Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions

By Carl N. Hammarskjold

Introduction

THE PARCHMAN LOCKDOWN is the maximum-security unit of Mississippi’s only maximum-security prison. When Cary Allen Clark encountered Randy Bevill in the lockdown, Clark was already nine years into a thirteen-to-thirty-two-year sentence for a string of felonies. Bevill, though, had just arrived. He had violated his parole with a burglary. More importantly to both men, Bevill was facing murder charges.

Clark pestered Bevill for days to tell him everything about the killing. Bevill refused at first but finally became angry and confessed, according to Clark’s testimony at Bevill’s trial. Specifically, Bevill told Clark, “All right. I killed the bitch and f[ucke]d her too. Now lay off the questions.” The jury convicted Bevill of capital murder.

Appealing his conviction, Bevill presented a letter that Clark had written to the sheriff before the trial. In the letter, Clark offered to help and requested a transfer from dismal Parchman to the more de-

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2. Id.
3. Id.
4. Id.
5. Id.
sirable Harrison County. The physical condition of the letter itself suggested that Clark had altered the substance of the purported confession to make it more incriminating. Specifically, in his proffer to the sheriff, Clark had “obviously marked over ‘ss’ in the word ‘kissed,’ changing them to ‘ll.’” With two strokes of a pen, Clark had transformed Bevill’s kiss-and-tell into a kill-and-tell.

The Mississippi Supreme Court saw little difference between the two and refused to reverse on this ground. The unaltered letter as written “would still have been a damning admission if Bevill in fact said it.” That “if” introduced the question of whether Clark was credible. The court refused to invade the traditional territory of the fact-finder. “The credibility of a witness is for the jury. Clark’s interest in securing some relief from his miserable existence was there for the jury to consider in weighing his credibility. The State never attempted to pass him off as a paragon of virtue.”

In light of the altered letter, Clark was a transparently dishonest jailhouse snitch. Yet he and many like him routinely take the stand, swear an oath, and testify against criminal defendants. In short, even such obviously dishonest testimony is allowed by the judge, because credibility is the province of the jury. There is no need to screen out lying snitches before they reach the jury—the jury is the screen. The underlying premise is that a dishonest jailhouse snitch does not prejudice an innocent defendant when the jury sees through the lies and disregards the snitch’s testimony. This Comment argues that this premise is false.

This premise is false because the mere presence of a jailhouse snitch, whether or not the jury gives his testimony any weight, can adversely affect the jury instructions a criminal defendant is entitled to. In jurisdictions like Mississippi, testimony recounting a purported confession is considered direct, not circumstantial, evidence. This is true even when the witness recounting the confession is not a law enforcement official. The witness can be any individual, including a

6. An inmate at Parchman, which is in the heart of the Mississippi Delta, told me that the cells heat up to such a degree that many inmates choose to sleep directly on the relatively cool concrete floors instead of on their bunks. But there, they are vulnerable when snakes enter their cells. Of course, on the bunk or on the hard floor, there is no relief from the swarms of mosquitoes.
7. Bevill, 556 So. 2d at 707.
8. Id.
9. Id.
10. Id. (citations omitted).
12. Id.
jailhouse snitch. In a criminal trial where such snitch testimony is the only direct evidence, the snitch singlehandedly knocks out the circumstantial-evidence jury instruction that the jury would otherwise hear. Typically, circumstantial-evidence jury instructions caution jurors that it is their sworn duty to convict only if they can exclude every reasonable hypothesis consistent with innocence. Jurors weighing circumstantial evidence may need this guidance to correctly apply the beyond-a-reasonable-doubt standard and avoid wrongfully convicting an innocent defendant.

This Comment argues that innocent defendants are placed in jeopardy of wrongful convictions in states where snitch testimony is considered direct evidence. This Comment proposes that all jurisdictions reclassify snitch testimony as circumstantial evidence. In this way, eligible criminal defendants will still be entitled to have the jury hear a circumstantial evidence jury instruction even after a snitch emerges in a trial where the prosecutor’s case-in-chief otherwise consists entirely of circumstantial evidence.

This reform will reduce the amount of wrongful convictions. Focusing on credibility addresses only the primary danger of snitch testimony—that the jury will believe a lying snitch. Focusing on credibility ignores the secondary danger—that a lying snitch, even if disbelieved, can convict an innocent defendant by determining which jury instructions are read. Reclassifying snitch testimony as circumstantial evidence will eliminate the risk that a lying snitch will influence the trial outcome just by showing up.

Part I of this Comment explores the background of how jailhouse snitches contribute to wrongful convictions. Jailhouse snitches, as opposed to accomplice snitches or community snitches, are the most dangerous variety of snitch. Snitches are major contributors to convicting the innocent because they are predisposed to lie and are rewarded for lying. I look at the notorious Los Angeles snitch, Leslie Vernon White, and the snitch-fueled wrongful conviction of Guy Paul Morin. Both triggered massive investigations that have yielded valuable details about the snitch system that are as incredible as the snitches themselves. Part I also briefly examines the safeguards currently in place and some proposed additional safeguards. This section

classifies the safeguards meant to protect the innocent from lying snitches into two categories: those meant to bar snitches from the witness stand and those meant to demolish the snitch’s credibility on the witness stand. This section also explains the origins of the mistrust of circumstantial evidence from which arose the circumstantial-evidence jury charge, and it contrasts this charge with the standard jury instruction regarding the burden of proof. This section is mostly descriptive.

Part II argues that snitches are especially potent contributors to wrongful convictions both because they blend the most powerful aspects of false confessions and eyewitness misidentification and because they can tailor their testimony to fill the gaps in the prosecution’s case. Part II also argues that existing and proposed safeguards are inadequate both because of specific flaws and because they all rest on the faulty assumption that a snitch who is not credible cannot help convict an innocent defendant. This inadequacy fosters the snitch system. In a thriving snitch system, even a snitch with zero credibility with a jury can do enormous damage simply by depriving the accused of a circumstantial-evidence jury instruction. This section argues that this jury instruction is crucial to guide juries. Finally, this Comment proposes that all jurisdictions protect innocent criminal defendants by classifying snitch testimony as circumstantial, instead of direct, evidence.

An explanatory note: the title of this Comment links together some essential features of jailhouse snitches and circumstantial evidence. As we shall see, almost no price is too low to entice a jailhouse snitch to lie. For example, after testifying about a fellow inmate’s confession, notorious snitch Sidney Storch asked the prosecution for money. Storch stated, “[p]erhaps I’ve been spoiled by the likes of [Deputy District Attorney Sterling] Norris . . . but I’ve usually been allowed $30.00 from petty cash . . . and an OK from the Investigator to stop and get me some smokes and candy.”

Fabricated confessions are obviously prejudicial on their own, but doubly so when they are considered direct evidence in a trial that otherwise features all circumstantial evidence. As we shall see, in some states a snitch can deprive the accused of a jury charge he would otherwise be entitled to. This circumstantial-evidence jury instruction explains to jurors how they ought to evaluate and analyze circumstantial evidence. The need for such guidance can be traced back to Biblical times. For example, the Gemara, a commentary on the Babylonian

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15. Maxwell v. Roe, 628 F.3d 486, 505 n.10 (9th Cir. 2010) (ellipses in original).
Talmud, provides this illustration of the danger of conjecture, “He [the judge] says to them: Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword in hand with blood dripping from it, whilst the murdered man was writhing [in agony]: If this is what ye saw, ye saw nothing.”

I. Background: Incentives & Lies; Evidence & Instructions

To provide important context, this section explains what jailhouse snitches are and how they contribute to wrongful convictions. The infamous snitch Leslie Vernon White and the famous exoneree Guy Paul Morin are studied. Next, existing and proposed measures that are meant to protect the innocent from lying snitches are detailed. Finally, the longstanding mistrust of circumstantial evidence and the jury instruction that evolved out of that mistrust are explained.

A. Jailhouse Snitches

“Informants” are individuals who are not in law enforcement but who pass along information to law enforcement. Criminal informants include in-custody jailhouse snitches, who purport to hear confessions or admissions from fellow inmates; and accomplice snitches, who inform on their partners in crime. These informants typically testify at trial. Out-of-custody informants include regular citizens in the community and criminal “stoolies.” These informants usually do not testify.

Though out-of-custody informants do contribute to wrongful convictions by prematurely and erroneously focusing police on the wrong suspect, the in-custody and accomplice informants are the most damaging to the wrongfully accused, because they introduce devastatingly effective stories at trial. Jailhouse snitches are less reliable than accomplice snitches and more likely to fabricate confessions from innocent persons.

18. Id. at 1094–95.
19. Id. at 1124.
A handy definition of a jailhouse snitch comes from the California Penal Code: “[A]n ‘in-custody informant’ means a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.”21

The trend among scholars is to write about the sociological implications of out-of-custody citizen informants cooperating with police in impoverished neighborhoods. This cooperation is fascinating, because it has created a backlash, the so-called “Stop Snitching” movement.22 Out-of-custody informing highlights racial tension between police and citizens in crime-ridden neighborhoods, turns neighbor against neighbor, and leads to witness intimidation.23 But it is the in-custody informants who are doing the most to help convict the innocent.24

B. Snitches and Wrongful Convictions

Snitches heavily populate the landscape of wrongful convictions. In their classic study of 350 erroneous convictions in potentially capital cases, Bedau and Radelet found “[p]erjury by prosecution witness[es]” to be a cause in 117 cases—the single largest categorical cause.25 Accomplice, informant, or jailhouse snitch testimony accounted for thirty-five of these wrongful convictions.26 Snitches were present in 21% of the sixty-two wrongful convictions exposed by DNA tests studied by Dwyer, Neufeld, and Scheck.27 Snitches appear in 45.9% of the wrongful capital murder convictions documented by Northwestern University School of Law’s Center on Wrongful Convic-

21. CAL. PENAL CODE § 1127a(a) (West 2004).
23. NATAPOFF, supra note 22, at 101–38.
24. This Comment focuses exclusively on jailhouse snitches; and unmodified, simple references to “snitches” refer specifically to jailhouse snitches. A note on style: in the following pages I refer to snitches who “hear” confessions or admissions from other inmates. Many of these supposed confessions are not in fact heard but invented or confabulated. Still, to avoid the repetitious and distracting preface of “purported,” “alleged,” “so-called,” and the like, snitches hereinafter will hear confessions even when they did not.
27. JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000).
tions, making snitches the leading contributor. Samuel Gross identified false testimony by jailhouse snitches and their kin in almost half of the wrongful murder convictions he studied.

These figures raise complicated questions of causation versus correlation and to what degree these proven wrongful convictions represent the tip of the iceberg of yet-to-be-discovered wrongful convictions. Such questions are beyond the scope of this Comment. But it is indisputable that innocent people are now in prison and on death row, and they were put there by snitches.

Ninth Circuit Court of Appeals Judge Stephen S. Trott, among his warnings for prosecutors who use criminals as witnesses, cautioned that

[the most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.]

Snitches testify for rewards. The most sought-after rewards are early release and dropped charges. Other rewards are more prosaic. Snitches have told investigators that they sought and received benefits like televisions, bail reduction for a girlfriend, donuts, “smokes,” cell transfers, an end to beatings by deputy sheriffs, lunch outside the jail, and cash.

Often, when snitches testify for rewards, they testify falsely. The Los Angeles grand jury concluded that snitches, because they are incarcerated for breaking society’s law, already have a low commitment to the truth. Then, they “violate the code of the criminal world” by becoming informers. Even “honor among thieves” is not what it used to be, as the modern snitch will even inform against other informers, which was forbidden “in the old days.” According to the grand jury, based on numerous accounts from snitches of perjury and

33. Id. at 13–15.
34. Id. at 16.
35. Id.
36. Id.
providing false information to law enforcement, “[t]his disinclination to follow societal rules extends to their willingness to defile an oath.”

Snitches lie for their masters. Inmates have reported to investigators that they were turned into snitches by officers who either housed them with other snitches or created the impression they were already snitches. Snitches have reported that officers send them on “missions” to acquire information from other inmates.

The Fifth Circuit has concluded, “[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.” The Ninth Circuit has determined: “By definition, criminal informants are cut from untrustworthy cloth . . . . Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison.” The U.S. Supreme Court has concluded, “[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.

C. Case Studies

In 1989, a jailhouse snitch named Leslie Vernon White visited America’s living rooms via a segment on CBS’s 60 Minutes. With flair and ease he demonstrated how he and his fellow snitches could fabricate convincing confessions. An earlier demonstration for a Sheriff’s Department sergeant triggered a multi-part series in the Los Angeles Times. Viewers and readers were thus introduced to colorful snitch jargon such as “booking” (telling officials about other inmates’ confessions and admissions, real or fabricated), “freeway time” (when inmates can roam the jail corridors), “getting in the car” (sharing or selling information to another snitch to produce multiple confessions—the “car” is the vehicle they hope will transport them away from jail as a reward), and “juice man” (the police officer or prosecu-

37. Id.
38. Id. at 20.
39. Id. at 21.
40. Id. at 25.
41. United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).
44. Grand Jury, supra note 14, at 72–73.
45. Id.
tor who is the snitch’s liaison). The nationwide publicity and the sustained local media effort prompted the abovementioned major grand jury investigation of jailhouse informants in Los Angeles. This 153-page document is one of the best primary sources about the mechanics of jailhouse snitching that has been produced. One hundred and twenty witnesses testified and 147 exhibits were submitted. The study concluded that the District Attorney’s Office failed in its ethical obligation to curtail the misuse of snitch testimony, and that the Sheriff’s Department failed “to control improper placement of inmates with the foreseeable result that false claims of confessions or admissions would be made.”

These confessions and admissions were manufactured in a highly organized setting. At any one time during the decade-long period of inquiry, eighty to ninety informants, classified as “K-9” and tagged with red wristbands, were housed in the “snitch tank.” One of these men was Leslie Vernon White.

White gained infamy for demonstrating to officers and reporters how easy it was for him to fabricate detailed, convincing, and verifiable confessions. His peculiar genius was for both learning facts about the crime that supposedly only someone intimately involved would know and arranging for the establishment of a record placing him and the target inmate together. In this way, White was able to fabricate compelling confessions from people he had never met. All he needed was a telephone.

White demonstrated his deft skills first for officers. He was given only the name of an inmate held on murder charges. Posing as an employee of a bail bond company, he called the jail and learned the inmate’s booking number, birthday, eye and hair color and other physical attributes, case number, date of arrest, court date, and location within the jail. Posing as, variously, Sergeants “Williams,” “Stevens,” and “Johnson,” White was able to learn the victim’s name, age, and race, along with descriptions of the clothes he had been found

47. Id.
49. Id.
50. Id. at 6.
51. Id. at 4.
52. Id. at 9.
53. Id. at 70.
54. Id. at 69.
55. Id.
56. Id.
wearing, where his body had been found, cause of death, results of blood work, and even “the prosecutor’s personal opinion of the likely defense in the case.”

Next, posing as Deputy District Attorney “Michaels,” White called a courthouse in Van Nuys and convinced the bailiff to transport White and the target inmate to Van Nuys the next day. White then said,

I have enough information to put a story together that’s very believable, accurate, detailed story. Like I said, any homicide detective is gonna go for, cause they’re gonna think the only way I could get these facts is to get ‘em from the suspect. Secondly, I now have the defendant or whatever ordered out to a court where I can say that I was with him . . . .

White also said he would be able to trade his “fabricated confession to a homicide detective for ‘a hell of a deal’ such as time served on his case.”

In response to White’s dramatic and disturbing demonstration, in October 1988 the Sheriff’s Department directed all personnel to verify the identity and “need to know” of anyone calling for criminal history or sensitive information. The District Attorney’s Office responded in a similar fashion.

Three months later, White repeated his demonstration in a hotel room for 60 Minutes. Given a new target, he achieved identical success in the same manner. This demonstration took place after the Sheriff’s Department and the District Attorney’s Office had implemented their reforms.

Another illustrative case study is that of Guy Paul Morin, who, unlike White, was not a snitch but an innocent defendant wrongfully convicted by a snitch. Morin was exonerated ten years after his wrongful conviction in Canada for the murder of his nine-year-old neighbor. After DNA evidence cleared him, the Canadian response was much different from the typical U.S. response: senior Crown counsel and the Attorney General of Ontario conceded his innocence and apologized, and the government of Ontario paid compensation and 

57. Id.
58. Id. at 70–71.
59. Id. at 71.
60. Id.
61. Id. at 72.
62. Id.
63. Id.
64. Id. at 72–73.
called for a public inquiry.\textsuperscript{66} Hearings lasted five months.\textsuperscript{67} The Commission concluded that fabricated testimony from two jailhouse snitches was central in the wrongful conviction.\textsuperscript{68} The story at trial was that Morin confessed in his cell to Robert Dean May, and the confession was heard by another inmate known as Mr. X.\textsuperscript{69}

The presiding Commissioner, Fred Kaufman, reported:

I have found that Mr. May and Mr. X were wholly unreliable. Their evidence was motivated by self-interest. They were predisposed, by character and psychological make-up, to lie. Mr. May was diagnosed as a pathological liar and, on his own admission, he was a particularly facile liar. Since these witnesses were motivated by self-interest and unconstrained by morality, they were as likely to lie as to tell the truth, depending on where their perceived self-interest lay. Their claim that Guy Paul Morin confessed to May was easy to make and virtually impossible to disprove. These facts, taken together, were a ready recipe for disaster.\textsuperscript{70}

Douglas Dalton, Special Counsel to the Los Angeles grand jury that investigated Leslie Vernon White and the Los Angeles snitch system, was a witness at the Commission hearings.\textsuperscript{71} Dalton expanded on some of his earlier findings, including that “incentives and rewards did not have to be great in all cases.”\textsuperscript{72} An extra banana with a meal would suffice to coax a lie.\textsuperscript{73} Dalton’s testimony helped Kaufmann identify the risks and flaws in jailhouse snitch testimony, especially in regard to May and X. “An informant’s motive to lie may not be obvious—indeed, it may often be less conspicuous than that of a defendant.”\textsuperscript{74} Snitches lie even without agreements for rewards because the hope of consideration is enough.\textsuperscript{75} Admonishments from prosecutors that the snitch tell the truth are useless because the “truth, to an unscrupulous witness, may only be that which is consistent with the prosecution’s theory of the case.”\textsuperscript{76} Informant “impropriety” is rampant: one snitch, rebuked and unrewarded by his handler, wrote to the prosecutor that “the more he thought about it, the more he believed

\begin{itemize}
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} \textit{NATAPOFF, supra note 22, at 64.}
\item \textsuperscript{68} \textit{KAUFMAN, supra note 14, at 9.}
\item \textsuperscript{69} \textit{Id.}
\item \textsuperscript{70} \textit{Id. at 556.}
\item \textsuperscript{71} \textit{Id. at 557.}
\item \textsuperscript{72} \textit{Id. at 562.}
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id. at 563.}
\item \textsuperscript{75} \textit{Id. at 565.}
\item \textsuperscript{76} \textit{Id. at 566.}
\end{itemize}
his conversation with the defendant never took place.”77 The entire snitch system—jailers, deputies, police, attorneys, and judges—is utterly credulous when a “defendant who had always denied any criminal involvement would purportedly confess in 20 minutes to a total stranger in a holding tank.”78

Officials in many jurisdictions probably read about Los Angeles and Leslie Vernon White but learned no lessons because they could not relate to the sheer magnitude of the problem there. Kaufman’s view was that

I do not suggest that the situation which now exists in Ontario approaches either the scope or the gravity of what occurred in Los Angeles County. But what happened there can happen here too. We have no reason to suspect that criminals in Canada are less cunning or less sophisticated than criminals in California, so we must learn from the Los Angeles experience and benefit from their deliberations.79

D. Safeguards to Destroy or Blunt the Impact of Lying Snitches

The foregoing establishes that by now, judges, defense counsel, prosecutors, policymakers, and scholars share at least some awareness of the risks and unreliability of snitch testimony and the links to wrongful convictions. The safeguards that have evolved to mitigate the problem fall into two broad categories: (1) safeguards designed to prevent juries from hearing the snitch in the first place; and (2) safeguards designed to enable juries to accurately assess snitch credibility.

1. Keeping Snitches Off the Witness Stand

It is well understood that the ingredients that make for a wrongful conviction are added early and then bake in for a long time.80 The most damaging harm to an innocent person accused of a crime comes early in the process, when police select a target and then focus on evidence and theories that confirm their selection, to the exclusion of competing or inconsistent theories.81 Thus, the most effective remedies ought to come early as well. However, jailhouse snitches differ temporally from other causes of wrongful convictions. Mistaken eyewitness identifications and false confessions to police can occur in the

77. Id. at 567.
78. Id. at 570.
79. Id. at 582.
81. Id.
early stages of an investigation when a victim is interviewed or a person of interest is interrogated. But, by definition, for a suspect to confess to a cellmate, he must already be incarcerated. Because of their nature, snitches tend to emerge at least some time after the defendant has been arrested.

The prosecutor’s duty is a safeguard of sorts. The prosecutor has a duty not only to prevail on behalf of the state in criminal trials but also to convict no one wrongfully. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.” Beyond ethics, due process requires that a prosecutor not willfully seek and present perjured testimony or knowingly present perjured testimony.

The Sixth Amendment, which provides criminal defendants with the right to counsel, provides another safeguard. The right to counsel has been interpreted in Massiah v. United States to be available at certain critical stages in the prosecution, once proceedings have advanced such that the right has attached. For example, defendants have the right to counsel, after the right has attached, at police interrogations when a confession might be deliberately elicited.

The U.S. Supreme Court applied Massiah to a jailhouse snitch situation in United States v. Henry. There, the Court found that the Sixth Amendment was violated when an FBI agent, though he might not have intended a contingency-fee snitch placed in the defendant’s cell to “take affirmative steps to secure incriminating information, [the agent] must have known that such propinquity likely would lead

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82. Note, however, that a person may be incarcerated immediately after an eyewitness misidentification, or after police coerce a confession from him. Also, under some circumstances, a person can be in jail for an unrelated charge and encounter a snitch who hears a jailhouse confession to a different crime. See, e.g., Cagle v. State, 507 S.W.2d 121 (Tenn. Crim. App. 1974) (during search for murder victim, Cagle was arrested and held for a check charge).

86. U.S. Const. amend. VI.
88. Id.
to that result." The violation sprang from merely “intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel.” Henry had the potential to suppress many confessions to jailhouse snitches, as statements made in violation of the Sixth Amendment are inadmissible. But just six years later, in the jailhouse snitch case Kuhlman v. Wilson, the Supreme Court made a distinction between active jailhouse listeners who act on behalf of the government, and passive listeners who do not, and thus avoid the Sixth Amendment problem. In Wilson, the career snitch was found to be a passive ear—and what he heard admissible—even though the snitch actively goaded Wilson by telling him that his original story “didn’t sound too good,” and “things didn’t look too good.” Since Wilson, state officials can take snitches out of the ambit of the Sixth Amendment by subtly and indirectly creating conditions favorable for jailhouse confessions or by avoiding formal arrangements for rewards.

2. Demolishing Snitches on the Witness Stand

At common law, many witnesses were deemed incompetent and thus could not testify. Felons were among this group. Many jailhouse snitches, then, were barred. But the liberalization of the Federal Rules of Evidence made witnesses presumptively competent and shifted the burden of truth-detecting from the judge to the jury. The rationale is that the oath, demeanor, and, especially, cross-examination give the jury the means to perform this function.

The U.S. Supreme Court has held that due process does not forbid compensating informants who appear as witnesses, because that witness will be cross-examined. “The established safeguards of the

90. Id. at 270.
91. Id.
94. Id. at 439–40.
96. See, e.g., JAMES B. THAYER, SELECT CASES ON EVIDENCE AT THE COMMON LAW 1070 (1892); Rosen v. United States, 245 U.S. 467, 470–71 (1918).
97. Id.
98. Fed. R. Evid. 601 advisory committee’s note.
99. Id.
100. Hoffa v. United States, 385 U.S. 293, 311 (1966). The informant’s wife was paid with government funds and charges against the informant were either dropped or neglected. Id. at 298.
Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.\textsuperscript{101}

Cross-examination can be extremely effective in reducing a snitch’s credibility to zero because, as Judge Trott observed, “[o]rdinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable.”\textsuperscript{102}

Yet, in a recent study involving mock jurors given trial transcripts, jurors were more likely to convict in cases featuring secondary confessions to cooperating witnesses.\textsuperscript{103} Moreover, the mock jurors who learned that the witnesses had incentives to testify (such as leniency or rewards) were overwhelmingly unwilling to ascribe the informant’s motives to the incentive, believing instead that testimony was motivated by personal factors such as feeling of guilt, being a good person, or believing it was the right thing to do.\textsuperscript{104}

These findings are worrisome because, in the snitch context, the chief guarantee that cross-examination will be effective is adequate disclosure of such incentives from the prosecutor to the defense. \textit{Brady v. Maryland} held generally that due process requires prosecution disclosure of exculpatory evidence.\textsuperscript{105} The U.S. Supreme Court in \textit{Giglio v. United States} explained that \textit{Brady} requires disclosure of any inducements made to testifying informants, so that information may be used for impeachment.\textsuperscript{106} \textit{Kyles v. Whitley} further explained that the duty to disclose includes the duty to learn of exculpatory evidence known by others acting on the government’s behalf, such as police.\textsuperscript{107}

Thus, whether the jury consists of Trott’s jurors who instantly reject the snitch, or Neuschatz’s jurors who believe the snitch even when rewards and leniency are disclosed on cross-examination, the process due an innocent defendant on trial is that his attorney be able to cross-examine the snitch with the full panoply of impeachment evidence known to the prosecutor and police.

\textsuperscript{101} Id.
\textsuperscript{102} Trott, \textit{supra} note, 31, at 1385.
\textsuperscript{103} Jeffrey S. Neuschatz et al., \textit{The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making}, 32 \textit{Law & Hum. Behav.} 132, 146 (2008).
\textsuperscript{104} Id.
\textsuperscript{105} Brady v. Maryland, 373 U.S. 83, 87 (1963).
The final guarantee for effective cross-examination stems from the criminal justice system’s recognition that informants as a class pose “serious questions of credibility,”108 and thus some jurisdictions require that the judge nurture jurors’ doubts with a jury instruction calling attention to the credibility question. In California, for example, upon request the court shall instruct the jury that:

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.109

In sum, when a jailhouse snitch invents a confession from a factually innocent defendant, that snitch will generally be able to take the stand, and the defendant’s rights are thought to be guarded by his counsel’s vigorous cross-examination, fueled by properly disclosed impeachment evidence, before a carefully instructed jury.

3. Proposed Solutions

Because snitch-generated wrongful convictions have occurred despite these safeguards, some commentators are suggesting, and some jurisdictions are experimenting with, additional guarantees.

At least eighteen states require that accomplice snitch testimony be corroborated.110 But the problem of uncorroborated jailhouse snitch testimony has gone unaddressed, although the American Bar Association has recommended that, “to reduce the risk of convicting the innocent . . . no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.”111 The greater skepticism among jurisdictions of accomplice testimony is perhaps understandable since accomplices have a compelling incentive to shift blame to their partners. But in doing so, they implicate themselves to some degree in the underlying crime. So it is curious that of the two, jailhouse snitches are presumed more reliable, because the jailhouse snitch, in producing a confession, does not implicate himself whatsoever in the crime. Nevertheless, the typical attitude is reflected in a

109. CAL. PENAL CODE § 1127a(b) (West 2004).
110. AM. BAR ASS’N SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 7 n.16 (2005).
111. Id. at 1.
California Supreme Court decision that rejected a defendant’s argument that jailhouse snitch testimony should be corroborated just like accomplice testimony: “Whatever consideration a jailhouse informant may expect for testifying, the direct, compelling motive to lie is absent.”

Were corroboration to be required in jailhouse snitch cases, the mechanism might follow that of accomplice snitch cases. Typically, in those cases, corroboration evidence must not merely show the commission of the crime but a connection to the defendant. Often, corroboration cannot come solely from another accomplice or accomplices. But, corroboration need not extend to every detail of the accomplice’s evidence.

Another proposed safeguard is reliability hearings. There is surface appeal in likening jailhouse snitches to experts who testify because both are in the tiny minority of witnesses who can permissibly be compensated for appearing on the stand. Following this logic, some jurisdictions have flirted with subjecting snitches to reliability hearings modeled on Daubert v. Merrell Dow Pharmaceuticals before they are allowed to take the stand. Some factors a judge may consider include rewards and leniency, prior history of informing, specificity of testimony, the manner the confession was obtained, degree of corroboration, inconsistencies, and the snitch’s criminal history. Nevada has a limited common-law version of this approach, and Illinois—where death row exonerations outnumber executions—required reliability hearings in capital cases by statute.

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114. Id.
115. See State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994).
116. Harris, supra note 26, at 1.
119. Harris, supra note 26, at 31.
E. Circumstantial-Evidence Jury Instruction

To supply the final background element, we momentarily turn away from snitches and turn toward the distinction and the tension between direct and circumstantial evidence.

Dictionary definitions are too simplistic, as we will see, but they provide a useful starting point. Direct evidence is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.”[^122] In contrast, circumstantial evidence is “[e]vidence based on inference and not on personal knowledge or observation.”[^123]

In states like Mississippi, when evidence at a criminal trial is limited solely to circumstantial evidence, jurors hear this cautionary instruction (or one like it) from the judge:

> The Court instructs the jury that before you are warranted in convicting the Defendant on the evidence in this case you must exclude every reasonable hypothesis consistent with his innocence; and that if there is a reasonable hypothesis consistent with his innocence then it is your sworn duty to find the Defendant not guilty.^[124]

This instruction is the product of the long evolution of attitudes toward indirect evidence. Historically, there was great resistance to, and skepticism of, the use of circumstantial evidence to prove guilt.^[125] For example, ancient Jewish law included the Talmudic absolute prohibition against circumstantial evidence, because the introduction of such evidence was thought to put the innocent at risk of conviction.^[126] Early common law restricted use of circumstantial evidence but did not ban it outright.^[127] Eventually, English courts accepted circumstantial evidence in all trials, albeit with an important qualification. As noted by William Wills, “In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”^[128]

The U.S. Supreme Court, in the 1954 decision Holland v. United States, rejected the common-law approach, held that direct and cir-

[^123]: Id.
[^124]: Franklin v. State, 23 So. 3d 507, 516 (Miss. 2009).
[^125]: Rosenberg & Rosenberg, supra note 16, at 1376–90.
[^126]: Id. at 1375.
[^127]: Id. at 1390–91.
[^128]: Id. at 1391.
cumstantial evidence were equivalent, and found that trial judges need not specially instruct juries with regard to evaluating circumstantial evidence.129 Holland was a prosecution for income-tax evasion using the “net worth” method, a type of case that by its nature must ordinarily rest on circumstantial evidence.130 But, its holding was not so limited, and the federal circuits and many states have followed Holland and dispensed with the circumstantial-evidence jury instruction altogether.131 By 1995, thirty states and the District of Columbia had done away with the mandatory circumstantial-evidence jury instruction.132

Now, a majority of jurisdictions simply instruct juries as to the reasonable-doubt standard required by In re Winship,133 even when cases rest entirely on circumstantial evidence.134 California’s jury instructions regarding proof “beyond a reasonable doubt” provide an example of such an instruction:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.135

Comparing the two instructions demonstrates that the circumstantial-evidence charge is not subsumed within the reasonable-doubt charge. The two address different concerns. In short, the typical “beyond a reasonable doubt” charge tells jurors how certain they must be to return a guilty verdict; the typical “reasonable hypothesis of innocence” circumstantial-evidence charge tells jurors how to evaluate and analyze the evidence before them.136

Other commentators and dissenting judges have argued vigorously in general for the restoration of the circumstantial-evidence

131. Id. at 1397.
132. Id. at 1400 n.121.
charge in federal and all state courts. This Comment will touch on this scholarship in the Analysis section. But the focus of this Comment is to demonstrate the special danger presented by classifying jailhouse snitch testimony as direct evidence. This Comment now addresses the dimensions of this singular and profound unfairness.

II. Analysis

With the foregoing background in place, this Comment now turns to an analysis of why jailhouse snitches are so prevalent in the arena of wrongful convictions and why existing and proposed safeguards fail to protect the innocent and fail to choke off the snitch system. This section also considers why even when those safeguards work perfectly, a discredited snitch can still contribute to a wrongful conviction by denying a defendant the critical circumstantial-evidence jury instruction. Finally, this section considers and provides justifications for a simple remedy for this last problem: reclassifying snitch testimony as circumstantial, not direct, evidence.

A. Snitches Are Uniquely Devastating

Among the 350 wrongful convictions studied by Bedau and Radelet, coerced or false confessions were present in forty-nine and mistaken eyewitness identification in fifty-six. False confessions have an enormous impact on juries, because jurors are unable to fathom that an innocent person would admit to a crime he did not commit—even though it is well established that innocent suspects do in fact, with alarming frequency, falsely confess. Some confess to escape a grueling interrogation; some—especially juveniles and the mildly mentally retarded—confess to please their interrogator; some confess to avoid the possibility of the death penalty; and some even confess because police trickery, like falsifying polygraph results or lying about DNA evidence, actually convinces them of their own guilt. Eyewitness identification is notoriously unreliable because of, *inter alia*, the power of suggestion, lopsided lineups, faulty memory, cross-racial

137. See, e.g., Rosenberg & Rosenberg, supra note 16; Julie Schmidt Chauvin, Comment, “For it Must Seem Their Guilt”: Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard, 53 Loy. L. Rev. 217 (2007).
138. See discussion infra Part II.C.2.
139. Bedau & Radelet, supra note 25, at 57.
141. Id.
identification problems, and reinforcement bias and false confidence as the wrong person is selected first in a photographic lineup, then reselected in a live lineup, and finally identified in court.  

Snitch testimony is extremely powerful because the snitch recounts a compelling confession, often embellished and embroidered with convincing facts, and he does so from the witness box as a lay witness. Snitches are con artists, and con artists know how to sell. For example, when young children are victims, snitches often say they came forward because of “their repugnance towards the crime.” The snitch combines the crushing gravity of the false confession with the persuasive and dramatic jolt of a mistaken eyewitness.

Snitches are also devastating witnesses because their testimony can fill gaps left by the State’s other evidence. Often, circumstantial evidence is very strong connecting a defendant to a crime through ballistics, loot, opportunity, motive, and so on. But there may be no evidence whatsoever to build the final premise—that the defendant, and not someone else, actually pulled the trigger. The snitch can supply the missing connections by manufacturing a confession that falls snugly into place, like a Tetris piece.


143. Kaufman, supra note 68, at 563; see also Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).


145. A snitch can also supply evidence of intent, premeditation, or deliberation relevant to degree-setting that the prosecution cannot otherwise develop. A snitch can, of course, do this directly by manufacturing details to fit the State’s theory. But in some jurisdictions a snitch can also ascribe intent to a defendant by the mere fact of recounting a bare-bones confession, no matter how vague. For example, in Johnson v. State, 220 S.E.2d 448, 450 (Ga. 1975), a former doctor developed debilitating narcolepsy after a car accident. Only Ritalin in its injectable form provided effective relief, but the company eventually stopped making the injectable form. Id. Johnson experimented with Ritalin enemas, but guesswork as to dosage, and combinations with alcohol and Darvon, made this method less effective. Id. Johnson apparently shot and killed his wife but had no memory of his wife’s death, or anything, until he woke up at Milledgeville hospital, where he had been sent after arrest and incarceration. Id. at 451. Johnson’s cellmate before the transfer testified that Johnson “claimed he was Jesus Christ and that he would get them all out of jail, and admitted killing his wife by shooting her with a shotgun.” Id. Not only did the snitch and the snitch alone deny Johnson a circumstantial-evidence jury instruction, but because Johnson admitted homicide to the snitch “and he state[d] in connection therewith no facts or circumstances of excuse or justification . . . the law presumes malice, the requisite mental state to be guilty of murder.” Id. That snitch testimony can create a presumption of malice in a homicide case and thus add a significant term of years to a sentence or even make a defendant eligible for the death penalty is another understudied facet of snitch testimony, and another area ripe for reform, but is beyond the scope of this paper, which focuses on actual innocence.
Empirical studies suggest that jurors are less likely to convict based on circumstantial evidence, and more likely to convict based on direct evidence, even when the probative value of the evidence is the same. One explanation is that jurors worried about reaching the wrong verdict “are far less suspicious of witnesses who provide direct testimony than false-conviction statistics indicate they should be” because “if the defendant turns out to be innocent, they can blame the witness instead of themselves, minimizing their responsibility for the false conviction.” It follows that even a snitch who comes across as unreliable can nonetheless prompt a guilty verdict because the snitch enables jurors’ “responsibility-laundering” by filling the role of a “convenient scapegoat” for hesitant jurors. Another phenomenon is “narrative transportation,” when a juror becomes engrossed in a witness’s testimony and “all of her mental systems—attentive, imagistic, emotive—converge on its events, with dramatic real-world results: her ability to think critically about the narrative is reduced, making her more likely to believe that it is authentic and less skeptical of the credibility of its author.” Because transportation is most pronounced with “well-crafted, high-quality narratives,” especially ones with “rich, concrete descriptions,” it follows that jurors would be especially susceptible to snitch testimony, given that such testimony often just repackages a news story about a grisly crime written by a professional journalist for maximum punch.

**B. Inadequacy of Existing and Proposed Safeguards**

The problem with safeguards designed to keep snitches off the stand is that the witness box in a criminal trial is a welcoming place, and modern rules of evidence declare virtually any witness competent to testify so long as he claims to have firsthand knowledge. True, a prosecutor of course cannot suborn perjury, but a prosecutor is free to put shady or generally unreliable characters on the witness stand.

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148. *Id*.
149. *Id*.
150. *Id*.
151. See, e.g., generally Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010) (“[Snitch Sidney] Storch openly admitted that he was in possession of a newspaper article about the murders; the newspaper article itself mentioned all of the specific facts to which Storch testified.”).
152. See, e.g., Fed. R. Evid. 601.
Judge Trott uses the example of People v. Gordon, where a prosecutor admonished the jury that one of his witnesses might not be completely truthful. The California Supreme Court said, “a party does not necessarily have a free choice of witnesses but must take those who know the facts, and therefore cannot vouch for them.”

The magic cloak of firsthand knowledge also limits the availability and effectiveness of snitch reliability hearings based on the Daubert model for screening out bad experts. The key distinction between experts and lay witnesses is that experts need not have firsthand knowledge, but lay witnesses must. Therefore, a judge has a whole host of tools with which to deal with experts that she does not have once a witness such as a snitch makes the claim of firsthand knowledge.

Turning to the proposed corroboration requirement safeguard, one defect is that it is de facto already in place because for prosecutors, it is “the proven rule of thumb that the jury will not accept the word of a criminal unless it is corroborated by other reliable evidence.” Another flaw is that the corroboration can be, and usually is, circumstantial evidence, which is, for the purposes of the argument in this Comment at least, a circular remedy. In Tennessee, for example, “corroborative evidence [in accomplice snitch cases] may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction.” Moreover, prosecutors tactically use sleight-of-hand to make it seem that the snitch is corroborating the circumstantial evidence, instead of the other way around. Judge Trott advises prosecutors to invite jurors to become detectives and solve the case by “[d]well[ing] on the strength of the circumstantial evidence . . . and fashion[ing] out of the corroborating and circumstantial evidence a web that points toward and snares the defendant.” In this manner, the snitch is characterized not as the “key witness” but merely as the “frosting on the cake,” who merely establishes the defendant’s guilt already proven by the circumstantial evidence “not only beyond a reasonable doubt, but to an absolute certainty.”

The liberal rules of evidence favor lay witnesses who purport to have firsthand knowledge, including snitches, taking the stand. The

155. Trott, supra note 31, at 1424.
156. Gordon, 516 P.2d at 307 n.8.
158. Trott, supra note 31, at 1425.
159. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994).
160. Trott, supra note 31, at 1428.
161. Id.
The presumption of competence is strong enough to defeat most of the efforts to block snitches from testifying in the first place. The prosecutor may suspect that a snitch is lying, but unless she knows for certain (and how could she?), she does not violate her duty to the public by putting a snitch on the stand.\textsuperscript{162} Reliability hearings based on the expert-witness model have limited applicability to lay witnesses. And corroboration, because it need not come from direct evidence, does little to screen out the liars. Therefore, snitches routinely take the stand, and the system relies almost wholly on the jury’s determination of credibility to avoid wrongfully convicting the innocent.

The three main tools that assist the jury in weighing credibility are the oath the snitch takes, his demeanor on the stand, and the cross-examination he must endure. As discussed above, because the snitch has violated even the criminal code of ethics by informing, the value of the oath is dubious. His demeanor is subject to different interpretations. Some snitches are smooth, like Leslie Vernon White, and convincing. Others will betray outward signs of lying, but a citizen juror unaccustomed to observing career recidivists may miss these signs because they are swallowed up by the overall exotic behavior of the snitch, who is likely to be a specimen of an unfamiliar criminal underworld class.

That leaves cross-examination, which, as discussed above, is where the criminal-justice system expects the heavy lifting will be done. Specifically, the innocent are supposed to be acquitted, despite a snitch testifying to a fabricated confession, when an effective cross-examination impeaches the snitch. Thus, it is no surprise that the three major testimonial safeguards (prosecution disclosure, cautionary jury instructions, and cross-examination) all address the same potential problem: that the snitch may be lying. Disclosure of impeachment evidence gives defense counsel ammunition. Jury instructions emphasizing the peculiar reliability risks of snitches make jurors wary. The cross-examination itself is the battlefield. But, there are significant problems with all three.

Prosecutors are duty-bound by \textit{Brady} and \textit{Giglio} to disclose snitch impeachment evidence, including that which is known to the police. The problem is that when the prosecution fails to disclose, and the defendant is convicted, that defendant often has no recourse. The failure to disclose may never be discovered. Further, failure to disclose

before trial can only be established after trial—but by then a convicted defendant has lost the presumption of innocence and the concomitant constitutional and procedural advantages. Prosecutors are only required to disclose exculpatory evidence that is “material”—evidence that, had it been disclosed to the defense, would have created a “reasonable probability” of a different outcome.163 There is no per se reversal rule. Judges considering Brady claims on appeal or in post-conviction proceedings have their own hindsight and confirmation biases to overcome while doing counterfactual evaluations as to what is material.

The problem with cautionary jury instructions as to the inherent reliability problems of snitches is that they are typically advisory and tentative in nature. Jurors “should” (not must) evaluate snitch testimony with “caution” (not suspicion), and “should” (not must) “consider” (to an unknown degree) receipt or expectation of benefits.164 Nevertheless, it is common for a prepared defense lawyer, forearmed with impeachment material properly disclosed by the prosecution, to effectively cross-examine a snitch in front of a forewarned jury that is properly wary of the snitch’s motives to lie. But all this emphasis on credibility reveals an assumption that has not received much scrutiny: that credibility is the whole enchilada. In other words, there is a binary arrangement. If the snitch is believed, that bodes ill for the defendant. If the snitch is not believed, then the defendant suffers no ill effects.

But credibility is not a talisman. In some situations, a lying snitch, even when disbelieved by the jury, can inflict tremendous harm on a defendant. So far, this Comment has attempted to show that, with respect to jailhouse snitches, virtually all of the focus on avoiding wrongful convictions is on assisting the fact-finder ascertain the credibility of the snitch testimony. The shortcomings of these credibility safeguards undoubtedly increase the number of snitches who find their way to the witness box. But even if these safeguards were one hundred percent effective, the focus on credibility overlooks another risk. The remainder of this Comment explains this overlooked risk and proposes a solution.

A testifying jailhouse snitch can convict an innocent defendant even when the credibility safeguards at trial work perfectly, even when disclosure is thorough, and even when a properly instructed jury hears

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164. CAL. PENAL CODE § 1127a(b) (West 2004).
a devastatingly effective cross-examination. A jailhouse snitch can convict an innocent defendant even when the jury disbelieves the snitch. Specifically, in states like Mississippi, Georgia, Tennessee, Indiana, Montana, and New York, testimonial accounts of confessions made to individuals outside of law enforcement are considered direct, not circumstantial, evidence. Thus, in these jurisdictions, jailhouse snitch testimony recounting a fellow inmate’s confession is classified as direct evidence. In these jurisdictions, cautionary jury instructions regarding the proper evaluation of circumstantial evidence are given when the prosecution’s case rests entirely on circumstantial evidence. In such jurisdictions, sometimes a snitch’s testimony recounting a jailhouse confession constitutes the only direct evidence in the trial. When this is the case, the snitch thereby deprives the defendant of the circumstantial-evidence jury instruction he would have otherwise been entitled to. This is true whether or not the snitch is believable. Circumstantial jury instructions are crucial because they instruct the jury, when presented with conflicting, reasonable hypotheses, to resolve these inconsistencies in the defendant’s favor. This reasonable hypothesis of innocence standard assists the fact-finder and makes wrongful convictions less likely. The solution is to reclassify snitch testimony as circumstantial evidence. This simple reform will make wrongful convictions less likely by not allowing a lying snitch to influence the jury instructions given at trial.

C. Why Snitch Testimony Should Be Circumstantial, Not Direct, Evidence

With the foregoing summary in mind, we turn to developing the argument at hand. The remainder of this Comment explores how prosecutions based solely on circumstantial evidence affect the risk of

166. See cases cited supra note 165. The general rule in the aforementioned jurisdictions is that, for the purpose of circumstantial-evidence instructions, testimony of a confession is direct—not circumstantial—evidence, and thus it is not error to refuse to charge the jury on circumstantial evidence in such cases. There are some variations by state. For example, in Tennessee, “when the evidence introduced against the defendant is both circumstantial and direct and the defendant requests a charge on the law of circumstantial evidence, it is reversible error to refuse to give it.” Monts v. State, 579 S.W.2d 34, 41 (Tenn. 1964). Montana draws an evidentiary distinction between “confessions,” which are admissions of crime itself, and “admissions,” which concern only a specific fact that tends to establish guilt or an element of the crime. See Hallam, 575 P.2d at 62.
wrongful convictions, how the circumstantial evidence jury instruction lessens that risk (and allowing snitches to negate those instructions increases that risk), and finally why snitch testimony should not be classified as direct evidence.

1. Circumstantial Evidence and Wrongful Convictions

Recall that direct evidence is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” In contrast, circumstantial evidence is “[e]vidence based on inference and not on personal knowledge or observation.”

Circumstantial evidence can be very strong. Strong circumstantial evidence alone is enough to convict. But strong circumstantial evidence can prompt inferences that are plain wrong. In their classic study of wrongful convictions, Bedau and Radelet wrote:

But the cause of a wrongful conviction is not always corruption or negligence on the part of the authorities, or the good-faith error of eyewitnesses. Confusing circumstantial evidence often misleads the prosecution and the court. This was a factor in thirty cases [of 350 wrongful convictions in potentially capital cases analyzed]. . . . In the 1919 Ripan case, the defendant was eventually freed when ballistics tests proved that the fatal bullet could not have come from the gun in his possession. In two other cases, the defendant reported to the police the murder of his wife only to find himself the prime suspect, based on the circumstances of the crime. In 1974, Sergeant Jackson was convicted of murder when it was erroneously believed that a wallet in his possession had belonged to the victim. . . . In 1979, Sheila Wilson was convicted of murder in Kentucky because she was present when the victim was killed, and she was foolish enough to try to conceal this fact from the police. In each of these cases the circumstantial evidence was damning, and innocent persons were convicted on its strength.

In two of the wrongful convictions studied by Bedau and Radelet, misleading circumstantial evidence was present combined with perjury by prosecution witnesses. These were the cases of Hoffman and Tucker. Neither apparently involved jailhouse snitches, but they signal that the combination of circumstantial evidence and lying witnesses can be especially lethal. When that lying witness is lying specifically about a defendant’s supposed confession, that combina-

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168. Id.
170. Id. at 173–74.
171. Id. at 126, 164.
tion becomes all the more lethal in a state like Mississippi, where the emergence of the snitch means that the case is deemed to no longer consist only of circumstantial evidence.

The following decisions involve snitches whose emergence removed the conditions that otherwise would have warranted a circumstantial evidence jury instruction. These snitches thus singlehandedly thwarted the reasonable hypothesis of innocence standard for the defendant. These convictions were upheld on appeal despite indicia of snitch untrustworthiness that one must hope were evident to jurors even if they were not evident to courts.

In *Cagle v. State*, Cagle was sentenced to ninety-nine years for strangling a nineteen-year-old married woman with whom Cagle was acquainted.\(^\text{172}\) Circumstantial evidence included the fact that when officers came to arrest him, Cagle asked the officers if they had found the victim’s body.\(^\text{173}\) This fact was supposed to point toward guilt, but Cagle himself testified that the reason he asked was because police told him that he would be picked up if the body was found.\(^\text{174}\) Snitch Richard Cole, a fellow inmate while Cagle was incarcerated on an unrelated charge between the time the victim went missing and the body was found, said that Cagle at first denied killing the victim, then became “enraged after reading newspaper accounts” and said to Cole, “Yeah, I killed the damn bitch.”\(^\text{175}\) The court did not discuss and apparently attached no significance to the presence of news articles about the killing in the jail. Jurors may or may not have surmised that the newspapers could have provided Cole with details with which to fabricate a convincing confession. The court, refusing to reverse the conviction because of the failure to grant a circumstantial-evidence jury instruction, said,

\[\text{[t]he defendant’s confession made to fellow prisoners while he was in jail on another charge, prior to the discovery of the deceased body, was direct evidence. Since the verdict in this case rested on both direct and circumstantial evidence, and the defendant did not request a charge on the law of circumstantial evidence, the trial judge did not commit reversible error in failing to instruct the jury on that subject.}\] \(^\text{176}\)

In another decision, *Ladner v. State*, defendant Ladner was convicted of capital murder after the killing of two women and the theft

\(^{173}\) Id. at 126.
\(^{174}\) Id. at 128–29.
\(^{175}\) Id. at 126.
\(^{176}\) Id. at 130 (citations omitted).
of their jewelry. No fingerprints were found, but staff from the jewelry store where some of the jewelry turned up picked Ladner out of a photo lineup. Ballistics evidence matched the death bullet to the gun that Ladner ordinarily kept at his in-laws’ house. Ladner’s fellow inmate Eddie Prevost at the Jefferson Parish Correctional Center in Louisiana testified that Ladner confessed two murders to him. The Mississippi Supreme Court understood that “Prevost was a third floor ‘hall man’ who had informed in the past and had testified against fellow inmates on two prior occasions.” But when Provost requested a change and was moved from his first floor “pod” to Ladner’s “pod,” the court described this relocation as merely “fortuitous,” not orchestrated. The court was satisfied that Provost “was promised nothing and given no reward for testifying in Ladner’s case.” The Court did not discuss and apparently did not attach any significance to Provost’s singular status as “the only sentenced prisoner in the parish jail.” Jailers kept him there instead of transferring him to Angola prison “for his safety.”

Ladner’s jurors at trial may have disagreed with the court’s opinion that being kept out of Angola was not, in fact, a “reward.” Angola is a notorious prison, an even more loathsome place than Mississippi’s Parchman. For example, in approving a district judge’s findings that conditions of confinement at Angola violated the Eighth Amendment prohibition of cruel and unusual punishment, the Fifth Circuit said:

During the three years preceding the Special Master’s hearings more than 270 stabbings of inmates by other inmates were reported; 20 deaths resulted. This deplorable condition is due to overcrowding and to lack of security. Numerous “forcible rapes” were committed on inmates by other inmates, the total number being unknown. Inmate dormitories were “terribly overcrowded” and insufficient cell space existed to segregate dangerous prisoners from the rest of the inmate population. The prison staff included too few guards to protect the inmates from one another through either supervision or through confiscation of weapons. Easy inmate

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178. Id. at 746–47.
179. Id. at 747.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id. at 749.
185. Id.
186. Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977).
access to unsupervised machinery and other resources resulted in widespread possession of weapons. Fire and safety hazards constituted an “immediate threat to the life and safety” of both inmates and staff. Multiple health and sanitation violations were in evidence, including accumulation of sewage under the main kitchen (since cleaned out) and including a “serious rodent problem.”

But even if the *Ladner* jurors thoroughly discounted the snitch’s testimony, they never heard about the reasonable hypothesis of innocence standard. The court refused to ascribe error to the trial court’s decision not to grant a circumstancial jury instruction, because “the ‘confession’ which constitutes direct evidence of a crime is not limited to a confession to law enforcement but also includes an admission made to a person other than a law enforcement officer.”

2. The Reasonable Hypothesis of Innocence Standard

The juries delivering verdicts in the trials of the abovementioned defendants would have heard circumstancial-evidence jury instructions but for the presence of jailhouse snitches who had motives and opportunities to fabricate confessions. But what exactly is the import of the circumstancial-evidence jury instruction?

Recall that in states like Mississippi, when evidence at a criminal trial is limited solely to circumstantial evidence, jurors hear this cautionary instruction or one like it from the judge:

The Court instructs the jury that before you are warranted in convicting the Defendant on the evidence in this case you must exclude every reasonable hypothesis consistent with his innocence; and that if there is a reasonable hypothesis consistent with his innocence then it is your sworn duty to find the Defendant not guilty.

The risk of convicting the innocent is that, without the circumstancial evidence jury instruction, a reasonable hypothesis does not preclude a juror from being convinced beyond a reasonable doubt. Again, compare the above “reasonable hypothesis of innocence” standard with California’s jury instructions regarding proof “beyond a reasonable doubt”:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt...

187. *Id.*
189. This is the text of a circumstancial-evidence jury instruction tendered by the defense in *State v. Franklin*, 23 So. 3d 507, 516 (Miss. 2009), where two snitches provided the sole direct evidence in the conviction of Franklin for murder and arson. The trial judge first agreed to give the instruction, then later refused.
whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.\(^\text{190}\)

Comparing the two charges shows that the “reasonable doubt” instruction goes to the quantum of proof, but the “reasonable hypothesis” instruction goes to the analytical process a jury should follow. They are different altogether. Omitting the circumstantial evidence charge leaves a jury rudderless. A rudderless boat is bad enough; permitting a snitch to tow such a boat to shore is outrageous.

The crux of the problem is that jurors can find that a defendant’s theory is a reasonable hypothesis, and yet still vote to convict based on a reasonable-doubt standard, unless informed via a circumstantial evidence instruction that the jury has a “sworn duty” to “exclude every reasonable hypothesis consistent with . . . innocence.”\(^\text{191}\) In this fashion, a snitch can become the actual cause of a conviction—even if disbelieved—because his mere appearance in the witness box changes the way jurors evaluate the legitimate evidence before them. One commentator has summed up the importance of the cautionary instruction this way:

[D]ue to the inferential nature of circumstantial evidence, it is possible for an improperly instructed jury to pile inference upon inference and reach a verdict that is founded upon mere suspicion. While the defendant may be able to offer a reasonable hypothesis of his innocence, the jury is free to ignore this hypothesis if the law does not require a cautionary jury instruction. It is in this way that the reasonable hypothesis of innocence jury instruction protects against improper inferences and unjust conviction—it forces the jury to consider whether there is a reasonable alternative explanation.\(^\text{192}\)

Without such an instruction, juries faced with both the “ambiguity of the beyond a reasonable doubt standard [and] the inferential nature of circumstantial evidence” have little guidance on how to weigh the evidence.\(^\text{193}\) Without guidance, jurors weighing circumstan-

\(^{190}\) Cal. Jury Instr. Crim. 2.90 (West 2010).
\(^{191}\) See Franklin, 23 So. 3d 507.
\(^{192}\) Chauvin, supra note 137, at 222–23.
\(^{193}\) Id. at 243.
tial evidence are prone to misinterpreting the evidence and misapplying the beyond a reasonable doubt standard.194

The logic of refusing to allow a jailhouse snitch to deprive an accused of the circumstantial jury instruction was expressed perfectly in a different context by the Supreme Court of Tennessee in Monts v. State.195 In Monts, the court found reversible error when the trial court refused to grant codefendant West’s request for a circumstantial-evidence jury instruction in a murder trial with both direct and circumstantial evidence.196 The court explained:

The jury is the sole judge of the credibility of the evidence, whether it be direct or circumstantial. A confession, being direct evidence falls within this rule. While the admissibility of a confession is for the court, its credibility is for the jury. When a case is grounded on both circumstantial and direct evidence, it is entirely possible that the jury, in the exercise of its function as the sole judge of the credibility of the evidence, may find that the direct evidence is unworthy of belief. If they should so find, then they would be left with only the circumstantial evidence to guide them in determining whether the defendant is guilty of the offense charged. But without the law of circumstantial evidence before them, how can they be expected to properly evaluate this evidence? The possibility that we have just mentioned makes it imperative that the trial judge instruct the jury on the law of circumstantial evidence.197

How, indeed? Scholarship and studies suggest that jurors underestimate the value of circumstantial evidence while arriving at a verdict,198 underestimate the degree of certainty required to satisfy the beyond a reasonable doubt standard,199 and underestimate the intellectual rigor necessary to make sense of circumstantial evidence.200 It is tempting to hope that these three mistakes cancel each other out, but such a hope is too facile. What is more likely is that this tension produces both wrongful convictions and false acquittals. The same studies show that just as jurors undervalue circumstantial evidence, they overvalue direct evidence,201 so when a storytelling snitch emerges in an otherwise all-circumstantial case, all of the cognitive and psychological factors pull toward a wrongful conviction.

194. Id. at 241.
196. Id. at 40.
197. Id. at 41 (emphasis added) (citation omitted).
198. See Heller, supra note 146, at 244–45.
199. See generally Chauvin, supra note 137.
201. Heller, supra note 146, at 252.
With respect to the three varieties of juror underestimation, the first involves the probative value of circumstantial evidence. One experiment involving mock jurors concluded that the crucial difference between the way jurors determined verdicts based on the type of evidence was “the degree to which they permit a juror to simulate a scenario in which the defendant is innocent.”202 This is but another way of characterizing a “hypothesis consistent with innocence,” which is the very area where the circumstantial-evidence instruction provides guidance.

The second variety is underestimation of the quantum of proof. I was unable to locate experiments or empirical research precisely comparing how jurors properly instructed as to circumstantial evidence decide verdicts versus those not properly instructed. But a Florida study involving mock jurors produced a relevant, telling, and chilling result. The mock jurors received standard jury instructions for a burglary case but apparently not a circumstantial-evidence jury instruction.203 Though on the whole the instructed jurors showed “a statistically significant gain over the control group in understanding the legal principles involved,” there were several “areas in which they showed little gain in comprehension.”204 One such area was interpreting circumstantial evidence. Specifically, “in a circumstantial evidence case, 23 percent of the instructed jurors believed that, when faced with two equally reasonable constructions, one consistent with the defendant’s guilt and the other with his innocence, the defendant should be convicted.”205

The third variety is underestimation of the intellectual rigor involved in making sense of circumstantial evidence. With direct evidence, there is no problem—if a juror believes a witness who testifies that she saw the defendant gun down the victim, no additional inference is needed. But the inferential nature of circumstantial evidence is different. Recognizing this danger, New York’s highest court said in People v. Kennedy:

202. Id. at 259.
203. David U. Strawn & Raymond W. Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478 (1976). Although at the time of the study Florida required the circumstantial-evidence jury charge in circumstantial-evidence cases, the focus of the study was the efficacy of “instructions . . . required to be given in all criminal cases,” which presumably would not have included the circumstantial-evidence instruction. Id. at 479 (emphasis added).
204. Id. at 480.
205. Id. at 481.
Cases involving circumstantial evidence must be closely reviewed because they often require the jury to undertake a more complex and problematical reasoning process than do cases based on direct evidence. . . . The jury must attempt a careful and close analysis of the evidence and determine what inferences can and should be drawn not merely from each separate piece of evidence, but from the whole complex of interrelated information which is presented in evidence. . . . The reasoning process tends to be more complex, and is thus more subject to error.206

And later in People v. Ford:
The reason for the current application of [the circumstantial evidence charge] rule is not that circumstantial evidence is thought to be weaker than direct evidence, since the reverse is frequently true. Rather, the rule draws attention to the fact that proof by circumstantial evidence may require careful reasoning by the trier of facts. By highlighting this aspect, the rule hopefully forecloses a danger legitimately associated with circumstantial evidence—that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree.207

3. Reclassifying Snitch Testimony to Salvage the Circumstantial-Evidence Jury Instruction

As we have seen, criminals who are offered even meager rewards will testify falsely that other prisoners confessed to them. This is one reason why there have always been, and continue to be, special rules for dealing with snitches at trial.

At common law, many criminals were incompetent witnesses and simply could not testify at all.208 Confronting an accomplice snitch in a 1909 decision, the U.S. Supreme Court observed that

Without his evidence it would have been difficult, if not impossible, to convict the defendant . . . . The evidence of a witness, situated as was Lorenz, is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.209

Justice Peckham then observed, “In many jurisdictions such a man is an incompetent witness unless he has been pardoned.”210

209. Id.
210. Id.
Not so today. The liberalization of the rules of evidence is thought to be beneficial overall because it puts more information in the hands of the fact-finder. But profound problems with snitch reliability demand a compromise. Because snitch testimony is so suspect, it indeed “ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.” A modest reform, and one that could be accomplished quickly in those jurisdictions that do not already observe this rule, would be to categorize all tales of confessions to individuals other than law-enforcement officers as circumstantial, rather than direct, evidence.

This issue has not been litigated at all in some states and inadequately in others. The Mississippi example is instructive. There, the Mississippi Supreme Court, in 1989, decided McNeal v. State, which overturned a murder conviction. The conviction was challenged on several grounds, including that the prosecution admitted prejudicial photographs of the victim, some of which were gruesome and blown up to life size. The conviction was also challenged because a jailhouse snitch singlehandedly knocked out the circumstantial jury instruction—all of the other evidence at trial was circumstantial. The Mississippi Supreme Court reversed on the prejudicial photographic evidence ground but nonetheless discussed the trial court’s refusal to grant the circumstantial-evidence instruction.

In McNeal, jailhouse snitch Freddie Suttles claimed that defendant McNeal confessed to him in a jail cell, but the court noted that “Suttles had a local newspaper subscription and avidly followed all the details of the McNeal investigation. . . . McNeal claimed that Suttles derived pleasure from harassing McNeal with the details of Darlene’s murder which he had picked up from the media.” The McNeal case was in the papers in part because the accused was a former policeman.

Soon after his interview with someone in the District Attorney’s Office, Suttles began to brag to at least two different prisoners that he would soon be released in exchange for testifying about the “ex-pig” Don McNeal. Whatever the substance of Suttles’ boast, it is

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211. Id.
213. Id. at 159–60.
214. Id. at 158.
215. Id. at 159.
216. Id. at 157.
217. Id.
undisputed that his armed robbery charge was soon reduced to the much less serious charge of simple robbery. 218

The Court discussed the risk of a wrongful conviction:

Due to the uncertainty of Freddie Suttles’ source for his facts (newspaper or McNeal), we strongly question the reliability of testimony which was given in exchange for a reduced sentence. The testimony of jail-house informants, or “snitches,” is becoming an increasing problem in this state, as well as throughout the American criminal justice system. The present case is one of many across the nation where the truthfulness of the informant has been called into question. Informants, like Freddie Suttles, are offering evidence against their fellow inmates in exchange for reduced sentences. In the process of reaping their benefit, they are manipulating the system by helping to convict innocent citizens. 219

The Court then cited to an ABA Journal entitled “No Honor Among Thieves” that quoted the president of the California Attorneys for Criminal Justice as saying:

[Failure to follow procedures to confirm snitch reliability results in] an unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement who’s running a training ground for snitches over at the county jail, and the prosecutors who are taking what appears to be the easy route, rather than really putting their cases together with solid evidence. 220

(The ABA Journal in question had appeared during the Leslie Vernon White scandal.)

The practice in Mississippi was to give a circumstantial-evidence jury instruction whenever the prosecution could not produce either an eyewitness or a confession. 221 Mississippi loosened this practice in a 1985 decision to broaden “confession” to include “unwritten verbal admissions made to any lay witness.” 222 The trial judge had relied heavily on that 1985 decision, Mack v. State, 223 in his decision not to grant McNeal a circumstantial-evidence jury instruction. 224

The McNeal court followed its damning indictment of the use of jailhouse snitches with this observation: “It is doubtful that such testimony [of a state’s witness who has received a reduced sentence to testify] should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction . . . ” 225

218. Id.
219. Id. at 158.
220. Id. at 158 n.2; Mark Curriden, No Honor Among Thieves, A.B.A. J., June 1989, at 51.
221. McNeal v. State, 551 So. 2d 151, 157 (Miss. 1989).
222. Id.
224. McNeal, 551 So. 2d at 158.
225. Id. at 159.
This discussion in *McNeal* opened the door and triggered litigation in subsequent cases where a jailhouse snitch was the but-for cause of the refusal to grant a circumstantial-evidence jury instruction.\(^226\)

But because *McNeal* had been decided on prejudicial evidence grounds, the entire discussion of snitches was dicta. The Mississippi Supreme Court soon backed away from the “doubt[s]” it had expressed in *McNeal*. In a 1991 decision, the court refused to ascribe error to a lower court judge who refused to give a circumstantial-evidence jury instruction where the only “conceivable direct evidence” was jailhouse snitch testimony.\(^227\) In finding no error, the court cited to *Mack* and two other pre-*McNeal* cases and said bluntly and dismissively, “*McNeal v. State* is not authority for Ladner’s position on this issue. *McNeal* was decided on other grounds and is not authority here.”\(^228\) Mississippi thus slammed the door and squandered an opportunity to protect the rights of the innocent.\(^229\)

\(^{226}\) See, e.g., Ladner v. State, 584 So. 2d 743 (Miss. 1991).

\(^{227}\) Id. at 750.

\(^{228}\) Id. at 750 n.1 (citation omitted).

\(^{229}\) As mentioned, the Mississippi Supreme Court decided *McNeal* in 1989, the same year that Leslie Vernon White appeared on television and the same year as the grand jury investigation into the Los Angeles snitch scandal. But, by the time the court decided *Ladner*, just two years later, jailhouse snitches were out of the headlines. It bears mentioning that judicial attention to the snitch problem should not have cooled along with media attention. One reason is that the victims of snitch testimony continue to languish in prison and on death row. This is true even of victims of the notorious L.A. snitches. The Ninth Circuit recently decided *Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010). In *Maxwell*, habeas petitioner Bobby Joe Maxwell was arrested in 1979 for being the “skid row stabber” who murdered ten homeless men in Los Angeles. Id. at 491. He was convicted in 1984 on two of the ten counts and sentenced to life without parole. Id. at 491–93. The prosecution lacked solid physical evidence. Id. at 491. One witness even told the prosecutor, “I sure hope you have the right guy, because if you do, he sure did change a lot in the last six months.” Id. at 492. The prosecution’s best evidence was testimony of jailhouse snitch Sidney Storch. Id. at 498. Storch, along with White, was among “Los Angeles County's most infamous jailhouse informants and he operated at the height of the County’s jailhouse informant scandal.” Id. at 505. But Maxwell was convicted before the scandal broke. Even after the scandal, Maxwell’s state-court appeal was unsuccessful in 1991. Id. at 493. The California Supreme Court denied review that same year. Id. State habeas proceedings took place between 1991 and 1996, when the California Supreme Court issued an order to show cause on the issue of whether Storch gave false testimony. Id. at 493–94. A two-year evidentiary hearing followed at the trial level, whereupon the superior court concluded that “while Storch might have proceeded to become an established liar and sophisticated jailhouse informant, Storch had not lied at Maxwell’s trial.” Id. at 494. A second state-habeas petition failed in 2001. Id. Maxwell initiated federal-habeas proceedings in 2002. Id. The federal district court did not disturb the state’s findings and the petition was denied in 2006, whereupon Maxwell appealed to the Ninth Circuit. Id.

In 2010, the Ninth Circuit reversed and granted Maxwell a new trial. Id. at 513. The court surmounted the high habeas procedural hurdle by concluding that “it was an objec-
Though the Mississippi Supreme Court ultimately did not follow its own reasoning in *McNeal*, that decision signaled the correct course of action. Because snitches lie, and lying snitches convict the innocent, all jurisdictions should classify jailhouse-snitch testimony as circumstantial evidence. This change may prevent some wrongful convictions, because no longer will snitches have the power to dissolve circumstantial-evidence jury instructions that inform jurors of their sworn duty to resolve all reasonable hypotheses in favor of the defendant.

How exactly should states like Mississippi proceed to reclassify snitch testimony as circumstantial, rather than direct, evidence? First, jurisdictions should acknowledge that the distinction between circumstantial and direct evidence is much more amorphous than the dictionary definitions indicate. The Supreme Court of Mississippi has found that the difference is easy to state: “A circumstantial evidence case is one where the State is without a confession and wholly without eyewitnesses to the gravamen of the offense charged. But where the accused has made an admission on an element of the offense, it is no longer a circumstantial evidence case.”

230 Garrett v. State, 921 So. 2d 288, 291 (Miss. 2006) (citations and internal quotation marks omitted).

Id. at 506. If Storch was a neophyte informant at the time of Maxwell’s trial, his inexperience showed not in his forthrightness, but, rather, in the lack of creativity in the lies he told. Storch simply repeated facts about the Skid Row Stabber killings contained in a newspaper article he admitted to possessing, and he offered no details about any of the crimes that were not already public and in widespread print. Storch testified at Maxwell’s trial because he wanted to obtain a benefit—a reduction in his sentence—and, because he was dishonest, he was willing to say or do anything to obtain that goal.

Id. at 505. The Ninth Circuit found that the Superior Court “arbitrarily cabined Storch’s perjury methods to a time period starting after 1984, and, in spite of the numerous known lies Storch told at Maxwell’s trial, unreasonably found his testimony truthful.”

Id. The Maxwell decision is remarkable because of how forthright it is. *Maxwell* was an easy case. But what a long, hard road. The tragedy is that state courts repeatedly got it wrong, as did a federal district court. Bobby Joe Maxwell served twenty-six years of his sentence before obtaining relief.

One final point is that Maxwell is the typical snitch case where the lies themselves bring about the conviction. Had Storch been an ineffective liar, and had Maxwell been convicted nonetheless, habeas relief might have been unavailable because the testimony of a less accomplished liar might not have satisfied the condition of being “material.” Id. at 507. Though no doubt most wrongly accused defendants would prefer an unconvincing snitch to a convincing snitch, the special danger of the transparent liar who nonetheless takes the circumstantial-evidence jury instruction off the table is that post-conviction relief can be withheld for lack of materiality. Id.
ceded that “the definition of circumstantial evidence gives rise to ling-
guistic problems which do not fit into nice, neat mutually exclusive
categories of either direct or circumstantial evidence.”

Second, jurisdictions should acknowledge that testimony recount-
ing oral confessions is much less akin to direct evidence than the phys-
ical presence of a written confession. A strange decision from the
Supreme Court of Colorado ultimately concluded, “confessions, oral
as well as written, are direct evidence.” Before so concluding, how-
ever, the court summarized the “several imperfections by reason of
which evidence of an oral confession is classed as circumstantial
rather than direct.” They are:

The facts of guilt are not stated in documents; they do not come
under the cognizance of the senses of the witness testifying; they
are only inferred from establishing circumstances; they are twice
removed from such circumstances; the language may have been
misconstrued; the inferences may be erroneous; the witness may
have testified falsely.

These “imperfections” are, of course, at their zenith when a snitch
takes the witness stand. This concern leads to the next point.

Third, jurisdictions should recognize that inherent problems with
snitch reliability justify a judge’s reclassification of evidence while still
respecting the jury’s job of assessing credibility. As the law now stands,
uttering the word “credibility” is like pulling a fire alarm: judges run
out of the courthouse. Testimony recounting a confession is consid-
ered direct evidence even when there are obvious signs of lying, such
as “when the witness in question admitted to making a prior inconsis-
tent statement, attributing the confession to another.” For purposes
of the circumstantial-evidence jury charge, courts refuse to distinguish
between bona fide confessions made to multiple credible witnesses,
and tall tales supposedly made to unreliable narrators because it is

232. Mitchell v. People, 232 P. 685, 687 (Colo. 1924). The reasoning in Mitchell was
hard to follow:

One is not convicted on evidence of the existence of a confession alone, hence
whether such evidence is direct or circumstantial is immaterial. One is convicted
on a confession which, once established, is itself the evidence to be considered. It
is then always direct and always convincing . . . .

233. Id. at 686. The summary comes from Damas v. People, 163 P. 289 (Colo. 1917),
which the Mitchell court promptly overruled.
“the jury’s prerogative—not this Court’s—to assess the credibility of witnesses.”

But in other areas of the law, judges exercise independent judgment in assessing confessions. For example, in evaluating a prosecutor’s bare-bones application for leave to file the information to justify the issuance of an arrest warrant, a confession need not be accepted to establish probable cause without a judicial enquiry into “the circumstances and context in which defendant allegedly made this statement. To whom did he make this statement? Was it a child, a policeman, a relative, a friend, and eavesdropper? Was the person reliable?”

Given the proven unreliability of jailhouse snitches, it does not seem right that judges should exercise more care before authorizing an arrest than before entering judgment on a conviction. Instead, courts should borrow from other areas of law where judicial intrusion into the realm of reliability is the norm and make the modest reform of reclassifying snitch testimony as circumstantial evidence. Such a reform, after all, in no way disturbs the central function of the trier of fact. But, in the event that the jury does discount the snitch, the reform ensures that the jury can still benefit from the reasonable hypothesis of innocence instruction that it would have heard had the snitch never emerged.

In sum, jurisdictions should acknowledge that the line between direct evidence and circumstantial evidence is often blurry, that oral confessions exhibit special “imperfections,” that judges can make certain allowance for witness reliability without stepping on jurors’ toes, and that jailhouse snitches are, as a class, among the least reliable witnesses imaginable. With the above in mind, jurisdictions should adopt the view that jailhouse-snitch testimony that recounts a cellmate’s purported confession is “direct evidence that an admission or confession was made by defendant but circumstantial evidence of the truth of what was admitted.” If truth is found wanting, the statement, if there even was one, was not an admission or confession, and thus no more direct evidence of guilt than the reading of a poem. With one modest adjustment to the way a single, narrow category of evidence is classified, states can reduce wrongful convictions by preventing snitches from depriving the accused and their juries of the essential circumstantial-evidence jury instruction.

Conclusion

A jailhouse snitch may fabricate and testify about a bogus confession from a cellmate in exchange for leniency or even some mundane reward (e.g., a piece of fruit). The liberalization of evidence rules makes it difficult to keep such jailhouse snitches off the stand. The fate of innocent defendants is entrusted to jurors, who are supposed to be able to detect and discount those snitches that are lying.

There are flaws with all of the safeguards that are supposed to help jurors tell if a snitch is lying or not. Lying snitches continue to testify. Even when the system works perfectly and juries see through a lying snitch, the chance for an acquittal for some innocent defendants is diminished. For these defendants, the emergence of the snitch destroys the conditions that would otherwise warrant the reading of a circumstantial-evidence jury instruction. This situation occurs in states like Mississippi, where defendants confronted with only circumstantial evidence are entitled to a reasonable hypothesis of innocence standard, and where snitch testimony is considered direct evidence despite its reliability problems.239 In such a state, when the snitch in a particular trial constitutes the only direct evidence in the prosecution’s case, the snitch influences the course of the trial and the deliberations of the jury, even if that snitch is patently, transparently, and even laughably lying.

If, despite all we know about the propensity of jailhouse snitches to lie, they are permitted to testify against cellmates, the least we can do is ensure that if these snitches are deemed to be not credible witnesses, then they should play no role whatsoever in the determination of guilt or innocence. In the interests of justice, the jurisdictions that classify snitch testimony as direct evidence should reclassify snitch testimony as circumstantial evidence. Only in this way will the stain from a lying snitch be obliterated without a trace.

239. See, e.g., Edwards v. State, 413 So. 2d 1007, 1009 (Miss. 1982).