishandled, videotaping may be avoided. I accept that losing the slight benefit of visual recording is outweighed by the resistance to such recording.

²¹⁹ The revelation of Virginia defense attorney Leslie P. Smith is instructive. He revealed that in conversation with his client to secure his testimony, the prosecutor turned off the tape recording equipment when his client's version of the facts did not mesh with the prosecution's theory of the case and the physical evidence. See Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. TIMES, Jan. 19, 2008, at A1.

²²⁰ Concretely, the interviewer should be required to make a good faith effort to capture the conversation in detail in the original interview notes. Also, destruction of those notes must be prohibited; the claim that they have been incorporated into typed compilations should be specifically rejected by the formal requirements of the rule requiring documentation and preservation of the "first drafts" of these conversations.

requirement. All that I am proposing to add, which I recognize is a major change for many jurisdictions, are the requirements of retention of those notes and their production during discovery when the witness becomes identified as an informant.

North Carolina's newly enacted discovery rule requires the prosecution to "[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."²²¹ The term "file" is broadly defined to include "witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation."²²² It mandates that "[o]ral statements shall be in written or recorded form."²²³ Like the provision enacted earlier that was applicable to post-conviction litigation in North Carolina death penalty cases, this is "full open-file discovery" in the sense that the prosecution is responsible for providing the defense not only with the material that it has in its file, but also with material in law enforcement agency files.²²⁴

Had such provisions been in effect in the Hunt case, the defense, and more importantly Hunt's jury, could have seen the work of the inducements if Williford in his conversation with law enforcement officers in his lawyer's office began with a version that inculpated only Cashwell. The constancy or transformation of his testimony would have been available to support Hunt's guilt in the former situation against defense attack or to win his acquittal in the latter. Clues could also have been gained from the "early drafts" of the testimony of the jailhouse informants, Goodman and Thompson,²²⁵ and from the other alleged involved informant, West. If any of these stories changed significantly, the defense was constitutionally entitled to the alterations under the general obligation of the prosecution derived

²²¹ N.C. GEN. STAT. § 15A-903(a)(1) (2007). For a summary of its provisions, see John Rubin, *2004 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULL., Oct. 2004, at 1, 2–8, available at <http://www.sog.unc.edu/programs/crimlaw/aoj200406.pdf>.

²²² § 15A-903(a)(1).

²²³ *Id.* In *State v. Shannon*, 642 S.E.2d 516, 522–26 (N.C. Ct. App. 2007), the North Carolina Court of Appeals rejected the state's argument for a narrow construction of the term "statement" and held that it applied, *inter alia*, to oral statements made by witnesses to prosecutors, which they are required to take down in written form and produce under the new discovery statute.

²²⁴ In 2007, a provision was added that requires "[u]pon request by the State, a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with [discovery requirements]." 15A-§ 903(c). This statutory mandate gives force to the prosecution's request for cooperation by investigative agency in making their files available to satisfy discovery requirements.

²²⁵ Goodman's first contact came in a conversation set up for other purposes and apparently without any record of the content of that conversation. See *supra* note 66 and accompanying text. An early draft from Thompson, who wrote to the authorities, should have been available, see *supra* note 75 and accompanying text, but any intermediate transformations of his story were apparently not.

from *Brady* to provide evidence it possesses that impeaches its witnesses to the defense.²²⁶

The constitutional entitlement, however, is subservient to the practicality of what documents are created and survive. This means that unless recording is mandated many alterations will disappear under the combined operation of imperfect human memory and adversarial motivation. The system that I advocate here is in many ways a radical change, but in some ways it is only what Hunt and the prosecution deserved from the beginning—an accurate record of the underpinnings of highly incentivized testimony. Tragically, we may never know the truth, and as a result, Hunt, even if innocent, may die in prison because we cannot now know. However, problematic informant testimony in many future cases can be avoided by the reforms proposed here.

In all but a few states, the discovery obligations that were newly added to North Carolina law do not presently exist, and the legislatures may be unwilling to adopt such a major change applicable to all criminal cases.²²⁷ However, the dangers of informant testimony are so great that at least in this limited area a recording requirement should be imposed on both the prosecution and investigative agencies.

I have purposefully chosen a statutory requirement imposed on the prosecutors and investigative authorities rather than a disciplinary rule focused on prosecutors because the latter is inadequate. Bar ethics rules cannot in many situations reach police conduct, which is often the source of abuses, and if investigative agents are outside the reach of the law, misconduct may migrate here and effectively be hidden from both discovery and remedy.

Mechanical recording should be required at the earliest point consistent with practicality. It should be required as soon as a negotiation for cooperation begins, and in terms of clarity, that “trigger” is pulled as soon as either side broaches the subject. However, I propose that a distinction should be made between when the suggestion of cooperation comes from the investigator rather than from the potential informant. For the police simultaneously to suggest that the suspect cooperate and agree to have his or her conversation recorded is likely to threatening. However, the situation changes when the prospective informant broaches the idea of cooperation. Given the importance of mechanical verbatim recording for determining the truth, the indicated willingness of the witness to

²²⁶ The doctrine takes its name from *Brady v. Maryland*, 373 U.S. 83 (1963), and requires disclosure to the defense of evidence favorable to the accused, a duty that encompasses impeachment evidence as well as exculpatory evidence. See *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). *Giglio v. United States*, 405 U.S. 150 (1972), discussed earlier, which requires the prosecutor to reveal information about its inducements to the informant, is a specific application of this general obligation to provide the defense with impeachment evidence.

²²⁷ I have argued elsewhere, see generally Mosteller, *supra* note 2, that full open-file discovery should be adopted by all jurisdictions because of the inadequacy of constitutional and disciplinary remedies.

consider becoming an informant should be sufficient indication of practicality to impose the requirement that the investigative official turn on the recording equipment, that is if it is readily available.²²⁸ This requirement would mean that in virtually every case mechanical recording would be required when the prosecutor is involved in conversations with the informant that either develops the deal or recites the details of the informant's future testimony.

Under this proposal, the conversation in the Hunt case when Williford's lawyer arranged for a meeting with authorities in the lawyer's office and Williford provided some version of events would have been mechanically recorded. We, and more importantly, the jury would have had data to determine the meaning of Williford's cryptic statements regarding this discarded draft of his story.²²⁹

I acknowledge a potentially large gap in the ability to obtain "first drafts" and to discern the development of perfected versions of the informant's story. When an attorney representing the informant is the source of the "first draft" or when that attorney assisted the informant in perfecting the version to be presented to the prosecution, getting such information will often be impossible. The barrier to disclosure is the attorney-client privilege, which in rare situations would be waived,²³⁰ but will generally protect the earlier versions given by the client to his or her lawyer in confidence.

Defense attorney Barry Tarlow argues that lawyers should be free to refuse to represent informers in arranging cooperation agreements. In making that argument, Tarlow describes the defense attorney as being involved in the evolutionary process of the client transforming his or her testimony in response to subtle or overt suggestions by the investigative agent regarding what would be helpful testimony.²³¹ He states that despite what he believes is a widespread practice defense attorneys do not routinely come forward and inform the court

²²⁸ If the equipment is not readily available, the requirement can be excused. This exception is an obvious place for willful avoidance, but given the growing availability of such equipment and the recognition of the need to permit investigations to go forward in unforeseen situations, I believe such an accommodation is reasonable.

²²⁹ See *supra* note 145 and accompany text (stating "I didn't implication [sic] what I should have.").

²³⁰ Although the conversation was not obtained by Hunt's lawyer at his trial, Williford's testimony during the Cashwell trial may well have been the rare instance of waiving attorney-client privilege. Williford continually invoked his lawyer's advice as a justification for his cooperation. He went further during his direct testimony in the Cashwell trial and indicated that he had told his lawyer about the details of the crime, using that statement to buttress the details and truthfulness of the version he gave to the court. See *Cashwell Tr.*, *supra* note 40, at 45-46 (responding to the prosecutor's question whether he discussed his personal knowledge or involvement in the relevant events with any person, Williford testified that he talked to a friend and "I did discuss this with my lawyer"). He thus disclosed not only the fact of a conversation but effectively asserted the general nature of the contents. The attorney-client privilege should have been waived.

²³¹ See Barry Tarlow, *RICO Report: The Moral Conundrum of Representing the Rat*, CHAMPION, Mar. 2006, at 64, 65.

about this disturbing activity.²³² He argues correctly, I believe, that the defense attorney cannot breach the attorney-client privilege as to prior inconsistent statements, and, moreover, even non-privileged revelation would be counter to the client's legal interests.²³³

When the attorney and client meet with the prosecutor and/or investigative agents, the privilege clearly does not exist because the presence of "outsiders" renders the conversation not confidential.²³⁴ Thus, those conversations are not protected and the lawyer may be a witness.²³⁵ Where a client's version has been finalized for presentation to the prosecutor, it would arguably also not be privileged because it is for the purpose of disclosure and therefore not intended to remain confidential. However, the initial version given to the attorney with no thought of disclosure would not be available, as well as some and perhaps all the "rough drafts" that were discarded and were not intended to be disclosed.²³⁶

²³² *Id.* Indeed, Tarlow stated he could find no reported case of such a disclosure. *Id.* Despite the general accuracy of Tarlow's point, there is a recent exception. In 2007, Virginia attorney Leslie P. Smith revealed that he had witnessed the prosecutor's manipulation of his client's story to match the physical evidence and confirm that the co-defendant, Daryl R. Atkins, fired the fatal shots. *See* Liptak, *supra* note 219, at A1. Atkins' identity as the person who fired the fatal shot was critical to securing a death sentence under Virginia law. *Id.* After attorney Smith kept his secret for ten years under the advice he received from the Virginia State Bar when he initially inquired about his ethical duties to his client, Smith inquired again of the Bar, emphasizing that his client's case was over. In a statement that the Bar attorney would only provide orally, this time Smith was authorized to reveal his observations, and Atkins' death sentence was commuted to life in prison. *Id.*

Under the duty of candor to the tribunal, the defense attorney is not generally ethically obligated to disclose information that contradicts representations made in court by a prosecution witness. This is because the defense attorney is not offering the testimony; the prosecutor is. *See* N.C. REVISED RULES OF PROF'L CONDUCT R. 3.3 (2003).

²³³ *See* Tarlow, *supra* note 231, at 65. *See also* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995) (describing the generally precarious position of defense attorneys involved in negotiations between a cooperating witness and the government).

²³⁴ *See* 1 MCCORMICK ON EVIDENCE § 91 (Kenneth S. Broun ed., 6th ed. 2006).

²³⁵ In a recent North Carolina death penalty case that was reversed because of the failure to disclose the full nature of the incentives given to the informant, the defense attorney provided information on the full nature of the promises, although the trial court relied only on matters of record that occurred in federal proceedings involving the informant to grant relief. *See* Mosteller, *supra* note 2, at 276-84 (describing criminal litigation in the Gregory Hoffman case and disciplinary proceedings against the prosecutors in the case and, as to the latter, the important role of an affidavit from the defense attorney for the informant setting out the additional undisclosed promises made to the informant).

²³⁶ *See* 1 MCCORMICK ON EVIDENCE, *supra* note 234, § 91, at 409 (arguing that the privilege ought to protect preliminary conversations and draft wording regarding documents intended to be disclosed in a final form); *In re Stoutamire*, 201 B.R. 592, 595-96 (Bankr. S.D. Ga. 1996) (concluding that the attorney-client privilege covered the initial intake interview even though parts of that communication were intended to go onto a public disclosure, which is not privileged because intended ultimately to be given to a third party). *But see* 1 MCCORMICK ON EVIDENCE, *supra* § 91, at 408-09 (discussing the split in case law on this subject, which includes some cases that would disclose preliminary conversations about, and drafts of, documents that are to be given to third parties).

B. *Public Statement and Examination of the Deal*

One problem that is often encountered where informants testify is the failure of the prosecution to provide full evidence on the nature of the promises made and inducements given, particularly vague promises and inducements. That defect did not arise in the Hunt case; the inducements for the informants were both substantial and made explicit in written form. Because of the difficulty years after a trial of discovering undisclosed inducements and because of the dangers that deals will be hidden or disguised by their imprecision, the law should require that witnesses who are testifying under inducements state on the record the nature and extent of the inducements they have received and expect to receive before they testify.

To help alleviate this all too common problem of a failure of full disclosure, Professor Cassidy has helpfully argued for a written agreement and a hearing at the time of entry of a guilty plea to establish the expectations of leniency of the person entering the plea.²³⁷ I suggest modifying and extending Cassidy's proposal.

The need is illustrated by the conviction and death sentence given to Joseph Hoffman in Union County, North Carolina, which was reversed after a *Giglio* violation was unearthed through the hard work of post-conviction counsel.²³⁸ There, according to the affidavit of defense counsel who was present, a series of explicit promises were made to the witness, but all but one were to be carried out after the informant's testimony and/or by others than the prosecutor who was appearing in court to prosecute Hoffman.²³⁹ Thus, proving the actual promise was difficult, and as Cassidy points out, the fact that a later benefit is bestowed does not necessarily prove that an earlier promise was made.²⁴⁰

Two types of disclosures should be required. The first is a written statement, mandated in all cases where witnesses testify under inducements, signed by the prosecutor and signed and sworn to by the informant that details the promises made and inducements received. The document should recite that it includes all promises and inducements made by any law enforcement personnel, any prosecutor, and any other government agent in all jurisdictions. This comprehensive informant inducement document should pointedly also ask for a listing of both definite promises and suggested possibilities.²⁴¹ It should also state

²³⁷ See *supra* notes 209–11 and accompanying text. ABA Standards for Criminal Justice: Prosecutorial Investigations 2.5(h) (2008), <http://www.abanet.org/crimjust/standards/pinvestigate.html>, states that the prosecutor should reduce a cooperation agreement to writing and should include in it, in addition to “details of all benefits and obligations agreed upon,” “a complete list of any other promises, financial benefits or understandings.”

²³⁸ See Mosteller, *supra* note 2, at 276–84.

²³⁹ *Id.* at 278–81.

²⁴⁰ See Cassidy, *supra* note 200, at 1160–61.

²⁴¹ Requiring this consolidated document could well encourage prosecutor offices across jurisdictions and levels of government to create an information sharing system regarding inducements

that absent extraordinary circumstances, rewards not noted on the form or reflected as possibilities would be assumed to demonstrate that the disclosure was incomplete and therefore false and would therefore likely expose the informant to prosecution.

Second, a pre-testimony hearing should also be mandated where the court would inquire of both the informant under oath and of the prosecution as to the accuracy of the inducement document. The hearing should also include questions designed to expose any uncertainties that the informant might have or additional inducements that might not have been included on the form, which would most likely have been prepared by the prosecutor's office rather than the informer. This proceeding could virtually put an end to the retrospective inquiry of what promises were made, which is often now undertaken years after the events when memories have dimmed and proof of other promises is more likely unavailable.

Together, the inducement form and the hearing regarding the inducements could also help eliminate intentionally hidden promises, and might even do so as a matter of law. I propose that the court conducting the hearing state to the witness and all those present that all promises and inducements whether explicit or implicit must be put on the record because if they are not they will be considered invalid and unenforceable.

With only a little effort, courts could develop a standard inquiry that would focus on frequently omitted inducements. For example, does the informant know of any financial reward and does he or she have expectations of receiving it?; do or did the informant have cases in other courts or jurisdictions that received or may need attention?; have police officers other than the prosecutor discussed helping the informant? The court should also state that if any undisclosed inducements are later discovered the witness may be prosecuted for perjury, and all those who were aware of the failure to disclose may be subject to other forms of discipline. The hearing would establish a firm record, and it would announce to all present to "speak now or forever hold your peace" about promises and inducements. If witnesses were disappointed about the failure of those on the prosecution side to step forward and announce or support publicly what had been suggested, then perhaps the witness would be less complete in his or her anticipated incriminating testimony, and a non-legal remedy would thereby be imposed on the prosecution for its omissions.

given to informants and require law enforcement agencies to participate. *Cf. Mosteller, supra* note 2, at 272–76 (describing how the North Carolina legislature required law enforcement and prosecutorial agencies to make their files available to the State for compliance with the new discovery law that requires full disclosure of not only prosecution files but of other investigative agencies). I cannot ascribe percentages to the different causes for past failures to disclose all inducements, but many of them no doubt arose not from purposeful withholding of information but from a lack of full information in the hands of the prosecutor making representations to the court.

C. An Independent Review Whenever Informant Testimony Provides the Only Direct Evidence of Guilt

The concept of a thorough review when jailhouse informants provide the exclusive evidence for conviction has been advocated by many; indeed, even more is often proposed. When a review is suggested, it is often described in detail.²⁴² What I propose instead is broader and less specific. It is that in every case where informant testimony of whatever type provides the only direct evidence of guilt every prosecutor's office, large or small, have an established procedure for an independent review of the merits of the prosecution.²⁴³

I make the assumption that the effectiveness of this inquiry depends less on the specification of the issues to examine than on the integrity and independence of those conducting it. I have written before about both the unenforceability of the prosecutor's duty to "do justice" and the critical importance of having that duty carried out by conscientious prosecutors.²⁴⁴ Despite the unenforceability of this amorphous responsibility on review, I firmly believe in its great power when exercised by skilled prosecutors acting with good will.

However, neutrality or at least some separation from the competitiveness of the immediate adversary process is required for the review to be meaningful and effective. Noting that "[p]rosecutors who investigate a case are poorly positioned to make a final assessment of guilt because they cannot view the facts impartially,"²⁴⁵ Professor Rachel Barkow argues that roles within a prosecutor's office should be separated with the investigative or prosecutorial duties kept apart from those that are fundamentally adjudicative.²⁴⁶ This proposal shares that basic insight that neutral evaluation is almost inherently incompatible with direct investigative and prosecutorial duties and applies it to the ultimate adjudicative decision within the prosecutor's office—the decision to terminate proceedings against a person targeted for trial. Each prosecutor's office should be required to

²⁴² See *supra* note 182 (discussing the protocol developed for Ontario, Canada).

²⁴³ As with independent prosecutorial review of substantial claims of innocence discussed in the next proposal, I believe that independent review may be appropriate for other discrete, identifiable classes of cases where the dangers of false convictions has been documented, such as uncorroborated single witness identification cases. However, the focus of this article is on the grave dangers of informant-dependent convictions for which often the only meaningful control is careful review by experienced professionals motivated to independently evaluate the evidence.

²⁴⁴ See Mosteller, *supra* note 1, at 1365 (noting the critical importance of the prosecutor's duty to do justice, even though practically unenforceable, as an aspirational goal in our criminal justice system); *id.* at 1372 (recognizing general importance of goal).

²⁴⁵ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 883 (2009). Cf. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117 (1998) (arguing that operating system of criminal justice places prosecutors effectively in an administrative role as they assess evidence and judge criminal responsibility).

²⁴⁶ Barkow, *supra* note 245, at 896.

set up such a mechanism for review by personnel from outside the involved prosecutor's office.

The circumstances in North Carolina illustrate what is clearly possible and what would be important. The state has three natural geographic divisions. Review teams could be organized from senior prosecutors in each region. Of course, the review team for a particular case would not include members of the prosecutor's office being reviewed.

In North Carolina, a senior prosecutor, Tom Keith, of Winston-Salem has been called upon to handle a similar duty. When serious questions were raised about the guilt of James Johnson in a murder in another part of the state, the Administrative Office of the North Carolina Courts asked his office for help, and a senior prosecutor from that office was appointed as special prosecutor.²⁴⁷ That prosecutor determined that the murder charge was not warranted, and it was dismissed.²⁴⁸

A system should be put in place by each state to handle these reviews. Many different designs are possible, such as the regional approach described above, drawing review members for local prosecutions from the state's attorney general's office, or perhaps taking them from a national organization of prosecutors. Independence is critical and so is a willingness to take the possibility of innocence seriously. Selecting the review members from the ranks of seasoned prosecutors may appear to bias the outcome in favor of denying relief to the accused. That is undeniably true. My sense, however, is that going outside the prosecutorial fold would mean that the review would rarely be done voluntarily, and given the virtual absolute control that local prosecutors have on decisions in most jurisdictions, the result of the inquiry must be one that will be respected, which is most likely if the judgment of the group performing the review is readily accepted by the prosecutor who exercises ultimate control over the case.

D. Official Prosecutorial Inquiry into Substantial Claims of Innocence in Cases Dependent on Informants

Early in this essay, I discussed my disappointment with the North Carolina appellate courts in failing to review the Lee Wayne Hunt case generally and

²⁴⁷ See Patrick Wilson, *Accused to Be at Two Local Churches: Review of Disputed Charges Nearly Done*, WINSTON-SALEM J., Dec. 16, 2007, available at 2007 WLNR 24830384. One reason District Attorney Keith may have been selected was his own involvement with the case of an innocent defendant, Darryl Hunt, who was convicted of rape and murder and spent eighteen years in prison before being exonerated. See *supra* note 160 (discussing Hunt case). For years, Keith fought Hunt's appeals until he finally conceded that DNA proved Hunt had not committed the rape and murder of which he had been convicted. See Patrick Wilson, *Justice Deferred?: Advocates Say Projects Looking at Inmate Claims of Innocence Are Meeting Resistance*, WINSTON-SALEM J., Dec. 23, 2007, available at 2007 WLNR 25319624. The experience did not make Keith necessarily easy to persuade, but it did give him the insight that serious mistakes are made. See *id.*

²⁴⁸ See Titan Barksdale, *Murder Charges Dropped in Wilson*, NEWS & OBSERVER (Raleigh), Dec. 20, 2007, at A1.

particularly the failing to give guidance on the dimensions of the attorney-client privilege for deceased clients who conveyed information to their attorneys that exculpated others. I here also reiterate my disappointment with the response of the North Carolina Attorney General's Office to Staples Hughes' revelation.

I can find no evidence that the Attorney General's Office took the possibility of Hunt's innocence seriously.²⁴⁹ For example, it made no effort to meet with Staples Hughes face-to-face to attempt to determine whether his claims were partisan and easily refuted or firmly held and substantial. I cannot find anything in the record that should have kept the Attorney General and his staff from entertaining the possibility that Hunt was innocent of the murders of Roland and Lisa Matthews.

In general, to ensure a careful, critical, and equivalent response across cases, the Attorney General's Office or other authority charged with handling issues that arise in cases after conviction should establish an internal system that looks at cases independently and freshly when substantial claims of innocence are raised. This should be an accepted part of the justice process that would help ensure public confidence and aid in securing a more timely remedy for injustice.

An office with this broad mandate should be established.²⁵⁰ However, the focus of this article is more narrowly on abuses by informants and their correction. My specific proposal concerns informant-dependent convictions and requires substantial allegations of innocence: In cases where the only direct evidence of guilt comes from informants, a prosecutorial agency independent of the office that secured the conviction should be charged with the duty of conducting further investigation into facially credible fact-based claims if those claims would create a reasonable likelihood of innocence if true.

In February 2008, the ABA's House of Delegates approved changes to Rule 3.8 of its Model Rules of Professional Conduct that require the prosecutor to investigate innocence if the prosecutor "knows of new, credible and material evidence creating a reasonable likelihood" of the innocence of a convicted defendant and seek to remedy the conviction when the prosecutor "knows of clear and convincing evidence establishing that" the convicted defendant is innocent.²⁵¹

²⁴⁹ As noted earlier, *see supra* note 101, the Attorney General's Office, rather than local prosecutors, were in charge of the initial prosecution of Hunt. The lack of independence from trial decisions to rely on the informants may have been a reason the reaction to the new evidence from Staples Hughes by the Attorney General's Office did not appear to trigger a vigorous new evaluation of the case but instead produced suggestions of professional impropriety against Hughes, opposition to any consideration of Cashwell's statement, and threatened prosecution for perjury for informant Kenneth West if he were to testify. *See* Transcript of Hearing on Hunt MAR, *supra* note 87, at 66 (defense attorney for West stating that he understood if West testified to anything different than in his plea transcript the State would charge him with perjury, which could make him eligible for enhanced punishment as a habitual offender).

²⁵⁰ *See supra* note 243 (discussing general need for pre-trial mechanism for independent review of other identifiable questionable categories of convictions).

²⁵¹ *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (adopted Feb. 11, 2008).

The proposed disciplinary rule requires action upon the prosecutor acquiring the prescribed levels of actual knowledge of innocence.²⁵² My proposal builds on that ethical duty and adopts the logical next step that the prosecution should have the duty to conduct an inquiry when it does not yet “know” but is presented with facially credible claims that are subject to verification that if established would give rise to an ethical duty to proceed further, e.g., would create a reasonable likelihood of innocence if verified.²⁵³ And under that standard, the information provided by Staples Hughes in his affidavit would clearly require the commencement of the prosecutor’s internal investigation and evaluation rather than an apparently uncritical and certainly unrestrained defense of the conviction.

Mistakes can be made in difficult cases by honorable and talented prosecutors. Establishing a process that allows such mistakes to be recognized and remedied adds to the strength of our system. Independent Innocence Commissions are important. In some cases, however, their role should become unnecessary

²⁵² As Professors Green and Yaroshefsky persuasively argue, the Model Rule should be understood to establish minimum standards both for prosecution investigation and disclosure of information and for prosecutorial efforts to secure the release of an incarcerated defendant. See Bruce A. Green & Ellen Yaroshefsky, *Adjudicating Innocence: Prosecutorial Discretion After Conviction*, 6 OHIO ST. J. CRIM. L. 467 (2009).

²⁵³ The ABA disciplinary rule requires action only when the prosecutor acquires the prescribed level of actual knowledge of innocence. My broader proposal is that those responsible for the post-conviction defense of cases should create an agency that is generally available to examine innocence claims. A pre-existing structure should exist to facilitate the acquisition and evaluation of evidence of innocence when a substantial claim is made or when the prosecution itself discovers some evidence suggesting the possibility of error. The inquiry may be conducted in a broader array of cases confidentially and out of public view, but institutionalizing receptivity to the idea that errors do occur is itself important.

This proposal builds on the ABA ethics rules but would operate in many cases before the ethical duty to proceed to a full investigation would arise and certainly before there is a duty to join the defense in seeking relief. Sufficient proof of innocence to create a prosecutorial duty to act under the new ethics rule may come to the prosecutor in a single discovery or revelation. Also, it may come from sources internal to the prosecution that are assumed, if not worthy of belief, at least worthy of further inquiry. In other cases, the initial revelation or discovery may be incomplete and a process of evaluation and further investigation would be required to meet the ABA’s stated threshold level for investigation. In such cases, I propose that the prosecution has a duty to conduct at least a preliminary inquiry to determine whether claims hold up.

The allegations in Hunt case are in this last category. The major claim came from a source outside the prosecution that might typically be discounted because of presumed adversarial bias. My proposal is to create a structure within the prosecutorial branch that is independent of those who secured the conviction and is receptive to correcting possible injustice when substantial, potentially credible fact-based allegations of innocence are made even if not yet clearly based on credible evidence. This entity should have the duty to look independently and fairly into an allegation such as that from Staples Hughes to judge neutrally whether it creates the required level under the ABA’s proposal to warrant full-scale investigation.

Facially incredible claims can be ignored. I use the term fact-based allegation to connote a claim that is subject to possible verification. Obviously, theoretical claims of innocence are possible in most situations. The prosecution need not conduct an investigation on claims that are unverifiable. On the other hand, formal proof or even a sworn proffer may not be available from witnesses and should not be required.

when a fresh set of prosecutorial eyes look at new facts and rectify an understandable but still unfortunate error in justice.

VII. CONCLUSION

Dangers abound when the target in a specific case is one of the “usual suspects whether the evidence under consideration is “other crimes” evidence, which largely proves character, a co-conspirator statement, or the testimony of an informant. The dangers are particularly great and errors especially difficult to discern when the prosecution has already targeted the defendant and presumed his guilt as the perpetrator because of the suspect’s real or assumed involvement in criminal acts. Informants, both jailhouse informants and those who are more plausibly credible because they are the target’s criminal associates and presumably directly involved in the crime, often provide critical testimony. They are more likely to step forward because the authorities can put pressure on a group of the defendant’s associates who have committed crimes and therefore have exposure to punishment. Even though these individuals may lack the ordinary credibility of the typical witness, in comparison with the accused and testifying in the face of the assumed menace of a crime kingpin, they stand a reasonable chance of being believed despite their obvious incentives to distort the evidence. Moreover, law enforcement officials and prosecutors honorably trying to do their job to protect the community, who would generally follow an ethical path, are more likely to turn a blind eye to cutting ethical corners in cases involving known criminals. Their understandable justification is that they are “doing justice,” but doing so in a real world inhabited by criminals, like the suspect, who do not exhibit such honor.

Those falsely accused in the Duke Lacrosse Case ultimately received the just exoneration they deserved. They were fortunate that circumstances made it difficult for the victim’s erroneous accusation to be buttressed by witnesses who would benefit by aiding a prosecutor who was intent upon securing a conviction. Lee Wayne Hunt’s case provides the counter-point. His situation was ripe for informants to step forward and develop a version of events that not only included fingering the actual murderer, but took along with him the reputed head of a drug distribution ring.

It is time for every jurisdiction, not only those which have experienced disastrous cases of demonstrated injustice involving informants, to act to lessen the problem. I propose four reforms. The first is to create recording and discovery requirements that go beyond ethical mandates and as a matter of statutory law require the production of the initial versions of facts provided by informants to authorities. In order for there to be disclosure at trial, laws must mandate substantially verbatim recording the dates of contact and the content of conversations with informants and require that such information be preserved. Broad discovery provisions regarding such contacts and statements are also necessary. Because much of the work with informants, particularly the early, often

critical contact, is done by investigative authorities rather than prosecutors, disciplinary rules, which can be important supplements, but apply only to prosecutors, are not sufficient. This is the minimum set of requirements that should be imposed. Notes are frequently inadequate and subject to easy omission. Consistent with the needs of effective investigation, mechanical recording should be required of all jailhouse informants who contact the authorities and offer assistance, and mechanical recording should be required for all informant conversations as soon as the informant raises the subject of receiving benefits for cooperation.

A second proposal is to require that a document be prepared and a hearing be held before the informant testifies to establish on the record what inducements the prosecution offered and the informant's expectations. This information is constitutionally required under *Giglio*. The United States Supreme Court has not required soliciting and recording the information beforehand, but legislatures should fulfill their appropriate role as drafters of criminal procedure rules and require such documentation of this constitutionally required information. History has shown that, even with good faith efforts, multiple actors involved in the process lead to inadequate disclosure and false testimony, a situation that cannot be effectively remedied by happenstance discovery by defense lawyers and/or occasional post-conviction proceedings where years after the relevant events an effort is made to establish that failures to disclose inducements occurred.

Third, all prosecutors' offices, whether large or small, should set up a review process for any case where the only direct proof of guilt comes from informant testimony. Good models exist for jurisdictions willing to undertake extensive reviews,²⁵⁴ but demanding such an exacting procedure likely dooms the proposal as unrealistic. In the end, I believe the key to any review is not its detail, but the fact of undertaking a real review by "an independent set of eyes." Requiring a review procedure is not an onerous mandate. It is reasonable to require a real focus on whether guilt is shown independently of the expectation that the charged individual did the crime and the claims of highly motivated informants. If actually conducted, such review should uncover and correct some errors before they result in the conviction of someone innocent of the charged crime.

Finally, when a conviction for which the only direct evidence of guilt comes from informants is called into question by a substantial and potentially verifiable claim of innocence, each state should have an independent process within their attorney general's office to review the case with "an independent set of eyes." Holding this review should be without any negative consequence for the State: it should not in any way be considered by the fact finder as evidence that the prosecution doubted the merits of its case. However, its conduct should be regarded by the public as a reason for confidence that justice has been done in the case.

²⁵⁴ See the description of the Ontario, Canada, procedure discussed in *supra* note 182.

These last two proposals depend on the prosecution honoring its duty to “do justice” and on a careful exercise of discretion. They can be done by prosecutors who are fully committed to the goal of convicting the guilty, but they are done best by prosecutors who are independent of the particular prosecution and the personal commitment to guilt that such involvement often creates. Giving a suspect who is a known bad actor such independent review is asking a great deal, but our commitment to justice must be not only strong but specific. It requires proof of guilt in the particular case and a demonstration of rectitude against the potential of treachery by informants.