

WRITTEN TESTIMONY FOR
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY,
AND THE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES

**Joint Oversight Hearing on
Law Enforcement Confidential Informant Practices**

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2141 Rayburn House Office Building

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Mr. Chairman, Committee Members,

Thank you for the honor of appearing before you today. My name is Alexandra Natapoff and I am a law professor at Loyola Law School in Los Angeles. I have spent the past several years studying the use of criminal informants in the domestic criminal justice system. The two law review articles that I have written on the subject have been submitted for the record.¹

I. HOW THE KATHRYN JOHNSTON TRAGEDY REVEALS THE PROBLEMS WITH USING CRIMINAL INFORMANTS

The use of criminal informants is an important part of our criminal justice system. Police and prosecutors routinely cut deals with criminals for information in connection with all sorts of cases, from murder to antitrust to corruption to terrorism. The practice is, in many ways, a necessary evil. Without it, some kinds of cases could never be prosecuted or solved. It also has significant costs. It is a very broad topic and so I am going to concentrate today on one facet – the facet that makes the Kathryn Johnston tragedy a common and predictable occurrence.

The government’s use of criminal informants is largely secretive, unregulated, and unaccountable. This is especially true in connection with street crime and urban drug enforcement. This lack of oversight and quality-control leads to wrongful convictions, more crime, disrespect for the law, and sometimes even official corruption. At a minimum, we need more data on and better oversight of this important public policy.

The Kathryn Johnston tragedy reveals the special dangers associated with using criminal informants or “snitches” in poor, high-crime, urban communities. Criminal informants are a cornerstone of drug enforcement – it is sometimes said that every drug case involves a snitch. And drug enforcement is most pervasive in poor urban communities like the so-called “Bluffs” where Mrs. Johnston lived. In these neighborhoods, high percentages of the young male population are under criminal justice supervision at any given time – here in the District it is estimated to be over half.² A high proportion of these arrests are drug related, and it is routine for police to pressure drug arrestees or addicts to provide information. In addition, police rely especially

¹ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE L. REV. 107 (2006) (both articles available at <http://www.lls.edu/academics/faculty/natapoff.html>); see also Alexandra Natapoff, *Bait and Snitch: The High Cost of Snitching for Law Enforcement*, SLATE.COM (Dec. 12, 2005) (available at <http://www.slate.com/id/2132092/>).

² Eric Lotke, *Hobbling a Generation: Five Years Later* (Nat’l Ctr. on Institutions and Alternatives, Alexandria, VA, 1997); see also Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (The Sentencing Project Washington, D.C. Oct. 1995).

heavily on confidential informants to get warrants in inner city zip codes.³ As a result, many individuals are likely to be informing or trying to inform at any given time. In these communities, therefore, “snitching” is a fact of life.

What does this mean for law abiding residents like Mrs. Johnston? It means they must live in close proximity to criminal offenders looking for a way to work off their liability. Indeed, it made Kathryn Johnston’s home a target for a drug dealer. It also means that police in these neighborhoods tolerate petty drug offenses in exchange for information, and so addicts and low level dealers can often remain on the street. It also makes law enforcement less rigorous: police who rely heavily on informants are more likely to act on an uncorroborated tip from a suspected drug dealer. In other words, a neighborhood with many criminal informants in it is a more dangerous and insecure place to live.

These negotiations between criminals and law enforcement occur largely off the record, without rules or public scrutiny. This is the heart of the informant problem: secrecy and lack of accountability. The Atlanta police could plant drugs on Fabian Sheats – the alleged drug dealer and the first informant in this case -- because the culture of snitching told them that it would never come to light. In our system, 95 percent of all cases are resolved by plea, not by trial. This means that the processes by which the government obtains information – even when they are illegal -- will typically remain secret.

The fact that Mr. Sheats’ information was wrong is also an infamous aspect of informant use. According to Northwestern Law School’s Center on Wrongful Convictions, nearly half of all wrongful capital convictions in this country are due to bad information obtained from a criminal informant.⁴ Because of the demonstrated link between the use of informants and wrongful convictions, at least three states – Illinois, Texas, and California – have passed or are considering legislation to curtail the use of snitch witnesses.⁵

Informants breed fabrication. The Atlanta police could invent an informant to get a warrant because the culture of snitching assured them that they would never have to produce an actual person in court. Likewise, they could pressure Alex White to lie after the fact because fabrication is so common. According to research conducted by Professor Laurence Benner and the San Diego Warrant Project, police often fabricate informants to support warrant applications. This is made possible because courts almost never require

³ Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER, RACE & JUST. 183 (2002); Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WEST. L. REV. 221 (2000).

⁴ Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions (Northwestern University School of Law, 2004) (available at <http://www.law.northwestern.edu/wrongfulconvictions>).

⁵ Ill. Comp. Stat., ch. 725, § 5/115-21; Vernon’s Ann. Tex. C.C.P. Art. 38-141; www.CCFAJ.org (California Commission on the Fair Administration of Justice).

the informant to be produced or the information verified. Many wrongful convictions have resulted from police and prosecutors using informants to bolster weak cases.⁶

Snitching also breeds crime. In this case, the police were willing to forego the prosecution of a suspected drug dealer with three prior felony arrests. They also had a long relationship with Alex White who himself has a substantial criminal record. Using criminal informants means, by definition, that the government is tolerating crime – both the crimes already committed by informants, but also the crimes informants routinely continue to commit. For example, the U.S. Department of Justice Office of the Inspector General reports that ten percent of the FBI’s confidential informants commit unauthorized crimes while working for the FBI.⁷ That is in addition to the crimes that their handlers permit them to commit.⁸ The news media likewise provides a steady stream of evidence that informants continue to commit crimes while working for the government.⁹

In sum, this culture of secrecy, rule breaking, and disregard for the law and the truth is what led to the Kathryn Johnston tragedy and it is the hallmark of this kind of informal, unregulated law enforcement practice.

II. THE BROAD SCOPE OF CRIMINAL INFORMANT USE

Everyone involved in the criminal system – from judges to prosecutors to police to defense attorneys – agrees that informing has become a pervasive part of the legal system. And yet we have very little concrete data. We do not know how many informants are deployed by state and local police departments, how many successful cases they generate, how many botched investigations they ruin, and what sort of crimes they are permitted to commit.

In the federal system, approximately 20 percent of convicted defendants receive on-the-record sentencing benefits as a result of cooperation pursuant to section 5K1.1 of the Sentencing Guidelines.¹⁰ The percentages are higher for drug crimes, but defendants in every category of crime receive deals for informing, from murder to child pornography to white collar crime, antitrust, and terrorism. Just as many defendants cooperate and do not

⁶ Northwestern Law School Report, *supra* note 4; Nina Martin, *Innocence Lost*, SAN FRANCISCO MAGAZINE (Nov. 2004).

⁷ The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines, U.S. Dep’t of Justice, Office of the Inspector General (Sept. 2005) (hereinafter *OIG Report*) (available at <http://www.usdoj.gov/oig/special/0509/final.pdf>).

⁸ The Attorney General’s Guidelines Regarding the Use of Confidential Informants, U.S. Dep’t of Justice (May 2002) (establishing Tier I and Tier II categories of “otherwise illegal activity” that CI’s can be authorized to commit) (available at <http://www.usdoj.gov/olp/dojguidelines.pdf>).

⁹ E.g., John Glionna and Lee Romney, *Snagging a Rogue Snitch*, L.A. TIMES (Dec. 5, 2005); *FBI Informant Indicted for Nine Felonies Including Drug Trafficking and Obstructing Justice*, U.S. DOJ Press Release (Oct. 28, 2005) (available at http://www.usdoj.gov/opa/pr/2005/October/05_crm_576.html).

¹⁰ BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.36 (2002) (hereinafter *SOURCEBOOK*).

get benefits,¹¹ and many more cooperate and avoid prosecution altogether and therefore do not show up in the statistics.

The FBI, the DEA, and other agencies handle many more informants, some of them also criminals, some of whom work for money alone. According to its budgetary request, the FBI maintains over 15,000 confidential informants,¹² while the DEA states that it maintains 4,000 paid informants.¹³

At the state and local level, it is much harder to estimate the extent to which law enforcement relies on criminal informants. The Kathryn Johnston case and others like it suggest that it is pervasive. Drug cases typically involve snitches, sometimes more than one, and drug cases represent 35 percent of state felony convictions and over 1.5 million arrests each year.¹⁴ Investigations of other common crimes such as burglary also rely heavily on criminal informants. Anecdotal evidence and media reports indicate that snitching – and snitches gone wrong – are common in all jurisdictions.¹⁵ The Committee can thus be confident that this is a pervasive issue of national importance.

III. RECOMMENDATIONS

The kind of informal deals involved in the Kathryn Johnston case are the most dangerous, the most secretive and unregulated, and the most subject to abuse. As part of these deals, crimes committed by informants are tolerated. Rules are easily broken, and lies are easily told and covered up. These deals are typical of drug enforcement at the state and local level. That means that they take place primarily in urban communities of color, and thus mostly affect the safety and quality of life of the poor and the vulnerable.

The vast majority of police and prosecutors use criminal informants with the best intentions, trying to fight crime. In law enforcement arenas such as white collar crime, informant practices are better documented and more accountable. The informal, unregulated deals typical of street crime and drug enforcement, however, are so fraught with risk that additional scrutiny and regulation is needed. The legislative and judicial branches should assume a larger role in shaping this vital aspect of the criminal system.¹⁶

¹¹ Linda Drazga & John Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* (U.S. Sentencing Commission, Jan. 1998) (six out of ten defendants who provided assistance did not receive departures) (available at <http://www.ussc.gov/publicat/5kreport.pdf>).

¹² FBI FY 2008 Authorization and Budget Request to Congress, pp. 4-22 – 4-25 (available at http://www.usdoj.gov/jmd/2008justification/office/33_01_justification.doc).

¹³ Audit Report: The DEA's Payments to Confidential Sources, U.S. Dep't of Justice, Office of the Inspector General (July 2005) (available at <http://www.usdoj.gov/oig/reports/DEA/a05>).

¹⁴ SOURCEBOOK, Table 5.44, Table 4.1.

¹⁵ E.g., Henri Cauvin, *13 Cases Collapse After Disclosure of Informant Offenses*, WASH. POST. (Feb. 11, 2007); *Fake Drugs: Evolution of a Scandal*, DALLASNEWS.COM (available at <http://www.dallasnews.com/s/dws/spe/2003/fakedrugs/fakedrug1103.html>); Lawrence Messina, *Criminals Earn Cash, Beat Rap by Becoming Drug Informants*, WEST VIRGINIA SUNDAY GAZETTE-MAIL (May 10, 1998).

¹⁶ Additional details regarding these recommendations are contained in my law review articles, *supra* note 1.

1. Data Collection and Evaluation

Even the officials at the center of the criminal process – police and prosecutors – do not know the extent of the use of informants in their own jurisdictions, how many crimes informants help to solve, or how many crimes they get away with. Most state and local jurisdictions have no mechanisms for counting, evaluating or regulating the ways that informants are used. To the extent such data exists, it is not public.

The federal government has begun to address this problem. The Department of Justice revised its guidelines for managing confidential informants in 2002. The Office of the Inspector General has conducted two audits – one of the FBI and one of the DEA – which produced significant information about the handling, reliability, and productivity of the confidential informants used by the federal government. The Sentencing Commission keeps records of how many defendants receive sentencing benefits for cooperation.

The federal efforts need improvement. The OIG report on the FBI concluded that 87 percent of the time, the FBI's handling of its informants did not comply with DOJ guidelines. OIG's DEA audit also found that the DEA procedures for handling its confidential informants were inadequate. U.S. Attorneys offices vary widely in their informant practices, with little public accountability. Nevertheless, these are useful models on which state and local law enforcement agencies can build.

The Committee should craft legislation to expand federal data collection on informant practices, and to require state and local law enforcement agencies to start collecting information along the lines of the federal model. Aggregate information including the total number of criminal informants, their zip codes, race and gender, their productivity in solving crimes and the crimes they commit, should then be reported to the Bureau of Justice Statistics along with other aggregate criminal justice data that appears in the Uniform Crime Reports. This data should be made publicly available.

2. Permit Judicial Review of Federal Cooperation and Benefits

Federal criminal law is currently structured to make informing the primary way that a defendant can obtain a departure from statutory minimum sentences or under the Sentencing Guidelines. It is also structured so that the decision about whether a defendant's cooperation will be a basis for a departure, or whether the issue will be aired at all, lies entirely in the hands of the prosecutor. This is because only a "government motion" asserting a defendant's "substantial assistance" will permit a court to consider a defendant's cooperation.¹⁷

¹⁷ 18 U.S.C. § 3553(e); USSG § 5K1.1; FED. R. CRIM. P. 35; *see* *Wade v. United States*, 504 U.S. 181 (1992) (government decision not to file 5K1.1 motion unreviewable except where unconstitutional motive is alleged).

This legislative focus on cooperation to the exclusion of all other bases for departure has made informing the dominant currency in federal sentencing, and a target for abuse, manipulation, and inconsistency. Courts should be permitted to review – and defendants to air – issues surrounding cooperation, without prosecutorial permission. The Committee should expand the bases for such departures, eliminate the “government motion” requirement, and permit greater judicial review of the cooperation and reward process.

3. Reliability Hearings and Corroboration Requirements

When scientific and other experts testify in federal court, we require the court to act as “gatekeeper” to ensure their reliability and to protect the jury from undue prejudice and confusion.¹⁸ The same concerns arise with informants, who are, after all, another form of compensated witness. Numerous state jurisdictions recognize the inherent unreliability of snitch and accomplice witnesses and require corroboration.¹⁹ These two measures would help alleviate the significant problem of false informant testimony at trial. Because such a small percentage of cases go to trial, however, it should be recognized that trial-based procedures can address only a part of the larger problem.

IV. CONCLUSION

The FBI has requested funds to create a new system to improve data collection and monitoring of its confidential informants. In its budget request it states that “without the personnel necessary to oversee the [monitoring system,] the FBI will be unable to effectively ensure the accuracy, credibility, and reliability of information provided by more than 15,000 [Confidential Human Sources].” If the FBI cannot ensure the reliability of its sources without better data collection and monitoring, then state and local law enforcement agencies such as the Atlanta police department cannot be expected to either, and we will continue to see tragedies like Kathryn Johnston.

More fundamentally, when the government cuts a deal with a criminal in exchange for incriminating information, it implicates some of the most important values of our criminal system. We pride ourselves in having a justice system that is public, accountable, and that follows the rule of law. The widespread use of secret deals threatens these ideals. Until now, we have substantially failed to scrutinize or regulate this official practice. As a result, our system failed to protect Kathryn Johnston. By establishing better oversight and regulation in this area, Congress can strengthen law enforcement, improve community safety, and promote justice.

¹⁸ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); Rule 702, Fed. R. Evid.

¹⁹ *See* American Bar Association, Resolution, Adopted by House of Delegates February 14, 2005 (urging nationwide adoption of corroboration requirements and documenting current state legislation) (available at <http://www.abanet.org/leadership/2005/midyear/daily/108B.doc>).