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The trouble with jailhouse informants

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When jailhouse informant Timothy Villalba first told a jury that Roy Garcia had implicated himself in a killing, there were reasons to doubt Villalba, a convicted murderer looking for a way out of prison.

Now, with Garcia heading for a second trial this week, there is far more reason.

Since he testified against Garcia six years ago, Villalba has said he heard another jailhouse confession from another inmate. It, too, involved a killing. But after hearing from Villalba in that case, a federal judge ruled that he had no credibility and overturned the conviction of Glen "Buddy" Nickerson in a notorious 1984 drug-related double homicide.

Nevertheless, as he prepares to retry Garcia, Deputy District Attorney Javier Alcalá has said in court that the federal judge is wrong about Villalba.

Garcia's case is the latest in a series of Santa Clara County prosecutions that raise questions about the use of jailhouse informants who report confessions from other inmates, a Mercury News investigation revealed. This week, a state commission will study ways to guard against the potential for wrongful convictions in cases based on informants with no connection to the crime.

The Mercury News examined eight local cases involving jailhouse informants, reviewed how easily inmates can invent confessions from other prisoners, and studied the steps Santa Clara County and other jurisdictions have taken to guard against false testimony.

"Clearly, the jailhouse informant has great incentives to do something to reduce his time," said George Harris, a professor at the McGeorge School of Law and former federal prosecutor. "You are talking about people who have nothing but time on their hands, and learning details of the crime turns out to be not that difficult."

The review found:

- In some cases, including Garcia's, prosecutors rely on jailhouse informants despite specific reasons to doubt the confessions they say they heard.
- Informants who testify that they heard jailhouse confessions have received favorable outcomes in their own cases -- outcomes that exceed the explicit promises revealed to jurors.
- Though the Santa Clara County District Attorney's Office has enacted procedures to protect against false testimony from jailhouse informants, they fall short of rules adopted elsewhere. Outside legal experts say more protections are necessary.

Local officials say that although they use jailhouse informants infrequently, they recognize the problems informants pose.

Said Assistant District Attorney David Tomkins: "We do not use their testimony if we are not satisfied that they are truthful."

Tomkins noted that his office has developed policies to guard against the misuse of informants and takes additional steps, such as reviewing the details of information from informants, to ensure reliable testimony.

Crucial evidence

• Informant doubted as trustworthy

Roy Lopez Garcia was an obvious suspect after the body of mental health therapist Deborah Gregg was found in 1998

near the line separating their Morgan Hill properties, two shotgun blasts in her back. The two had been feuding since Garcia bought 250 adjoining acres and began to bulldoze the land.

Neighbors had heard Garcia call Gregg an enemy. Garcia, a successful businessman, was an avid hunter and owned shotguns and other weapons. But there was a shortage of physical evidence pointing to Garcia, who has maintained his innocence. The guns in his home did not match the weapon used in the killing. There was no eyewitness, no fingerprint, no DNA match.

That made Timothy Flores Villalba a crucial piece of the case.

Lawyers in the office of District Attorney George W. Kennedy know to be skeptical of jailhouse informants, and Villalba was no exception. Villalba was a heroin user who avoided a possible death sentence by pleading guilty to first-degree murder after he beat a man to death with a baseball bat during a robbery. He was sentenced to 25 years to life in prison, where he became a member of the notorious Nuestra Familia gang, ordered prison stabbings and was repeatedly disciplined for drugs.

In late 1999, Villalba wrote to authorities saying that during a chance encounter two months earlier, Garcia had implicated himself in Gregg's murder. Villalba repeated at trial what he told authorities: Garcia said they would never find the shotgun used in Gregg's killing.

Villalba testified that he came forward because Garcia described the victim as a "cuerpesito," which he interpreted to mean a child was killed.

But defense attorneys noted that Villalba first came forward after he was notified he could be eligible for parole as soon as 2003 if he improved his conduct. In return for Villalba's testimony, trial prosecutor Javier Alcalá agreed to inform parole officials of his cooperation but made it clear he would not explicitly recommend Villalba's release.

The trial ended with Garcia's conviction. Less than a year later, Villalba told Alcalá that he long ago heard "Buddy" Nickerson admit to starting the shootout that ended in the deaths of an alleged drug dealer, John Evans, and his stepbrother, Mickie King.

Villalba came forward a second time just as Nickerson's conviction was unraveling. DNA had linked someone new to the crime, raising questions about the identification of Nickerson. A co-defendant had come forward to say Nickerson had nothing to do with the crime.

At a 2002 hearing, Villalba testified that Nickerson told him long ago that he instigated the shootout as revenge. But U.S. District Judge Marilyn Patel found the testimony "entirely without credibility" and overturned Nickerson's conviction.

Her assessment was no surprise to Nickerson attorney M. Gerald Schwartzbach, who had raised a series of discrepancies in Villalba's testimony. They included Villalba's refusal to answer questions in both the Garcia and Nickerson cases about his own charges "on the advice of my attorney" because his case remained on appeal. Court records showed his statements were not true: The appeal had been denied more than a decade earlier.

If the defense saw reasons to disbelieve Villalba's testimony, the prosecution saw the opposite. To Alcalá, Villalba was a credible witness who had tried to put gang life behind him.

He contended that Villalba provided details to establish his credibility, such as the name of an attorney Garcia was preparing to hire. To the defense, such details proved nothing. By the time Villalba revealed them, the attorney's name was already public.

Villalba has appeared before the parole board twice. Both times, the district attorney's office informed the board of his cooperation. Both times, parole was denied. His next hearing is set for 2011.

Last year, the state Supreme Court overturned Garcia's conviction, ruling that the trial judge erred by allowing jurors to visit the crime scene without either the defendant or his attorney.

As he prepares to try Garcia again, Alcalá has said in court that he stands by Villalba and plans to use him as a witness again in the Garcia case. Alcalá testified that he had not bothered to read either his informant's federal court testimony or the judge's opinion. He declined to comment for this article.

Tomkins, the assistant district attorney, said he had discussed "many things" about the case with Alcalá and is satisfied. "We are prepared for trial," he said, adding that decisions about which witnesses to call will be made as the

trial proceeds. ``We have a witness list, and we'll go from there."

Manufactured

● **'Too easy to make up confessions'**

One man who found Villalba's testimony implausible is Leslie White. ``I wouldn't believe what anybody in custody says about another inmate," said White, whose long career as an informant has made him an expert on the topic. ``There are too many motivations to lie, and it's too easy to make up confessions," he said in a recent interview.

White knows as well as anyone how easily a confession can be manufactured. A man with a history of repeated brushes with the law in the 1980s for drug offenses, robbery, car theft and kidnapping, White provided authorities with information he contended had come from other inmates in ``numerous" cases -- as many as 40, he testified -- for more than a decade.

The help he offered law enforcement -- which he said provided a ``get out of jail free card" -- ended abruptly in 1988 after White provoked a nationwide scandal when he decided to share with authorities just how easily he had made up such stories.

When skeptical Los Angeles sheriff's deputies provided White with the name of an inmate, White easily gathered details about the inmate and his case from a jail telephone by falsely identifying himself to clerks and police officers as a bail bondsman, a prosecutor or a cop.

The exercise prompted a grand-jury investigation and national media attention. White was convicted of perjury. Officials in Los Angeles County reviewed every case involving informants and adopted new rules to guard against over-reliance on informants. The state adopted one law requiring that jurors be told to treat informant testimony with caution and another requiring prosecutors to notify victims when a suspect becomes an informant for the prosecution.

After the Leslie White debacle, Los Angeles County adopted an extensive set of protections against the misuse of jailhouse informants. The office policy is designed to ``strictly control" the use of informants as witnesses, it states. Any trial prosecutor seeking to use an informant must submit a written request detailing the case to a committee of top-ranking officials. That committee will approve only if strong corroboration -- beyond details of the crime that authorities believe are not public -- exists.

The office maintains an index of jailhouse informants and the cases in which they testify. The policy also protects against future Leslie Whites by restricting information that attorneys may reveal by telephone.

The policies have made a ``tremendous difference," said John K. Spillane, chief deputy district attorney in Los Angeles. Since the standards were enacted, the number of applications to use jailhouse informants has dwindled, as police and trial prosecutors realized the high standard set by the committee, he said.

In the 1980s, jailhouse informants were routinely used in major criminal trials, said Spillane. But in the past five years, the office has used them in five out of more than 12,000 criminal trials, he said.

The Los Angeles policy goes far beyond the policy in Santa Clara County. The local office directs attorneys to follow laws and court regulations regarding the use of informants. There is no committee. The policy requires approval of an assistant district attorney if the informant is receiving immunity.

In practice, Tomkins said, Santa Clara County prosecutors go through a checklist before deciding to use informants: Are they necessary to the case? Are they credible? Have they committed a crime so serious that the office will not use them as a witness? Prosecutors will not use informants unless they are satisfied with the answers, he said.

Unlike Los Angeles, an exact number of cases relying on jailhouse informants in Santa Clara County is not readily available, though officials say the number is small. The office has no special database for informants. It has introduced a new computer system to identify all witnesses, Tomkins said. That database is not yet complete and some lawyers use it more diligently than others, Tomkins said.

Sorting out truth

● **'Prosecutorial tunnel vision'**

Ellen C. Yaroshesky, an expert in criminal law and ethics at the Benjamin N. Cardozo School of Law in New York City, says she believes more needs to be done. The professor said existing protections are often inadequate, even though authorities have known for years that jailhouse informants are unreliable and have been responsible for wrongful

convictions.

She says she believes jurors should be given specific reasons to look skeptically at informant testimony and told that even if there are no explicit promises of leniency, inmates may still expect -- and receive -- rewards later.

Yaroshefsky, who will be appearing before the California Commission on the Fair Administration of Justice when it meets Wednesday to consider informant testimony, cited a new step mandated in Illinois death-penalty cases: Before a trial, a jailhouse informant's reliability is the subject of a hearing.

Inmates who contact prosecutors to say they have overheard a confession put law enforcement officials in a dilemma. Certainly some inmates are telling the truth and provide evidence to convict dangerous criminals. The challenge is how to reliably sort out which informants are telling the truth.

The problem is compounded by the fact that prosecutors, like anyone, tend to believe information that fits with their theories, a phenomenon Yaroshefsky calls "prosecutorial tunnel vision."

She explained: "Because prosecutors believe they have the right person and are looking for corroboration of that fact, they don't look critically enough at the reliability of the statement. It is easy for inmates to make up such stories. And prosecutors are too ready to believe them, especially in cases where the stakes are highest."

Rick Walker's case demonstrates the problem. Walker is the East Palo Alto man exonerated after spending more than 11 years in custody for the murder of a former girlfriend, Lisa Hopewell. He was convicted after prosecutors too readily believed one of the two killers, who said Walker was involved, and a woman facing drug charges who provided incriminating information about Walker that she later admitted making up.

Before Walker was sentenced in 1992, a jailhouse informant wrote officials to say another man, Mark Swanson, had confessed that he, not Walker, killed Hopewell. It took officials 11 years to discover the informant was telling the truth.

Assessing the honesty of a jailhouse informant is difficult because inmates can easily learn details about a crime or a suspect's personal life. Those details can in turn mislead authorities into thinking the informant is truthful.

"I could send my girlfriend to a preliminary hearing and gather details of a crime," White said, describing one of several techniques he had used in his days as an informant. "Then I could talk to the inmate and learn the name of his sister, the name of his pet. Suddenly, I could put those details together in a way that officials would readily believe."

White, who has been out of custody for two years and now lives under a new name, said he believes that the only thing that will prevent manufactured confessions is banning the use of jailhouse informants.

No promises

• Jury doesn't know benefits come later

By law, jurors must be told the terms of any deal with informants. But lawyers and inmates all know jurors will be more skeptical of inmates who are promised favors in exchange for testimony.

"When an inmate testifies, everybody in the courtroom may know there will be a benefit except the jury," Yaroshefsky said.

In the assault case against James Evans, jurors heard that no promises had been made to informant Alton King, a convicted child molester who was facing new charges when he testified that Evans had confessed to him in jail.

King provided his information about Evans after first telling authorities about the confession of another inmate: Curtis Dean Anderson, who later pleaded guilty to the highly publicized molestation and murder of 7-year old Xiana Fairchild, King's attorney said.

King testified at Evans' 2005 trial that prosecutors did not promise him anything in return for his cooperation. Nevertheless, he testified he still was hopeful of getting some benefit in his case, which is still pending.

"It is how these things are done. No promises are made. Inmates have hope," said King's attorney, Allen Schwartz.

Like King, inmate Homer Resendez testified that he received no promises when he came forward with information that accused child molester Vassar Smith had incriminated himself when the two shared a jail cell in 1999. But in a pending

federal appeal, Smith contends jurors were deceived about the benefits Resendez would get.

Resendez, a gang member with a long criminal history, was facing a murder charge at the time he cooperated. At Smith's trial, Resendez testified that he had been wrongly accused and was not worried about his own case.

The next month, prosecutors dropped the murder charge against Resendez -- which carried a potential life sentence -- and he pleaded guilty to being an accessory. He received an eight-month sentence.

Resendez has since been convicted of new felony charges and is back in prison.

Risky deals

• A 'chilling' demeanor

The case of Eric Duarte shows the pitfalls of deals with informants.

A member of Nuestra Familia with a long record of crimes that included arson and burglaries, Duarte was arrested after four South Bay banks were robbed in 1994.

Duarte began cooperating with authorities, offering them rich insights into Nuestra Familia in return for a promise that he would be prosecuted in federal court, where he felt safer from gang retribution, rather than in state court. In federal court, Duarte pleaded guilty to armed-robbery charges that carried a potential life sentence. He hoped for, but was not promised, a reduced sentence in return for his cooperation.

Duarte testified at the trial of Eddie Perales that he and Perales had organized the robberies to raise money to fund gang operations. He testified that Perales had been behind other crimes as well.

Duarte was subject to extensive cross-examination from Perales' attorney, Daniel Barton, who confronted Duarte with a series of lies that he had told. Soon after Duarte's testimony, Perales' trial ended abruptly in a plea bargain. Rather than the life in prison that prosecutor Michael Fitzsimmons initially sought, Perales would receive less than 22 years with the possibility of parole.

Duarte helped authorities in other matters as well. He said he had heard two gang members admit their roles in murders. One was his cellmate, Alberto Guillen. Duarte testified at Guillen's trial; Guillen was convicted.

After he had finished cooperating, prosecutor Fitzsimmons wrote to federal authorities urging that Duarte be given a break in sentencing, saying the informant had provided "invaluable information" despite the risk of "great peril." He added, "Based on his cooperation, and in the interests of justice, I believe that Mr. Duarte is deserving of favorable consideration in his upcoming sentencing."

Federal officials were wary. Assistant U.S. Attorney Gary Fry contended that, despite Duarte's cooperation, he deserved a 25-year prison sentence. Duarte, Fry wrote, was dangerous. Not only did he have a lengthy and serious criminal history, Fry wrote, Duarte's "matter-of-fact demeanor during his description of violent crimes can only be called chilling."

That left county prosecutors with a dilemma: Duarte was facing a longer prison sentence than Perales, the man he had testified against. A deal was struck, according to state and federal officials. The federal charges were dropped in 2001. Duarte was permitted to plead guilty to the robberies in state court and was given immediate parole seven years after his arrest.

Fry's concerns became clear soon enough: Duarte was arrested for the armed robbery of a San Jose Wells Fargo bank. He was convicted in 2004 and sentenced to spend 223 years to life in prison.

Former Mercury News Staff Writer Noam Levey contributed to this report.