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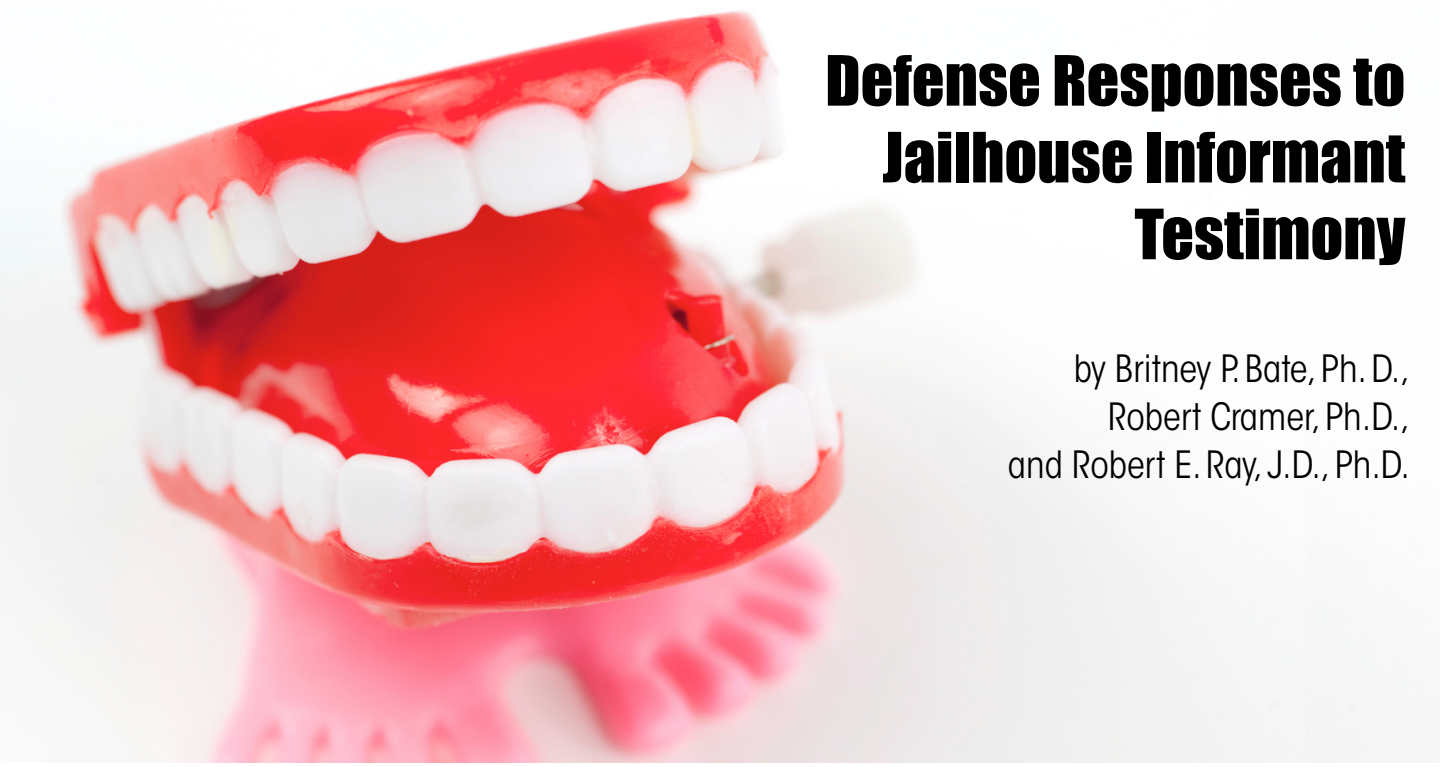

# Defense Responses to Jailhouse Informant Testimony

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Only eight years after his birth in 1958, Leslie Vernon White had his first of many run-ins with the criminal justice system. A career criminal, some of White's crimes included drug offenses, robbery, and kidnapping (Bloom, 2002). As a means of navigating the criminal justice system, White was also one of the most clever jailhouse informants to date, likely responsible for a very high number of wrongful convictions throughout his criminal and informant career. Unfortunately, White is just one of many jailhouse informants influencing trials, and attorneys as well as trial consultants may need to deal with these witnesses in their work.

A jailhouse informant ("JI") is most often a "cooperating witness" who provides testimony of a crime based on information obtained while incarcerated (Neuschatz, Lawson, Swanner, Meissner, & Neuschatz, 2008). Information gathered through supposed conversations with the accused are relayed to an agent of the legal system, as the courts oftentimes rely upon JIs for prosecutorial information (Mazur, 2002). Most frequently, this includes a purported confession, referred to in the literature as a secondary confession (Neuschatz et al, 2008). The JI is often looking for promise of early release, a reduction in charges, or early parole. JI's may also seek in-custody benefits, such as more food, greater telephone or television privileges, or cash (Bloom, 2002). Regardless of the JI's specific desire, options of such deals make it incredibly motivating for informants to gather and provide information, even if that means fabricating or lying in order to further their personal agenda.

Turning our attention back to Leslie Vernon White, he is particularly well known for gathering or fabricating information about an individual who was facing charges, and then offering this information to the authorities in exchange for rewards or sentence reductions. In fact, he was so creative in his role as a snitch he would use the jail telephone to call offices such as the morgue or police precincts to obtain information about crimes not yet released to the media, thereby gleaning information to make for seemingly reliable testimony comprised of details that he theoretically would only have been able to receive from the defendant (Neuschatz, Wilkinson, Goodsell, Wetmore, Quinlivan, & Jones, 2012). Of note, he testified against the leader of an Aryan brotherhood prison gang in a prison murder case, against a burglary suspect when the rest of the evidence was circumstantial at best, and provided testimony

of a later admittedly false confession against a defendant who could not effectively speak English (Bloom, 2002). White was able to maintain his informant business for close to 11 years before going public in a 1989 segment of *60 Minutes*, in which he confessed to consistently fabricating confessions of fellow inmates in the form of perjured testimony to the courts (Bloom, 2002). While clearly an exceptional case of JI influence, White illustrates a potential problem for attorneys and consultants. Interestingly, we may be able to turn to a small body of social science research to gain insight into how to deal with JIs at trial.

## Experimental Literature on Perceptions of JIs

There have been very few studies that have addressed JI influence in an experimental way. One of the first investigations into this area included two experiments examining the relationship between juror knowledge of incentive for testifying and verdict rendered, utilizing both community and college samples. Across the two experiments, Neuschatz et al. (2008) had participants read a trial transcript that included either a secondary confession from an accomplice witness (AW), a JI, a member of the community (CD), or a no confession control (NCC). In half of the experimental conditions, it was made clear to participants that the cooperating witnesses were provided with incentive to testify. Results of both experiments showed that information pertaining to incentive to testify (either leniency or reward) had no influence on the verdict rendered. In the second experiment, results confirmed the presence of a fundamental attribution error in participant jurors' decision making, in that participants attributed the motivation of the AW and JI as being a reflection of personal factors as opposed to situational factors, discounting incentive entirely. Finally, and consistent with the literature on confessions (e.g., Kassin, Bogart, & Kerner, 2012; Kassin & Gudjonsson, 2004; Kassin & Neumann, 1997), both experiments confirmed that mock jurors were significantly more likely to render a guilty verdict when there was a confession, albeit secondary, in comparison to a no confession control.

As this study was one of the first of its kind, it is important to more specifically discuss the results and implications of each experiment. In experiment one, the researchers arrived at several important findings: First, no significant difference in conviction rates was found between the "incentive" and "no incentive" conditions. When participants were made explicitly aware that the cooperating witness was receiving some type of incentive as a result of providing the secondary confession, they were no more likely to render a guilty verdict than when not made explicitly aware of the provided incentive. Second, across all conditions and sample types, mock jurors convicted significantly more often when there was a secondary confession present. Regarding the college and community samples, the college sample convicted significantly more often than the community sample. Finally, the CD witness (i.e., the community member) received higher ratings in trustworthiness, truthfulness, interest in serving justice, and was perceived as being less interested in serving his own needs in comparison with the other cooperating witnesses.

It was hypothesized that such results were consistent with the presence of the fundamental attribution error (Kassin & Gudjonsson, 2004). This psychological concept posits that individuals tend to attribute the behavior of others to dispositional factors, while ignoring the power of situational factors. It seemed as though jurors committed the fundamental attribution error in attributing the cooperating witnesses' secondary confessions as being indicative of dispositional factors (such as truthfulness, guilt, civic duty), while ignoring the situational incentive for testifying (such as leniency or reward). As a result, participants likely ignored the impact that an incentive may have on willingness to provide accurate or truthful information (Neuschatz et al., 2008). Further supporting this idea, there were no significant differences found regarding ratings of trustworthiness or truthfulness across the "incentive" or "no incentive" conditions.

Neuschatz et al. (2008) considered that participants might have simply failed to notice the incentive manipulation, leading to the results found in experiment one. In order to assess whether the results were actually due to the fundamental attribution error or simply a result of cognitively disregarding the incentive manipulation, experiment two implemented a few changes to test these possibilities. In order to assess if participants noticed the incentive manipulation, all participants in the experimental conditions were asked if the cooperating witness was provided an incentive for their testimony. Further, participants were asked to indicate what that incentive was. Participants were then asked to explain why the cooperating witness would provide the secondary confession evidence. In line with theory pertaining to the fundamental attribution error, if results were indeed a result of this error, participants in all conditions should attribute the secondary confession testimony to dispositional aspects of the cooperating witnesses (i.e. honesty, trustworthiness, guilt) as opposed to situational factors (i.e. receiving an incentive for their testimony). Finally, a "no incentive explicit" condition was added in which the witness explicitly indicated that no incentive was given in exchange for their testimony, so as to be sure no assumptions were made on the part of the participant regarding the notion of a potential incentive. With the exception of these noted changes, all other aspects of the experiment remained the same as described within experiment one.

Results of experiment two largely duplicated that of experiment one. Regarding appropriate recognition of the presence of an incentive, results indicated clear awareness of the presence of the incentive, as participants correctly identified this condition over 90% of the time (Neuschatz et al., 2008). Eighty-five percent of participants attributed the testimony of the cooperating witnesses to internal factors (i.e. guilt, feeling sorry for the family, etc.) or both internal and situational factors (i.e. reward, leniency, etc.) compared to only 15% of participants attributing the testimony to solely situational factors. Cumulatively, it

seems clear that participants were aware of the presence of an incentive, yet were able to disregard the situational incentive to testify, instead focusing on dispositional attributions as a reason for the testimony. Again no significant differences in verdict decision were found between the "incentive" and "no incentive" conditions, suggesting that jurors ignored the motivation cooperating witnesses may have had to fabricate their testimony in exchange for a reward, and instead relied on dispositional attributions of trustworthiness and honesty to accept the testimony at face value.

In further support of how impactful secondary confession evidence can be, it is important to note that within this study the secondary confession evidence was presented in an otherwise extremely weak case, as evidenced by the fact that in the control condition, participants as a whole voted guilty only 26 percent of the time (Neuschatz et al., 2008). However, when secondary confession evidence was presented, participants as a whole rendered guilty verdicts 71 percent of the time.

As a result of the implications of the prior study, Neuschatz et al., (2012) conducted a follow-up study to examine other facets of JI testimony that may impact juror verdict decisions. In this two-experiment study, participants read trial transcripts that presented secondary confession evidence from either a JI or an accomplice witness (AW). However, in the first experiment JI testimony was manipulated so participants were made aware that the JI had previously testified as an informant in either zero, five, or 20 cases. In the second experiment, participants were educated by an expert witness testifying on the unreliability of testimony of cooperating witnesses. Results of both experiments again yielded interesting results. The percentage of jurors who rendered guilty verdicts did not vary as a result of incentive, JI testimony history, or jury education through expert testimony. Further, this study replicated previous findings that participants exposed to secondary confession evidence rendered a guilty verdict significantly more often than when no confession evidence was presented.

## Implications for Trial Preparation

The testimony of JIs can result in wrongful convictions given the influence of confession testimony on jurors. The following paragraphs describe strategies now in practice in different parts of the country, or recommended in the literature. Finally, we include our own recommendation to further explore the issues of jury selection and jailhouse informant testimony.

One solution suggested included using expert witnesses to help the jury better understand the unreliability and motivations associated with testimony given as a result of suggestive interaction with handlers (Gershman, 2002). However, as presented in Neuschatz et al. (2012), a study utilizing mock jurors to test this exact premise found no difference in the number of guilty verdicts rendered when comparing the experimental (expert witness) and control (no expert witness) conditions.

Another solution that has been implemented in some states, such as California and Illinois, include instructions delivered by the judge to more directly encourage jurors to carefully scrutinize the testimony and consider the degree to which the informant may have been influenced by promises of reward or leniency (Neuschatz et. al., 2008). However, it has been shown throughout the literature that cautionary instructions likely have little effect on verdicts rendered (Neuschatz, Jones, Wetmore, & McClung, 2012). As an example, a meta-analysis of 48 studies examining judicial instructions to ignore inadmissible evidence in juror verdict decisions found that juror verdicts did not vary with the presence of cautionary instructions, deeming such instructions ineffective (Steblay, Hosch, Culhane, & McWethy, 2006).

A final solution was for lawyers to more effectively cross-examine these cooperating witnesses in an effort to make their motivations to gain leniency or some other reward more salient to jury members (Cassidy, 2004; Mazur, 2002). At that time, it was thought that if the jury were made explicitly aware of a cooperating witness' incentive to testify (leniency or reward) or testimony history, then the jury would be more likely to discount testimony (most oftentimes secondary confessions) provided by that witness. However, Neuschatz et al. (2008) as well as Neuschatz et al. (2012) provided evidence suggesting that neither incentive nor testimony history have a significant impact on juror verdict decisions.

Given that research has shown current strategies are not particularly useful, attorneys may need to rethink strategies to deal with JI testimony. Since there appears little that a judge, expert witness, or sound cross-examination can do to assist in changing juror perceptions of JI's and, particularly, secondary confession testimony, a next logical step may be to address the very root of the problem: re-conceptualizing jury selection.

Through the use of juror questionnaires and peremptory challenges, one can apply social science knowledge in assisting with de-selecting individuals who may be most likely to believe a JI or fall victim to the fundamental attribution error. We highlight two potentially useful juror characteristics to consider measuring in the jury panel members: dogmatism and need for cognition.

Dogmatism is a personality trait characterized by close-minded, "black-and-white" type thinking in which individuals rigidly view things on absolute ends of a spectrum (Devine, Clayton, Dunford, Seying, & Price, 2001). Simply put, dogmatic jurors passionately cling to their belief systems or rules (Cramer, Adams, & Brodsky, 2009). Empirical evidence suggests that high dogmatism is associated with more guilty verdicts (Shaffer & Case, 1982). In application to cases involving JI's, a defense attorney would likely want to de-select individuals high in dogmatism. In criminal trials, the defense typically prefers individuals who are cognitively flexible, and who tend to avoid views of the world as black and white. Regarding testimony of a JI, an individual who exhibits high degrees of dogmatism

is likely to hear the provided secondary confession and fail to consider other factors relating to the testimony. Accordingly, these individuals may be candidates for de-selection. A full version of the Rokeach Dogmatism Scale (Rokeach, 1960) can be viewed within *Measures of Personality and Social Psychological Attitudes* (Robinson, Schaver, & Wrightsman, 1991, p 560-564). However, Troldahl and Powell (1965) provide a shortened 20-item dogmatism scale, likely more useful for purposes of jury selection. (See page 10 of this file for the 20-item scale.)

Notwithstanding its age, the Dogmatism Scale provides a foundation for meaningful use in both SJQs and voir dire. As a practical matter, however, it is unlikely that a trial court would permit all 20 items to be included in a SJQ, or allow all items to be the subject of voir dire inquiry. With the understanding that research-level reliability as a predictor is compromised, a reduced number of four or five of Troldahl and Powell's scale items could be added to the SJQ as scaled response questions to get a sense of a panel member's level of dogmatism. The following five of Troldahl and Powell's items might be considered:

1. In this complicated world of ours the only way we can know what's going on is to rely on leaders or experts who can be trusted.

2. My blood boils whenever a person stubbornly refuses to admit he's wrong.

3. There are two kinds of people in this world: those who are for the truth and those who are against the truth.

4. Most people just don't know what's good for them.

5. Of all the different philosophies that exist in this world there is probably only one that is correct.

With a six or seven point response scale using end points "Strongly Agree" and "Strongly Disagree," the attorney can get a glimpse of the respondent's views that could be followed up during voir dire. Even without a follow-up opportunity, the attorney has more information than would ordinarily be available to evaluate whether the prospective juror should be struck for cause or by peremptory challenge. If the SJQ is not permitted, the attorney may still utilize dogmatism scale items by asking the venire for a show of hands of those who agree or disagree with the scale item, and then making decisions about which jurors' responses or response patterns warrant additional inquiry.

Need for cognition addresses the extent to which people actually enjoy and put forth effortful thinking (Cacioppo, Petty, Feinstein, & Jarvis, 1996). You will often hear need for cognition assessed in voir dire by the attorney asking potential jurors if they enjoy Sudoku or completing crossword puzzles. As applied to the courtroom, a juror high in need for cognition is likely to thoroughly enjoy the challenge of discerning the "truth" and will not be satisfied until they have wholly examined all evidence presented from various viewpoints (Brodsky, 2009). Here is the short form of the Need for Cognition Scale.

In our situation, the defense would likely want to de-select those individuals who have a low need for cognition, as they may be especially susceptible to accepting the JI's testimony at face value, and thus falling prey to the fundamental attribution error. Similar to the dogmatism scale, a limited number of items or related concepts from the NCS could be incorporated into the jury selection process by way of an SJQ or in the voir dire to give counsel some sense of the venire's general willingness to engage in "effortful cognitive endeavors" (Cacioppo, Petty & Kao, 1984). For example, an attorney for a criminal defendant might integrate the concepts behind NCS items into an SJQ question such as,

"Which statement best describes your view:

1. I prefer daily routines that do not require much mental effort; or

2. I prefer daily situations that require problem solving and abstract thinking."

Though not directly drawn from the NCS itself, attorneys can employ scale items to formulate SJQ or voir dire questions that may provide answers which enhance their ability to identify jurors with a low need for cognition, followed by additional voir dire questions intended to confirm whether a prospective juror is willing and able to scrutinize and evaluate the evidence in a way that considers generally recognized concerns raised by JI testimony. Most importantly, however, these responses can form the overall basis on which attorneys can make more informed decisions about how to treat those members of the panel when exercising peremptory strikes or proposing strikes for cause. If time and money allows, testing all individual scale items in mock jury/mock trial research could potentially identify the most useful items for the case at hand.

Further research within trial consulting is needed to address the issue of juror perceptions of jailhouse informants. If more time was spent on juror perceptions of JI testimony within focus groups, mock trials, and shadow juries, it is possible that patterns could be drawn as to what characteristics are most relevant in juror perceptions of informant testimony. Practical limitations to this approach are that it is costly, time-consuming, and each individual study would be largely a game of trial-and-error, in that trial consultants would be testing different strategies, case conceptualizations, and juror questionnaires to see which one, or which combination, may work to reveal the optimum or "best" type of juror for the defendant. We believe such a research-informed approach to jury selection in JI-involved cases offers a promising start in dealing with this unique type of evidence.

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