

Jailhouse Informant Testimony

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Outline

- ▶ A bit about me
- ▶ Jailhouse informant history and terminology
- ▶ Prevalence of informant testimony
- ▶ Willingness to provide informant testimony and what it looks like
- ▶ **Persuasiveness to jurors**
 - ▶ **Sensitivity to various factors**
 - ▶ **Effectiveness of safeguards**
- ▶ Conclusions and recommendations

Informants: A Brief History and Case Study

- ▶ Use of informants dates back to ancient Greece
- ▶ First recorded American case in 1812 in Vermont
- ▶ Numerous infamous informants to present day
- ▶ Few legal restrictions



Paul Skalnik

Terminology

- ▶ Criminal informants (a/k/a “snitches”): individuals who provide the state with info about criminal activity
- ▶ Usually receive incentive (e.g., leniency, immunity, cash, prison privileges)
- ▶ Recruited by government or come forward on own initiative
- ▶ Subtypes: some more problematic than others
 - ▶ **Jailhouse informant**: info obtained from suspect while suspect in custody
 - ▶ Cooperating witness: knowledgeable citizens (e.g., friend, eyewitness)
 - ▶ Accomplice witness: involved in same alleged crime
- ▶ JI provides a **secondary** confession

Prevalence of Informants in Exoneration Cases

- ▶ Impossible to know how often informants testify, or are used to leverage plea deals
- ▶ A leading cause of wrongful convictions (Innocence Project data, right)
- ▶ #1 factor in death row exonerations (40-50%)



How Willing Are People to Provide Informant Testimony?

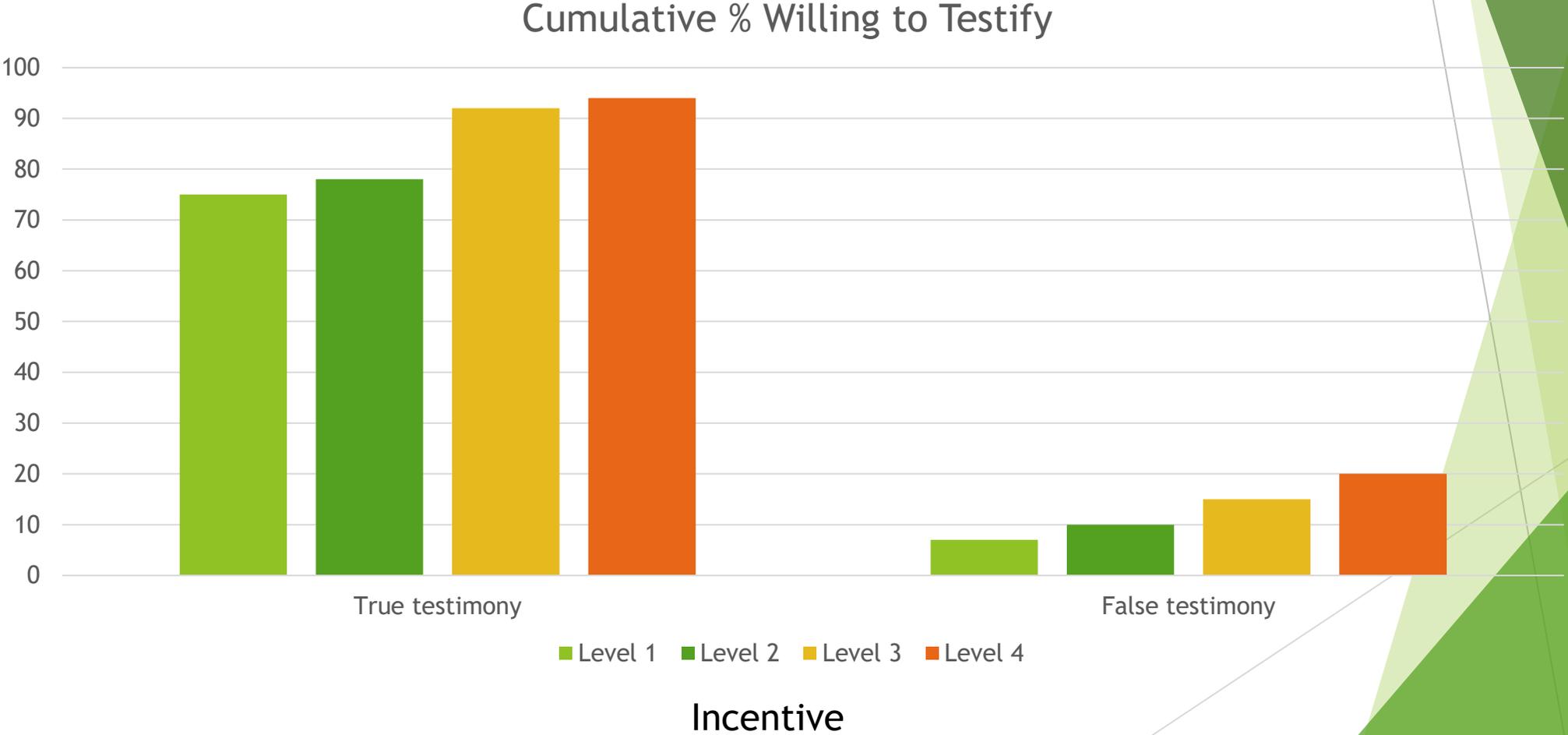
- ▶ Robertson & Winkelman (2017)
 - ▶ Participants asked to imagine they had been charged w/ minor felony (e.g., tax evasion, drunk driving)
 - ▶ Max penalty 3 yrs in prison, up to \$270,000 in fines
 - ▶ Told they were placed in cell next to an inmate charged w/ murder, against whom LE had significant evidence

Lying for an Incentive

- ▶ Inmate did or did not confess to participant
- ▶ Presented with increasing series of incentives (sentence reduction to immunity + cash)
- ▶ Defense atty advised on perjury, details of deal
- ▶ Prosecutor tried to convince them to testify



Robertson & Winkelman (2017) results



More Findings on Willingness to Lie

- ▶ Size of incentive or increases it
- ▶ Size of incentive increases willingness to lie more than willingness to tell truth
- ▶ Threatened negative consequences for *not* lying increases it
- ▶ Reasonable to expect that persons with criminal history or under criminal investigation more susceptible to incentives
- ▶ Incentives motivate virtually any human behavior imaginable—why should this be any different?

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- ▶ What can we learn about informant testimony from informants' role in real-world wrongful conviction cases?

The Truth about Snitches: A Content Analysis (Neuschatz et al., 2021)

- ▶ Identified and coded all 22 trial transcripts w/ informants in Innocence Record
 - ▶ So JI testimony necessarily **false**
- ▶ 28 rape and/or murder defendants
- ▶ Defendants spent avg of 16.5 yrs incarcerated pre-exoneration
- ▶ 53 informants, mostly (43) JIs
- ▶ 91% male

Characteristic	%
Testified for prosecution	79
Incarcerated for nonviolent crime	69
Prior history with CJ system	75
Asked about prior testimony	31
Asked about incentive	75
Admitted to receiving incentive (of those asked)	12.5
Dispositional motive for testifying	78
Accurate details in testimony	67

Jurors' Perceptions of Informants

- ▶ Brief overview of mock juror/jury research methods
- ▶ Main variables examined
 - ▶ Disclosure of incentives
 - ▶ Disclosure of testifying history
 - ▶ Compared to other kinds of evidence
 - ▶ Case characteristics

Incentives and Testifying History: Research Results

- ▶ 5-yr sentence reduction v. no incentive
 - ▶ Incentivized informant seen as more self-serving, *but*:
 - ▶ No difference in verdict or rating of truthfulness
- ▶ Testified 5 or 20 times before (with incentive) v. no prior testimony
 - ▶ Witness with any testimonial history seen as more self-serving, *but*:
 - ▶ No difference in verdict or rating of truthfulness

Secondary confessions v. other evidence (Wetmore et al., 2014)

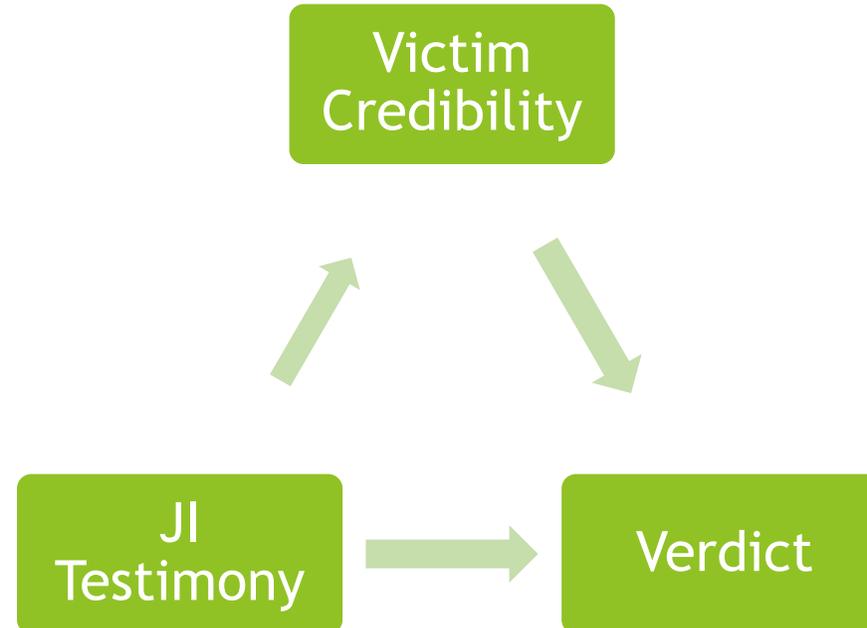
- ▶ Mock jurors read summary of murder trial (jealous husband charged w/ killing wife and her “friend”)
- ▶ Contained secondary confession, eyewitness, and character evidence
 - ▶ Jurors rank ordered strength of evidence
- ▶ Secondary confession received lowest (i.e., strongest) ranking; slightly stronger than eyewitness
- ▶ Parallel finding in terms of conviction rate
- ▶ Follow-up study: secondary confessions only slightly less influential than primary confessions

Case Characteristics

- ▶ What's the effect on informant credibility of things like:
 - ▶ Consistency of testimony
 - ▶ **Crime with which defendant charged**
 - ▶ Details of informant's criminal history (e.g., "honesty" crimes)
 - ▶ Circumstances of the alleged "confession"
 - ▶ Defendant's denial of confession
- ▶ For the most part, we don't know

Golding et al. (2021): JI in Sexual Assault Case

- ▶ Jury simulation compared:
 - ▶ 6-yr-old v. 25-yr-old sexual assault victim
 - ▶ JI v. no JI (alternate prosecution witness)
- ▶ Trial summary
 - ▶ First-degree rape
 - ▶ Defendant the victim's neighbor
 - ▶ JI testified that defendant confessed during interaction in jail
- ▶ Same result regardless of victim age



Jury Research Summary

- ▶ JIs among most influential kinds of testimony
- ▶ Some aspects of JI's testimony can affect credibility
- ▶ Yet nothing much seems to affect verdicts in cases involving a JI

Why are jurors so accepting of informant testimony?

- ▶ Some informants do tell the truth
- ▶ Poor deception detection
- ▶ Prosecutorial vouching
- ▶ Testimony contains accurate info (e.g., from media, authorities)
- ▶ Fundamental psychological processes
 - ▶ Truth default state—hard to overcome
 - ▶ Fundamental attribution error
- ▶ Lay beliefs

What do laypeople and defense attorneys know about secondary confessions?

- ▶ Key et al. (2017)
 - ▶ Surveyed students, community members, and defense attorneys
 - ▶ Ranked 7 kinds of evidence on believability to jurors
 - ▶ Responded to statements about secondary confessions
- ▶ Results
 - ▶ All groups ranked secondary confessions as 2nd least believable kind of evidence (after DNA, primary confession, eyewitness, fingerprint, forensic)
 - ▶ Substantial minority (30-40%) of laypeople believed they would vote to convict based on JI testimony, esp. if no incentive
 - ▶ Defense attys more skeptical about JI testimony, had better understanding of factors affecting its veracity, believed juries more influenced by it

Safeguards

- ▶ Precedent: “The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.”
Hoffa v. U.S. (1966), at 311
- ▶ Typical safeguards
 - ▶ Cross-examination (e.g., Howell materials)
 - ▶ **Instructions**
 - ▶ **Expert testimony**

Jury Instructions

- ▶ Do jury instructions aid in distinguishing between reliable and unreliable jailhouse informants?
 - ▶ Lacking in most states
 - ▶ Available in CA, CT, IL, MT, and OK
- ▶ Skepticism v. sensitivity

Connecticut Instructions

- ▶ In considering the testimony of this witness, you may consider such things as:
 - ▶ Confirmed by other evidence
 - ▶ Specificity
 - ▶ Details known only by perpetrator
 - ▶ Criminal record
 - ▶ Incentives
 - ▶ Have they previously provided reliable or unreliable information
 - ▶ Details could be obtained from other source than defendant
- ▶ No guidance on *how* to consider these factors

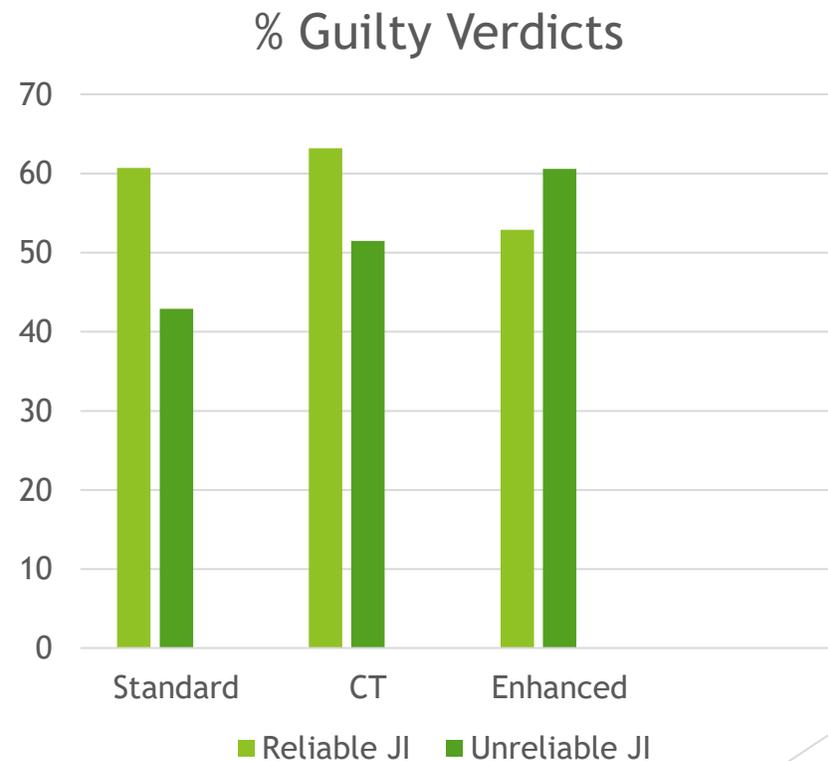


Wetmore et al. (2021)

- ▶ Mock jury trial: murder of 3 young boys (based on West Memphis 3)
 - ▶ Physical evidence and JI testimony
- ▶ Varied
 - ▶ Informant reliability
 - ▶ Reliable v. unreliable (e.g., details known only by perp, incentive, criminal record)
 - ▶ Jury instructions
 - ▶ Standard (not JI-specific), CT (factors to consider), enhanced (*how* each factor affects credibility)
- ▶ Dependent variables
 - ▶ Verdict, perceptions of JI's honesty, trustworthiness, self-interest, etc.

Wetmore et al. (2021) results

- ▶ No signif. effect of informant reliability on verdicts
- ▶ No signif. effect of instructions on verdicts
- ▶ No signif. interaction
- ▶ Reliable informant perceived more favorably (e.g., more honest, interested in justice, less self-serving)



Expert Testimony

- ▶ Courts generally reluctant to admit—evidence not “beyond the ken”
- ▶ Mock jurors’ verdicts in JI case with v. without expert testimony
 - ▶ No difference, whether expert:
 - ▶ An ex-jailhouse informant (Neuschatz et al., 2012)
 - ▶ A social science researcher (Maeder & Pica, 2014)
- ▶ Comparison to other social science expert testimony

Conclusions

- ▶ Many courts have explicitly recognized the problem
 - ▶ “[I]nmate testimony is inherently unreliable. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence ... setting up and betraying friends, relatives, and cellmates alike.” *Sivak v. Hardison* (9th Cir., 2011)
 - ▶ ”It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.” *U.S. v. Cervantes-Pacheco* (5th Cir., 1987)

Conclusions (cont'd)

- ▶ Informant testimony is a powerful tool that is sometimes (often?) reliable and accurate
 - ▶ But sometimes (often?) it's not
 - ▶ The state is unlikely to give it up
- ▶ Jurors are heavily influenced by informant testimony
 - ▶ And fail to take limitations into account
 - ▶ And safeguards that have been examined are largely ineffective
 - ▶ And many informants have incentive to provide false testimony

What to do?

- ▶ Educate, educate, educate: defense bar, prosecutors, judges, law enforcement, and jurors
- ▶ Stricter discovery rules
- ▶ Work for legislative and caselaw reform
 - ▶ Limiting law enforcement's ability to engage inmates as agents of the state (as opposed to "spontaneous" informing)
 - ▶ Provide penalties for egregious conduct: perjury for lying informants, professional sanctions for state actors
 - ▶ Employ safeguards (e.g., effective cross-examination)
 - ▶ Some version of jury instructions ought to work
 - ▶ *Daubert*-like pretrial reliability hearings (e.g., Illinois)

Acknowledgments

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- ▶ Jeffrey Neuschatz, University of Alabama-Huntsville
- ▶ Stacy Wetmore, Butler University

Final Thoughts

- ▶ Recommended reading:
 - ▶ Alexandra Natapoff (2009). *Snitching: Criminal informants and the erosion of American justice*. NYU Press.
 - ▶ Jeffrey Neuschatz & Jonathan Golding (forthcoming). *Jailhouse informants*. NYU Press.
- ▶ Questions?