THE USE OF A CRIMINAL AS A WITNESS: A SPECIAL PROBLEM

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"[T]he informer is a vital part of society's defensive armor."
McCray v. Illinois, 386 U.S. 300, 307 (1967).

"This Court has long recognized the 'serious questions of credibility' informers pose . . . . We have therefore allowed defendants 'broad latitude to probe [informers'] credibility by cross examination' and have counseled submission of the credibility issue to the jury 'with careful instructions.'"
Banks v. Dretke, 540 U.S. 668, 701-02 (2004).

"A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. Because the Government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the Government stands uniquely positioned to guard against perfidy. By its action the Government can either contribute to or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery."
United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir. 1993).

Preface

In the hands of an experienced physician, a scalpel is a marvelous tool. It can remove a deadly tumor or repair a diseased heart. The success of such procedures, of course, depends upon the skill of the surgeon, because that same scalpel in inexperienced or careless hands can fatally nick a healthy artery, severe an unseen nerve, or even perform an operation on the left knee when the right one is the problem.

A cooperating criminal used as a witness against other criminals is much like a scalpel. Jimmy the Weasel Fratianno can be used to bring down the West Coast Mafia, Sammy the Bull Gravano to unseat mob boss John Gotti, and Michael Fortier to deliver a crushing testimonial blow to Timothy McVeigh in the Oklahoma Federal Building bombing case. In point of fact, one of the most useful, important, and, indeed, indispensable weapons in civilization's constant struggle against criminals, outlaws, and terrorists is information that comes from

their associates. But, as in the case of a scalpel, the careless, unskilled, or unprepared use of cooperating criminal as a witness has the capacity to backfire so severely that an otherwise solid case becomes irreparably damaged, and the fallout can sometimes wreck a case and even tarnish a prosecutor's reputation or career.

A cooperating criminal is far more dangerous than a scalpel because an informer has a mind of his own, and almost always, it is a mind not encumbered by the values and principles that animate our law and our own Constitution. An informer is generally motivated by rank and frequently sociopathic self-interest and will go in an instant wherever he perceives that interest will be best served. By definition, informer-witnesses are not only outlaws, but turncoats. They are double crossers, and a prosecutor not attuned to these unpleasant truths treads without cleats on slippery ice. In a moment, a prosecutor can effectively go from prosecutor to the object of an investigation, with chilling consequences. Moreover, an informer even apparently fully on board can commit perjury, obstruct justice, manufacture false evidence, and recruit other witnesses to corroborate his false stories. After 40 years in our justice system, I conclude that the greatest threat to the integrity of our justice process and to its truth seeking mission -- indeed, even to prosecutors themselves -- comes from informers poorly chosen for their roles and then carelessly managed and handled.

On the other hand, some of the greatest successes in our criminal courts could not have been accomplished without the expert and skilled use of such witnesses. Vincent Bugliosi deftly used Manson Family members to bring down their trusted leader, Charles Manson himself. An endless array of adept prosecutors have used mafiosi to topple their bosses and destroy their empires. Even President Richard Nixon was extracted from the highest office in our nation with the help of testimony from his closest confidants. The list of successes is lengthy, and it is impressive. As the Supreme Court said in Kastigar v. United States, 406 U.S. 441, 446 (1972), our immunity statutes "reflect the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."

But how does a prosecutor become adequately schooled and skilled in this peculiar area of his or her craft? The required curriculum cannot usually be found in the classrooms of our law schools, but only on the streets and in the

jails and courtrooms of our towns and cities. Knowledge here comes from the trenches, from the veterans, from the school of hard knocks; and hopefully it comes before troublesome mistakes are made.

I draft this outline not with the goal of enabling any person to win a given case, but to attempt to shed disinfecting light on a recurring problem that frequently knocks the justice system loose from its moorings and causes it to capsize. Furthermore, I do not claim to have all the answers to the challenges I discuss. Each case and each witness will be different. All I can do is alert you to the problems with the hope that your solutions will enable you to achieve your goals, and those of your agency. As the motto of the United States Department of Justice says, "The government always wins when justice is done." Let us begin.

A. In the early stages of a prosecutor's career, most prosecution witnesses are normal citizens who, by virtue of some misfortune or otherwise, have been either the victim of, or a witness to, a criminal act. Mr. Jones, for example, is called to the stand, and testifies that he was swindled out of his life's savings; Mr. Wilson tells the jury about his stolen car; Mrs. Johnson identifies the body of her son who was killed in a robbery; or Agent Bond recounts his discovery of cocaine in the defendant's luggage at the airport.

With these kinds of witnesses, character, credibility, and integrity are usually not critical issues, either during the investigation of the case or in court. The most generally expected from the other end of the table is a defense based on the assertion that such a witness -- although admittedly a good person -- is simply mistaken as to what he or she believes was seen or heard.

Sooner or later, however, another type of not-so-reliable witness starts to make an occasional appearance on the subpoena list, and the prosecutor begins to venture out onto a totally different sea where he or she is frequently ill-prepared to navigate -- the watery and treacherous domain of the accomplice, the coconspirator, the snitch, and the informer. After Mr. Jones testifies as the victim of a swindle, one of the swindlers is called to the stand in an attempt to convict the mastermind who cooked up the scheme and who hid all the loot in foreign bank accounts. After Mr. Wilson laments the disappearance of his Mercedes, the car thief is

called in pursuit of the kingpin who for profit runs hot German cars into Mexico. After the mother of the murdered clerk identifies her dead son, the defendant's cellmate is called to recount a jailhouse confession; and after agent Bond identifies the cocaine, the mule in turn points the finger of guilt at the brains of the organization.

The usual defense to this kind of criminally involved witness is never just a polite assertion that he is mistaken. Not surprisingly, the rejoinder ordinarily mounted amidst loud, indignant, and sometimes even enraged accusations is that the witness is lying through his teeth for reasons that should be patently obvious to every decent person in the courtroom.

In this vein, the surprised prosecutor on occasion will discover that his or her own personal integrity is on the line. Such an unexpected turn of events is not a laughing matter. It is neither helpful to a prosecutor's case nor very comforting personally to have the defense persuasively arguing to the court and jury, for example, that you, as a colossal idiot, have given immunity to the real killer in order to prosecute an innocent man. Alan Dershowitz in his book, The Best Defense, describes this defense tactic as follows:

> In representing criminal defendants -- especially guilty ones -- it is often necessary to take the offense against the Government; to put the Government on trial for its misconduct. In law as in sports, the best defense is often a good offense.

In this perilous world, "character," "bias," and "credibility" aren't just interesting issues in a book about evidence -- they become the pivotal win or lose elements in the prosecution's case, from start to finish. How these witnesses are managed and how these issues are approached and handled when they arise -- especially including discovery -- may determine the success or failure of the case.

There are two principal reasons why this type of frontal offensive can be marshaled against these kinds of witnesses. Unfortunately, the two reasons and their legal and tactical ramifications are not fully appreciated by a prosecutor or an investigator until he or she has been in the profession long enough to observe firsthand a case or an investigation go

monumentally sour because of a treacherous witness. Working with the Joneses, the Wilsons, the Johnsons, and the Bonds of the world gives an unseasoned prosecutor a false sense of security with all witnesses. The two reasons appear obvious enough on paper, but unless they are uppermost in a prosecutor's or an investigator's consciousness at all times when dealing with criminals as witnesses, serious and irremediable errors in judgment can occur.

The first of the two reasons relates to the general nature of a person/witness predisposed to criminality. Read it and commit the message to memory:

1. Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murders, and thieves are not far behind. Criminals are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom "truth" is a wholly meaningless concept. To some, "conning" people is a way of life. Others are just basically unstable people. A "reliable informant" one day may turn into a consummate prevaricator the next.

In case you have any doubts about the observation that criminals are capable of unfathomable lies under oath, try on for size this essentially accurate article from the front page of the Los Angeles Times.

> Denver - Marion Albert Pruett's is an appalling but compelling story.
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> Held in federal prison, he bartered his way to freedom by agreeing to testify against a prisoner accused of killing Pruett's cell mate [who himself was scheduled to testify for the Government]. In exchange, the U.S. Government took him into its secret witness

> security program, giving him a new identify and a new start in life.
>
> By last October and by his own account, however, Pruett had committed a string of bank robberies and had murdered two convenience store clerks, near Denver, another in Fort Smith, Arkansas, and a savings and loan employee in Jackson, Mississippi. Now back in jail, Pruett recanted the testimony that had led to his freedom and declared that he, Marion Pruett, had actually killed his cell mate.

Or, if Mad Dog Pruett doesn't stand up the hair on the nape of your neck, how about the story of Willie Kemp, who, in return for money, trumped up criminal cases against 32 innocent people. The National Law Journal told the story on February 27, 1995 under this headline: Postal Agents Stamped by Scandal:

> Scam Exposed
>
> For 15 months, Willie Kemp and the others had infiltrated the Cleveland Post Office, ostensibly looking for evidence against drug users and dealers. Flush with government money, they lived to the hilt, renting fancy cars, living in pricey condos, wearing expensive clothes, and hosting parties.
>
> "The inspectors had arranged for them to be hired as postal workers, so they were getting regular paychecks," Mr. Maloney [the ex-prosecutor] says. "But they also were being paid about $100 extra per transaction. On top of that, they were pocketing the drug buy money the inspectors were giving them."
>
> Prosecutors and defense attorneys believe the inspectors obtained the names of postal employees who had signed up voluntarily for substance abuse counseling. At the beginning of the investigation, it appears, agents gave informants a list of workers who

could be targets. Several of them were in drug counseling, a fact that was supposed to be confidential, ...

The postal inspectors wired their informants and sent them out with thousands of dollars in buy money. The inspectors never saw the targets and only heard barely audible tapes of the informants striking up conversations and describing the deals.

Then the informants returned to the inspectors with drugs they'd allegedly just purchased.

"If they had searched the informants, the inspectors would have known that the informants were bringing drugs to the deal and had the buy money hidden in their socks following the deal," says Mr. Maloney.

The other voices on the tapes, he says, were "friends paid by Willie Kemp and the other informants to play the role of the postal workers." The drugs, too were phony. Bags of white powder they said was cocaine purchased from postal employees was really baking soda.

When Mr. Moore was arrested, a public defender recommended that he plead guilty. Insisting that he was innocent, he demanded a trial. "I was certain that once the agents and informants saw me in court, they would recognize I was the wrong person and I would be immediately let go," he told the NLJ.

Instead, in a bench trial, Common Pleas Judge Richard J. McMonagle believed the informants and found Mr. Moore guilty in December 1992 on all four counts of drug trafficking. In February 1993, as the scheme began to unravel, the judge set aside the conviction.

In November, Leroy Lumpkin became the last of the 32 postal workers indicted to have his case dismissed, according to Mr. Maloney and Cuyahoga County Asst. Prosecutor Sean Gallagher, who took over the investigation when Mr. Maloney went into private practice last year.

Mr. Gallagher says an investigation into the inspectors' conduct is pending.

Informants Convicted

"All of the informants involved have been convicted of perjury and falsifying evidence and are in prison." Mr. Gallagher says. "The focus now is on the postal inspectors. Did they know what was happening? Did they knowingly commit any crimes?"

The two inspectors in charge of the investigation-Timothy Marshall and Daniel Kuack-were fired. Both declined requests for interviews, and their attorneys did not return calls for comment.

The 19 postal workers fired after they were arrested in September 1992 have been reinstated to their jobs.

Shades of Operation Corkscrew in Cleveland in the early 1980's. In that embarrassing meltdown, an informer-undercover operative who promised to make cases against allegedly crooked judges pocketed the intended bribe money and then manufactured bogus tape recordings of the supposed bribes. On the tapes, the informer pretended to be a crooked judge who had just taken the money. The informer and two other imposters who also falsely played the parts of judges ended up in jail.

Then there was Mark Whitacre, whose scary saga has been turned into a book called "*The Informer*," By Kurt Eichenwald. This true story of deceit and dangerous double dealing is a must read for all prosecutors and investigators. More about Whitacre later.

Finally, read Commonwealth v. Bowie, 243 F.3d 1109 (9th Cir. 2001) for the saga of a cooperating witness ("C.W.") caught on paper attempting to "influence" the testimony of other C.W.s in his favor and against a co-defendant. The prosecutors' failure to respond appropriately to this information resulted in the reversal of a conviction.

The second of the two reasons why converted criminals come under such heavy fire pertains to the general disposition of people who become jurors towards informers. To a prosecutor, it is of equal importance as the first. Commit it to memory:

2. Ordinary 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, openly expressing disgust with the prosecution for making deals with such "scum."

We find a clear example of this hostile attitude in a newspaper report about a federal prosecution of eleven Hell's Angels. The failure of the case was accurately reported in the newspaper as follows:

> After two mistrials and a cost in the millions, the Government gave up Wednesday trying to convict the notorious Hell's Angels motorcycle gang on conspiracy and racketeering charges. . . .
>
> Federal prosecutors had attempted to prove that the maverick and frequently violent motorcycle gang had become engaged in full-time criminal activity sometime in the 1960s and was deeply involved in an extensive drug and narcotics operation in Northern California and elsewhere, using illegal firearms, murder, threats, and assaults to further its enterprise.
>
> But a second trial, which began last October, ended with the jury of nine men and three women advising Orrick it was hopelessly deadlocked. An earlier trial which began in 1979 and concluded in 1980 also ended in a hung jury for most of

the defendants. [The rest were acquitted.]

A juror in the latest trial told reporters that the vote was 9-3 for acquittal and described the Government's key witnesses, including a former Hell's Angel who admitted being paid $30,000 in exchange for his testimony, 'despicable and beneath contempt.'

Another graphic example of jurors unfavorable reactions to an informant--witness can be found in the DeLorean case. The following is an excerpt from the American Lawyer about one of the Government's main witnesses:

Testimony from a 'Creep'

Ruthe Sutton remembers that when James Timothy Hoffman, a jowly 43-year-old 225-pounder in a government-purchased brown polyester suit, took the stand as the prime witness against John DeLorean, 'he never looked anyone in the eye. He was just not believable from the minute he spoke.'

'I believed nothing Hoffman said,' recalls Jo Ann Kerns. 'And I kept thinking to myself, "If Hoffman can do this to DeLorean, he can do this to any of us."' Kerns's point should not be mistaken for a broader argument about entrapment or sting operations: 'I'm all in favor of going after people if the Government knows or has reason to believe that they are dealing in narcotics. Then anything goes. Any tricks that the Government can come up with. But here it was just Hoffman's word. And then we never saw DeLorean on the tapes actually participate in the conspiracy.'

Prosecutor Walsh took Hoffman through the story of how he had befriended DeLorean because his son and DeLorean's had played together when the two were neighbors near San Diego in 1980. Hoffman explained that it was the sons' friendship -- not an intention to try to snare DeLorean in a drug deal -- that had led Hoffman to call DeLorean two years later (on June 29, 1982) -- by which time Hoffman,

coincidentally, had become a Government informant. 'This guy's father of the year,' (juror) Holladay recalls thinking to himself. 'He's using his own son to make up a story to get money as an informant.'

Why hadn't all of Hoffman's conversations with DeLorean been taped, once DeLorean had made his supposed drug deal overture? Because the equipment hadn't been available or had been faulty, Hoffman said.

If DeLorean had really asked on June 30, whether Hoffman still had his 'connections in the Orient' necessary to do a drug deal, and Hoffman had said yes, why had DeLorean, desperate as he was, waited until July 11 to come to California to meet with Hoffman? And why, asked Weitzman repeatedly, hadn't that meeting been taped? Hoffman said he didn't know why DeLorean had waited and that the meeting hadn't been taped because the federal agents didn't think it was important enough to arrange for a taping on a Sunday.

'I still figured I was pretty sure DeLorean had been in a conspiracy with Hetrick after Hoffman testified,' says Hal Graves, 'but I knew one thing for sure: Hoffman is a pitiful, psychopathic liar -- the kind that believes what he's saying but can't tell the truth. I can tell people like that. My own father used to tell stories and they'd change over the years, yet he'd still believe them. That's how this guy was.'

Every juror, except Wolfe, uses words and phrases like 'completely unbelievable' (Jackie Caldwell's description) in assessing Hoffman, while Wolfe says 'he was probably lying a lot.' For some, like Andersen, Sutton, Kerns, Dowell, Lahr, and Holladay -- jurors who would never see the full elements of conspiracy -- this was not as important as it was for the others, like Graves, Caldwell, Gelbart, and Hoover. Later, their view of the case -- that DeLorean had indeed conspired in some way with Hetrick but that Hoffman couldn't be counted on to be telling the truth about his initial contact with DeLorean --would be the fulcrum of the jurors'

entrapment decision.

A third example of this ever present problem with jurors occurred in a major federal corruption/fraud case in Los Angeles in 1985. The headlines and partial text from the Los Angeles Times follows:

> Los Angeles - Jury Acquits Bank Official in Moriarty Fraud Case.
>
> A Los Angeles federal jury Monday acquitted former Orange County bank official Nelson Halliday of conspiring with confessed political corruption figure W. Patrick Moriarty in an alleged money-laundering scheme. . . . The verdict stunned federal prosecutors and prompted a suggestion by Halliday's attorney that the government may have problems in its continuing investigation of political corruption because of Moriarty's lack of credibility as a witness. . . . 'They flat didn't believe the man,' [Halliday's attorney] said of the jury's verdict Monday afternoon. 'I would love to defend anybody with Moriarty as a complaining witness. . . . Charles Williamson, 49, of Garden Grove, one juror who said he <u>believed that Halliday was guilty</u> on all counts, confirmed that the jurors simply didn't believe Moriarty's testimony. 'Had he <u>not</u> been on the stand <u>maybe the evidence would have been enough</u>.'

With the foregoing in mind, let me put a different spin on this and confront you with some observations that color the answer to the threshold question of whether or not to use an accomplice or a snitch as a witness in the trial of any particular case. The observations are as follows:

1. Calling to the stand an actual participant-eyewitness to the crime who knows the criminals and their escapades -- normally a devastating witness -- can backfire, even if he is telling the truth, and have the unintended effect of making your case <u>worse</u> rather than better -- <u>if</u> the eyewitness is a crook who has bartered for some sort of consideration in return for his testimony.

2. Evidence amounting to a complete confession -- normally the end

> of a defendant's chances with a jury -- can actually have the unanticipated effect of making your case weaker rather than stronger, if the witness upon whom the jury has to rely for the truth of the testimony is a person they will not trust.

Why? Because in the hands of a skillful defense tactician, all the liabilities and the unseverable baggage that such a witness brings to your case, along with the "confession" or the revelations, become the elements of reasonable doubt the defense is looking for and the brush with which the rest of your case is then tarred. Like the effect of the proverbial red herring, the issue of the defendant's guilt can leak away -- as it did in the Moriarty/Halliday case -- as the prosecutor attempts to defend against the forceful assertions of deceit and misconduct on the part of the Government's witnesses; and once a prosecutor loses control and begins in desperation to defend rather than prosecute, disaster is right around the corner! The defense will go after these witnesses with everything they can find, hoping to make them the vulnerable links in your chain. (Remember, "The Best Defense is a Good Offense.")

A sure way to compound this problem is to call more informer witnesses to the stand than you have to. As with alibi witnesses, if one cracks, they all go down, and possibly so does your case. Listen to Roy Black describe in 1996 a triumphant defense attorney's glee at a government case too full of vulnerable witnesses:

> Miami News Times - "The Impossible Victory" by Jim DeFede.
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> The trial of Willy Falcon and Sal Magluta will best be remembered for the 27 informants called by prosecutors to testify, each of whom was then decimated by the defense's tag-team approach to cross-examination. "Before the trial started," Black concedes, "we thought the most frightening thing would be if the government tried the case in three or four weeks, pared it down to a handful of their major witnesses, worked on those witnesses, put them on, and then got out and put on whatever corroboration they had. If they did that, we thought it would be a

> tougher case. Thankfully, that didn't happen."
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> Instead, Black and his defense teammates say, the government called informant after informant --each more sleazy than the last -- all of whom testified against Falcon and Magluta in hopes of having their prison terms reduced. "What happened in this case is that their worst witnesses spilled over and poisoned the better witnesses. We were able to create not just reasonable doubt but to prove perjury. And when you prove perjury about witnesses A, B, and C, then the jury automatically distrusts witnesses D, E, and F."
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> "Al Krieger agrees: "Some of the witnesses were so bad they infected those who were not so bad."

The jury foreman reported after a defense verdict that the jurors distrusted the cooperating witnesses because they had so much to gain from their testimony. "No one wanted to believe these 27 people who were brought here," he said. The prosecution presented so many witnesses we got inundated with evidence, but it wasn't good evidence."

Post script: It turns out that a juror was bribed (<u>not</u> by the attorneys), which helps to explain the "impossible victory." On March 3, 2000, juror Miguel Moya was sentenced to 17 years in prison for accepting $500,000 in bribes to vote to acquit. Moreover, Falcon and Magluta have been charged with ordering the killings of three witnesses in their trial. These defendants play for keeps.

In 1991, The Miami Herald devoted much of its front page and first section to a negative series of stories about informants. The lead article in the spread demonstrates how ambivalent we are about criminals as witnesses and how their misuse can create chaos:

> Privileged criminals - lying, cheating and stealing for the United States of America - infest the courtrooms of the world.
>
> The government labels them CIs, or confidential

informants, and they are a booming, megabuck industry that thrives in secrecy - and almost no public oversight.

Some get rich. Some corrupt cops. Some fabricate testimony. Some trap innocent people. Some get away with - if not murder - assault, robbery, and cocaine trafficking.

Some CIs are extremely effective and proud of what they do. "I'm a magnet for maggots," says Alex Spiegel, 41, sipping Amstel Light at R.J.'s Landing on the Intracoastal.

Gregarious and charming, Spiegel and his breed could easily call their shadowy enterprise Rats 'R Us.

Bankrolled by burgeoning U.S. drug forfeitures, tax bounties and undercover funds, CIs buy leniency for themselves and twist deftly through a sometimes-careless criminal justice system.

Lawmen argue emphatically they need rats to catch rats. Police simply could not crack big drug and public corruption cases with CIs. "They don't line up to meet you in the National Cathedral," says Thomas V. Cash, special agent in charge of Miami's Drug Enforcement Administration office.

As the government enrolls more and more informants, almost like an addict, questions about costs, fairness, and effectiveness intensify. So do complaints.

"If Benedict Arnold were alive today, the government would give him an ID, a Mercedes and call him a hero," says Fred Haddad. "There is such a mania over drugs. No one gives a damn what it takes to stop it."

What this article should teach you among other things is how fast the

media will turn against you if something goes wrong.

Nevertheless, and notwithstanding all the problems that accompany using criminals as witnesses, the fact of the matter is that police and prosecutors cannot do without them -- period. Often they do tell the unalloyed truth, and on occasion they must be used in court. If a policy were adopted never to deal with criminals as prosecution witnesses, many important prosecutions -- especially in the area of organized and conspiratorial crimes -- could never make it to court. In the words of Judge Learned Hand in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) aff'd, 341 U.S. 494 (1951):

> Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely on them or upon accomplices because the criminals will almost certainly proceed covertly.

As articulated by the Supreme Court, "Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law." On Lee v. United States, 343 U.S. 747, 756 (1952).

Our system of justice requires percipience of a person who would testify in court. It is a simple fact that frequently the only persons who qualify as witnesses to serious crime are the criminals themselves. Terrorist and Klan cells are difficult to penetrate. Mafia leaders use underlings to do their dirty work. They hold court in plush quarters and send their soldiers out to kill, maim, extort, sell drugs, run rackets, and corrupt public officials. To put a stop to this, to get at the bosses and ruin their organizations, it is necessary to turn underlings against those at the top. Otherwise, the big fish go free and all you get are the minnows. They are criminal minnows to be sure, but one of their functions is to assist the sharks to avoid prosecution. Snitches, informers, coconspirators, and accomplices are therefore indispensable weapons in a prosecutor's battle to protect a community against criminals. For every setback such as the ones mentioned in this material, there are scores of sensational triumphs in cases where the worst scum of the earth have been called to the stand by the Government. The prosecutions of the infamous Hillside Strangler, the

Grandma Mafia, the Walker-Whitworth espionage ring, the last John Gotti case, the first World Trade Center bombing case, and the Oklahoma City Federal Building bombing are only a few of the thousands of examples of cases where such witnesses have been effectively used with stunning success.

In complex fraud cases, an insider is often indispensable in order to unravel and to explain the intricacies of the scam. A good example is the "Crazy Eddie" case involving a $100 million financial statement fraud including in turn tax evasion, securities violations, and international money laundering. Eddie Antar, the President and C.E.O. of Crazy Eddie's Electronics was finally sent to prison on the testimony of his cousin, Sam Antar, the company's C.F.O. Check out "Frankensteins of Fraud," by Joseph T. Wells, "The Antar Complex." This is a "must read" for white collar prosecutors. Sam Antar now consults (for free) with fraud auditors and investigators both inside and outside the Government. However, while you are at it, read also another chapter in Wells's book, the chapter called "It's a Wonderful Life." This chapter details how an "insider" with his own agenda double-crossed the FBI during the investigation of price fixing at Archer Daniels Midland, "the agri-chemical giant known to Sunday morning television [in 1990] as the 'Supermarket to the World.'" This insider, Mark Whitacre, sued his FBI handler and the Bureau for abuse (unsuccessfully) and ended up pleading guilty to 37 counts of fraud.

This contextual perspective is not designed to scare you off or make you gun-shy, but instead to recognize the validity of the maxim that "to be forewarned is to be forearmed." If you know where the pitfalls are, you will be able successfully to avoid them.

The appropriate questions, therefore, are not really whether criminals should ever be used as Government witnesses, but <u>when</u> and if so, <u>how</u>? The material covered in the following outline of my presentation is designed to do nothing more than to accomplish the two main goals of a prosecutor and an investigator:

1. To discover the truth, the whole truth, and nothing but the truth; and
2. To present persuasively and forthrightly what you have unearthed to a jury and to convince them to rely on it in arriving at a just verdict.

As the Supreme Court said in Brady v. Maryland, “Society wins not only when the guilty are convicted but when criminal trials are fair; our system . . . suffers when any accused is treated unfairly.” 373 U.S. at 87.

B. Tread with care. In this regard, there are a few important rules of thumb that should normally be observed:

1. The Department of Justice and most probably your own office maintain at all times department guidelines regarding the use of confidential informants. Be familiar with those guidelines.

2. Make agreements with "little fish" to get "big fish." A jury will understand this approach, but they may reject out of hand anything that smacks of giving a fat deal to a "big fish" to get a "little fish." It will offend their notion of basic fairness and play into the hands of the defense. In a well known east coast legal disaster, a police chief was let off the hook relatively easily in order to prosecute subordinates. Angered at this inverted set of priorities, juries acquitted all the subordinates. It is also the case that sometimes, even though you have a bigger fish in mind, the one you already have in the net is simply too big to give anything substantial in return for his cooperation. Don't keep going when the stakes are no longer favorable. You must be prepared in compelling terms to defend and justify the deal you have made to the jury in your final argument, after it has been attacked by the defense. "Why did you give this witness immunity? Because it is unacceptable to get just the bag man and let the crooked senator get away, that's why. The integrity of government -- indeed our very way of life -- demands it!"

3. Do not give up more to make a deal than you have to. This is a temptation to which too many prosecutors succumb. If you have to give up anything at all, a plea to a lesser number of counts, a reduction in the degree of a crime, or a limitation on the number of years that an accomplice will serve is frequently sufficient to induce an accomplice to testify; and it sounds better to jurors when they discover that both fish are still in the net. Total immunity from prosecution should be used only as a last resort. Convict them and

then make them testify before the grand jury. Resort to post-conviction "use immunity" if necessary. Sometimes if the smaller fish is firmly in the net, all you have to give him is "an opportunity to help himself" at sentencing. Do this without winking. Tell him it's his choice. All you will do is advise the judge of his cooperation, or lack thereof, as the case may be. This frequently works because the criminal has no other options to get what he wants.

Section 9-27.610 of the United States Attorneys' Manual makes it clear as a matter of policy that if possible, an offender should be required "to incur . . . some liability for his/her criminal conduct." Non-prosecution agreements must only be used as a last resort and should be avoided unless there is no other avenue that will lead to your objective. See 9-27.6l0 et seq. for Department policy and procedure in this area.

It is a good idea in a nonthreatening way to remind the defendant's attorney that a sentencing court may properly consider the defendant's refusal to cooperate in the investigation of a related criminal conspiracy after his Fifth Amendment rights are gone. Roberts v. United States, 445 U.S. 552, 556 (1980). He can stand before the judge as a person who helped or a person who did not help. The option is his. You will be surprised how often this will be all you need. Acceptance of responsibility becomes a premium at sentencing. Be tough. The crook will respect you. It must appear that he needs you, not vice versa.

4. You must always be in control, not the witness! The moment you sense that the witness is dictating terms and seizing control of the situation, you're in very deep trouble and you must reverse what has happened. You must be in control, not your informants. Do not fix their parking tickets, smooth over their rental car defalcations, or intervene in all their problems with the law without expecting repercussions later on. Inexperienced prosecutors and investigators tend to coddle such witnesses for fear of losing their testimony. This fear stems from not understanding what drives them. The basic deal is all you need to keep them on board. As to all the rest, they are just using you, and you have lost control. Be resolute.

Turn down any inappropriate request, but remember a mere request by an informer witness for any form of consideration is Brady material. If they won't cooperate with you, get rid of them!

5. The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him, and 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 out of the air and stray details. This is why O. J. Simpson's lawyers asked that he be in solitary quarters while in the Los Angeles County Jail. They knew any prisoner who got close to him might manufacture incriminating statements.

Possibly the most infamous episode of jailhouse snitch perfidy involved Leslie Vernon White, who brought to light the chilling inmate slogans "Don't go to the pen -- send a friend" and "Why spend time -- drop a dime." See Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63-66 (Praeger 2002). This is just part of his unnerving story:

> New York Times - California Shaken Over an Informer.
>
> In the seamy world of jailhouse informers, treachery has long been their credo and favors from jailers their reward. Now lawyers and prosecutors must ponder whether fiction was their method. That is the unhappy implication behind the crisis in law enforcement that has been unfolding in Southern California since an inmate, Leslie Vernon White, who has testified in numerous highly publicized cases, demonstrated in October [1988] how he could fabricate the confessions of other inmates without ever having talked to them. He said later he had lied in a number of criminal cases. Defense lawyers have compiled a list of 225 people convicted of murder and other felonies, some of them sentenced to death in cases in which Mr. White and other jailhouse informers testified over the last 10 years in Los Angeles County.

The precautionary rule of thumb with a jailhouse admission or confession offered by another inmate is that it is false until the contrary is proved beyond a reasonable doubt. If you do not know how Leslie Vernon White was able to concoct credible confessions without talking to the alleged confessor about the crime, you better find out. By using the telephone and misrepresenting who he was, he was able to collect enough inside information about a crime from official sources to convince investigators that he heard about it directly from the suspect. As light but instructive reading, you might try "Key Witness" by J.F. Freedman. It's a novel, but one that will open your eyes. Could a potential snitch looking for information on a defendant to trade to the police to help the snitch out of trouble really hack into a defense attorney's computer files? Think about it.

6. DO NOT CALL CRIMINALS TO THE STAND AS WITNESSES UNLESS IN THE MOST CAREFUL EXERCISE OF YOUR JUDGMENT SUCH A MOVE WILL SIGNIFICANTLY ADVANCE YOUR ABILITY TO WIN YOUR CASE. Remember, this is an area where less can be more! When you do call an informer, be prepared for war. The injection of a dirty witness into your own case gives tremendous ammunition to the defense, ammunition that frequently is more powerful than the benefit you expect. Here, for example is a laundry list from the National Association of Criminal Defense Lawyers of the kinds of weaknesses your opponent will be looking for:

> If the informant was addicted to drugs or alcohol during the time to which the statement relates, witnesses and medical records showing this addiction must be introduced. If the informant failed urinalysis tests while on pretrial release and while “cooperating” with the government, the pretrial services reports showing continued drug use should be offered. If you can document inconsistencies or critical omissions between what the informant claimed during one interview or grand jury appearance and what he said in another, these must be carefully set forth during the

> hearing. Similarly, any evidence you have about other false statements made by the informant, particularly those made under penalty of perjury (such as false statements on loan applications, tax returns, drivers license applications, INS forms, etc.) should be introduced. Prior convictions of the informant (admissible to impeach credibility under Rule 609) or opinion or reputation evidence showing the informant was not a truthful person (admissible under Rule 608) must be put in the record. If you have evidence tending to show the informant had a reason to lie about your client or any evidence of bias, it must be offered. And, of course, you need to establish what sentence the informant was facing, what the mandatory minimum and guideline ranges were without cooperation, and what other benefits (such as immunity for relatives) the informant got in return for his or her cooperation. All these factors are indicia of a lack of credibility of the declarant and, hence, are indicia of a lack of trustworthiness of his statements.

Juries expect prosecutors to be men and women of integrity. If you don't show the proper distance between yourself and the witness in court, and if you haven't handled your witness correctly beforehand, your own credibility can become suspect; and a prosecutor without credibility in court might as well throw in the towel. You must always ask not just what does the witness have to say, but what will the jury think not only of him as a person, but <u>you</u> for how you have handled the situation.

Don't try to make these tough calls by yourself. Call in an experienced prosecutor who is not involved in your case for advice. Try it out on a friend who is not a lawyer. Your friend's reaction may surprise and inform you regarding your decision.

If I were responsible for running a prosecutor's office, I would require <u>all</u> assistants to run these decisions by an experienced non-involved supervisor before going ahead. Line prosecutors are so close to the action that they sometimes lose perspective on these

issues.

7. If you decide to call an informer as a witness, you will end up spending much time with him preparing for his testimony. Not all such witnesses are hard core street criminals, and some of them are affable and will try to ingratiate themselves into your good favor. Remain courteous, but do not let down your guard and share the kind of information with them you might share with a friend or colleague. Today, he might be testifying for you, but as gang-member Henry Harris did in the El Rukns cases in Chicago in the 1990's, tomorrow he may decide to turn against you. So, never say anything to a witness -- or for that matter to anybody including people on your own team -- that you would not repeat yourself in open court or want to see on the front page of the Washington Post or your hometown newspaper. The last witness for the defense in the DeLorean case was an ex-DEA agent who testified that one of the prosecutors boasted of seeing the investigative team on the cover of Time magazine. The agent claimed that the investigation was driven by "blind zeal" to get a celebrity. Although this claim was untrue, it was damaging to the Government's attempt to rebut the claim of entrapment.

   Then, of course, there was the testimony during the O.J. Simpson trial regarding C. Anthony "The Animal" Fiato, a federally protected Mafia enforcer, and his brother Larry. According to this testimony. Detective Philip Vanatter had allegedly made statements to the brothers Fiato that were inconsistent with his testimony regarding the reason why he went to Simpson's house after Simpson's wife was found murdered. These statements to the Fiatos were used by the defense to mount a vigorous claim that Vanatter was a perjurer. Whatever Vanatter may or may not have said to the Fiatos, both of whom were called to the stand by the defense, it is certain that he learned (or relearned) (1) <u>not</u> to talk to informers about sensitive case related matters, and (2) that criminals are as prone to testify for you as they are to testify <u>against</u> you: it all depends where they see the best butter for their bread.
8. Assume at all times -- especially when you are on the telephone -- that you are being taped. If you want to read a chilling account of an informer who secretly tape recorded the improper remarks of an

investigator trying to get him to cooperate, read the chapter in Alan Dershowitz's book "The Best Defense" entitled "The Boro Park Connection." When the investigator discovered for the first time on the witness stand that he had been taped, his chair turned into a real hot seat. But read the book, don't take my word for it.

Remember, informers are not your friends. Keep a healthy arm's length between yourself and such a witness. In this same vein, keep them away from strategy discussions about your case. If the witness starts to believe he is one of the team, or a "junior G-man," he may be tempted to try to help you by manufacturing evidence that doesn't exist.

9. Law enforcement agents handling informers can unintentionally cause significant problems. The agents simply do not appreciate the courtroom and credibility implications of getting too close to an informer witness. On occasion, they became too close to their star witness. In the prosecution in 1995 of attorney Patrick Hallinan in Reno, Nevada, for example, the agents became very friendly with their witness Ciro Mancuso who was being used against his ex-attorney Hallinan, even to the point of permitting Mancuso to prepare and type their police reports (DEA 6s). Moreover, the agents permitted him without supervision to gather evidence which the defense at trial successfully attacked as fraudulent. In addition, the agents allowed him to keep $2,000,000 in excess of the $5,000,000 already provided for in the plea agreement, all of which went untaxed. Remarkably, the agents also allowed Mancuso to keep a firearm even though he was a convicted felon. All of these unnecessary mistakes evince a lack of control of the witness, and they were successfully exploited during the trial by the defense to attack Mancuso's motives and credibility and to besmirch the Government's bona fides. The lesson here is that your agents must be as aware as you of the need for appropriate and careful handling of informers, i.e., people of questionable character who are profiting from their cooperation. You must meet with the agents early in an investigation to discuss this problem and to establish appropriate ground rules.

Any prosecutor dealing with federal agencies with well-developed

informant programs would do well to read “Deadly Alliance” by Ralph Ranalli, the story of the FBI’s Top Echelon Informant Program gone bad in Boston. Sometimes, there are things you may need to know, but the agency is reluctant to tell you. Beware! The official cases arising out of this debacle are United States v. Salemme, 91 F. Supp. 141 (D. Mass., Sept. 15, 1999) and United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000). Read also Judge Nancy Gertner’s Memorandum and Order in Limone v. United States, 497 F.Supp.2d 143 (2007), awarding $100 million to four persons wrongly convicted as the result of the FBI’s improper activity with a valuable informant -- who happened to be the real killer.

10. Never forget that the defense may try to prove that your witness actually did what he claims was done by the defendant. The jury argument goes like this: "Of course he has extensive knowledge of the facts of this crime. He is the one who committed it, that's why! Now, ladies and gentlemen, he's lying to save his own skin, encouraged by the disreputable plea bargain given to him by the careless and inept prosecutor."

C. The initial contact.

1. Your first hurdle involves ethical considerations. Is the prospective witness represented by an attorney? Has he been indicted? If so, are you required to work through that attorney, even though you suspect his or her integrity? The American Bar Association's Model Rule of Professional Conduct 4.2 and Disciplinary Rule 7-104(A)(1), for example, prohibit contacting a person represented by a lawyer on the subject of the representation without going through the lawyer. Many states also have such ethical standards for lawyers. Also, Standard 4.1(b) of the ABA Minimum Standards for Criminal Justice provides, in part, as follows:

> It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval . . .

If the prospective witness is under indictment and he calls you and says that he wants to cooperate but that he doesn't want his lawyer to know about it, be very careful. This is a situation that must be handled with great care. You will be confronted not just with Fifth Amendment waivers, but Sixth Amendment waivers also which carry a greater burden. And remember, a defendant may be able to waive his rights, but he cannot waive your ethical obligations.

Federal prosecutors' conduct in this area is now governed by 28 U.S.C. § 530(B), called the McDade Act after the Congressman who sponsored it. The McDade Act, which went into effect in April, 1999, requires all federal government attorneys to abide by "state laws and rules, and local federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state." For guidance, federal prosecutors must contact Justice's Professional Responsibility Advisory Office for the latest policy and rules, which have changed almost yearly since 1985. The Tenth Circuit has ruled that the McDade Act says what it means, and means what it says. United States v. Colorado Supreme Court, 189 F.3d 1281, 1287-89 (10th Cir. 1999). For background and history on this issue you will want to read United States ex rel. O'Keefe v. McDonnell Douglas, 132 F.3d 1252 (8th Cir. 1998); United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993); and In re Hanes, 940 P.2d 159 (N.M. 1997).

Lopez will show you how problematic this process can be. The prosecutor in Lopez, who arranged for a meeting between the defendant and a magistrate judge, ended up on the other end of an ethics complaint filed by the defendant's lawyer with the Arizona State Bar. Although the prosecutor was exonerated -- a year later -- his advice is as follows: "Regardless of the Department policy and regulations, never communicate with a represented person without the permission of the lawyer; it is not worth the professional risk." The Ninth Circuit's language in Lopez may validate this advice: "[W]e are confident that, when there is no showing of substantial prejudice to the defendant, lesser sanctions [than dismissing the indictment], such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings, can be adequate to

discipline and punish government attorneys who attempt to circumvent the standards of their professions."

Check the law of your own jurisdiction on this issue, and if you work for the Justice Department, make sure you have a copy of the latest Department Regulations covering this area. To be protected by these regulations, your conduct must comport with them.

2. A second complication with which you may be confronted in this context is the situation in which the witness at some point during debriefing begins to tell you about ongoing or new crimes in the offing in addition to those that have already happened. For a general look at the problem of handling new or ongoing crimes that crop up during the handling of a case, read Maine v. Moulton, 474 U.S. 159 (1988), and check the Department's regulations on the subject.

This particular hurdle can become unusually touchy when the witness with whom you are dealing is an attorney who himself is under suspicion of criminal conduct and he suddenly offers up his own clients with respect to new or ongoing offenses in return for leniency or immunity. This rare but real situation should immediately set off loud alarm bells in your analytical mind, raising questions of privilege, 5th Amendment rights, 6th Amendment rights, conflict of interest, and disciplinary rules, especially if the suggestion is made that the attorney wear a wire and work his clients with respect to crimes in progress. If you are not extremely cautious, you may succeed in convicting the attorney's clients, but you may do so at the expense of your own license to practice law, a mission that has the potential to backfire.

The case of United States v. Ofshe, 817 F.2d 1508 (11th Cir. 1987) provides a graphic example of the problems lurking in this situation. Please read the case for the facts, but the bottom line for prosecutors is found in footnote six (6) of the opinion which reads as follows:

> While we have not found the Government's conduct [in using attorney Glass to make a case against his client Ofshe] sufficiently outrageous to warrant the dismissal of his indictment, we do believe that [the attorney's and

> the Assistant United States Attorney's] conduct was reprehensible. Because the district judge is more familiar with the attorneys' conduct, we assume he will refer the matter to the Attorney Registration and Disciplinary Commission, 203 North Wabash, Suite 1900, Chicago, Illinois 60601 for appropriate action.

Ofshe, was a drug case in which no lives were directly at risk. Would the analysis differ if the ensnared lawyer were to have come to you and reported that his client had engaged the services of an unknown contract killer to murder a witness, or a prosecutor, or a judge? Probably so, based on the elements of the outrageous government conduct test that requires an examination of the totality of the circumstances; but this remains one area in which one should tread with great caution.

3. Take great care in the debriefing of any recruited codefendant who you plan to use against his cohorts to avoid "invading the common defense camp." If the witness without warning begins to tell you the particulars of a defense strategy meeting he has attended with his codefendants and their attorneys, you are in trouble. This pitfall is easily avoidable up front by advising the witness in writing not to tell you about any such meetings. For additional guidance, see Weatherford v. Bursey, 429 U.S. 545 (1977), United States v. Brugman, 655 F.2d 540 (4th Cir. 1981), United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), and United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984).

D. Who goes first, you or the witness?

1. The first problem that usually arises is the "Catch 22" situation where you want to know exactly what the witness has to offer before committing yourself to a "deal," but the witness, even though desirous of cooperating, is afraid to talk for fear of incriminating himself unless he is promised something first. When you get into such a bind, never buy a pig in a poke! If you first give a criminal absolute immunity from prosecution or commit irrevocably to a generous deal and then ask him what he knows, the probability is that you will get nothing but hot air. Remove the witness' incentive

to cooperate and you will lose all the fish, both big and little. Never forget that almost always they are cooperating because you have them in a trap. Open the door too early and their willingness to cooperate will evaporate.

The answer to this seeming dilemma is very simple. Get a proffer! Promise the witness in writing that you will not use what he tells you at this stage of the proceedings against him, but make it equally clear that your decision whether or not to make a deal and what that deal might or might not entail will not be made until after you have had the opportunity to assess both the value and the credibility of the information. Tell them "It's an opportunity to help yourself; take it or leave it." If they don't trust you enough to go first -- how in the world are you going to trust them? You can talk possibilities, but that is all! And remember, once you have committed to something, your word must be as good as gold, both with respect to what you will do if he delivers and what you will do if he doesn't! Caveat: If he later tells you something different from what he told you in the proffer, Brady is implicated.

2. Make sure that the full extent of the preliminary understanding is in writing and signed by all parties. Try to anticipate all problems that you may be confronted with down the road. Consider adding a "Mezzanatto provision" by which the informant agrees that any statements he makes during meetings and negotiations can be used to impeach any contradictory testimony he might give at his own trial should cooperation break down. In United States v. Mezzanatto, 115 S. Ct. 797 (1995), the Supreme Court held that such a provision is a valid waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6).

3. Remember, the document may come back to haunt you if it is badly drafted. Make sure you examine it as a probable court exhibit and try to avoid drafting it so it can somehow be used against you, or that you can't use it yourself. Do not forget that your side of the agreement -- immunity or whatever -- will be used in court by the defense as the "reason the witness is lying." The defense will characterize it as a "payoff," a "bribe," etc. Do not cause for yourself unnecessary problems by giving away too much.

4. Probe for secret "side-deals" with the police. If they exist, and they may, get them out in the open. The defense is entitled to know everything that the witness, his relatives, or his friends for that matter have been promised in return for cooperation. If for the first time on cross-examination the jury finds out that the chief investigator on the case has been paying the witness $100 a week pending the trial or fixing his parking tickets, you will be in deep trouble.

E. Extracting information from the witness.

1. A prosecutor must never conduct such an interview without an investigator present. And remember, never say anything to a crook that you do not want repeated in open court. He may be taping you!

2. Once the preliminary understanding is arrived at and the witness is now prepared to tell you what he or she knows about the case, the suspect, etc., precautions must still be taken to get the witness to tell the whole truth, not just parts of it.

3. Your first line of defense here is the witness' attorney. Impress the requirements of absolute honesty and full disclosure on the witness' attorney and ask the attorney to have a private discussion with the witness to try to pound this into the witness' skull. These witnesses invariably hold back information that makes themselves "look bad." It is devastating in front of a jury to find out that the first thing such a witness did was lie to the prosecutor or the case agent! Deliberate omissions are just as bad as outright lies, and, they are discoverable. Don't start the interview until the attorney assures you that he believes that his client is ready to come completely clean.

In fact, you might require the defendant to waive in writing his attorney-client privilege so that you can make sure he has not told his attorney a different story. You would not expect defense counsel to sit idly by and allow his client to obstruct justice and to commit perjury, but some defense attorneys might feel their hands are tied by the privilege, which is what occurred in Murdoch v. Castro, 365 F.3d 699 (9th Cir. 2004). The prosecutor's failure in

that case to use her leverage to get to the bottom of the problem before the trial resulted in endless and needless litigation or collateral review. If your potential criminal witness refuses to waive the privilege, then the witness is in control, not you; and the refusal should send up a large red flag of caution. Your next words to such a reluctant informant might be, “Fine, the deal is off, and the conversation is over.”

4. When you do start the interview, repeat the necessity of complete "honesty" and "full disclosure." Discuss perjury and the witness' liability for false evidence, etc. The objective is to "get at the truth" -- not "get the suspect." Let the witness know that if he gets to court, the truth will certainly come out on cross-examination. Tell him that the defendant isn't going to sit there and let him gild the lily. You want to hear it now, not later. One frequent problem confronted here is that the witness will falsely minimize his own role in the scheme. Warn him not to do this and be on the lookout for evidence that this is what he is doing. It will stand out like a sore thumb, if you are looking for it.

5. One incredible mistake made on more than one occasion -- especially by agents -- is to listen to the informer's story and then tell him, "That's not enough, you'll have to come up with more." The impetus for such a statement comes from agents' knowledge that informers hold some material back, but such a “can opener” should not be used for two reasons. First, the informer may react by making up "better stuff," an eventuality for which you do not want to be responsible. Second, when jurors become aware of such a tactic, they will become very willing to believe that you and your agents have solicited false information. This mistake played a significant role in the failed prosecution of attorney Patrick Hallinan in Reno, Nevada in 1995. When the jurors found out that the cooperating informer Mancuso had not fingered his own lawyer Hallinan until after agents told him he needed to come up with more, the force of the government's case slipped away. If you have done your job correctly before the interview turns to what the witness knows, this half-a-loaf mess should not occur.

6. Do not feed the witness key information. First, let the witness tell

the complete story on his or her own; then ask any questions needed to fill in the gaps, etc. One of your best jury arguments is that "the witness must have been there (or talked in confidence to the defendant) because he knows details that only somebody who was there would know!" Don't give this away by being arguably the source of the inside information. Make sure everybody on your team understands this and doesn't let the cat out of the bag. The investigators should watch for this kind of evidence during the interview and take good notes. Remember, all notes are discoverable, as are inconsistent statements, lies, false denials, and untrue “I don’t remembers.”

7. The defendant knows more about the informer than you do! This advantage may enable the defendant to mount an attack on cross examination, etc., based on facts or circumstances of which you are unaware and about which the informer has not told you. To avoid being caught unprepared, <u>ask the informer</u> what the defendant might bring up to discredit him or his testimony. Take your time on this because you're now probing for information the informer may not want to tell you about. Once again, a real story from a real trial is the best example of this problem:

> "The Impossible Victory." Experts say it is rare for prosecutors to face defense attorneys who know more about the government's witnesses than the government itself does. But that is exactly what happened in the Willy and Sal case. In addition to spending untold millions on attorneys, Falcon and Magluta also hired a score of private investigators who fanned out across the United States and throughout Latin America to track down incriminating information about the government's witnesses. "What made the difference was the fact that Sal Magluta and Willy Falcon were willing to fight this and fund an investigation that could expose all of these things," says Black, who adds this victory to a growing string of wins, including his representation of William Kennedy Smith and former Miami police officer William Lozano. "How many

> people can afford to hunt these things down? Do you know how many witnesses we investigated before the trial? They called about 30 accomplice witnesses, but they had given us notice on their witness list of about 81, and added 4 or 5 more just before trial."
>
> Among the government's many witnesses Nestor Galeano proved to be a favorite of the defense team. His testimony, they believe, was also a turning point in the case. Before the trial commenced, defense attorneys obtained several letters Galeano had written in prison to a friend in Colombia, fellow cocaine smuggler Manuel Garces. In those letters, Galeano eloquently explained his belief that the American justice system is corrupt, and that the only way to deal with it is to play along, to do whatever it takes to get out of prison, including, defense attorneys claimed, lying on the witness stand to please prosecutors. "Those letters were an overwhelming embarrassment to the government," says Krieger. "Or at least they should be."

Post Script: As indicated earlier, one of the jurors was bribed in this case, which helps explain the verdict. In any event, what the defense uncovered on the government's witnesses stands as a good lesson.

8. Do not be afraid to subject the story and the witness to intense scrutiny and cross-examination. Do not fear that the witness will crack. If he does, it's better that it happens in your office than in court. Prosecutors without much experience tend to treat such witnesses far too softly for fear they will not hold up or they will stop cooperating. This is wrong. Bear down!

9. Be on the lookout for any telltale suggestions that the informer is really the one who committed the crime under investigation and that he is falsely casting the blame on someone else to save his own skin. See Commonwealth v. Bowie, 243 F.3d 1109 (9th Cir.2001). If he knows much of the inside information about the crime, the

defense may argue that he learned it not from the defendant, but because he is the perpetrator! To understand the dimensions and ramifications of such a defense, read Kyles v. Whitley, 115 S. Ct. 1555 (1995).

An extreme example of this situation occurred in Los Angeles, California. Looking while in jail for information to trade to the authorities in return for leniency, Michael Birman successfully solicited three thugs on the outside to kill someone at random. When they did, Birman called the Sheriff's Department from jail and gave deputies specific information about the murder, asking in return to be released from custody on his own case. Birman did not reveal, of course, the purpose of the murder and the names of the killers. How did Birman compensate his coconspirators? He promised he would give them information about lucrative robberies they could commit. No doubt Birman would have framed someone had he had the opportunity. Fortunately, the plot failed, but it illustrates the lengths to which criminals will go to acquire something to trade.

10. Given the right showing, which will probably include a copy of this handout, do not be surprised if a judge grants a motion for the appointment of "an expert" -- or an investigator -- to examine the complete background and credibility of a proposed criminal/informant witness. The Criminal Justice Act, 18 U.S.C. § 3006A(e)(1) would seem to accommodate such a request for indigent defendants. See United States v. Chase, _____ F.3d _____ (9th Cir. 2007); United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973).

F. Test the witness' story.

1. Mistrust everything an informer says. Be actively suspicious. Look for corroboration on everything you can; follow up all indications he may be fudging.
2. Secure information on the witness' background.

    a. Mental problems. Mental or physical problems affecting the competency of a witness to testify, such as psychiatric

disorders or a stroke, are Brady material. Silva v. Brown, 416 F.3d 980, 987-88 (9th Cir. 2005).

b. Probation reports.

c. Prior police reports.

d. Consult other prosecutors who have either prosecuted the witness or used him in court. What do they think about his credibility? How did the jurors react to him? Was he a helpful witness or was he more trouble than he was worth? Criminal misconduct of an informant while working for the police is Brady material. Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002).

e. Sentencing memoranda file by the prosecution in previous cases.

f. Prison files regarding the witness' behavior while incarcerated.

g. Search for any promises, explicit or implicit, that investigators or other prosecutors have made to the witness in return for his cooperation or testimony. Be aware of Goldstein v. City of Long Beach and John Van de Kamp et. al., _____ F.3d _____ (9th Cir. 2007), a civil case alleging liability of the administrators of the District Attorney's Office to a person convicted largely on the word of an untrustworthy informant. After his conviction was reversed, Goldstein sued the elected District Attorney and his chief deputy for failure to establish a system in their office whereby promises made to an informant could effectively be made known to the trial prosecutors using that informant as a witness. Relying on Giglio v. United States, 405 U.S. 150, 154 (1972), the Ninth Circuit denied absolute prosecutorial immunity to the prosecutor defendants on the ground that the failure alleged was administrative, not prosecutorial in nature. This ruling did not discuss the doctrine of qualified immunity, leaving that for the district court on remand.

3. Assess the motivation of the witness. Why did he decide to cross over? You must understand why he has turned in order to keep him on your side once he has crossed over. This understanding will keep you from making mistakes caused by thinking you have to be friendly and generous to keep him on the team. Normally he will stay with you so long as the carrot he seeks is still in the future.

Do you really understand people who commit crimes? Why do people commit armed robberies, cheat the Government, sell drugs, swindle the elderly, attack Nancy Kerrigan?

What makes them tick? How do they think?

And when they get caught, why to they rush like lemmings to the prosecutor's office to squeal on their friends and relatives and associates and colleagues?

Why does Sammy the Bull Gravano testify against John Gotti? Why does Jimmy the Weasel turn against the Mafia? Carlos Lehderer against Manual Noriega? John Dean against President Nixon? Jeff Gilooly against Tonya Harding, his ex-wife?

Do you know what a sociopath is? Of what a sociopath is capable?

Do you know how criminals behave when caught, and what motivates them? Can you sort out the truth from lies? Do you know how to control Sammy the Bull? Jimmy the Weasel? Carlos Lehderer? Jeff Gilooly?

Or will they control and con you?

Unless you understand criminals and can control their treacherous behavior, you may be their next victim.

On occasion you will get a witness who is really and truly sorry for what he did. Play this for all it's worth with the jury -- but first make absolutely sure the sentiment is real. Usually it is phony.

4. Be wary of drug addicts. Consider a medical examination and find out from a doctor the effect of the drug your witness abuses on his capacity as a witness. Does Valium ruin your memory? You might want to call the doctor during your case-in-chief. Drug use is Brady material.

5. If your witness is "on loan" from a foreign government where due process is not a high priority, be careful the witness has not been given a script or a mission. Xiao v. Reno, 837 F. Supp 1506 (N.D. Cal. 1993), aff'd 81 F.3d 808 (9th Cir. 1996), chronicles the tale of an assistant United States attorney caught in the deadly fallout caused by an informer witness who took the stand for the government, lied on direct, and then subsequently revealed his lie, explaining that he was under pressure by the government of the People's Republic of China falsely to incriminate the defendant. Now, the witness is seeking asylum in this country because he fears he will be killed if he returns to China, and the AUSA is under investigation for allegedly lying to the court and committing other ethical violations as this mess unraveled.

6. THE KEY TO WHETHER OR NOT A JURY WILL ACCEPT THE TESTIMONY OF A CRIMINAL IS THE EXTENT TO WHICH THE TESTIMONY IS CORROBORATED. THE RULE THAT ALLOWS THE CONVICTION OF A DEFENDANT BASED ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE MAY PROTECT YOU FROM RULE 29, BUT IT WILL CUT VERY LITTLE ICE WITH THE JURORS.

   The New York Times in its discussion of the Friedman corruption case (prosecuted by now Mayor Rudy Giuliani), 854 F.2d 535 (2d Cir. 1988), put it this way:

> The Government's greatest strength in the case was also its greatest weakness: Mr. Lindenauer. His strength was his intimate knowledge of the bribery and extortion schemes that suffused the parking bureau, and his ability to describe them at length and in detail on the witness stand, his weakness was that he had been part of the scheme, and collected nearly $250,000

> from it, working in concert with Mr. Manes.
>
> Mr. Lindenauer pleaded guilty last March to federal charges of racketeering and mail fraud, reduced from a 39-count indictment as part of an agreement with the Government for his testimony. He faces a prison term of 25 years and $500,000 in fines, but is not expected to be sentenced until his role is completed in other trials relating to the municipal scandal.
>
> Mr. Lindenauer had a long history of lying and other fraudulent behavior, which defense lawyers forced him to admit during his cross-examination and exploited as they sought to undermine his credibility. But piece by piece, portions of his testimony were corroborated by other Government witnesses. In the end, the jury of seven women and five men agreed with Mr. Giuliani returning guilty verdicts on all but a handful of counts against the four defendants.

Check out everything your witness says. Look for documentary evidence, corroborating witnesses, prior consistent statements -- everything. If he says he made an important telephone call, bring in the phone company records. If he says he was in Las Vegas, prove it independently of what he says with hotel clerks and records. In a well publicized espionage case in Los Angeles, the person who passed secret documents to the spy testified that he received money in return which he put into his bank account. The prosecutor corroborated this with excellent charts and bank and payroll records, showing conclusively that he put more money into his account while he was spying than he earned from his salary. The excess matched his statement to the FBI and his testimony with regard to the amounts of the payoffs. In United States v. Martinez, 775 F.2d 31 (2d Cir. 1985), the prosecutor was allowed to prove that others against whom the witness had informed pleaded guilty, this to rebut Martinez' attack on the witness' motives and credibility. Martinez holds that when the defense attacks a witness' credibility, evidence that might not have been admissible on direct can be adduced on redirect to rehabilitate the witness.

7. Never overlook the appropriate opportunity to have your witness contact the suspect to try to extract from him some incriminating statements -- on tape, of course. This is dynamite if you can get it. Your investigator will help you and the witness come up with a plausible scenario for such a contact. But don't stumble over Massiah v. United States, 377 U.S. 201 (1964), or Henry v. United States, 361 U.S. 98 (1959).

8. In fact, the inherent weaknesses in the word of an informer can be used to satisfy the "necessity requirement" for a federal wiretap pursuant to 18 U.S.C. § 2518(1)(c) and (3)(c). United States v. Gomez and Fregoso, 358 F.3d 1221 (9th Cir. 2004) ("The truth-seeking function of our courts is greatly enhanced when the evidence used is not tainted by its immediate informant source and has been cleansed of the baggage that always comes with them.").

9. Consider the polygraph, but don't use it just because it's there. The machine is fallible! It is a tool, not a guarantee. Many experienced prosecutors will counsel you not to use it on a bet. This group of suspects is notorious for setting polygraph tests on their ears. In a major case against ultra right wing terrorists, the prosecutors made "the deal" contingent on passing the poly. Although they became convinced that the witness was telling the truth, he couldn't pass the test. The defense had a field day with this on cross-examination, and the prosecutors now cite this as a mistake.

    a. Talk to your polygraph operator about its efficacy.

    b. Don't refer to it in court if you use it as an investigative tool.

    c. The latest from the Supreme Court on polygraph results and Brady is Wood v. Bartholomew, 116 S. Ct. 7 (1995). Polygraph results per se are not Brady material.

10. The best way to anticipate the downside to a witness is to cast yourself in the role of the defense attorney for your suspect. If you were defending your target, how would you attack this witness and his testimony? Hire yourself, as if you were to take the other side of

the case. Do the kind of investigation a good defense attorney would do of those collateral things that shed light on the witness's credibility. A favorite tactic of a thorough defense attorney is to subpoena the federal prison security tapes made of cooperating inmates talking on the telephone to people on the outside. If your cooperating witness is in prison, you and justice will be well served if you review the tapes yourself to see if they contain statements that torpedo your case or the witness's credibility. Also, if they exist, make sure to review the electronic intercepts of your cooperating witness made during the investigation. Here is the text of what unsuspecting mob boss and cooperating government witness Ralph Natale said to confederates while discussing two flipped mobsters who had became government informants: "It's a shame. You know, if you commit a crime and you get caught, you should go to jail. But now these guys turn and become liars and try to give their [jail] time to somebody else." This will be the defense attorney's theme, and there it is, coming out of your own witness's mouth.

What does it look like from that side of the tracks? Then cross back over and ask: Can the weaknesses be explained? Spend a lot of time at this exercise. Call in a friend to help you. Every minute will be well worth it. It enables you to determine how to shore up your witness before the defense even gets to him. Do not pass up any opportunity you can find to watch defense attorneys cross examine cooperating criminals. Then you will be able to anticipate and to prepare for the onslaught.

G. If you're convinced, negotiate a final agreement; but don't give up too much, and don't give it away too soon!

1. Put the total agreement in writing, but before you do, read United States v. Dailey, 759 F.2d 192 (1st Cir. 1985). This case contains an educational discussion about what a plea agreement can and cannot say. Rewards and payments are tricky. Money for a witness will be trouble if not handled openly and with clean hands. There exists no outright legal prohibition against rewards, and indeed they have been approved on the ground that they serve the public policy interest of bringing witnesses to crimes forward with their information. See 18 U.S.C. §§ 1012, 1751, 3056, 3059,

3059A. United States v. Murphy, 41 U.S. (16 Pet) 203 (1842); United States v. Walker, 720 F.2d 1527 (11th Cir. 1983); United States v. Valle-Ferrer, 739 F.2d 545 (11th Cir. 1984); United States v. Cuellar, 96 F.3d 1179 (9th Cir. 1996). Payments to an informant on a contingency basis, however, may be viewed as an inducement to entrapment. United States v. Civella, 666 F.2d 1122 (8th Cir. 1981). If a witness asks for some sort of a "cut" or "percentage" or "reward," such a request may be discoverable even if it is turned down. By way of example, consider this New York Times coverage of this issue in the DeLorean case:

> LOS ANGELES, July 26 -- Federal District Judge Robert M. Takasugi today characterized James Timothy Hoffman, the Government's informer and star witness in John Z. DeLorean's trial on narcotics charges, as 'a hired gun.'
>
> He said he found it 'quite offensive' that the Government had failed to disclose sooner that Mr. Hoffman had 'demanded' a share of any money seized in the case.
>
> Mr. Hoffman instigated the Government's investigation of Mr. DeLorean when he told a Government agent in l982 that Mr. DeLorean had asked him for help arranging a narcotics deal.
>
> Mr. DeLorean's lawyers, Mr. Weitzman and Donald M. Re, contended that the prosecution had improperly withheld documents that would lead them to learn last week that Mr. Hoffman had demanded up to l0 percent of any assets seized as a result of the investigation of Mr. DeLorean. Mr. Hoffman made the demand Sept. 3, l982 and was rejected.
>
> The Government had hoped to seize several million dollars in cash and property belonging to William Morgan Hetrick, an admitted cocaine smuggler charged with Mr. DeLorean as a co-

> conspirator, and $2 million that was to have been invested by Mr. DeLorean, according to the Government's version of the purported drug scheme.
>
> Judge Takasugi, saying he was addressing the issue in 'real world' terms, characterized Mr. Hoffman's demand as 'a percentage of the take' and said he found it 'quite offensive,' particularly since Mr. Hoffman had testified that he was 'motivated in part by good' to furnish information.
>
> 'If there is such a thing as a smoking gun in terms of the credibility of Mr. Hoffman,' the judge said, Mr. Hoffman's demand was it.

But, although a reward or a monetary inducement does not automatically disqualify the recipient as a competent witness, the jury must be advised of the arrangement. The issue is not one of competency, it is one of credibility; and that is an issue for the jury. In my opinion, juries look askance at any arrangement whereby a prosecution witness will benefit financially from his testimony. So do some judges. Read what Judge Wiggins had to say about money and informers in United States v. Cardenas Cuellar, 96 F.3d 1179 (9th Cir. 1996).

Make sure the agreement will make sense to the jury if it ever gets in evidence, but be aware of the law that governs how plea agreements can and cannot be used. They are not automatically admissible in their entirety in evidence! See United States v. Edwards, 631 F.2d 1049 (2d Cir. 1980); United States v. Spriggs, 996 F.2d 320 (D.C. Cir. 1993). Consider adding a paragraph to the extent that if the witness backs out, everything he has said during the negotiations can be used against him. See United States v. Stirling, 571 F.2d 708 (2d Cir. 1978); United States v. Mezzanatto, 115 S. Ct. 797 (1995).

2. Warning! Avoid any temptation to try to sanitize the witness by making with his attorney a secret deal unknown to the witness. The simple fact that the witness does not know about a favorable deal in

exchange for his testimony does not permit you to call that witness to the stand to tell the jury under oath that he does not stand to gain anything from his cooperation. This ploy was condemned by the Ninth Circuit in Hayes v. Brown, 399 F.3d 792 (9th Cir. 2005) (en banc).

Equally fatal was a prosecutor's decision secretly to derail a planned psychiatric examination of an accomplice witness in order to try to avoid creating discoverable information that would hurt his credibility. In Silva v. Brown, 416 F.3d 980 (9th Cir. 2005), the witness' attorney had advised the prosecutor he feared his client might be insane. Recognizing that a mental evaluation might "supply ammunition to the defense," the prosecutor cut a deal with the witness: no mental evaluation, and murder charges would be dropped in exchange for his testimony. In granting the defendant a new trial in this capital case, the Ninth Circuit said, "When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." Id. at 991.

3. Don't lock the witness in so strongly to a particular evidentiary script that the ground rules violate the defendant's rights to confrontation. If you require a witness to stick to his or her original story in order to secure a "deal," this effectively makes the witness immune from cross- examination! Such agreements have produced reversals on appeal. All you can require substantively is that the witness tell the truth. See People v. Medina, 41 Cal. App. 3d 438 (1974).

4. Tell the witness all the ground rules:

   a. What he will have to do in terms of testifying; i.e., grand jury, two trials, or whatever.

   b. How long it will take. Do not underestimate!

   c. He does not have a credit card to go around committing other crimes while you are using him as a witness. Tell him not to call you if he gets a ticket. Do not leave this to the

imagination.

d. Security precautions may be in order. Decide what is necessary; what is available. If the witness is going into a witness security program, make sure that you and the witness understand exactly what this entails. Get a copy of the witness' memorandum of understanding with the Marshal's Service and read it yourself.

5. Hold something back.

a. The witness must perform first. If you give him everything to which he is "entitled" before he testifies, you may be unpleasantly surprised when he disintegrates on the witness stand. I preferred if possible to have such a witness plead guilty before testifying and be sentenced afterwards. If the witness' motivation to cooperate is removed, you will be lost. Do not rely on his sense of honor! See United States v. Insana, 423 F.2d 1165 (2d Cir. 1970) and Darden v. United States, 405 F.2d 1054 (9th Cir. 1969), which sanction this approach.

6. Have the defendant execute a signed and witnessed statement regarding what he knows that can be used in case he goes sour, either during the trial or later. This will be available as an admissible prior inconsistent statement should he "go south" on the stand and as protection for you and the case after a conviction if he decides to change his tune when confronted as a "snitch" in prison by other inmates. Take out an insurance policy, as it were. Be familiar with the law of impeaching your own witness, prior inconsistent statements, prior consistent statements, etc. A case on this subject that ought to be read by all prosecutors intending to use a turncoat as a witness is United States v. DiCaro, 772 F.2d 1314 (7th Cir. 1985), one of the leading cases on the subject of witnesses who are "overcome by amnesia" when they take the stand. The latest word by the Supreme Court on attempting to use a coconspirator's statement as a declaration against penal interest can be found in Williamson v. United States, 114 S. Ct. 2423 (1994), holding that confessions of arrested accomplices may be admitted

under Rule 804(b)(3) "if they are truly self-inculpatory rather than merely attempts to shift blame or curry favor." The Supreme Court has also used the same approach with respect to prior consistent statements: they will be admissible only if they were made before the alleged motive to fabricate or improper influence arose. Tome v. United States, 115 S. Ct. 696 (1995).

H. Is your case stronger without calling the informer to the witness stand?

1. Quite possibly the most effective (and most safe) way to use a cooperating accomplice is to use the information obtained from him to develop other evidence of your target's guilt, independent evidence strong enough to relieve you of the necessity of calling him to the stand. In fact, this should be your tactical goal: to build a case that does not depend on the testimony of the accomplice. Use him to help you do this. Ask him if he knows of any way independently to corroborate what he tells you. He may be useful in identifying other excellent witnesses to what he has told you.

   For a blueprint of how to use an informer's tape recorded conversation with a suspect without calling the informer to the stand, read these cases: (1) United States v. Davis, 890 F.2d 1373, 1379 (7th Cir. 1989); and (2) United States v. McClain, 934 F.2d 822, 832 (7th Cir. 1991). In both, the government's tactic of keeping a notorious informer off the stand survived objections based on the Sixth Amendment and Federal Rules of Evidence 607 and 806.

2. Remember, however, that such an approach should not be used dishonestly to milk helpful information from a witness and then unfairly dump him without consideration on the proverbial ash heap. The integrity of your office requires that you play fair, even with criminals. A witness you may decide not to call to the stand may nevertheless have given you sufficient assistance in building your case to merit substantial consideration.

I. Managing the witness' environment.

1. Be mindful of where the witness is going after you take his

statement and secure his cooperation. If he is going back to jail, serious problems may occur unless you take precautions to keep him away from other potential troublemakers. If he goes back into the "general population," chances are some other inmate will find out he is a snitch and confront him as an enemy. When this happens, it is not unusual for the witness to lie to his accuser and deny everything, or worse, to say that he was coerced into lying by you and the police. You then have a scared witness who may recant all, and you have a defense witness who will come in and tell the jury that your witness said he made it all up "just to get a deal," etc. These people also have a disquieting way of showing up unexpectedly as the predicate for a writ of error coram nobis or a motion for a new trial. One answer to this problem, of course, is to take advantage of the federal Witness Security Program which has a very effective chapter behind bars as well as on the outside.

2. You must keep the witness out of harm's way. Warn him against saying anything to anybody and especially to other prisoners, and have your investigator contact him frequently to keep the fires of cooperation burning. If you neglect the baby-sitting aspects of this business, you will get burned. If you do have access to a witness security program, know what it can do for you, how it does it, and what it can't. Then use it! If you don't have one available, start one. It is an essential ingredient of the fight against organized crime. Take note: if you fail to protect your witness and he gets killed or injured because he is cooperating, you may find yourself on the short end of a civil law suit. To understand your exposure, read Miller v. United States, 561 F. Supp. 1129 (1983), aff'd 729 F.2d 1448 (3rd Cir. 1984); Galanti v. United States, 709 F.2d 706 (11th Cir. 1983); and Wallace v. City of Los Angeles, 16 Cal. Rptr. 2d 113 (Jan. 1993).

Please take a moment in this regard to reflect on the tragic and sobering fate of Collier Vale as recounted on November 5, 1990 in the Los Angeles Times:

> Monterey - Informant's Murder Led Prosecutor to Suicide. Collier Vale was one of the most respected lawyers in the Monterey County district attorney's

office, a driven prosecutor who won numerous high-profile convictions and was a prime candidate for a judgeship.

But after 10 years as a prosecutor, where he frequently worked 60 to 70 hours a week and slowly rose through the ranks in the office, Vale felt that a single case had ruined his reputation and destroyed his career.

On a Thursday evening last month, after telling friends he was tired of defending himself against accusations that never seemed to end, Vale put a pistol in his mouth and pulled the trigger.

The case that friends say led to Vale's suicide involved the death of a confidential informant in one of his murder investigations. He was unjustly blamed for the woman's death, his colleagues say, and he was haunted by the case.

His ordeal highlights the pressures and responsibilities prosecutors face when dealing in the shadowy world of confidential informants. It is a world where prosecutors try to protect people who sometimes can't be protected, where blame is quickly assigned when the interests of witnesses and suspects suddenly collide.

Collier's case was a "prosecutor's nightmare," said Ann Hill, a deputy district attorney who worked with Vale. "What makes it so frightening is something like this could happen to any of us, no matter how conscientious we are . . . and Collier was maybe the most conscientious of us all."

Vale's informant was killed in a burst of automatic gunfire, after her identity was inadvertently revealed. Local press reports appeared to blame Vale for the mix-up, and the story eventually received national attention on the tabloid television show, "A Current

> Affair." Vale was extremely upset, friends said, when the controversy became a major issue in the June election campaign for district attorney.
>
> When the family of the murdered informant filed a wrongful death suit against the county and a local police department, Vale knew he would soon face a series of hostile depositions and possibly an embarrassing, highly publicized trial.
>
> Vale, 39, was a proud man, friends said, and he could no longer endure the indignity of being constantly blamed for a witness' death.
>
> "Collier saw this whole thing as humiliation and a failure," said his girlfriend Melinda Young. Her eyes filled with tears and she slowly shook her head. "He just couldn't let it go."

J. Discovery: A veritable minefield for the unwary.

1. The defense has a right to everything that reflects on the credibility of the witness -- maybe even your "work product" notes as a "statement of a government witness." Goldberg v. United States, 425 U.S. 94 (1976) holds that a prosecutor's notes taken during a witness interview may well be statements under the Jencks Act. See also, United States v. Ogbuehi, 18 F.3d 807, 810-811 (9th Cir. 1994). If you put something on paper, expect that it will have to be turned over. If it does, you won't be embarrassed. If it doesn't, so be it. Don't forget United States v. Harris, 543 F.2d 1247 (9th Cir. 1976), requiring the FBI to preserve rough notes of witness interviews. See also United States v. Riley, 189 F.3d 802 (9th Cir. 1999). If you have any doubt about a piece of evidence, the very fact of that doubt should cause you to seek a pretrial Brady ruling from the court, ex parte in camera if possible. If you haven't read Giglio v. United States, 405 U.S. 160 (1972) in a while, you might want to do so.

2. On April 19, 1995, the Supreme Court decided a very important

case discussing a prosecutor's Brady duty to disclose "favorable evidence" to the defense. If you are a prosecutor and have not read this case, you must do so immediately because it establishes certain affirmative discovery duties on the part of a prosecutor that if neglected may wreck havoc with your work.

Kyles v. Whitley, 115 S. Ct. 1555 (1995) is the case. It involves a prosecutor's failure in a murder case to turn over to the defense (1) impeachment evidence concerning key eyewitnesses and (2) inconsistent statements made by an informant, Beanie, who was never called to the stand but who the defense claimed was the real killer of defendant Kyles's alleged victim. Because five Justices decided that had this evidence been turned over to the defense a different result was reasonably probable, Kyles's conviction and death sentence were overturned.

In rendering this decision, the Court held that a prosecutor has an affirmative duty promptly to inquire and to learn from all agencies involved in the case whether evidence favorable to the defense exists. Justice Souter described this duty as follows:

> While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith,) see

> Brady, 373 U.S., at 87, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. at 1567 (emphasis added).

> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See Agurs, 427 U.S., at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. U.S., 295 U.S. 78, 88 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. . . . The prudence of the careful prosecutor should not therefore be discouraged.

Id. at 1568-69. See also Banks v. Dretke, 540 U.S.668 (2004) (“A rule thus declaring ‘prosecutor may hide, defendant must seek’ is not tenable in a system constitutionally bound to accord defendants due process.”).

Kyles is not the first case to put an affirmative duty on prosecutors to search out impeaching information regarding informer witnesses. In United States v. Osorio, 929 F.2d 753, 761-62 (1st Cir. 1991), the court held that a "prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows [about the witness] simply by declining to make reasonable inquiry of those in a position to have relevant knowledge. . . . The government, as represented by its prosecutors in court, is under a duty of inquiry regarding information concerning the criminal past of its cooperating witnesses . . . ." The Osorio panel went out of its way to castigate the government for what it called "sloppy practice." Read the opinion for a discussion of the effect of tardy disclosure to

the defense of impeaching evidence.

The Ninth Circuit has held that Brady and Kyles require the prosecution -- when it decides to rely on the testimony of witness with a significant criminal record -- "to obtain and review [that witness's] Department of Corrections file, and to treat its contents in accordance with the requirements of Brady and Giglio." Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc).

Equally important in the Supreme Court's opinion in Kyles is the Court's blessing of an attack by the defense on the caliber of the investigation conducted by the police as a way to defeat the legitimacy of the prosecution's case. In particular, the failure of the police to investigate whether the informant Beanie was the actual killer is identified by Justice Souter as fair game. Id. at 1570, n.14; at 1572, n.15. This means that a prudent investigator or a prosecutor will conduct an investigation of the informant's possible complicity and duplicity in any situation where it can be anticipated that one of the defenses might be (as in Kyles) that the "informant did it." Not only is such an investigation an excellent way to make sure that you have the right defendant, but it will save you when you do have the right defendant from the fate of the prosecutors in Kyles. Kyles, by the way, is a textbook on how not to put together a case. To say that the investigation shot itself in the head is charitable.

3. In the federal prison system, prisoners' telephone calls to the outside are tape recorded. In United States v. Merlino, 349 F.3d 144, (3d Cir. 2003), the Court of Appeals held (1) that Kyles v. Whitley "cannot be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue." Merlino, 349 F.3d at 154; and (2) that the defense had failed to make a showing that Bureau of Prisons tapes of more than 2,000 calls involving cooperating witnesses in the Witness Security Program contained Brady material. Thus, the Court of Appeals affirmed the District Court's denial of a subpoena for the tapes. Nevertheless, be aware of this fertile ground as a source of information that might damage the credibility of prisoner witnesses.

4. If you knowingly fail to turn over information to the defense to which the defense is entitled, you will be in BIG trouble. Read United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) for an example of how awful that trouble can be. Not only did the assistant get into trouble in that case, but his whole office was taken to task. Every competent defense attorney in America can be expected relentlessly to search for something you have "suppressed and failed to turn over." Make a mistake, and you'll never forget the hot water in which you find yourself. See also Silva v. Brown, 416 F.3d 980 (9th Cir. 2005). (Prosecutor failed to disclose a deal with a witness requiring the witness not to undergo a planned psychiatric evaluation before the witness testified for the state.)

5. See United States v. Hickey, 767 F.2d 705 (10th Cir. 1985), for a case denying defense access to the file of a witness in Witness Security Program on the ground that the witness was in danger. The Court held that under such circumstances, a general outline of the deal with the witness was all that the defendant was entitled to.

K. Guilty Pleas: The Factual Basis

The Supreme Court held in United States v. Ruiz, 536 U.S. 622 (2002), that the Constitution does not require the government to disclose material impeachment evidence regarding informants and other witnesses prior to entering into a plea agreement with a criminal defendant. Nevertheless, you can expect a defendant who discovers dirt about an informer to attempt to undo a plea of guilty by claiming "actual innocence." But, Ruiz does not give a prosecutor the option of falsely answering discovery motions. After you read Ruiz, always read Banks v. Dretke, 540 U.S. 668 (2004).

The best way to attempt to forestall unnecessary post-judgment litigation is to require at the time of the plea that the defendant explain in excruciating detail under oath exactly what he or she did that constitutes every element of the crime to which the plea is being entered. You cannot overdo this process. Don't be shy. Require the defendant to confess to everything, in his own words. Don't you describe what happened and

simply require the defendant to agree. Make the defendant describe the conduct and his state of mind, and make the defendant do it under oath. This way, any marginal doubt about the defendant's guilt is erased, and any new information about the informer-witness's credibility is irrelevant: the defendant has admitted the charge. Do the same with your cooperating co-conspirator or accomplice.

L. Trial tactics.

1. Motions in limine to limit cross examination and opening statement.

a. Although discovery is virtually limitless when it comes to factors weighing on the credibility of a cooperating criminal, careful consideration should be given to making a motion in limine to preclude the defense from going into inflammatory areas on cross-examination that are really a general attack on character rather than credibility.

The key to such a motion, of course, is Rule 403 of Federal Rules of Evidence which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issued, or misunderstanding the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403 has been interpreted on numerous occasions to limit cross-examination of government witnesses. See United States v. Bari, 750 F.2d 1169 (2d Cir. 1984) (precluding cross-examination relating to the psychiatric history of a government witness); United States v. Nuccio, 373 F.2d 168 (2d Cir. 1967) (excluding cross-examination of homosexuality); United States v. Rabinowitz, 578 F.2d 910 (2d Cir. 1978) (upholding trial judge's refusal to permit cross-examination with respect to government witnesses' prior act of sodomy and psychiatric treatment therefor); United States v. Glover, 588 F.2d 876 (2d Cir. 1978)(preclusion of cross-examination on psychiatric history after in camera review of psychiatric records);

United States v. Singh, 628 F.2d 758 (2d Cir. 1980) (limitation of cross-examination based on privacy concerns); United States v. Burke, 700 F.2d 70 (2d Cir. 1983) (allowing cross-examination on the involvement of a witness in a significant robbery but precluding cross-examination on the details).

In this regard, it should be argued (when appropriate) that permitting the defense to elicit extraneous and highly inflammatory information flies in the face of Rule 403 and in so doing prejudices the Government by causing the jury to focus unduly on elements of the witnesses' character not relevant to credibility.

This, however, is an area in which a prosecutor should tread with care. The right to confront and cross-examine a witness is a guarantee of constitutional dimensions, and a successful motion in limine in this area may backfire on appeal unless it is carefully crafted so as not to deprive the defendant of too much. United States v. Mayer, 556 F.2d 245 (5th Cir. 1977) ought to be read and digested when you are contemplating erecting a protective barrier around a testifying criminal. Mayer states in this regard that "cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope. . . . This is especially true where a prosecution witness has had prior dealings with the prosecutor or other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecution in exchange for the prosecutor's actions in having some or all of the changes against the witness dropped, securing immunity against prosecution, or attempting to assure that the witness received lenient treatment in sentencing."

The Ninth Circuit agrees with the Fifth Circuit. In United States v. Brooke, 4 F.3d 1480, 1489 (9th Cir. 1993), Judge Reinhardt said:

> We have previously pointed out that "[w]hen the case against a defendant turns on the credibility of a witness, the defendant has broad cross-examination rights." United States v. Ray, 731 F.2d 1361, 1364 (9th Cir. 1984). We cannot overemphasize the importance of allowing full and fair cross-examination of government

> witnesses whose testimony is important to the outcome of the case. Out of necessity, the government frequently relies on witnesses who have themselves engaged in criminal activity and whose record for truthfulness is far from exemplary.
>
> These witnesses often have a major personal stake in their credibility contest with the defendant. Full disclosure of all relevant information concerning their past record and activities through cross-examination and otherwise is indisputably in the interests of justice. Ordinarily, such inquiries do not require the expenditure of an inordinate amount of time, and courts should not be reluctant to invest the minimal judicial resources necessary to ensure that the jury receives as much relevant information as possible. Nor should unwarranted fear of juror confusion present any impediment. Federal jurors, who are expected to follow the complex testimony and even more intricate instructions that are presented in many of our criminal cases, such as multiple conspiracy prosecutions, are unlikely to be confounded by a defendant's inquiry into the bias and credibility of a key government witness. In any retrial, the district court should afford Brooke a full and fair opportunity to question Kearney regarding any of his past activities that are probative as to the credibility of his testimony or as to any bias that may underlie it.

If such a motion is made, and if it is successful, it obviously has ramifications with respect to opening statements and what counsel can and cannot say.

2. Voir dire.

    a. Let the jury know, without making a "big thing" about it, that you are going to call a witness that is getting something in return for his testimony. Ask if the jurors will reject such a witness out of hand or if they will fairly

listen to what the witness has to say. Adopt early an attitude that you aren't real pleased with having to do this, but crimes aren't all committed in heaven so all our witnesses aren't angels, etc. Preempt the defense. If a judge is reluctant to ask these questions, point out that they are all no different than asking a prospective juror whether he or she will give undue credibility to a police officer just because he is a police officer, etc.

3. Opening statement.

a. Front matter-of-factly and briefly all the "bad stuff" including the deal, but don't dwell on it. Follow up the bad stuff with references to matters that corroborate what he says. This is sometimes called the "doctrine of inoculation." But don't put all your eggs in the accomplice's basket. The case stands on its own two feet. Refer as matter-of-factly as possible to the witness. The objective here is to control the manner in which the jury first hears of the dirt. If you do not do this and instead turn over the opportunity to the defense to "uncover the government's dirty laundry," you will be in deep tactical trouble.

A trap lies waiting for you, however, unless you are careful. If you under inform the jurors about the extent of the witness' negative baggage, a clever defense attorney might accuse you of hiding relevant information, or "gilding the rotten lily." In the prosecution of Robert Wallach, for example, the prosecution only briefly referred in opening statement to the fact that its principal witness was a multiple felon. The defense immediately countered by expanding in detail and revealing that the witness had committed 113 felonies, all of which except one had resulted in virtually no sentence because of his cooperation with the prosecution. The jury was then asked, "Why did these facts not come from the government? Why is the government not honest with you about the facts?" To avoid this trap, be thorough and

clinical in your presentation.

4. Jury instructions.

a. In Banks v. Dretke, 540 U.S. 668 (2004), the Supreme Court all but mandated cautionary jury instructions with respect to a testifying informer's credibility, referencing I AK. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed. 2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony). You must be familiar with the instructions that cover accomplices, corroboration, perjurers, drug addicts, immunity, prior convictions, the witness security program, etc. Always review them with care long before jury selection. This will cause you to look for effective ways to cope with the cautionary admonitions that always crop up when an accomplice or an informer enters into a case. Figure out your jury arguments as early as possible.

b. The following is excerpted from a favorable jury instructions on the credibility of accomplices given in the case of United States v. Stanley Friedman, 854 F.2d 535 (2d Cir. 1988), a case successfully prosecuted in 1987 in Connecticut involving corrupt New York City politicians. On significant feature of the instruction is that it advises the jury not to second guess a prosecutor's decision to make a deal with a witness. It also advises the jury that dislike for a witness is not a basis standing alone to disregard his testimony.

INSTRUCTION

I now turn to the question of accomplices. Almost all of the important witnesses in this case are accomplices of one sort or another. An accomplice is a person who is guilty of

and could be prosecuted for any crime or crimes of which the defendants are accused. The law lays down several rules which govern your treatment of accomplice testimony. In the first place, it is no concern of yours or of mine why the Government chose not to indict a certain person or if it did indict him, why it determined to treat that with leniency. The decision of what persons should be prosecuted and what pleas of guilty should be accepted from persons who are indicted are matters which the Constitution and Statutes of the United States have delegated to the Attorney General of the United States, who, in turn, has delegated it to the United States Attorney and his counterparts in other judicial districts. It is an awesome responsibility, but the Constitution and statutes do not give you or me any authority to supervise its exercise.

Also, as I believe I told you when you were being selected, if you once come to the conclusion that an accomplice witness has given reliable testimony, you are required to act on it exactly as you would act on any other testimony you found to be reliable, even though you may thoroughly dislike the witness giving it to you.

However, the law imposes upon you stringent requirements as to how to evaluate such testimony before concluding it to be reliable. Obviously, it's much more pleasant to be a witness than a defendant. The law requires that you scrupulously examine an accomplice's motives in persuading the Government to accept him as a witness

rather than prosecuting him as a defendant. So, you can be sure that he's neither made up a story to incriminate someone nor colored the facts of an otherwise true story to make someone appear to be more guilty than he actually is.

I'm going to discuss with you in some detail the testimony of the Witness Lindenauer, not because I think his testimony is more important that any other witness -- that is a question wholly within your province to determine -- but simply because all attorneys in the case spent so much time on this particular aspect of his testimony that it lends itself to illustrating the principles involved.

In the first place, Lindenauer told you that he had lived a life characterized by acts of wrongdoing, many of which involved deception. This is obviously a factor you will take into account in determining the reliability of his testimony.

In the second place, he was able to negotiate a plea which considerably reduced the total scope of the sentence that might have been imposed upon him had he been convicted of all his wrongdoings.

And finally, he hopes, as he specifically told you, that the testimony he gave in the case will induce the judge before whom he pled guilty to be lenient in imposing sentence. These circumstances could have affected Lindenauer in at least three possible ways. They could have caused him to make up imaginary facts in order to incriminate some

or all of the defendants, or they could have caused him to color existing facts to make them appear to be more incriminating than they actually were. Or, on the other hand, they might have caused him to conclude that his best hopes of salvation was to be able to convince the judge who ultimately sentences him that he was scrupulously honest in his testimony before you. You should take account of these and any other possibilities that might occur to you in evaluating his testimony.

The foregoing principles apply in varying degrees to all so-called accomplice witnesses. Some face sentences and some testified under grants of various types of immunity, which greatly reduced the possibility of their ever being prosecuted. They all, in one way or another, could conceive it to be in their own best interest to achieve and retain the good will of the Government.

Now, in this connection, what you're concerned with is the witness' perception of this situation. And much has been argued about the risk he runs of perjury if he testified untruthfully. In that situation you must look at his perception of what would happen to him, and it might well be argued that his perception is that the best way of avoiding such things would be to curry favor with the only person who can prosecute him for perjury; namely, the Government.

On the other hand, it may just as logically result in his thinking that the best way to avoid it is to avoid the commission of

perjury. It's his perception that you focus on, what you think he thinks, how you think that would influence his testimony.

Of course, that's not the only thing you consider. You consider every element of credibility in dealing with the witness, how his testimony fits in with other evidence in the case, and all the other things that I mentioned to you.

5. Direct examination.

a. Make it pointed, and at times make it sound to the jury like cross-examination. You are not the champion of the witness. You are a person charged with getting at the truth; and you aren't at all embarrassed by having to call to the stand a crook to do it.

b. Bring out all the problems such as every benefit being extended to the witness in consideration of his testimony, previous inconsistent statements, etc., and confront the witness with them. Don't wait for the defense. You must control the manner in which the jury first hears of the dirt or the dirt will end up on you. Go on the offense. Section 607 of the Federal Rules of Evidence allows you to do this. See also United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981); United States v. Hedman, 630 F.2d 1184, 1198-99 (7th Cir. 1980); United States v. Craig, 573 F.2d 513, 519 (7th Cir. 1978); United States v. Necoechea, 986 F.2d 1273, 1280, n.4 (9th Cir. 1993), for the proposition that this kind of anticipatory material is appropriate on direct. The jury must rely on you to get at the truth! If a witness lied to someone, you must bring that out. Ask the witness if he lied, and then

tell him to explain why he did that. Probe his attitude about testifying. Frequently it can be convincing -- if it is candid. If there is a lot of this stuff, weave it in slowly rather than giving the jury too much to swallow in one bite.

Your goal in this regard is to steal every bit of legitimate thunder that the defense might be able to muster on cross. Vaccinate the jurors by controlling the manner in which they are exposed to the problems. If the jury has already heard it from you, it loses a lot of its sting. Put in a different perspective, the best defense that you can provide for a witness against vigorous cross-examination is to have revealed the problems yourself to the jury during opening statement and then on direct. If the jury first hears about such damaging and troublesome matters from you, the defense is disarmed and you build your own credibility. Under your skillful questioning, you can couch these matters in a sterile setting, minimize their dramatic impact, and cushion them with an appropriate explanation. Examples of such material are prior convictions, grants of immunity or leniency, deals, promises, rewards, perjury, mistakes, inconsistencies, etc. See United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), Winter, Hedman, Craig, United States v. Oxman, et al., 740 F.2d 1298 (3d Cir. 1984), and United States v. McNeill, 728 F.2d 5 (1st Cir. 1984). In People v. Gordon, 10 Cal. 3d 460 (1973), the California Supreme Court even went so far as to sanction an admonition by a prosecutor to a jury in opening statement that one of his own witnesses might not be completely truthful. The court noted that "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."

As discussed earlier, cast yourself temporarily in the role of the defense attorney and figure out how you would cross-examine your own witness. Make a list of the areas

you would attack, and then seek ways to prevent the attack by neutralizing the area before the defense attorney gets a chance.

If the witness is in the federal witness security program and receiving subsistence payments, go into it on direct. Otherwise, on cross-examination the defense will ask, "How much are you getting for your testimony?", and the answer may crush your case. See United States v. Partin 601 F.2d 1000 (9th Cir. 1979). Have a game plan to handle every aspect of the program if it is attacked as a method of purchasing testimony. What will you say in final argument?

If you anticipate a defense based on the argument that the informer/witness is really the perpetrator, after Kyles you probably have the option of using direct to put on evidence in the form of "conscientious police work," Kyles, 115 S. Ct. at 1572, n.15, that the police investigated this possibility and concluded that it was not true. Or, you might want to wait until redirect to wheel out these guns. The point here is that you must have a cogent plan to meet this contingency before the trial starts. But, watch out for the rule against personally "vouching" for a witness. See United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005).

If you like to write out verbatim the questions that you intend to ask a witness with the answers that he has told you he will respond with, be careful that you are not accused of perjuriously scripting the witness' testimony. Whatever you do, do not give a copy of such a document to the crook. If you do, it may come back to haunt you if the crook decides to cross back to the underworld with the "script" in his possession. Such a script was used (unsuccessfully) to accuse a U.S. Attorney in Oklahoma of manufacturing evidence.

6. Corroboration.

a. As I have already mentioned, when evaluating your evidence and planning your case, always start from the proven rule of thumb that THE JURY WILL NOT ACCEPT THE WORD OF A CRIMINAL UNLESS IT IS CORROBORATED BY OTHER RELIABLE EVIDENCE. (And you should not either.) Jurors will also pick and choose, accepting that part of a crook's testimony that is corroborated and rejecting that part that is not. I cannot stress this point too strongly. If you are going to have to rely on the uncorroborated or even weakly corroborated word of an accomplice or an informant, get back out in the field and go back to work. Corroboration is to an accomplice's testimony what gasoline is to a car: without it you get nowhere. The best thing that can happen to you is that the leads provided to you by the witness will uncover so much other good evidence that you won't have to call him at trial! Deciding not to use an accomplice, however, can be a difficult judgment call, especially when his evidence is very probative. On occasion, you may not have to make this decision until late in a trial when you can get a better sense of how everything is going than is possible before a trial starts. To retain the option of calling him, simply do not refer to his identity during voir dire or your opening statement. Simply say, "And we will prove that the defendant personally made the decision to execute his rival" without saying how you intend to do so. Then, if you decide at the end of your case in chief that you need the accomplice's testimony, you can use it without fear of claims of sandbagging -- so long as you have completed discovery and notified the court you are retaining this approach as an option. Do not surprise the judge. Some might deny you this opportunity if you do.

At the risk of repeating myself, let me give you yet another example of this important principal: the Walker/Whitworth espionage series of cases. Because of glaring weaknesses in the Whitworth case, John Walker

himself was called as a witness against his accomplice. This tactic was successful, but the jurors' observations as reported in The Washington Post are very educational.

> Jurors expressed considerable sympathy for Whitworth and extreme distaste for Walker, the chief witness against the former Navy colleague he recruited into the spy ring.
>
> In the first afternoon of deliberations, when they were finally permitted to express their views about the long trial, jurors 'vented our individual feelings,' Young said, and there was an outpouring of hostility against Walker.
>
> 'The man gives a new meaning to the word low,' juror Minda Amsbaugh, a bank officer, said.
>
> Foreman Neumann called Walker 'the most villainous person I've every seen,' and added, 'I personally would feel that it's not just' if Walker were released from prison before Whitworth.
>
> 'John Walker was clearly a worm, clearly a despicable character,' Young said. 'There was a feeling it was just too bad there wasn't another person on trial,' he added, referring to Walker. 'Walker seems to have gotten the better of this deal and Jerry's left holding the bag.'
>
> But, he said, the jury believed that Walker was 'essentially telling the truth' in his testimony about Whitworth's participation in the ring.

Walker agreed to plead guilty to espionage

> and is to be sentenced to life in prison in return for more lenient treatment for his son, Navy Seaman Michael Lance Walker, who also pleaded guilty and is to be sentenced to 25 years.
>
> 'We all had our favorite little lies that we thought we detected' in Walker's testimony, Browne said, 'but in the end it didn't make a difference because there was enough corroborating testimony on all the major issues.' He said he thought payment schedules seized in both men's homes were 'especially damning,' a factor also cited by Neumann.

b. Physical evidence is the best. Corroborate everything you can. Prove the guilt of the witness as well as the guilt of the defendant. Corroboration is what the jurors want and what they look for -- make it visual. Prepare charts, blow up pictures, etc.

c. In choosing the order of witnesses, where it makes chronological sense, consider corroborating the witness before you put him on the stand; i.e., have the storekeeper ID him first as the bystander robber, then he can take the stand and ID his killer accomplice. You are allowed to prove the substantive guilt of your witness to establish the truth of his claim to firsthand knowledge of the crime in question. The fact of his guilty plea is also admissible, but a limiting instruction constricting the use to which such a plea can be put is required. See United States v. Halbert 640 F.2d 1000 (9th Cir. 1981). Such testimony, is tricky, and should be handled with great care. The witness' plea is not admissible directly to prove a defendant's guilt, only to reflect on the witness' credibility, on his first- hand knowledge, or to dampen claims that the witness has been given a free ride for his cooperation. Read United States v. Gaev, 24 F.3d 473,

476 (3rd Cir. 1994) and United States v. Johnson, 26 F.3d 669, 675-678 (7th Cir. 1994) for good discussions of this issue. Whatever you do, don't say, "And our turncoat witness George Bultaco will tell you he has pleaded guilty to the very same crime for which the defendant is on trial."

If he is going to testify about his arrest, put the arresting officer on first to tell the jury what happened. If the jurors have already heard it from someone else, it is easily accepted by them when the same thing comes from him.

7. Preparation of the witness for cross-examination.

a. Prepare the witness for cross-examination, but be careful not to create a rehearsed witness who can be unmasked as such by the defense. Your witness must be able to survive a vigorous cross- examination to have any substantial value in the eyes of the jurors. Coaching a witness is a process that may need to be revealed on discovery, especially if a transcript or tape exists of the session. If you try to reconfigure a witness' confused story before it becomes testimony, the more you may be digging a hole for you and your witness, especially if the witness then claims on the stand that he wasn't coached. Read Banks v. Dretke, 540 U.S. 668 (2004) for a refresher on this pitfall.

b. The main thought to pound into the witness' head is that he must not play games with the defense attorney or allow himself to get upset. The only specific instructions I ever gave a witness was to remember at all times that testifying is not designed to "get anyone" or to protect himself, it is a time to tell "the truth about everything no matter who asks the questions -- me, the defense attorney, or the judge." If a defense attorney ever asked such a witness what I told him to say or do on the stand, the answer was, "The prosecutor told me to answer all the questions truthfully no matter who asks them, the

prosecutor, you (referring to the defense attorney), or the judge." Also, the witness should not play to the jury by looking at them. Jurors do not like this.

8. Perjury and false testimony.

a. In Mooney v. Holohan, 294 U.S. 103 (1935), the Supreme Court held that the knowing use by a prosecutor of perjury constitutes a violation of due process of law. In Alcorta v. Texas, 355 U.S. 28 (1957), the Court condemned the behavior of a prosecutor who told a prosecution witness not to volunteer certain information obviously helpful to the defendant, but if specifically asked, to be truthful about it. The witness lied, leaving the information known to the prosecutor out of his testimony. The prosecutor took no steps to correct the witness' testimony, and the Court concluded that petitioner was denied due process of law.

The Second Circuit extended the reach of these holdings in a case where an informer lied on direct examination about whether he had stopped his compulsive gambling. In fact, the government charged their witness after the trial with perjury, and he was convicted of the same. The government claimed, however, that it did not discover that the informer had lied until after the trial.

The Second Circuit was unimpressed and reversed the original target's conviction, holding based on the facts, that the government should have known that its witness was lying. United States v. Wallach, 935 F.2d 445 (2d Cir. 1991). What this means is that a prosecutor must be vigilant during the testimony of an informer to spot any surprise testimony that is not the truth and to identify it as such for counsel for the defense.

Also, a prosecutor faced with reason to believe that a cooperating witness may be prepared to commit perjury or has solicited others to do the same has a constitutional

due process obligation to investigate and to avoid this possibility. A prosecutor may not fail to act under these circumstances. Commonwealth v. Bowie, 243 F.3d 1109 (9th Cir. 2001); Banks v. Dretke, 540 U.S. 668 (2004).

However, it does not mean that a prosecutor is precluded from calling a witness to the stand who intends to lie, but whose lies will serve as the predicate for the introduction of prior inconsistent statements or the likes. The key is full disclosure to the Court and to defense counsel.

9. Final argument.

a. Accentuate the corroboration. Brush off the defense. Tell the jury, "We know that." I told you all about that during my opening statement and again during the direct examination! The issue in this case isn't whether Terry Miller is a crook with a prior felony conviction who lied to the police after he was arrested, the issue for you to decide is whether he has told the truth under oath here in court about his crime partner (point out the defendant) Alfred Mason, the defendant. And with that in mind, let's talk about the evidence that corroborates his testimony and "proves independently and conclusively that Alfred Mason murdered David Kernan."

An excellent tactic is to acknowledge the cautionary jury instructions and then to suggest to the jurors that they set aside at the outset of their deliberation the testimony of the accomplice for the purpose of testing the case on the basis of the rest of the evidence. The jury will do this anyway, and this approach enables you to argue that the case is "solid" without his testimony, but that with his corroborated testimony, all doubt has been erased. You called this obviously unseemly witness to leave no stone unturned in proving what happened.

"Let's suppose that Terry Miller [the accomplice witness], himself, was killed during the shooting and

never ever made it into this courtroom," I told them, "and let's see what the rest of the evidence shows." Then I took a Sherlock Holmes approach to "solving the case," and the jurors usually loved it. They want to be the detectives, not just the jurors. Invite them to solve it with you. Dwell on the strength of the circumstantial evidence. Then after I described an airtight case against the defendant, I told the jurors to add the accomplice's testimony to the mix and the defendant's guilt is established not only beyond a reasonable doubt, but to an absolute certainty. "Terry Miller's testimony is just frosting on the cake; he is not the Government's "key witness," as the defense would have you believe," he was Mason's choice as an accomplice.

In making this argument, you can fashion out of the corroborating and circumstantial evidence a web that points towards and snares the defendant. If you work towards this argument from the beginning of your case preparation, it will frequently fall easily into place. Its purpose among other things is to give the jury a device to shift the focus from your witness back to the defendant and to the incriminating and corroborating evidence. Do not buy into what the defense attorney says the case is all about.

b. Do not overlook the opportunity to turn the results of an aggressive cross-examination making your witness look like a horrible person into an advantage. In other words, turn the tables. The worse the defense makes the defendants' "former" best friend and partner look with crimes, drug use, tax evasion, lies, and the likes, the more able you will be to counter by pointing out -- probably in final closing argument after your witness has been thoroughly savaged -- that the defendants chose him as a partner to hang out with, not the government. If the witness is so awful and rotten, what does that say about his pals, the defendants? Birds of a feather flock together?

If the facts lend themselves to this rebuttal argument, you will be able to lay the groundwork for it on direct and especially redirect examination of your witness. Also, if a defendant takes the stand, you will have a golden opportunity to develop in great detail the extent of the witness' and the defendants' relationship.

This argument also serves to swing the spotlight off your witness and focus it where it belongs -- on the defendants. The Organized Crime Strike Force used this tactic to great advantage with their cooperating mafia witness Henry Hill. The worse the defendants made Hill look, the worse the defendants looked. Furthermore, who knows more about crime than criminals. Did you expect witnesses in a murder/drug/terrorist case to come from the Sisters of the Poor?

c. During your rebuttal argument, be prepared if necessary to justify and defend any deal that you have made, but do not vouch for the witness! Read United States v. Smith, 962 F.2d 923 (9th Cir. 1992) and United States v. Rudberg, 122 F.3d 1199 (9th Cir. 1997) to see what you cannot do and cannot say to a jury in this regard. Point out that crooks don't usually commit their crimes on video tape and leave copies lying around for everyone to review. Point out also that we can't go to central casting and get out witness, we have to go to people who know something about the crime and that unfortunately some of those people are going to be the crooks themselves. You didn't choose these witnesses, the defendant did by recruiting them into his scheme. They aren't the Government's friends, they are his!

You are not at all happy about having had to make this deal, but you are not apologizing for it either. "The integrity of Government demands it. It is simply unacceptable to convict only the bagman and let the crooked politician get off. If we never made deals with

the little fish, the smart big fish would always get away. Is that what you want to happen?" Once again, get the spotlight off your witness and onto the real crook.

This is also a good time to dust off the tried and true argument to the effect that when a defense attorney has the law on his side, he talks about the law; when he has the facts, he talks about the facts; but when he has neither, he attacks the prosecutor and the Government.

d. One aspect of the witness that you can emphasize is his motive to tell the truth. Point out that he can only have a motive to tell the truth because that is what will get him what he wants. Lies will only destroy the deal and cause him to be prosecuted for perjury. "He wants to stay out of jail. All he has to do to stay out is tell the truth, not lie. Lies will put him right where he doesn't want to be, in prison. His motive based on the evidence and the record can only be to tell the truth!" To this you can add that "by stepping forward and telling you what he knows, he has made himself publicly into an informer, a snitch." Do you think that a person does that lightly? Of course not. That is not something that a person would willingly do if it were just make believe!

e. Be very careful how you use the plea agreement. Again, you may not "vouch" for the witness. A number of cases in different circuits have severely criticized prosecutors for misuse of the terms of a plea agreement, referring to the polygraph, etc. For a comprehensive view of the problems in this area, read United States v. Brown, 720 F.2d 1059 (9th Cir. 1983); United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992); United States v. Smith, 962 F.2d 923 (9th Cir. 1992); United States v. Perez, 67 F.3d 1371 (9th Cir. 1995), opinion withdrawn in part, 116 F.3d 840 (9th Cir. 1997).

Postscript

In 1883, over a century ago, prosecutor William H. Wallace assumed the task of prosecuting the infamous Frank James, brother of Jesse, for murder. To do so, Wallace called a member of the James gang to the stand, one Dick Liddil. Liddil was a convicted horse thief, an accused murderer, and a traitor to the band who was trying to evade the punishment his crimes deserved. As was to be anticipated, Liddil's credibility and character came under fierce attack by the defense, as did the State for "its misconduct" in making an unholy deal with him. Here is prosecutor Wallace's reply to the jury. Although some of it certainly would be inappropriate under today's standards, you might find much of it useful.

> Dick Liddil was a member of a band of train robbers, known as the James gang. This nobody denies. If he had not been, he could not have rendered the State the vast benefit that he has. When men are about to commit a crime they do not sound a trumpet before them. They do their work in secret and in darkness. Neither when they are forming bands for plunder or death, do they select conscientious, honest citizens. A man contemplating murder would not say, "come along, Mr. Gilbrath, or Mr. Nance, [both jurors], and join me in my fiendish task." Their work is done when honest, law-abiding men are asleep, and "beasts creep forth". For this reason, when the State would break up a band of criminals, it must depend upon the assistance of one of their peers in crime to do it. Hence, it is a custom, as old as the law, to pick out from a desperate band one of their own number, and use him as a guide to hunt the others down. No honest, law-abiding man objects to this. When men go about where this is done, crying "perfidy", "traitor", "treason", you can put them down as the enemies of good government, or so steeped in prejudice that they know not what they do. Liddil, the least depraved man in the most secret, desperate band, perhaps the world ever saw, has thus been used; and the State has chosen, also, to call him as a witness in this case. Mountains of abuse have been heaped upon him; the English language has been ransacked for terms of vilification. Once, forsooth, and after he got to be a train-robber, too, he was a splendid fellow; splendid enough to be the boon companion of so pure and great a men as Frank James. You remember that the defendant himself testified that Liddil, passing under an

> alias, was his guest, ate at his table, and slept under his roof. Liddil was one of the heroes then of whom we have heard so much. But suddenly he makes a change. He leaves the shades of crime and comes out into the sunlight of law and order; and all at once, strange to say, he is transformed into a "viper"; a "villain", a "scoundrel", a "demon", or such "execrable shape" as his old tutor's counsel can give him. But let the attorneys for the defense go on with their abuse; it is part of their business. I shall not retort by calling the defendant a "viper", a "perjurer", a "demon", and the like . . .
>
> It is said that Dick Liddil surrendered, and bargained with the Governor of the State, and [Police Commissioner] Craig and [Sheriff] Timberlake to convict Frank James, guilty or innocent, in order to obtain immunity for himself. I deny that. There is no proof about it, and I have a right, in answer, to emphatically and positively deny it. The only contract with Liddil was that always made with those turning State's evidence, as we call it, namely, that he should tell the whole truth, and nothing but the truth; and if he told a falsehood he did it at his peril, and the contract was ended.
>
> From Closing Argument of William H. Wallace, Prosecutor, State v. Frank James, Murder, Gallatin, Daviess County, Missouri September, 1883.

I'm sorry to report the tag to this story: Frank James was acquitted. Why? Because the only evidence tying him to the murder came from Dick Liddil. So, there's nothing new to my claim that an absence of corroboration will be fatal to your case. See William A. Settle, Jr., Jesse James Was His Name, 129-144 (1966).

Finally, and I repeat, never at any time lose control of the witness. He will try to manipulate you if he can, thinking that you need him, not vice versa. Be prepared to say "no" to outlandish requests and let him know at all times that you are in charge. This can be done politely, but it must be done firmly, and believe it or not, he will usually respect you for it. He must trust you to a certain degree, but it doesn't hurt to have an element of fear built into the trust and respect. You do not want to let him think he can cross you and get

away with it. If he commits perjury, prosecute him for it. That's your duty. The truth is your stock in trade!

Stephen S. Trott
Senior Circuit Judge
United States Court of Appeals
for the Ninth Circuit

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