

THE CONFIDENTIAL INFORMANT ACCOUNTABILITY ACT
Proposals

Professor Alexandra Natapoff
Loyola Law School, Los Angeles

I. INTRODUCTION

The following proposals are offered as part of a comprehensive approach to improving the monitoring, quality control, and accountability of the government's use of confidential informants. Specifically, these proposals would: (1) require prosecutors to provide defendants with exculpatory impeachment material prior to plea negotiations regarding the criminal history of and benefits provided to informants used in the case; (2) require pre-trial "reliability hearings" to permit courts to test the reliability of compensated criminal informants outside the presence of the jury; and (3) require states to collect aggregate data on law enforcement use of criminal informants and their productivity.

II. DISCOVERY

A. Proposal

Prosecutors should be required to provide defendants with exculpatory material, including impeachment material regarding informants, prior to the entry of a guilty plea. Such impeachment information would include such information as: the informant's identity, criminal record, the benefits obtained or promised in connection with the case, and prior instances in any other jurisdiction where the informant lied, recanted, committed perjury, or otherwise provided false information.

B. Rationale

Exculpatory impeachment information is discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963). The government is already required to provide such information to defendants prior to trial, pursuant to *United States v. Giglio*, 405 U.S. 150 (1972). In 2002, however, the Supreme Court held that the government can withhold such information from a defendant if the defendant pleads guilty rather than going to trial. *United States v. Ruiz*, 536 U.S. 626 (2002). *Ruiz*'s reasoning could arguably also be extended to apply to core *Brady* factually exculpatory material, although that was not at issue in the case. Since approximately 95% of federal cases are resolved by plea, the effect of *Ruiz* is to exempt otherwise discoverable material by postponing its production. This is unfair to defendants, who often cannot meaningfully evaluate their case without impeachment information about the confidential informants who incriminated them. It promotes gamesmanship by permitting the government to withhold otherwise discoverable material in the hopes of obtaining a plea. It conceals the policies governing the use of informants from public scrutiny because it makes it easier for the government

to hide problematic informant information by offering beneficial plea agreements. Finally, many U.S. Attorneys offices already recognize that late disclosure of *Giglio* material can impede plea negotiations and have the informal policy to provide it earlier than constitutionally required. Accordingly, a rule establishing that such material must be provided prior to the entry of a plea accords both with practice, accurate convictions, and fairness.

Although the timely disclosure of *Giglio* material potentially affects all material witnesses, it will have little impact on civilian and non-criminal witnesses for whom there will be little if any impeachment material. The primary impact will be on criminal informant witnesses who have received government promises or who have prior histories of unreliability. This is precisely the sort of material that should be disclosed prior to the entry of a guilty plea because it affects the fairness and accuracy of the process. Because federal, state and local law enforcement often share informants, disclosure should include informant histories contained in state and local as well as federal files, if the federal government has reason to know that the informant has cooperated in other jurisdictions.

III. RELIABILITY HEARINGS

A. Proposal

Upon a defendant's request, courts should be required to hold pre-trial reliability hearings in which the government would be required to establish to the satisfaction of the court the reliability of any confidential compensated informant witness, or statements made by that informant, that the government intends to use at trial. If no hearing is held, the court should be required to make a reliability determination based on the submissions of the parties. If disclosure of a particular piece of information presents a substantial threat to a witness or to an investigation, the court should be able to craft a protective order to shield that information from the defendant, although not from defense counsel.

B. Rationale

Unreliable informant witnesses are one of the single largest sources of wrongful convictions in this country. The fact that prosecutors use lying informants as witnesses, and that juries believe their perjured testimony, indicates that our current adversarial process does not effectively protect against this source of wrongful conviction. Requiring courts to establish the reliability of informant witnesses by holding pre-trial reliability hearings would prevent wrongful convictions, increase fairness to defendants, and provide better oversight of the governmental use of unreliable compensated criminal witnesses.

There is substantial precedent for such a rule. Illinois has passed legislation that requires courts to hold reliability hearings before a jailhouse snitch witness can be used at a capital trial. Ill. Comp. Stat., ch. 725, § 5/115-21 (2003). The federal system already requires that expert witnesses – another type of compensated witness that tends to have an undue effect on juries – be screened by courts in hearings prior to trial pursuant to

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Fed. R. Evid 702. Federal courts already have the authority to conduct reliability hearings on informants under their general pre-trial authority to screen relevant and prejudicial evidence under Fed. R. Evid 104.

It will be important to define carefully the kinds of witnesses that will be subject to reliability hearings. The rule should not interfere with current expert witness procedures. Nor should it be used to screen civilian witnesses who received meals, lodging, or travel expenses from the government to facilitate their ability to testify. It also should not be used to burden or interfere with the testimony of crime victims. It should apply to witnesses who have been used by the government as undercover informants, who have or will receive, or who reasonably believe that they will receive any form of lenience for their own crimes, avoid the institution of new criminal charges in any jurisdiction, receive direct payment, sentencing concessions (including probation or parole modifications), immunity from prosecution, the initiation or continuance of government benefits such as food stamps or pensions, or any of these aforementioned benefits for a spouse, intimate partner, or family member in exchange for their testimony.

It should be recognizes that in some kinds of cases such as ongoing terrorism investigations, disclosure of an informant's identity or other information might pose a threat to a witness or to the investigation. Under those exceptional circumstances, courts should have the authority to craft narrowly tailored protective orders that would withhold specific pieces of information from the defendant and the public. Because defense counsel do not pose threats to witnesses or investigations, such information should be provided to counsel so that the defendant's rights can be preserved to the greatest extent possible.

IV. DATA COLLECTION

A. Proposal

All states receiving federal monies in connection with law enforcement or criminal justice should be required to collect data on the use of criminal informants at all stages of the criminal process, from investigations to the obtaining of warrants, to arrest, prosecution, and sentencing. To the extent possible, the data should include: the neighborhood or zip code where the informant was used; the informant's gender and race/ethnicity; the crimes committed by the informant; for each such crime, whether he/she was or was not arrested, charged, and/or convicted; the number of arrests and/or prosecutions in which the informant's information was used; the importance or weight of that information in that arrest or prosecution; and the length of time the informant has been cooperating with the government. The data should be transmitted annually in aggregate form to the Department of Justice for public dissemination and analysis.

B. Rationale

While the use of criminal informants is pervasive throughout state and local law enforcement, most jurisdictions lack any mechanism for keeping track of the number of informants used by the government and their productivity. As a public policy, it is therefore impossible to evaluate whether informant use actually makes communities safer, how many crimes they help solve, and how many they commit themselves. Because drug informants are concentrated in poor, high crime urban communities of color, there is also the problem of racial focusing in which the harms of informant use are disproportionately levied on poor black neighborhoods. States should be required to keep data on their use of informants so that criminal justice policymakers and legislatures can make rational public policy decisions about informant use. Such data will also permit the public to see how law enforcement works in their communities and permit a more informed public dialogue about law enforcement tactics.

Such a requirement would build on existing laws and regulations. States and localities are already required to provide the FBI with crime statistics, including hate crimes, in order to obtain criminal justice funding. By making these reporting requirements more sophisticated, they can provide the kinds of data that would reveal informant costs and benefits.

The purpose of the data collection is to permit a better public and governmental understanding of the use of informants and its true costs and benefits. It is not the purpose to endanger individual informants, officers, or to impede law enforcement investigations. For that reason, the publicly data should be reported in the aggregate without including individual identifying information. Such individual identifying information should be created and retained by the law enforcement agency for its own monitoring and evaluative purposes.

V. HEIGHTENED WARRANT REQUIREMENT

A. Proposal

Federal officers who apply for warrants in reliance on informants should be required to give information corroborating the informant as well as information regarding the informant's previous relationships with law enforcement (previous applications for warrants based on information provided by the informant, criminal history, and value given for the information). If a warrant or search does not comply with these requirements, the evidence gained thereby should be excluded.

B. Rationale

Informants are inherently unreliable. Thus it is not only informant witnesses who should be subjected to higher scrutiny, but informants who provide the information based on which law enforcement officers seek warrants. Requiring corroborative information and details about the informant will allow issuing courts to scrutinize a warrant application with more care and accuracy.

The heightened warrant requirements would apply only to federal officers. Applying the requirements directly to state officers under Congress's Fourteenth Amendment enforcement power would likely be unconstitutional under *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, and under the commerce power would likely be unconstitutional under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Tying the requirements to a federal funding stream might well be constitutional under the Spending Clause, but for tactical reasons we have chosen not to do so here.

Despite the fact that the warrant requirements of the section would apply only to federal officers, the right not to have evidence gained in violation of those requirements received in court would apply in state as well as federal court. The remedy to enforce that right – a motion to suppress – also would apply in state and federal court. This right and remedy are constitutional. If we assume that Congress has the power to establish the federal agency of which the federal officer is an employee, then Congress also has the power to regulate the officer's conduct of his job. *See, e.g.*, 5 U.S.C. § 7324 (prohibiting political activity by any employee of an executive agency while on duty). Regulating officers' conduct is "necessary and proper" in order to regulate how officers carry out an agency's duties. *See* U.S. Const. art. I, § 8, cl. 18. This proposed legislation would be enacted under the Necessary and Proper Clause as a means of regulating the conduct of federal law enforcement officers. As part of that regulation, and to ensure that federal law enforcement officers do not use state courts as a loophole, this proposed legislation would provide that any warrant obtained in violation of the legislation could not be admitted in state court. *See Sabri v. United States*, 541 U.S. 600, 605 (2004) (approving a statutory provision as a "rational means" of furthering the goals of the statute). Thus a federal officer would not be able to hand off to a state officer the evidence he obtained in violation of federal warrant requirements.

Simply because the legislation would provide that the state courts could not admit evidence obtained in violation of this legislation does not make the legislation unconstitutional under the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898 (1997) (the federal government cannot commandeer the states' executive or legislative branches in an effort to enforce federal law). As the Supreme Court has made clear, requiring the state *judiciary* to enforce federal law does not violate the Tenth Amendment. *See id.* at 907; *see also Lee v. Florida*, 392 U.S. 378, 387 (1968) (ordering the suppression of wiretap evidence in state court obtained in violation of a federal wiretapping law); *People v. Shapiro*, 409 N.E.2d 897, 906-08 (N.Y. 1980) (same).

Another way to view the judicial remedy authorized by the proposed legislation is to view it as giving state criminal courts concurrent jurisdiction to hear and vindicate the federal right granted by this proposed legislation. State courts must exercise this jurisdiction when they possess it. Not only has the Supreme Court stated that there is a "deeply rooted presumption in favor of concurrent state court jurisdiction" over federal claims, *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990), but it has held that in the absence of a "neutral rule of judicial administration," state courts *must* exercise jurisdiction over

federal claims if they have concurrent jurisdiction and the parties are properly before them, *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 374 (1990).