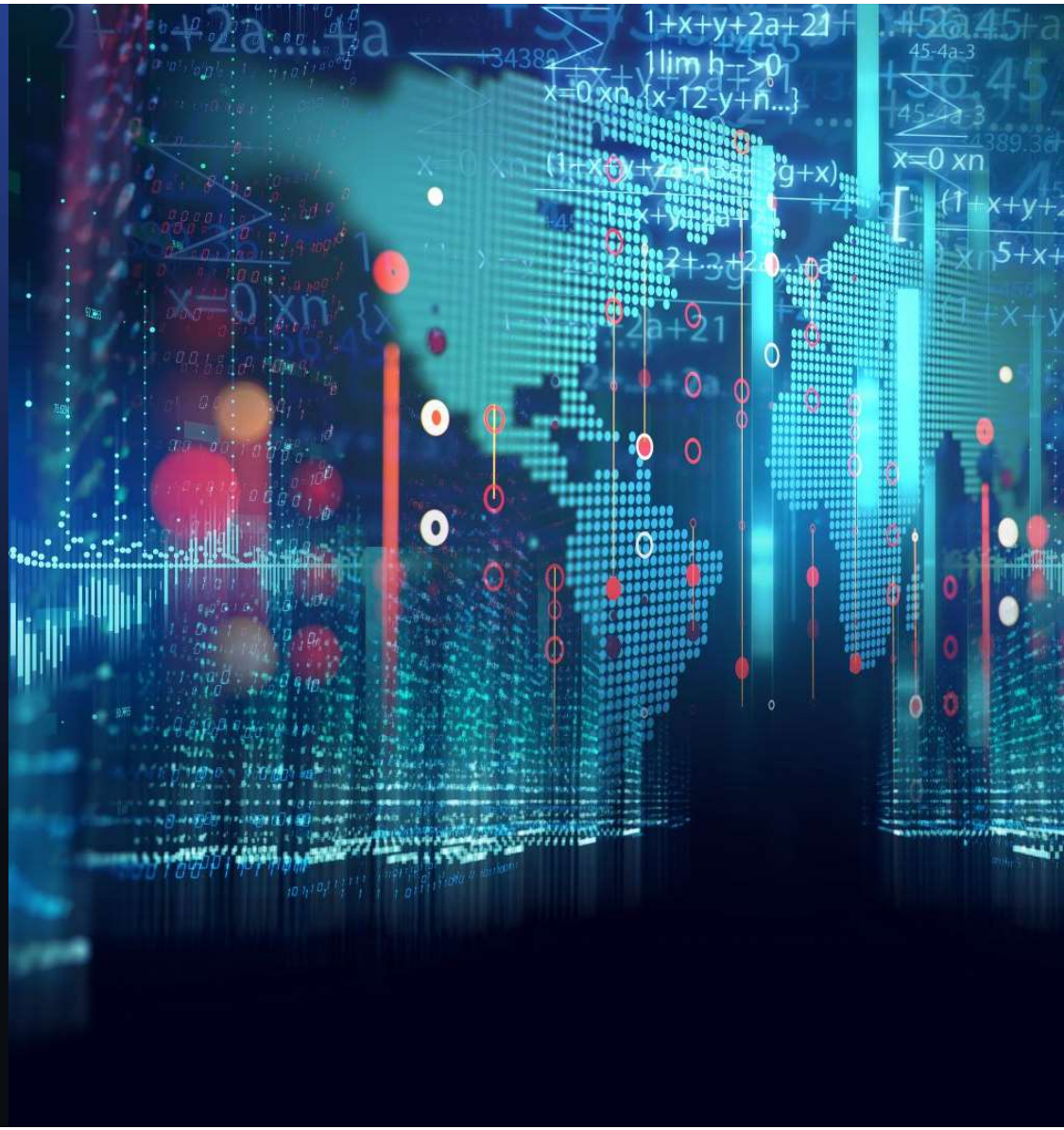
A SNITCH IN TIME DOESN'T MEAN YOU DID THE CRIME

ALLISON BROOK GARREN,

JD, MPH

DECEMBER 17, 2021



"The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money" – *United States v. Singleton*, 144 F. 3d 1343,1347, rev'd en banc, 165 F.3d 1297 (10th Cir. 1999)

Presentation Roadmap

- The pervasive problems of snitches
- Statutes and Case law
- Practice Tips

Hunts Point's Tats Cru graffiti crew to take city to court for covering 'art'

https://www.nydailynews.com/new-york/bronx/hunts-point-tats-cru-graffiti-crew-city-court-covering-art-article-1.318203

Snitches: Incentivized witnesses

- Jailhouse informant
- Cellmate
- Co-Defendant
- Someone with pending charges not in custody, not yet charged
- Someone with DSS involved in their lives – nothing to do with criminal matters
- Confidential Informants
- Cooperating Witnesses

167 exonerations to date where jailhouse informants played a role. – National Registry of Exonerations.

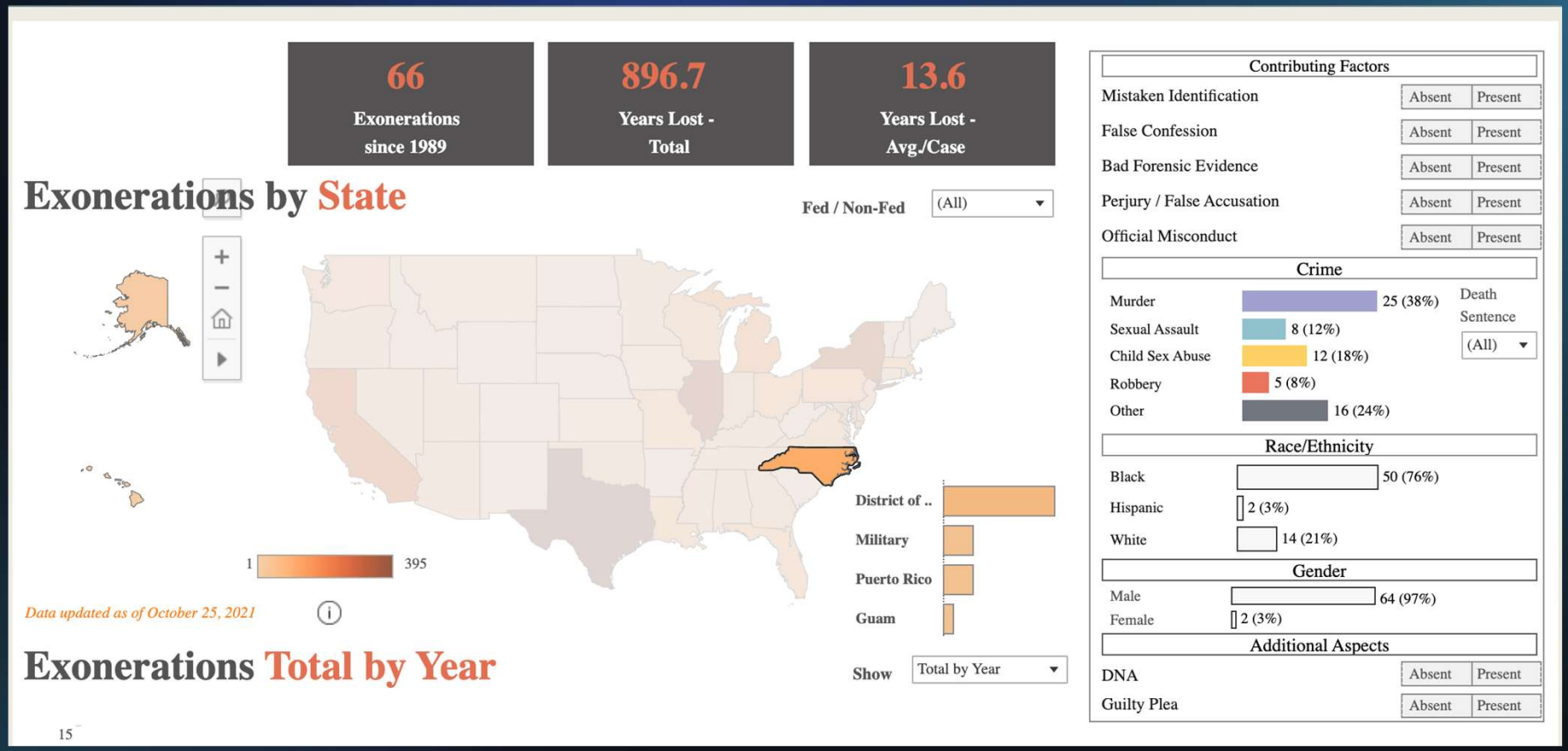
21% of 123 death row exonerations involved jailhouse informants – National Registry of Exonerations

Snitch cases account for 45.9% of Wrongful Convictions.

Jailhouse informant testimony is one of the leading contributing factors of wrongful convictions nationally, playing a role in nearly one in five of the 367 DNA-based exonerated cases.

– INOCENCE PROJECT

https://innocenceproject.org/informing-injustice/



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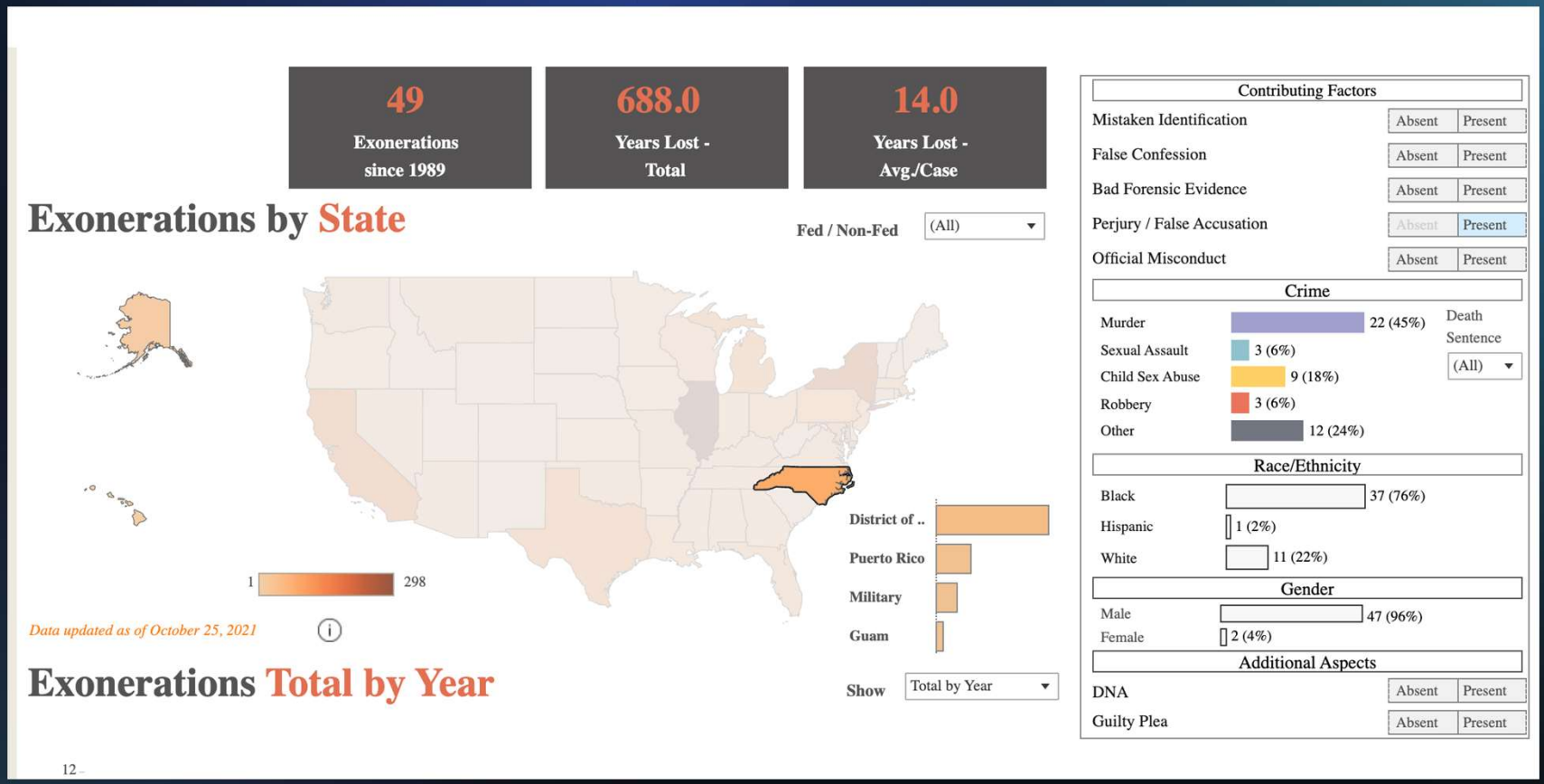

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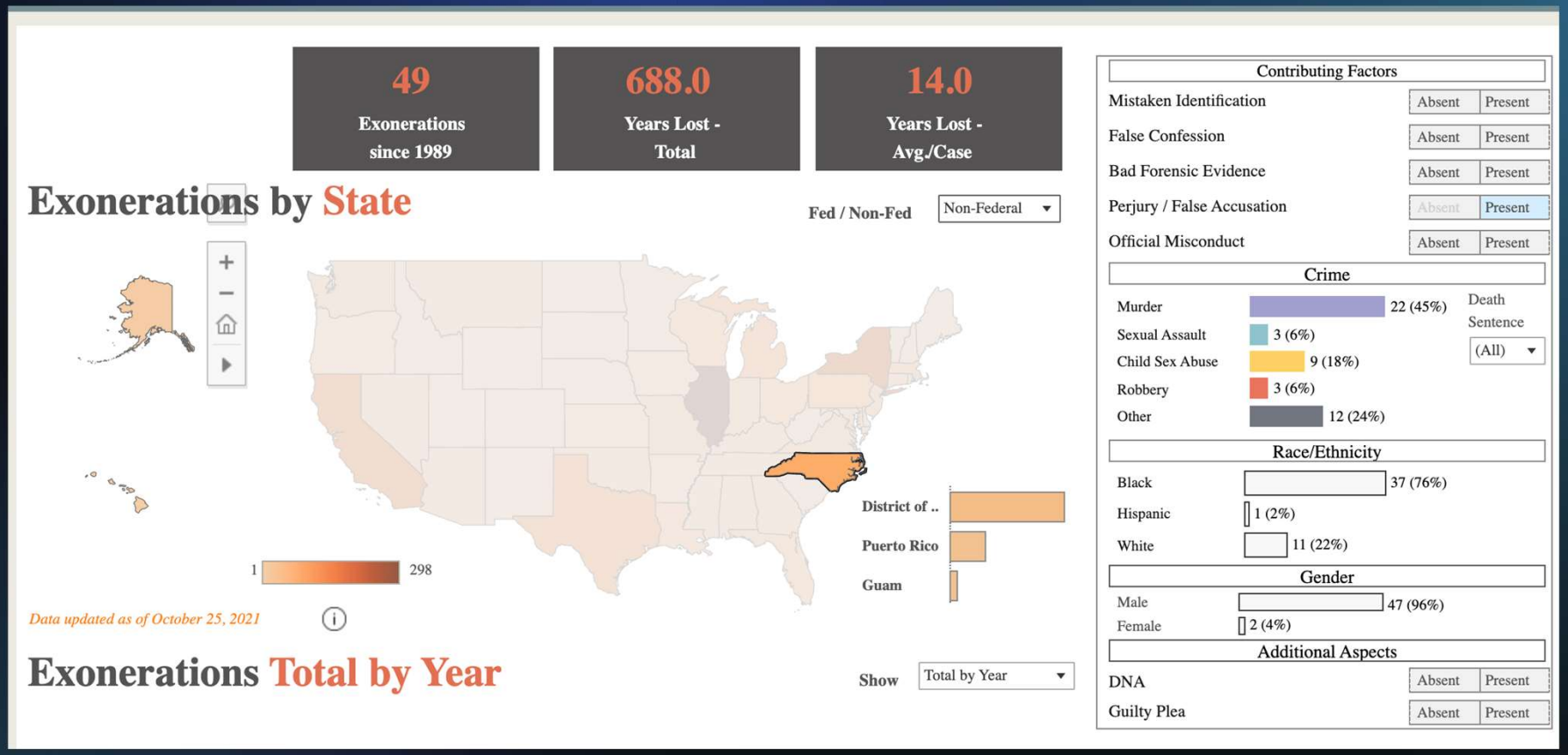


https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx

GREGORY TAYLOR

Other North Carolina Exonerations

Gregory Taylor

In September 1991, the body of a prostitute who had been beaten to death was discovered at the end of a cul-de-sac in Raleigh, North Carolina.

Gregory Taylor and his friend had parked in the cul-de-sac the night before to smoke crack, and had left the truck there overnight after it got stuck in the mud. When Taylor returned to get the truck, he and his friend were arrested for the murder of the woman.

At Taylor's trial, the prosecution presented a lab technician's report to the jury that described a "chemical indication for the presence of blood" in his truck. A prostitute testified that she had seen the victim get into Taylor's vehicle, and a jailhouse snitch testified that Taylor had confessed to him. In April 1993, a jury convicted Taylor of murder and he was sentenced to life in prison.

Several years after Taylor's conviction, another inmate confessed to the murder. It was also discovered that the prostitute who had testified against Taylor was on drugs when she claimed to have seen the victim get into Taylor's car, and couldn't remember what the driver looked like.

Additionally, the wording in the lab technician's report is the description analysts are required to give when an initial test indicates the presence of blood, but in this case, subsequent DNA testing showed that no blood was present. Because the author of the report did not testify, and did not tell the prosecution about the negative results, the jury did not hear the results of the subsequent tests.

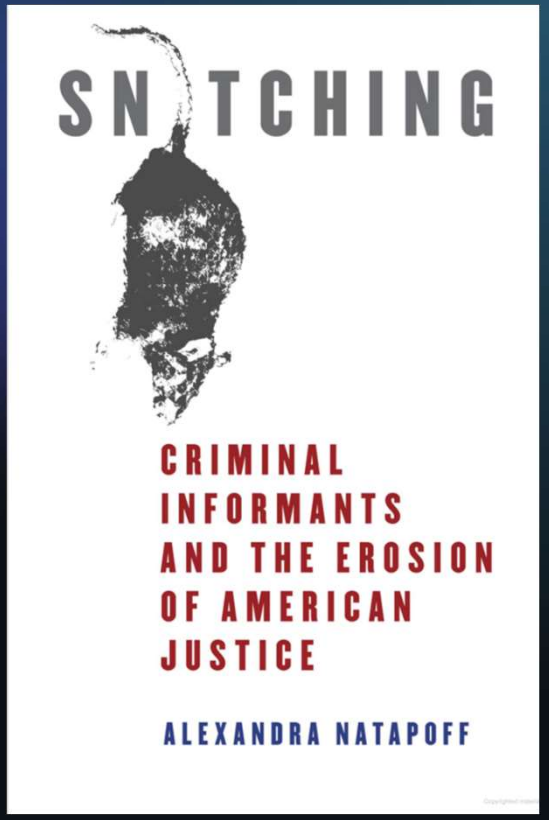
In 2009, the North Carolina Innocence Inquiry Commission held a hearing on Taylor's case, and the eight member commission unanimously concluded that Taylor was innocent. In February 2010, after a review by a three judge panel, Taylor's conviction was overturned, and in May 2010, he

State:	North Carolina
County:	Wake
Most Serious Crime:	Murder
Additional Convictions:	
Reported Crime Date:	1991
Convicted:	1993
Exonerated:	2010
Sentence:	Life
Race/Ethnicity:	White
Sex:	Male
Age at the date of reported crime:	28
Contributing Factors:	False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct
Did DNA evidence contribute to the	Yes*

The havoc of Derrick Megress

"In November 2000, a federally funded drug task force swept through the town arresting twenty-eight people, mostly African American residents of the Columbus Village public housing project. Megress, a suicidal former drug dealer on probation facing new burglary charges, had cut a deal with the local prosecutor. If he produced at least twenty arrests, Megress's new charges would be dropped. He'd also earn one hundred dollars for every person he helped bust."

- Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice



Substantial Assistance: The sentencing judge may impose a prison term less than the applicable mandatory minimum or suspend the sentence and place the defendant on probation **if a defendant has provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, coconspirators, or principals**. The sentencing judge must find that the defendant provided substantial assistance on the record and is not required to provide sentencing relief.

North Carolina Mandatory Minimums

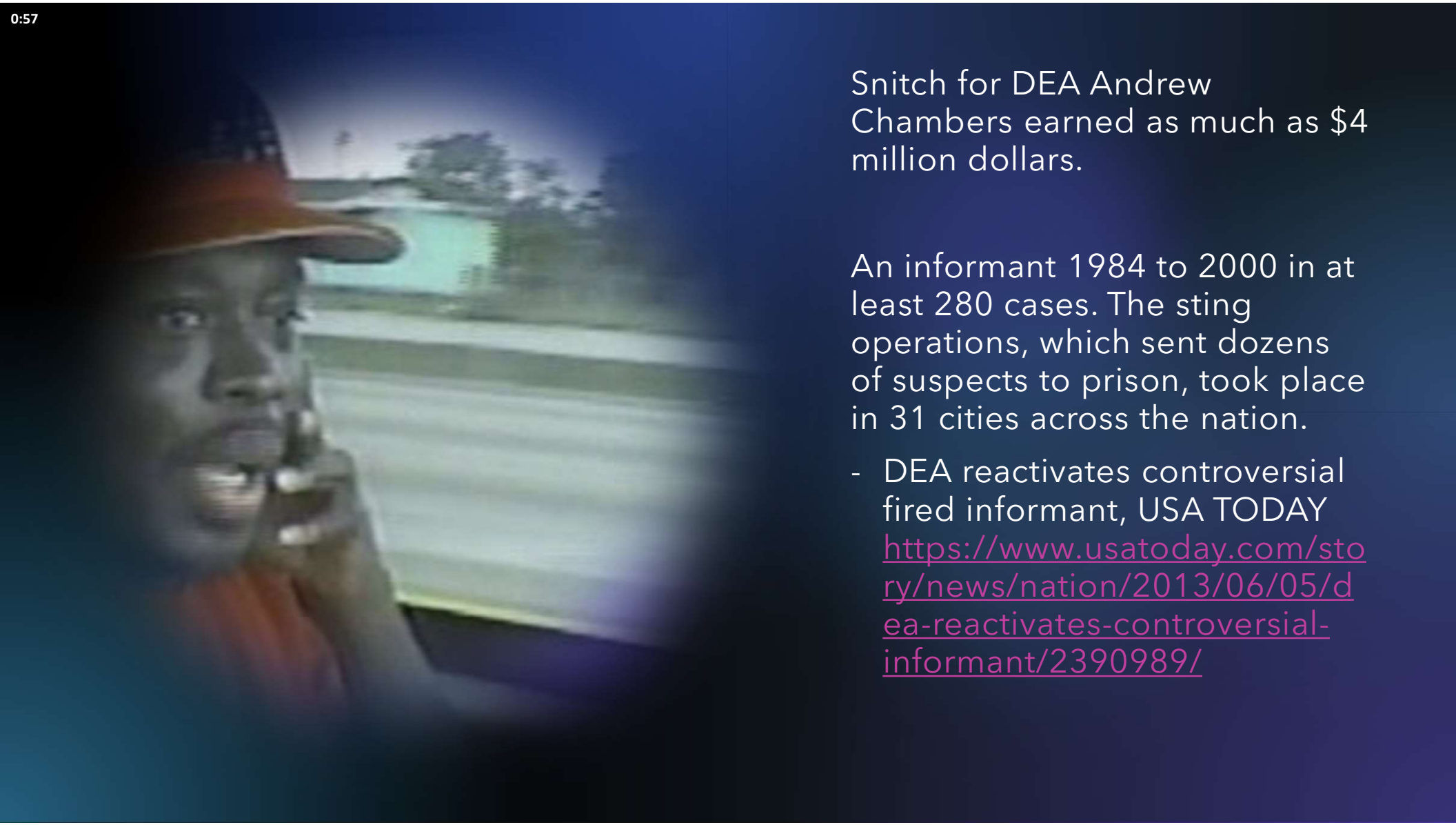
Mandatory Minimums: Under NC G.S. 90-95 (h), people convicted of drug trafficking offenses are subject to mandatory minimum sentences ranging from 25 months to 225 months depending on drug type and drug weight. These mandatory minimums cannot be run concurrently with other sentences and are not eligible for parole, probation, or suspension of sentence. The table below lists the current mandatory minimums under NC G.S. 90-90(h) by weight and drug. Sentences apply to anyone who sells, manufactures, delivers, or possess the specified weight and drug and anyone who is convicted of a conspiracy to commit these acts.

Drug	Weight	Mandatory Minimum (Felony Class)
Marijuana	10 pounds to < 50 pounds	25 months (Class H)
	50 pounds to < 2,000 pounds	35 months (Class G)
	2,000 pounds to < 10,000 pounds	70 months (Class F)
	10,000 pounds or more	175 months (Class D)
Synthetic Cannabanoid	50 to < 250 dosage units[1]	25 months (Class H)
	250 to < 1,250 dosage units	35 months (Class G)
	1,250 to < 3,750 dosage units	70 months (Class F)
	3,750 dosage units or more	175 months (Class D)
Methaqualone	1,000 to < 5,000 dosage units	35 months (Class G)
	5,000 to < 10,000 dosage units	70 months (Class F)
	10,000 dosage units or more	175 months (Class D)
Cocaine	28 to < 200 grams	35 months (Class G)
	200 to < 400 grams	70 months (Class F)
	400 grams or more	175 months (Class D)
Methamphetamine	28 to < 200 grams	70 months (Class F)
	200 to < 400 grams	90 months (Class E)
	400 grams or more	225 months (Class C)

"While certain politicians and prosecutors, both liberal and conservative, scramble to outdo each other in pandering to public hysteria about crime -- by promoting the return of barbaric and inhumane punishment and by championing the erosion of civil liberties -- a segment of our society is actually profiting quite nicely from the war on crime, and it is not the innocent victims.

So who benefits? Ironically, it is the manipulating sociopathic crooks who betray their fellow human beings .."

Charles Sevilla Introduction, The Updated Rat Manual
http://www.charlessevilla.com/_pdf/RATmanual.pdf



Snitch for DEA Andrew Chambers earned as much as $4 million dollars.

An informant 1984 to 2000 in at least 280 cases. The sting operations, which sent dozens of suspects to prison, took place in 31 cities across the nation.

- DEA reactivates controversial fired informant, USA TODAY https://www.usatoday.com/story/news/nation/2013/06/05/dea-reactivates-controversial-informant/2390989/

“Without informants, we’re nothing.”

Clarence Kelley, FBI Director

(1973-1978)

TEXAS BILL WOULD BAN SNITCH TESTIMONY IN DEATH PENALTY CASES

Nearly 50 percent of people wrongfully convicted and sentenced to death were prosecuted with the help of informants. One Texas lawmaker is trying to end this.

Jordan Smith

May 6 2015, 3:30 p.m.

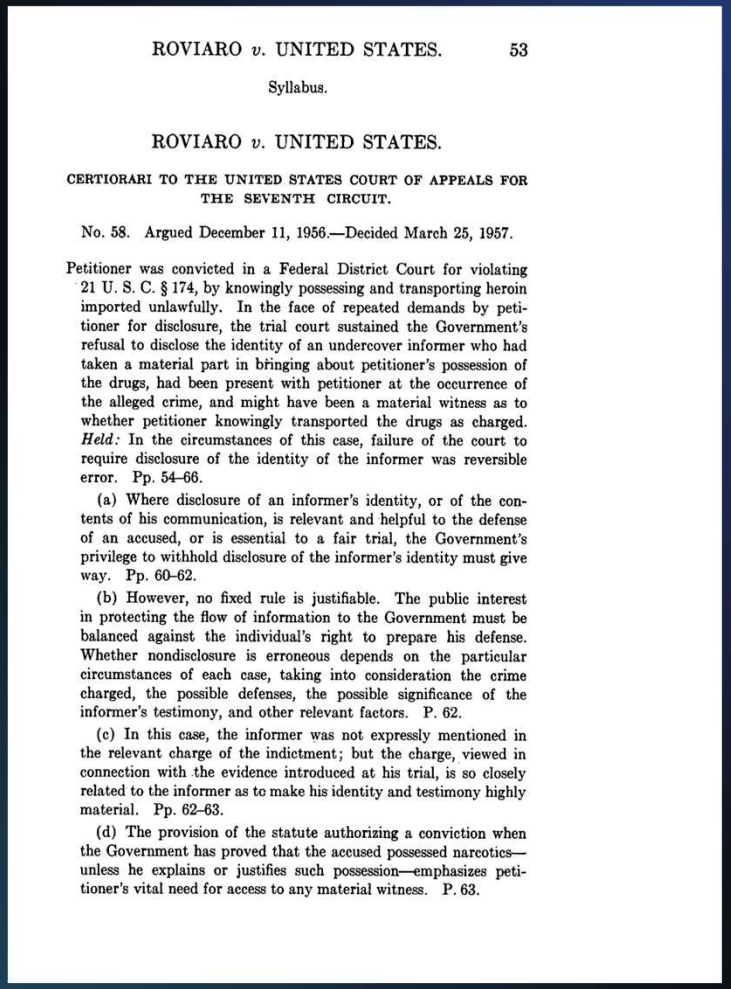
Last year, journalist Maurice Possley revealed a damning new development in the tragic and notorious case of Cameron Todd Willingham, executed by the state of Texas and almost certainly innocent. Convicted of setting a 1991 fire that killed his three young daughters — Amber, two, and her one-year-old twin sisters, Kameron and Karmon — Willingham swore that the blaze had been an accident. He described how he'd struggled to save his children but was unable to do so; the girls died of smoke inhalation. Willingham was killed by lethal injection in February 2004.

"state's case against Willingham was built on a foundation of outdated arson "science" that was debunked long ago. But that's not the only evidence that sent him to death row. The prosecution's case also relied on testimony from a jailhouse informant named Johnny Webb, who claimed that Willingham had confessed to him while the two were confined at the county jail. "

https://theintercept.com/2015/05/06/texas-lawmaker-ban-snitch-testimony-death-penalty-cases/

Unmasking the Informant

Seminal Case



ROVIARO *v.* UNITED STATES. 53

Syllabus.

ROVIARO *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 58. Argued December 11, 1956.—Decided March 25, 1957.

Petitioner was convicted in a Federal District Court for violating 21 U. S. C. § 174, by knowingly possessing and transporting heroin imported unlawfully. In the face of repeated demands by petitioner for disclosure, the trial court sustained the Government's refusal to disclose the identity of an undercover informer who had taken a material part in bringing about petitioner's possession of the drugs, had been present with petitioner at the occurrence of the alleged crime, and might have been a material witness as to whether petitioner knowingly transported the drugs as charged. *Held:* In the circumstances of this case, failure of the court to require disclosure of the identity of the informer was reversible error. Pp. 54–66.

(a) Where disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair trial, the Government's privilege to withhold disclosure of the informer's identity must give way. Pp. 60–62.

(b) However, no fixed rule is justifiable. The public interest in protecting the flow of information to the Government must be balanced against the individual's right to prepare his defense. Whether nondisclosure is erroneous depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. P. 62.

(c) In this case, the informer was not expressly mentioned in the relevant charge of the indictment; but the charge, viewed in connection with the evidence introduced at his trial, is so closely related to the informer as to make his identity and testimony highly material. Pp. 62–63.

(d) The provision of the statute authorizing a conviction when the Government has proved that the accused possessed narcotics—unless he explains or justifies such possession—emphasizes petitioner's vital need for access to any material witness. P. 63.

Roviaro v. United States
353 U.S. 53 (1957)

Question:

In a prosecution for trafficking heroin, may the government conceal informant John Doe's identity if he helped to set up the sale of heroin and was present during the sale?

Procedural History

- The U.S. Court of Appeals, Seventh Circuit, affirmed the ruling. Judge Walter Lindley, writing for a unanimous court, held **that because John Doe was not a participant in Roviaro's actual possession of heroin, Roviaro is not entitled to full disclosure of his identity.**

FACTS: Trees, Cadillacs & Pontiacs

Roviaro v. United States
353 U.S. *53* (1957)

- Federal agent trunk of Cadillac with informant
- Sees Roviaro get out of Pontiac
- Drive to another location
- Roviaro gets package from behind a tree
- Package is heroin

- **Question:** In a prosecution for trafficking heroin, may the government conceal informant John Doe's identity if he helped to set up the sale of heroin and was present during the sale?

NO.

Conclusion

6–1 DECISION FOR ROVIARO

MAJORITY OPINION BY HAROLD BURTON

ANALYSIS

Harold Burton

“Justice Harold Burton, writing for a majority in a 6-1 decision, held that Roviaro's interest in preparing his defense outweighed the public interest in protecting John Doe's identity. The Court focused on the fundamental requirements of fairness, reasoning that where the identity of an informant or the contents of an informant's communications are relevant and helpful to a defense, the government's privilege must give way. Justice Burton also noted that the charge in question required more than mere possession of heroin; Roviaro had the burden of justifying this possession, which underlined his need for access to material witnesses. John Doe was his only material witness.” – OYEZ

https://www.oyez.org/cases/1956/58

Balancing of interests – in other words:

- When an informant is a material witness to a crime being tried, his identity must be disclosed under certain circumstances to the defendant when that knowledge would be useful to his or her defense.

ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA, 481(4th ed. 2011),

McCray v. Illinois 386 U.S. 300 (1967)

DISTINGUISHES FROM ROVIARO

“The *Roviaro* case involved the informer's privilege not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial itself, where the issue was the fundamental one of innocence or guilt…. the informer had been an active participant in the crime. He had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged.”

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Statutory Basis

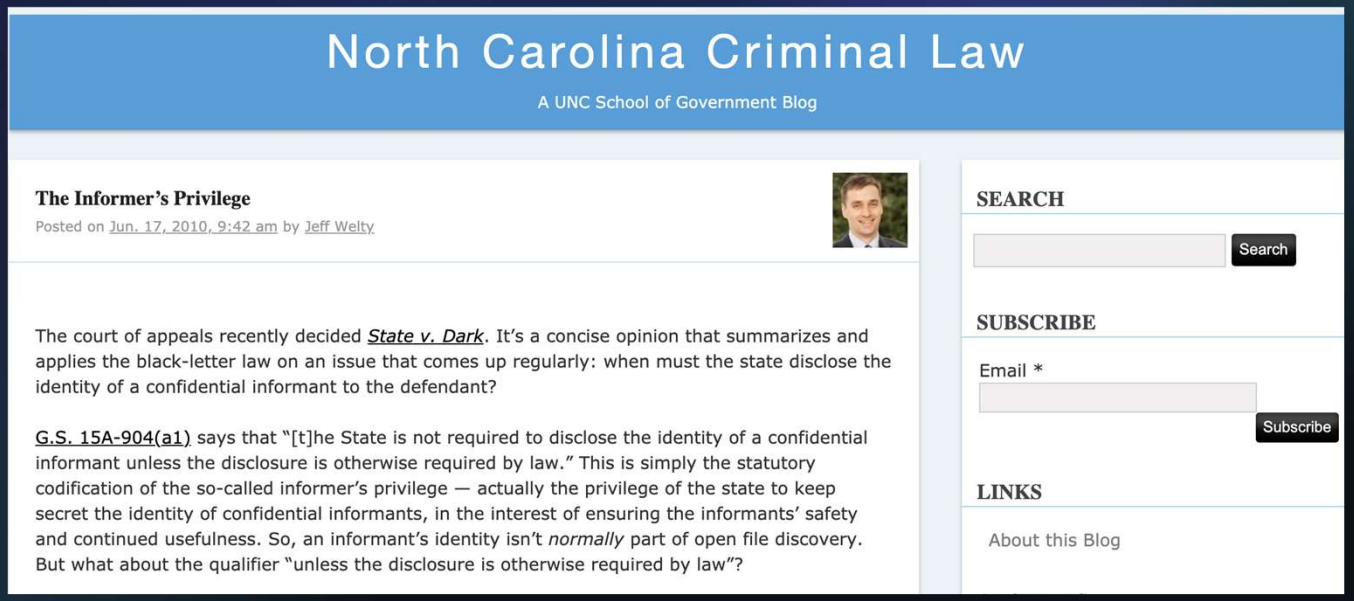
- **§ 15A-904. Disclosure by the State - Certain information not subject to disclosure.**
- (a1) The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.
- (c) This section shall have no effect on the State's duty to comply with federal or State constitutional disclosure requirements. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 2004-154, s. 5; 2007-377, s. 2; 2011-250, s. 2.)

Benchbook

- Law Enforcement Officer-Informant Privilege. The law enforcement-informant privilege provides that under certain circumstances the State is not required to reveal a confidential informant's identity. For a discussion of this issue, see ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA, 481-82, 564-65 (4th ed. 2011), and 2015 Cumulative Supplement, 80. **Note that under criminal discovery provisions, the State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law. See G.S. 15A-904(a1).** The duty to disclose is discussed in the reference cited above.

North Carolina Case Law

- State v. Dark, 204 N.C. App. 591 (2010):



North Carolina Criminal Law

A UNC School of Government Blog

The Informer's Privilege

Posted on Jun. 17, 2010, 9:42 am by Jeff Welty

The court of appeals recently decided *State v. Dark*. It's a concise opinion that summarizes and applies the black-letter law on an issue that comes up regularly: when must the state disclose the identity of a confidential informant to the defendant?

G.S. 15A-904(a1) says that "[t]he State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law." This is simply the statutory codification of the so-called informer's privilege — actually the privilege of the state to keep secret the identity of confidential informants, in the interest of ensuring the informants' safety and continued usefulness. So, an informant's identity isn't *normally* part of open file discovery. But what about the qualifier "unless the disclosure is otherwise required by law"?

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About this Blog

State v. Dark

- Defendant indicted for possession with intent to sell or deliver and sell deliver cocaine
- Moved to disclose CI

Facts showed:

- In Granville County, Henderson police officer sets up possible drug deal with use of confidential informant
- Informant makes call to Defendant, Defendant says meet me in this specific parking lot.
- Officer and CI drive to specific parking lot
- Officer gives money, takes drugs out driver window, with CI sitting in passenger
- Officer picks Defendant out of line up, had audio equipment, IDs Defendant's voice

MOTION TO DISCLOSE: DENIED

State v. Dark N.C.

- "However, before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981).

State v. Dark N.C.

"Two factors weighing in favor of disclosure are:

(1) the informer was an actual participant in the crime compared to a mere informant, and

(2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify." *Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520 (citations omitted).

Factors which weigh against disclosure include "whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt." *Id.* at 86, 325 S.E.2d at 520-21.

State v. Dark N.C.

“In this case, only the informant's presence and role in arranging the purchase weigh in favor of disclosure. We agree with the trial court's finding that "there has been no forecast as to how the identity of the confidential informant could provide useful information for the defendant in order to clarify any contradiction between the State's evidence and the defendant's denial."

Moreover, testimony by the informant was not admitted at trial; instead, the testimony of the police officer and the narcotics agent established defendant's guilt. Defendant has not carried his burden of showing that the facts of this case mandate disclosure of the informant's identity. Accordingly, the trial court did not err in denying defendant's motion for disclosure.”

Subsequent Cases

- **State v. Avent, 222 N.C. App. 147 (2012)**
- **State v. Best, 236 N.C. App. 505 (2014)**

State v. Broom, 274 N.C. App. 249 (2020)

- CI arranges transaction to buy cocaine from a person known who would get the drugs from Defendant's barber shop and they would sell it together.
- Defendant and third person get in car, Defendant stopped for speeding in a construction zone.
- Officers smell a "faint odor of marijuana" – K-9 sniff ensues
- Kilogram of cocaine found, marijuana shake, 2 cell phones
- Defendant waives Miranda Rights, admits to having cocaine and firearms at this house
- Search warrants shows items used to manufacture and distribute narcotics
- **Motion to disclose denied**

State v. Moctezuma
141 N.C. App. 90 (2000)

- Court of Appeals found that trial court erred in closing the hearing on this issue of identity to defendant.
- The judge appears to have literally CLOSED the hearing to be informed of the identity of confidential informant and made no findings.

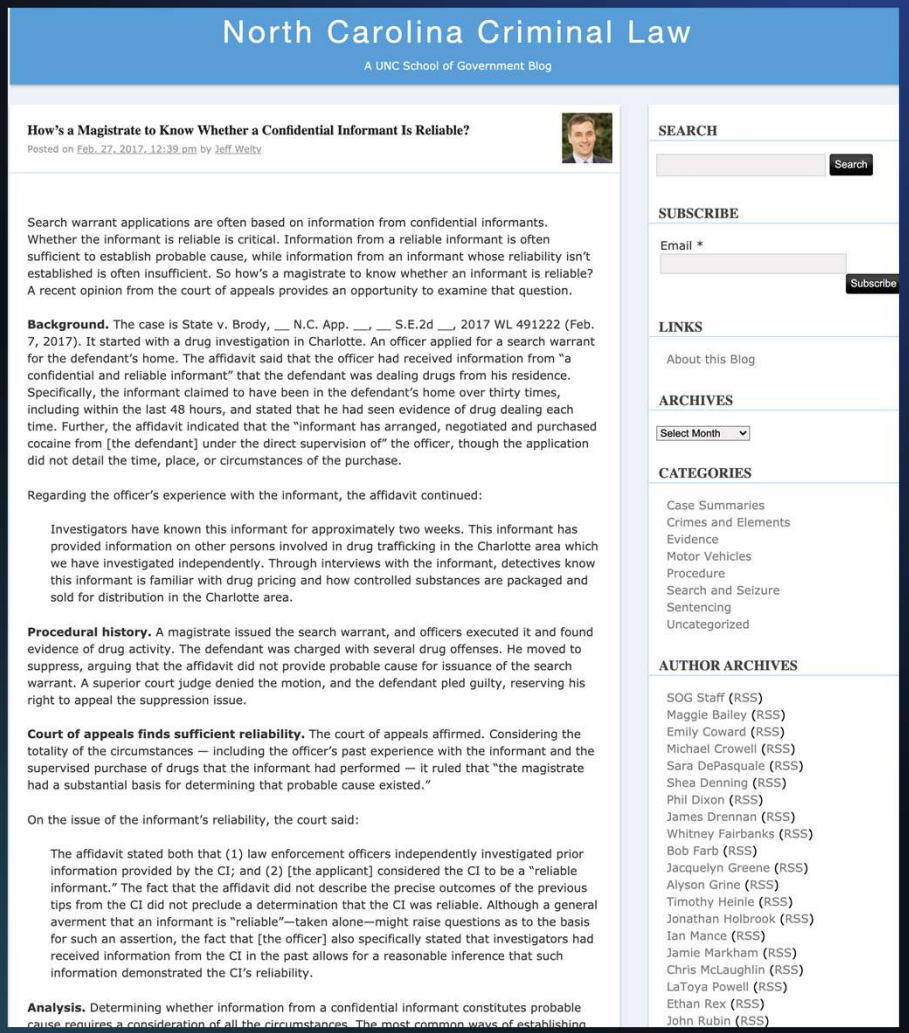
State v. McEachern
114 N.C. App. 218 (1994)

- Pretrial hearing on whether informant ID should be disclosed.
- State alleges a CI told an officer that he saw cocaine in the defendant's trailer home and identified the man as the Defendant.
- Subsequently, CI made buy from trailer, officers execute search warrant.
- Defendant testifies, let nephew use his trailer for a party and was out of town on day CI alleges he saw cocaine, and had been out of town until right before officers arrived at his house to execute serach warrant.
- Judge found CI was material and necessary witness for defense to corroborate alibi.
- Motion to disclose identity granted.
- **State refused to produce CI, case dismissed.**

REVISIT THE INFORMANT DURING INVESTIGATORY STAGE

- "The *Roviaro* case involved the informer's privilege not at a preliminary hearing to determine probable cause for an arrest or search, but at the trial itself, where the issue was the fundamental one of innocence or guilt.... the informer had been an active participant in the crime. He had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged."

McCray v. Illinois 386 U.S. 300 (1967)



North Carolina Criminal Law

A UNC School of Government Blog

How's a Magistrate to Know Whether a Confidential Informant Is Reliable?

Posted on Feb. 27, 2017, 12:39 pm by Jeff Welty

Search warrant applications are often based on information from confidential informants. Whether the informant is reliable is critical. Information from a reliable informant is often sufficient to establish probable cause, while information from an informant whose reliability isn't established is often insufficient. So how's a magistrate to know whether an informant is reliable? A recent opinion from the court of appeals provides an opportunity to examine that question.

Background. The case is State v. Brody, __ N.C. App. __, __ S.E.2d __, 2017 WL 491222 (Feb. 7, 2017). It started with a drug investigation in Charlotte. An officer applied for a search warrant for the defendant's home. The affidavit said that the officer had received information from "a confidential and reliable informant" that the defendant was dealing drugs from his residence. Specifically, the informant claimed to have been in the defendant's home over thirty times, including within the last 48 hours, and stated that he had seen evidence of drug dealing each time. Further, the affidavit indicated that the "informant has arranged, negotiated and purchased cocaine from [the defendant] under the direct supervision of" the officer, though the application did not detail the time, place, or circumstances of the purchase.

Regarding the officer's experience with the informant, the affidavit continued:

> Investigators have known this informant for approximately two weeks. This informant has provided information on other persons involved in drug trafficking in the Charlotte area which we have investigated independently. Through interviews with the informant, detectives know this informant is familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area.

Procedural history. A magistrate issued the search warrant, and officers executed it and found evidence of drug activity. The defendant was charged with several drug offenses. He moved to suppress, arguing that the affidavit did not provide probable cause for issuance of the search warrant. A superior court judge denied the motion, and the defendant pled guilty, reserving his right to appeal the suppression issue.

Court of appeals finds sufficient reliability. The court of appeals affirmed. Considering the totality of the circumstances — including the officer's past experience with the informant and the supervised purchase of drugs that the informant had performed — it ruled that "the magistrate had a substantial basis for determining that probable cause existed."

On the issue of the informant's reliability, the court said:

> The affidavit stated both that (1) law enforcement officers independently investigated prior information provided by the CI; and (2) [the applicant] considered the CI to be a "reliable informant." The fact that the affidavit did not describe the precise outcomes of the previous tips from the CI did not preclude a determination that the CI was reliable. Although a general averment that an informant is "reliable"—taken alone—might raise questions as to the basis for such an assertion, the fact that [the officer] also specifically stated that investigators had received information from the CI in the past allows for a reasonable inference that such information demonstrated the CI's reliability.

Analysis. Determining whether information from a confidential informant constitutes probable cause requires a consideration of all the circumstances. The most common ways of establishing

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Informants and Search Warrants

State v. Brody 251 N.C. 812 (2017)

- **Procedural history.** A magistrate issued the search warrant.
- Officers executed it and found evidence of drug activity.
- The defendant was charged drug offenses.
- Defendant files Motion to Suppress, arguing affidavit did not provide probable cause .
- Motion denied in Superior Court, defendant pled guilty, reserving his right to appeal the suppression issue.

Court of appeals finds sufficient reliability.

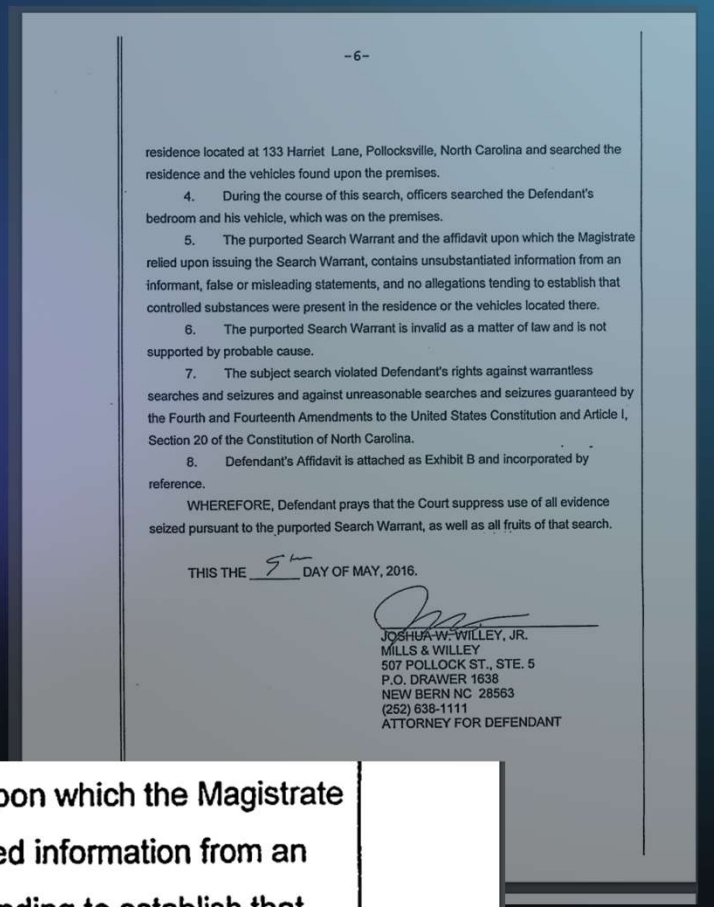
State v. Brody 251 N.C. 812 (2017)

From the Officer's Affidavit in Search Warrant:

"Investigators have known this informant for approximately two weeks. This informant has provided information on other persons involved in drug trafficking in the Charlotte area which we have investigated independently. Through interviews with the informant, detectives know this informant is familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area."

State v. Moore
275 N.C. App. 302 (2020)

- Informant reliability in Search Warrant at issue.
- Within search warrant, officer indicates a number of buys (4) made at at residence
- Searches residence and finds narcotics
- Defendant files Motion to Suppress/Frank's Motion alleging that search warrant lacked probable cause
- Warrant relied solely on officer affidavit



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residence located at 133 Harriet Lane, Pollocksville, North Carolina and searched the residence and the vehicles found upon the premises.

4. During the course of this search, officers searched the Defendant's bedroom and his vehicle, which was on the premises.

5. The purported Search Warrant and the affidavit upon which the Magistrate relied upon issuing the Search Warrant, contains unsubstantiated information from an informant, false or misleading statements, and no allegations tending to establish that controlled substances were present in the residence or the vehicles located there.

6. The purported Search Warrant is invalid as a matter of law and is not supported by probable cause.

7. The subject search violated Defendant's rights against warrantless searches and seizures and against unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the Constitution of North Carolina.

8. Defendant's Affidavit is attached as Exhibit B and incorporated by reference.

WHEREFORE, Defendant prays that the Court suppress use of all evidence seized pursuant to the purported Search Warrant, as well as all fruits of that search.

THIS THE 5th DAY OF MAY, 2016.

JOSHUA W. WILLEY, JR.
MILLS & WILLEY
507 POLLOCK ST., STE. 5
P.O. DRAWER 1638
NEW BERN NC 28563
(252) 638-1111
ATTORNEY FOR DEFENDANT

5. The purported Search Warrant and the affidavit upon which the Magistrate relied upon issuing the Search Warrant, contains unsubstantiated information from an informant, false or misleading statements, and no allegations tending to establish that controlled substances were present in the residence or the vehicles located there.

https://appellate.nccourts.org/opinions/?c=2&pdf=3945

7500

In the Matter of:
133 Harriett Ln. Pollocksville

STATEMENT OF PROBABLE CAUSE

(1) This investigation is part of a continuing and ongoing narcotics investigation that involves the possibility of further undiscovered illegal narcotics and/or other narcotics paraphernalia or contraband in the aforementioned home located at 133 Harriett Ln. Pollocksville

(2) The source of information is coming from a ongoing investigation that leads investigators with the Jones County Sheriff's Office to introduce an informant that would gain the trust of the subjects living at the home and make controlled buys of illegal narcotics from this location.

(3) On 10-09-2014, investigators met with an Informant, who stated that he was able to make buys from a subject by the name of "Matt", who lives at this location on Harriett Ln. And stated that he is known for dealing powder cocaine. I had the informant to set up a buy from this subject for a gram of cocaine. That day we were able to buy with no problem.

(4) On 10-21-2014, investigators met with the informant to make a second buy from the same location, that time we were able to set up and watch the suspect known as "Matt" come out of the house and meet with the informant and return back to the home afterwards.

(5) On 11-07-2014, investigators met with the informant to make a third buy from this location same as the last with no problems; subject known as "Matt" came from inside the home and made the deal then returned back inside the residence.

Sworn and subscribed before me this _25_ day of November 2014

Superior Court Judge/Magistrate

Affiant

State of North Carolina
County of JONES

In the General Court of Justice
District Court Division

In the Matter of:
133 Harriett Ln. Pollocksville

STATEMENT OF PROBABLE CAUSE CONTINUED

(6) On 11-25-2014, investigators met with the informant to make a forth buy from this location. At that time the suspect "Matt", made it clear that he was re-upping (getting more drugs) and told the informant that he would be good for whatever he needed.

(7) Based off of this information in this investigation, I am requesting this search warrant of this suspect's property for any and all narcotics and cash proceeds . Due to my training and experience, I have reason to believe that illegal narcotics, narcotic / drug paraphernalia, large amounts of US Currency, are being kept and sold from this location .

(8) Based on all of the findings of my investigation, I am able to show that the suspect listed above is in direct violation of the NC controlled substance act. By keeping and selling illegal narcotics at the residence located at 133 Harriett Ln. Pollocksville

Sworn and subscribed before me this _25_ day of November 2014

Superior Court Judge/Magistrate

Affiant

State v. Moore

confidential informant "has proven reliable and credible in the past . . . are the irreducible minimum on which a warrant ma

omitted).

The allegations in the affidavit do not sup

"fair probability that contraband or evidence of

Ln. *See McCoy*, 100 N.C. App. at 576, 397 S.E.

warrant must be voided and the fruits of the sea

probable cause was lacking on the face of the a

323, 502 S.E.2d at 884 (quoting *Franks*, 438 U.S

III. Conclusion

The trial court erred by denying Defendant's motion to suppress, where Corey acted in bad faith by presenting the magistrate with false and misleading information and no probable cause existed to issue the search warrant. We reverse the trial court's order denying Defendant's motion to suppress and reverse the judgment entered upon Defendant's guilty plea.

REVERSED.

Chief Judge McGEE concurs.

Judge TYSON dissents by separate opinion.

Practical tips – Cross Examination

- **Emphasize** this is a **PAID** witness
- Does not matter if zero dollars – find the value

It is about what the CI understands about a trade off

When a witness' credibility is an important issue in the case, evidence of any understanding or agreements about a future prosecution would be relevant to his credibility, and the jury would be entitled to know it. Giglio v. US, 405 US 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)

"The crucial inquiry is the witness' understanding or expectation as opposed to the actual deal…If the court excludes testimony which would clearly show bias…or the hope of reward on part of the witness, it is error and may be ground for a new trial." State v. Evans, 40 NC App 623, 625, 253 SE2d 333 (1979), quoting State v. Roberson, 215 NC 784, 787 (1939).

"It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."

– *United States v. Cervantes-Pacheco* 826 F.2d 310 (5th Cir. 1987)

Know if you need to go soft…still find and emphasize the value

Cross-Examination
By: Eric J. Davis,
Assistant Public Defender,
Harris County Public Defender's Office

https://www.nacdl.org/getattachment/fada47e0-4eb1-4a28-8ee3-166234331eb4/cross-examination-of-difficult-witnesses.pdf

The soft cross-examination also involves a modification of the content of the cross-examination. Instead of attacking the witness head on, the lawyer seeks to peel back emotional layers to reveal bias or other elements. For example, in attacking a snitch/cooperating witness a lawyer engaged in a soft cross might focus on the collateral emotional losses that the witness is facing instead of focusing merely on the punishment the witness faces. A typical cross of a snitch might look like this:

Lawyer: Mam, you have agreed to testify against my client in this case, right?

Snitch: Yes.

Lawyer: You are charged in a conspiracy case, true?

Snitch: Yes.

Lawyer: You are facing twenty years in the pen, true?

Snitch: Yes.

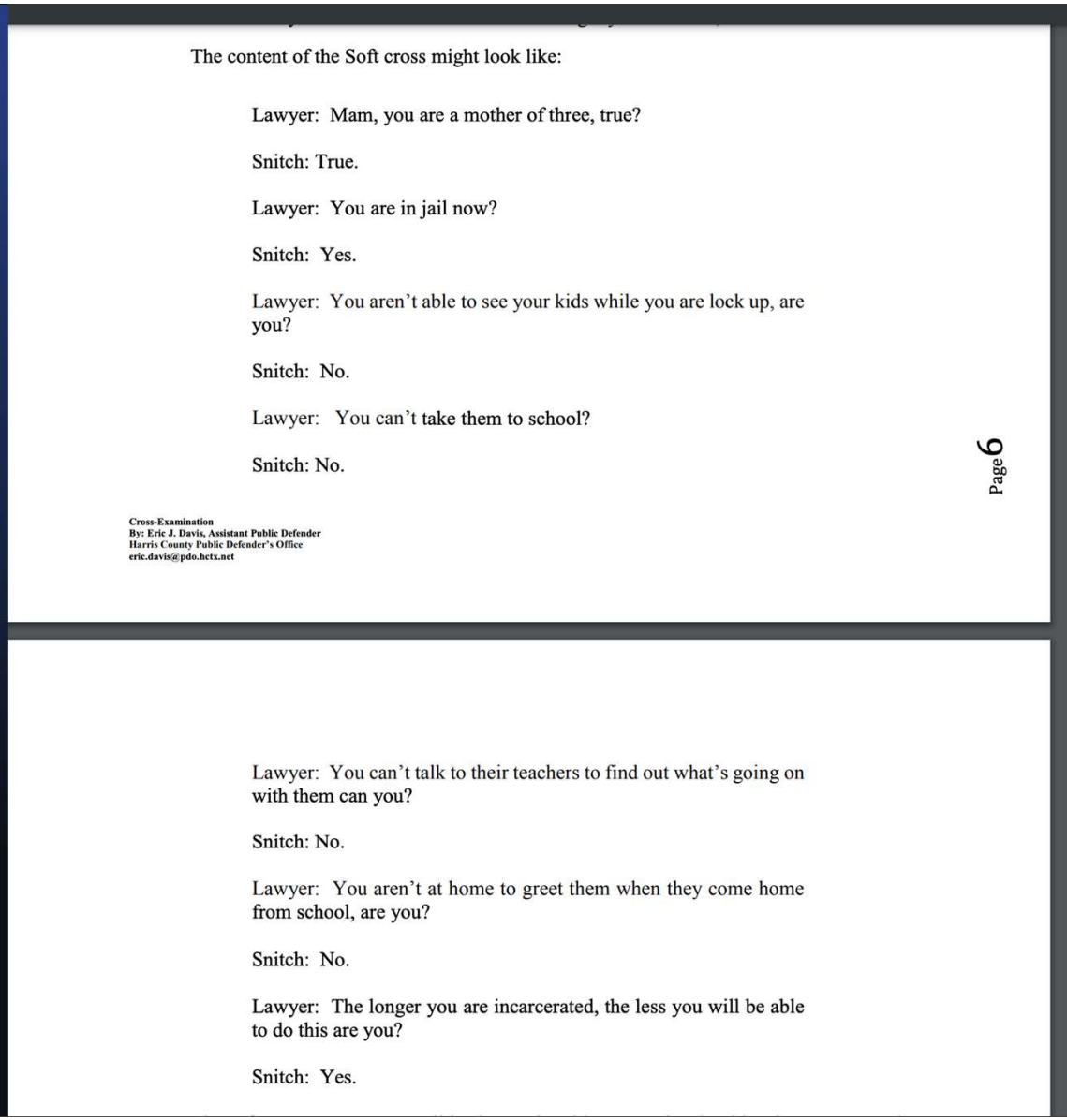
Lawyer: You are saying whatever you can to avoid doing that time, true?

Snitch: I am telling the truth.

Lawyer: But a different truth wouldn't get your time off, would it?

Cross-Examination
By: Eric J. Davis,
Assistant Public Defender ,
Harris County Public Defender's Office

https://www.nacdl.org/getattachment/fada47e0-4eb1-4a28-8ee3-166234331eb4/cross-examination-of-difficult-witnesses.pdf



The content of the Soft cross might look like:

Lawyer: Mam, you are a mother of three, true?

Snitch: True.

Lawyer: You are in jail now?

Snitch: Yes.

Lawyer: You aren't able to see your kids while you are lock up, are you?

Snitch: No.

Lawyer: You can't take them to school?

Snitch: No.

Cross-Examination
By: Eric J. Davis, Assistant Public Defender
Harris County Public Defender's Office
eric.davis@pdo.hctx.net

Lawyer: You can't talk to their teachers to find out what's going on with them can you?

Snitch: No.

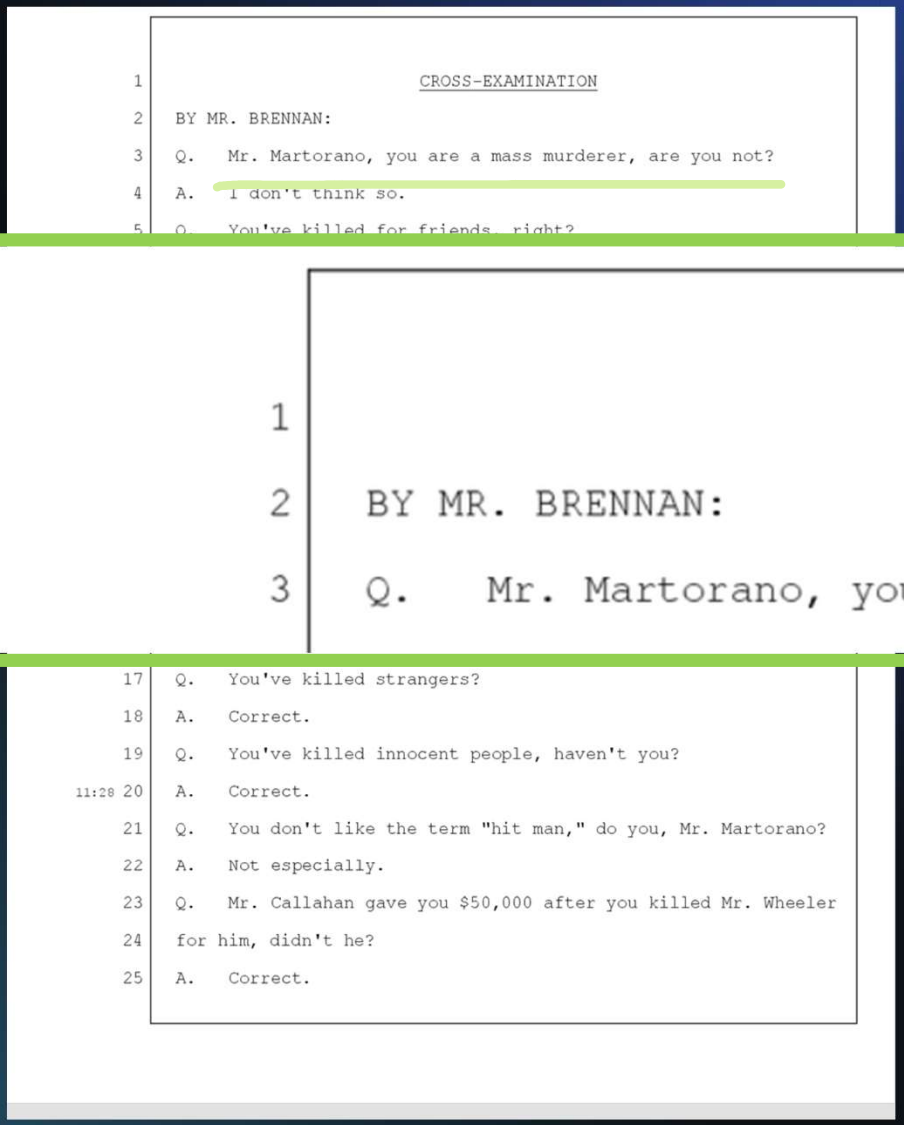
Lawyer: You aren't at home to greet them when they come home from school, are you?

Snitch: No.

Lawyer: The longer you are incarcerated, the less you will be able to do this are you?

Snitch: Yes.

LABEL THEM IN A WAY THEY CANNOT BE LIKED BY THE JURY



CROSS-EXAMINATION

BY MR. BRENNAN:

Q. Mr. Martorano, you are a mass murderer, are you not?

A. I don't think so.

Q. You've killed for friends, right?

Q. You've killed strangers?

A. Correct.

Q. You've killed innocent people, haven't you?

11:28 A. Correct.

Q. You don't like the term "hit man," do you, Mr. Martorano?

A. Not especially.

Q. Mr. Callahan gave you $50,000 after you killed Mr. Wheeler for him, didn't he?

A. Correct.

CROSS-EXAMINATION

BY MR. BRENNAN:

Q. Mr. Martorano, you are a mass murderer, are you not?

Transcript of John Martorano's testimony at the James 'Whitey' Bulger trial on June 18, 2013

http://archive.boston.com/news/specials/whitey/martorano_testimony_day2/

GREAT RESOURCE:

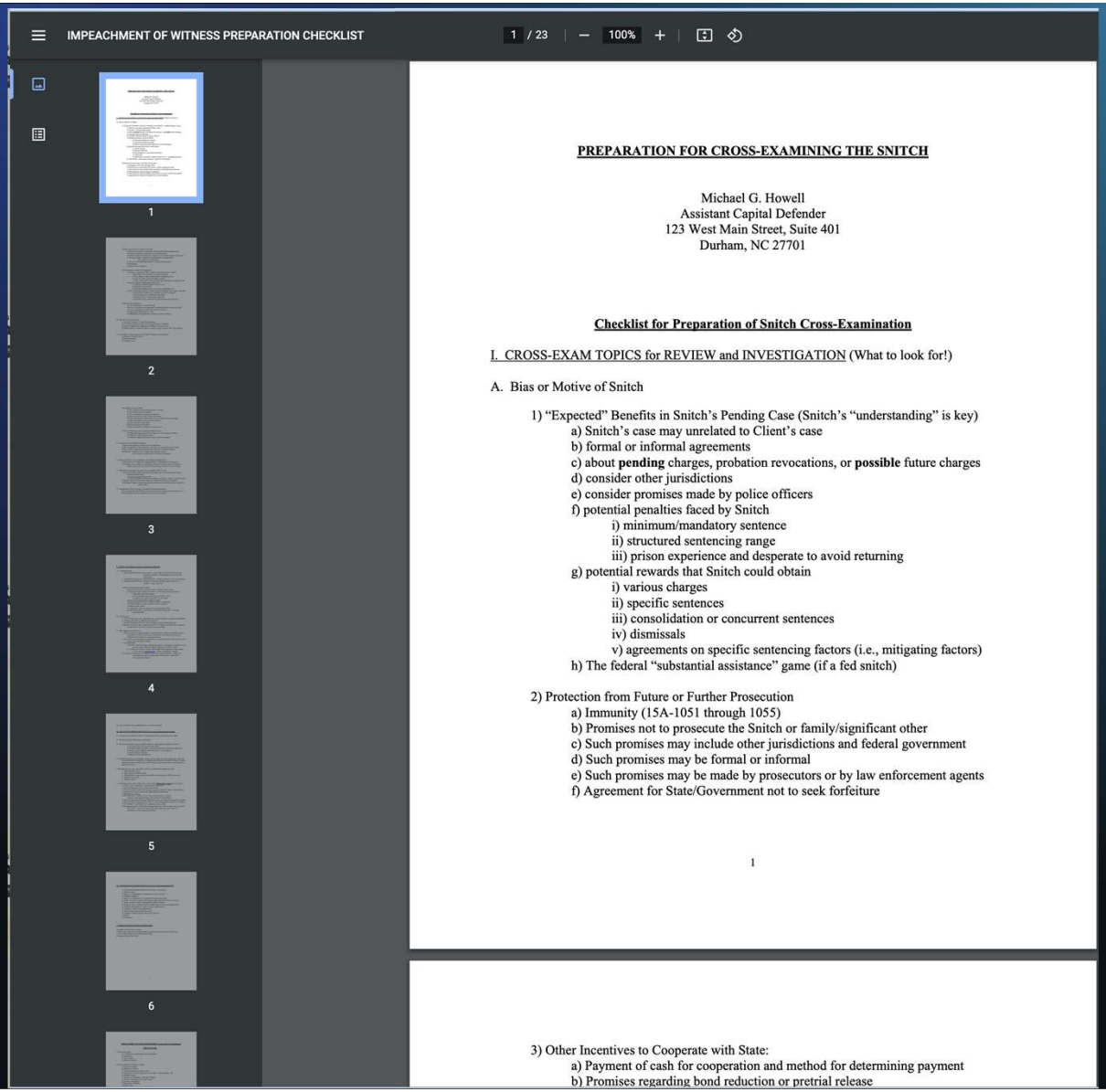
PREPARATION FOR CROSS-EXAMINING THE SNITCH

Michael G. Howell

Assistant Capital Defender

December 5, 2003

https://forensicresources.org/wp-content/uploads/2021/05/Cross-examining-the-snitch.pdf



Rule 608(b) Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. - The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. - Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. **They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.**

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. (1983, c. 701, s. 1.)

State v. Morgan
315 N.C. 626 (1986)

- Test for 608(b) "Whether the conduct sought to be inquired into is of the type which is indicative of the witness' character for truthfulness or untruthfulness."

1) Purpose is to show witness's conduct is indicative of his character for untruthfulness.

2) The conduct in question is probative of untruthfulness.

3) The conduct is not too remote in time.

4) The conduct did not result in a conviction.

- **NOTE: State cannot use extrinsic evidence to rehabilitate**

Types of Untruthful Acts under *Morgan*

- Use of false identity
- Making false statements on affidavits, applications or government (tax) forms
- Giving false testimony
- Attempting to cheat others
- Attempting to deceive/defraud others

- Think of others: violating plea agreement, bond conditions, drug use, probation violations, FTAs if you promised to appear

Criminal Record of Snitch
Rule 609(a) AND (b)

1. Felonies, Class A1, 1, or 2 Misdemeanors
2. Convictions outside 10 year time limit pertaining to credibility
3. Juvenile Adjudications relating to credibility or important issue
4. Obtain details for factual elements, non-609 purposes, rebuttal after "door-opened"

First Degree Murder Case:

It was reversible error not to allow the defendant to ask the state's witness if he had pending forgery and uttering cases in another county and if he had been promised or expected to receive anything in exchange for his testimony. *State v. Prevatte*, 346 NC 162, 163 (1997) (relied upon *Davis v. Alaska*).

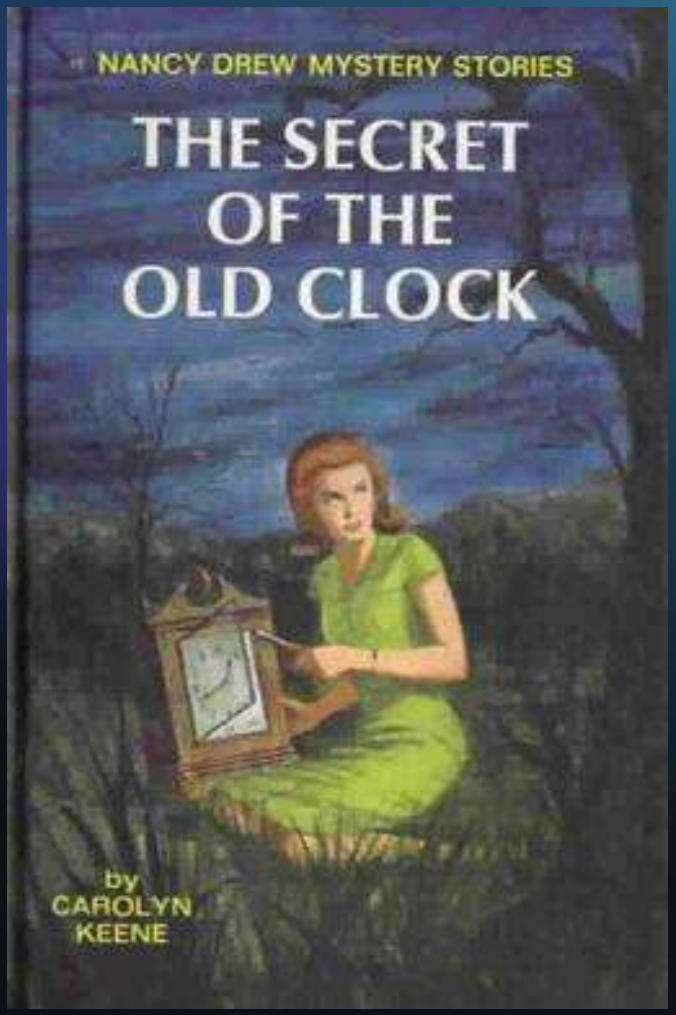
"The effect of the handling of the pending forgery and uttering charges on the witness was for the jury to determine. Not letting the jury do so was error."

- In *Davis*, the principal witness against the defendant was on probation. The defendant was not allowed to cross-examine the witness about his probationary status, and the United States Supreme Court held this violated the defendant's Sixth Amendment right "to be confronted with the witnesses against him." *Id*. at 315, 39 L.Ed.2d at 353.

- The Supreme Court said that the defendant had the right to show that the witness was afraid he would be charged with the crime because he was on probation and the right to show that the fact he was on probation gave the State of Alaska some power over him. The Supreme Court said, "Petitioner was thus denied the right of effective cross-examination which `would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1, 3, [16 L.Ed.2d 314, 316-17 (1966)]." *Id*. at 318, 39 L.Ed.2d at 355 (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 19 L.Ed.2d 956, 959 (1968)).

Do the Detective Work for Impeaching Evidence

- Get an investigator/Hire a PI if you can
- Find: Ex spouses, significant others, landlords, probation officers/Civil Records/Mental Health/Special Proceedings/Evictions/DMV/Jail or Prison Records/Mental Health/Military Records/creditors/Jailers/Employers/
- Neighbor/Friends, former friends



Check the Informant file

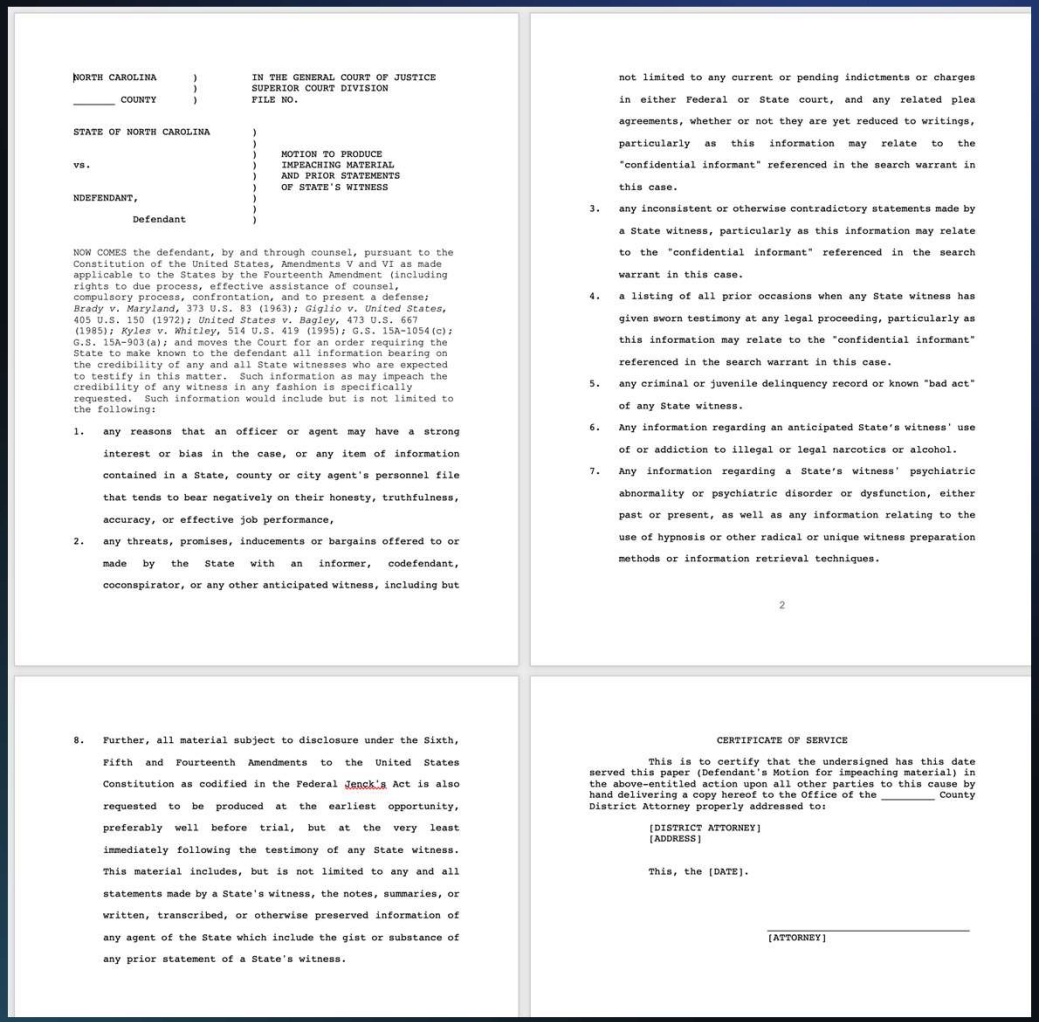
- Paid money and how much
- Document saying that they will claim it on their taxes
- Get them to admit and commit they did not claim informant money

Brand in the Hand

- Common law branding of thieves, etc. to show they could not be trusted

Photo by Dave Doody

Article: Bilboes, Brands, and Branks
Colonial Crimes and Punishments
by James A. Cox
https://research.colonialwilliamsburg.org/Foundation/journal/spring03/branks.cfm



NORTH CAROLINA)
) IN THE GENERAL COURT OF JUSTICE
) SUPERIOR COURT DIVISION
_____ COUNTY) FILE NO.

STATE OF NORTH CAROLINA)
)
) MOTION TO PRODUCE
vs.) IMPEACHING MATERIAL
) AND PRIOR STATEMENTS
) OF STATE'S WITNESS
NDEFENDANT,)
)
Defendant)

NOW COMES the defendant, by and through counsel, pursuant to the Constitution of the United States, Amendments V and VI as made applicable to the States by the Fourteenth Amendment (including rights to due process, effective assistance of counsel, compulsory process, confrontation, and to present a defense; *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); G.S. 15A-1054(c); G.S. 15A-903(a); and moves the Court for an order requiring the State to make known to the defendant all information bearing on the credibility of any and all State witnesses who are expected to testify in this matter. Such information as may impeach the credibility of any witness in any fashion is specifically requested. Such information would include but is not limited to the following:

1. any reasons that an officer or agent may have a strong interest or bias in the case, or any item of information contained in a State, county or city agent's personnel file that tends to bear negatively on their honesty, truthfulness, accuracy, or effective job performance,
2. any threats, promises, inducements or bargains offered to or made by the State with an informer, codefendant, coconspirator, or any other anticipated witness, including but not limited to any current or pending indictments or charges in either Federal or State court, and any related plea agreements, whether or not they are yet reduced to writings, particularly as this information may relate to the "confidential informant" referenced in the search warrant in this case.
3. any inconsistent or otherwise contradictory statements made by a State witness, particularly as this information may relate to the "confidential informant" referenced in the search warrant in this case.
4. a listing of all prior occasions when any State witness has given sworn testimony at any legal proceeding, particularly as this information may relate to the "confidential informant" referenced in the search warrant in this case.
5. any criminal or juvenile delinquency record or known "bad act" of any State witness.
6. Any information regarding an anticipated State's witness' use of or addiction to illegal or legal narcotics or alcohol.
7. Any information regarding a State's witness' psychiatric abnormality or psychiatric disorder or dysfunction, either past or present, as well as any information relating to the use of hypnosis or other radical or unique witness preparation methods or information retrieval techniques.

2

8. Further, all material subject to disclosure under the Sixth, Fifth and Fourteenth Amendments to the United States Constitution as codified in the Federal Jenck's Act is also requested to be produced at the earliest opportunity, preferably well before trial, but at the very least immediately following the testimony of any State witness. This material includes, but is not limited to any and all statements made by a State's witness, the notes, summaries, or written, transcribed, or otherwise preserved information of any agent of the State which include the gist or substance of any prior statement of a State's witness.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this paper (Defendant's Motion for impeaching material) in the above-entitled action upon all other parties to this cause by hand delivering a copy hereof to the Office of the _____ County District Attorney properly addressed to:

[DISTRICT ATTORNEY]
[ADDRESS]

This, the [DATE].

_____
[ATTORNEY]

Motion to Produce Impeachment Material

- https://www.ncids.org/resources/motion-to-produce-impeachment-material-and-prior-statements-includes-among-other-things-personnel-records-and-information-regarding-a-confidential-informant/

Giglio v. United States, 405 U.S. 150 (1972)

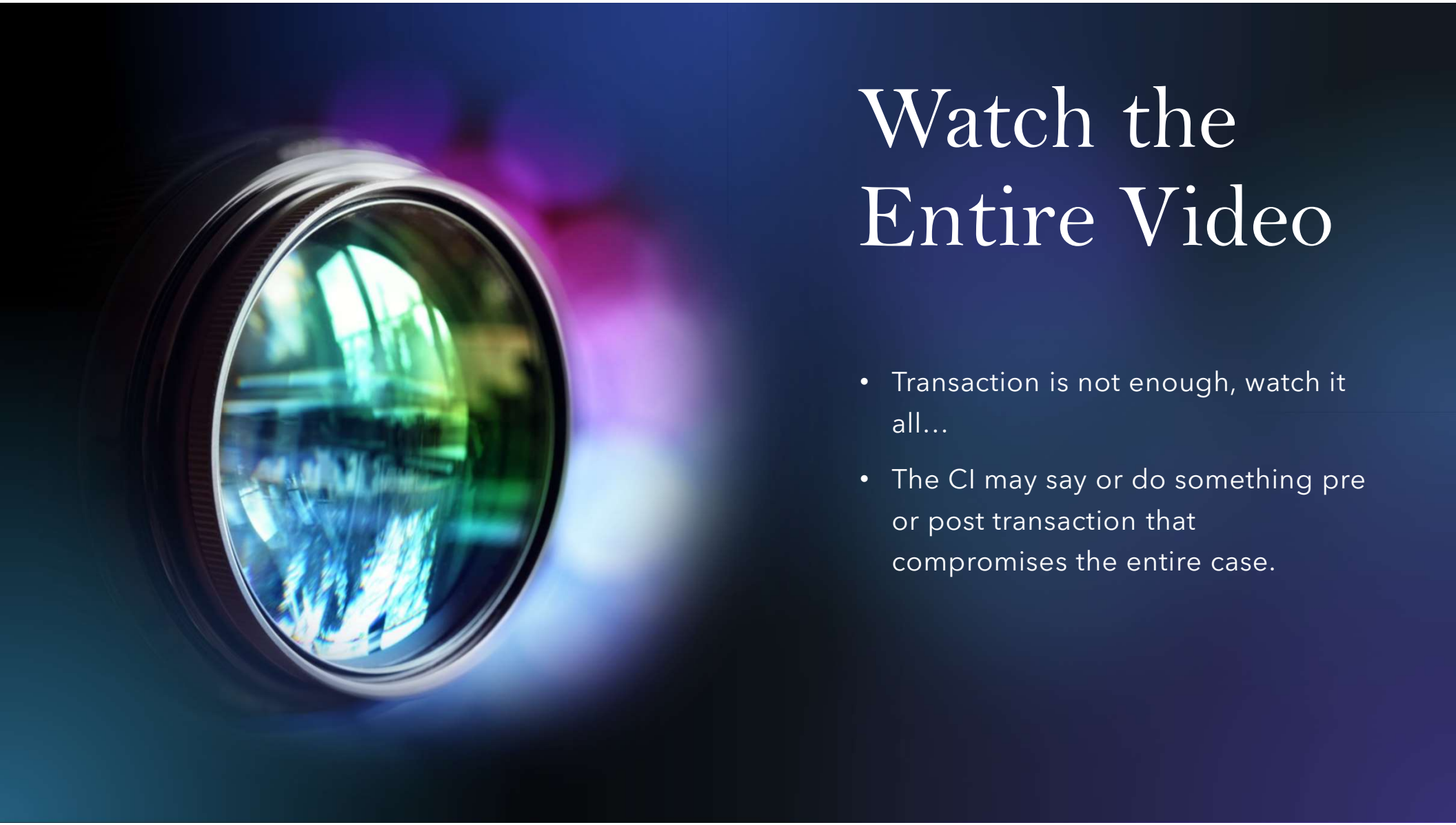
- Prosecutor must make effort to find out impeaching information in possession of other agencies and can't turn a blind eye to what others know about the informant.
- No Ostrich Defense
- See *Barbee v. Warden*, Maryland Penitentiary, 331 F.2d (4th Cir. 1964)

Barbee v. Warden, Maryland Penitentiary, 331 F.2d (4th Cir. 1964)

- **The court held that the prosecution is liable for the nondisclosure of exculpatory evidence in the hands of the police.**
- "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. `The cruelest lies are often told in silence.'" (Id. at 846.)

Interview the Snitch

- Do not do it alone
- With their attorney if they are represented
- You will be better prepared for trial and/or to negotiate and ditch trial efforts



Watch the Entire Video

- Transaction is not enough, watch it all…
- The CI may say or do something pre or post transaction that compromises the entire case.

The Hidden Deals

- Takes a lot of legwork
- Must review CI criminal records and check other court files sometimes in other counties even
- Frequently ADA's will forget that they dismissed something some time ago for that "SA" or substantial assistance.

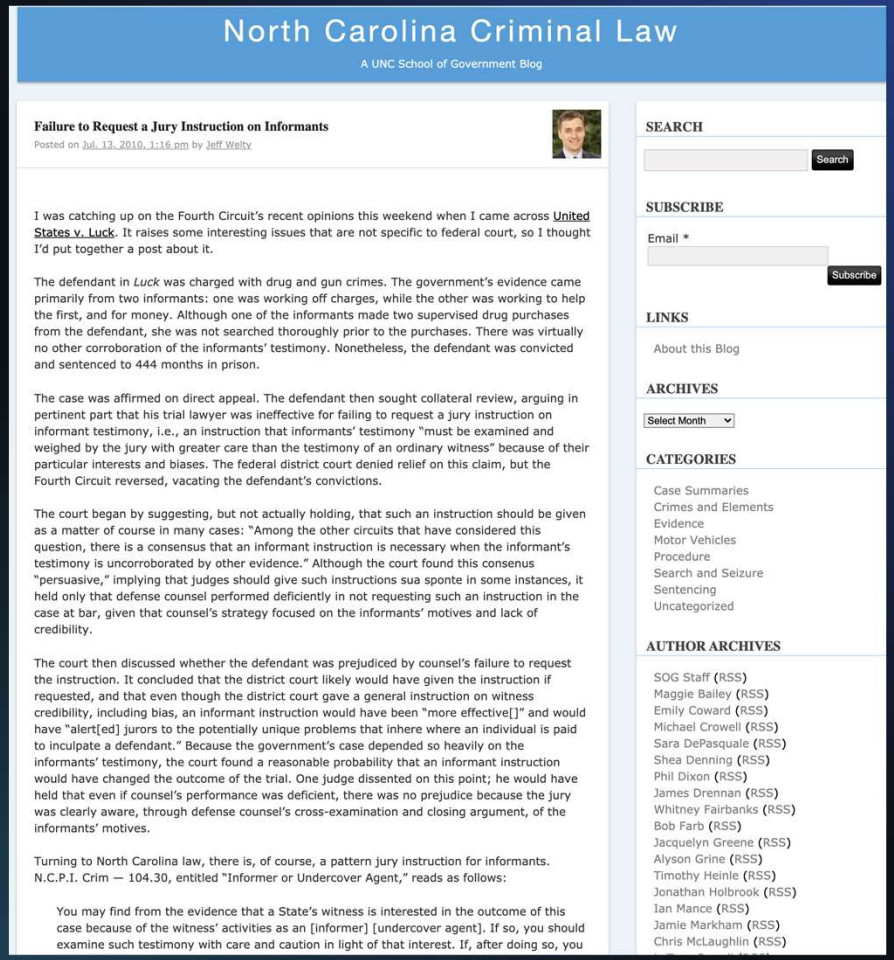
Good Snitch or a Bad Snitch?

MAKING YOUR CLIENT A SNITCH/CI CAN AND OFTEN IS A PART OF ZEALOUS ADVOCACY

Creating a Good Snitch

- Act early
- Make headway on bond early on
- Assess case against client as soon as possible and relay without sugar coating
- Address probationary issues if possible
- 100% truthful

Request a Jury Instruction on Informants



North Carolina Criminal Law

A UNC School of Government Blog

Failure to Request a Jury Instruction on Informants

Posted on Jul. 13, 2010, 1:16 pm by Jeff Welty

I was catching up on the Fourth Circuit's recent opinions this weekend when I came across United States v. Luck. It raises some interesting issues that are not specific to federal court, so I thought I'd put together a post about it.

The defendant in *Luck* was charged with drug and gun crimes. The government's evidence came primarily from two informants: one was working off charges, while the other was working to help the first, and for money. Although one of the informants made two supervised drug purchases from the defendant, she was not searched thoroughly prior to the purchases. There was virtually no other corroboration of the informants' testimony. Nonetheless, the defendant was convicted and sentenced to 444 months in prison.

The case was affirmed on direct appeal. The defendant then sought collateral review, arguing in pertinent part that his trial lawyer was ineffective for failing to request a jury instruction on informant testimony, i.e., an instruction that informants' testimony "must be examined and weighed by the jury with greater care than the testimony of an ordinary witness" because of their particular interests and biases. The federal district court denied relief on this claim, but the Fourth Circuit reversed, vacating the defendant's convictions.

The court began by suggesting, but not actually holding, that such an instruction should be given as a matter of course in many cases: "Among the other circuits that have considered this question, there is a consensus that an informant instruction is necessary when the informant's testimony is uncorroborated by other evidence." Although the court found this consenus "persuasive," implying that judges should give such instructions sua sponte in some instances, it held only that defense counsel performed deficiently in not requesting such an instruction in the case at bar, given that counsel's strategy focused on the informants' motives and lack of credibility.

The court then discussed whether the defendant was prejudiced by counsel's failure to request the instruction. It concluded that the district court likely would have given the instruction if requested, and that even though the district court gave a general instruction on witness credibility, including bias, an informant instruction would have been "more effective[]" and would have "alert[ed] jurors to the potentially unique problems that inhere where an individual is paid to inculpate a defendant." Because the government's case depended so heavily on the informants' testimony, the court found a reasonable probability that an informant instruction would have changed the outcome of the trial. One judge dissented on this point; he would have held that even if counsel's performance was deficient, there was no prejudice because the jury was clearly aware, through defense counsel's cross-examination and closing argument, of the informants' motives.

Turning to North Carolina law, there is, of course, a pattern jury instruction for informants. N.C.P.I. Crim — 104.30, entitled "Informer or Undercover Agent," reads as follows:

> You may find from the evidence that a State's witness is interested in the outcome of this case because of the witness' activities as an [informer] [undercover agent]. If so, you should examine such testimony with care and caution in light of that interest. If, after doing so, you

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https://www.sog.unc.edu/blogs/nc-criminal-law/failure-request-jury-instruction-informants

United States v. Luck, 611 F.3d 183, 184 (4th Cir. 2010)

- In 2005, Luck was indicted for conspiracy to distribute and to possess with intent to distribute fifty grams or more of cocaine base (Count One); using, brandishing, or carrying a firearm during and in relation to a drug trafficking crime (Count Two); and distribution of cocaine base (Counts Three and Four).
- Defendant convicted sentenced to 444 months in prison.
- Argued on appeal in part that his trial lawyer was ineffective for failing to request a jury instruction on informant testimony, i.e., an instruction that informants' testimony **"must be examined and weighed by the jury with greater care than the testimony of an ordinary witness"** because of their particular interests and biases.
- Federal district court denied relief on this claim, but the Fourth Circuit reversed, and vacated defendant's convictions.
- "The court began by suggesting, but not actually holding, that such an instruction should be given as a matter of course in many cases: "Among the other circuits that have considered this question, there is a consensus that an informant instruction is necessary when the informant's testimony is uncorroborated by other evidence." Although the court found this consenus "persuasive," implying that judges should give such instructions sua sponte in some instances, it held only that defense counsel performed deficiently in not requesting such an instruction in the case at bar, given that counsel's strategy focused on the informants' motives and lack of credibility." UNC SOG law blog https://www.sog.unc.edu/blogs/nc-criminal-law/failure-request-jury-instruction-informants

Prepare to Counter the Prosecution's Closing Argument

- Prosecutor closing: Boy Scouts won't buy methamphetamine argument
- Perhaps not, but emphasize not just a drug user, etc. but PAID witness, and if you have shown they lied, highlight it.

DARE GREATLY IN YOUR DEFENSE WORK

"It is not the critic who counts; not the person who points out how the strong person stumbles, or where the doer of deeds could have done them better. The credit belongs to the person who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends him/herself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he/she fails, at least fails while daring greatly, so that his/her place shall never be with those cold and timid souls who neither know victory nor defeat."

– TEDDY ROSEVELT

Sources Used in Preparation

- Bilboes, Brands, and Branks: Colonial Crimes and Punishments by James A. Cox https://research.colonialwilliamsburg.org/Foundation/journal/spring03/branks.cfm
- CPCS CRIMINAL DEFENSE TRAINGING – The Snitch Project https://aln.fd.org/sites/aln/files/article-file/Table%20of%20Contents%20for%20Distribution.pdf
- CROSS EXAMINATION **Cross-Examination** Eric J. Davis, Assistant Public Defender, Harris County Public Defender's Officehttps://www.nacdl.org/getattachment/fada47e0-4eb1-4a28-8ee3-166234331eb4/cross-examination-of-difficult-witnesses.pdf
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- Here's How to Handle a Snitch by Attorney Jeffrey W. Jensen http://www.jensendefense.com/hereshow/handlesnitches.html#:~:text=Avoid%20the%20Jail%2DHouse%20Snitch,other%20individuals%20in%20the%20jail.
- **Hunts Point's Tats Cru graffiti crew to take city to court for covering 'art',** New York Daily News https://www.nydailynews.com/new-york/bronx/hunts-point-tats-cru-graffiti-crew-city-court-covering-art-article-1.318203
- The Informer's Privilege, UNC SOG Criminal Blog, Jeff Welty https://www.sog.unc.edu/blogs/nc-criminal-law/informers-privilege
- Innocence Project Statistics on Informants https://innocenceproject.org/informing-injustice/

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