

Background and the Problems Surrounding Confidential Informants

Relying on human intelligence sources in police work when the person is untested takes a syllogistic form: Faith is belief in things that are hoped for, but for which evidence does not exist; untested informants possess no evidence of veracity or reliability; therefore, a police agency that deploys an untested informant operates on faith in the informant's veracity and reliability. This is a very precarious territory! Using human intelligence sources to develop probable cause to search or to arrest requires more than faith; it requires the police to establish the person's reliability by providing evidence they are competent and honest *before* the person is deployed to work, not merely hope that the things they say and the information they provide are truthful. Police officers should assess a confidential informant's (CI's) reliability as well as justify that reliability to a court when seeking a search warrant. To determine this, police officers must: (1) point to specific indicia of the person's reliability and (2) corroborate any information they receive from that person. Sufficient evidence of these two factors will satisfy the "totality of the circumstances" test of *Illinois v. Gates* (1983), justifying the issuance of a search warrant based on the CI's tip. Given the zeal of law enforcement, police officers frequently fail to be skeptical of a CI's tip and may not corroborate the information provided (Bowman 2014). Since reasonableness is the standard for police conduct embedded in the Fourth Amendment, if officers do not meet the *Gates* criteria before they apply for a warrant, then they act unreasonably by seeking a warrant that lacks probable cause. If they seek a warrant that lacks probable cause, then they present a false picture of CI reliability and veracity through some combination of: (1) fictitious police reports; (2) misleading the prosecutor; (3) perjuring themselves in the affidavit; (4) perjuring themselves when they swear or affirm before the court; and (5) perjuring themselves during grand jury proceedings, then during a suppression hearing, then again at trial, should the case reach the indictment and trial stage (e.g., Covey 2013; Fisher 1993; Gard 2007; Goldsmith 2005; Slobogin 1996).

In addition to acting unlawfully, they must also act unethically throughout the investigation and the warrant application process as they attempt to send a person—perhaps completely innocent—to prison...maybe to their death. How search warrants are crafted and how information delivered by a CI is handled by the police

can have grave consequences for innocent people when the search warrant is eventually executed (Delwan and Goodman 2007); they can contribute to generalized community distrust¹ (Natapoff 2009; Trott 1996), and they implicate why people decide to obey the law, a process termed “legitimacy” (Tyler 2006). That innocent people have been swept into the criminal justice system through the actions of dishonest or corrupted CIs is well documented (e.g., *Benn v. Lambert* 2002; Center on Wrongful Convictions 2005, p. 3; Congressional Subcommittee 2007, p. 2; New York State Bar Association 2009; Reinhold 1989), including a litany of media accounts concerning wrongful arrests, wrongful imprisonment, case dismissals, and alleged misconduct (Baker 2008; Deneger 2010; Donald 2002; Drew 2015; Fenton 2013; Gillham 2010; Lichtblau 2003; Maykuth and Slobodzian 2009; Mount 1991; Nelson 2013; Orton 2013; Owens 2013; Saltzman 2009; Scott 2013; Slater 2013; Slobodzian 2009; Stein 2010; Stillman 2012; Zaremba 2014). As Natapoff (2009, p. 112) aptly notes, informants are punished if they remain silent, but they are rewarded for producing inculpatory information that helps develop the government’s case, even when that information is not accurate. The legal system often protects them from the consequences of their inaccuracies in a variety of ways (Bowman 2014), including keeping their identity confidential, all the while relying on the information as the gravamen of the case. As police and prosecutors rely more heavily on that information, they become complicit as their stake in the case grows.

Aside from the implications for criminal trials, misusing CIs has also been costly for agencies involved in civil litigation arising primarily from Fourth, Sixth, and Fourteenth Amendment violations (e.g., *Crane v. Sussex County Prosecutors Office* 2010; *Cress v. Ventnor City* 2013; *Maudsley v. State of New Jersey* 1999). Private litigants, including CIs themselves, have successfully advanced various legal theories of liability against the US government and individual FBI agents based on informant and/or FBI misconduct:

- August 1992, the US Drug Enforcement Administration settled a \$2.5 million lawsuit with a businessman who was shot in his San Diego County (CA) home during a drug raid based on bogus information supplied by an informant (Curriden 1995).
- January 2005, a jury awarded an informant \$6.6 million after the informant successfully claimed that FBI agents framed him for murder and kidnapping (*Manning v. Miller*, 355 F. 3d 1028, 7th Cir. 2004).
- July 2007, US District Court in Boston ruled against the FBI and ordered the federal government to pay \$101 million for “framing” four men for a murder

¹ A series of monitoring activities of Muslim communities by the New York City Police Department that included using confidential informants generated widespread community resentment; see generally CBS New York, *Fallout Continues From NYPD Muslim Student Group Monitoring* (March 3, 2012); Eileen Sullivan & Chris Hawley, *New York Muslims Rally to Protest NYPD Surveillance Program* (Huffington Post, November 18, 2011); Adam Goldman & Matt Apuzzo, *Newark Muslims Hold Protest Rally over NYPD Spy Operation*, (Christian Science Monitor, February 24, 2012).

they did not commit. The FBI went along with protecting the offender, Vincent Flemmi, who was their informant (Belluck 2007).

- A class of litigants sought damages alleging that FBI agents mishandled their informants, which led to murder, extortion, and other violent crimes at the direction or acquiescence of the FBI (Castucci Estate, 311 F. Supp. 2d 184, D. Mass, 2004; *McIntyre v. United States*, 254 F. Supp. 2d 183, D. Mass, 2003).

These problems may be linked to the informant's integrity or policy deficiencies that implicate a lack of control over the informant, which eventually fosters an organizational accident (Shane 2013).² Since most of the work CIs perform is out of sight and sound of any police officers, the government cannot rely axiomatically on a CI's word without first testing their integrity, then independently corroborating the information they receive and controlling their behavior. In addition, after long trusted working periods, police may become comfortable, overly eager, or complacent with the informant that they relax their vetting process (as the Central Intelligence Agency (CIA) did in Afghanistan), overlook the CI's criminal behavior, fail to corroborate information brought to them by the CI, or become too socially or informally acquainted with the CI (*Crane v. Sussex County Prosecutors Office* 2010; Natapoff 2006, 2010). Police officers will draw legal conclusions about a CI's observations that have drastic implications for others' lives. To attest under oath that the information received that led to a search warrant (or arrest warrant) is truthful places the officer in the unenviable position of vouching for a CI when they really do not know anything about the CI's integrity or reliability. At some point, an officer is likely to state in an affidavit or testify in court that the informant has "proven reliable in the past on several occasions," "is well known to this department," "is a known informant," or is a "trusted informant," but before a CI can be deemed "reliable in the past," they must be deemed reliable in the first place. Without a documented history of testing the informant's integrity before the informant is deployed, a police officer risks introducing biased, inaccurate, or perjured information at trial, which contaminates the search for truth and vitiates the judicial process (e.g., *Commonwealth v. Lewin* 1989; Slobogin 1996).

² An organizational accident is a confluence of human, situational, and other contextual circumstances that combine and breach established organizational defenses that have been erected to guard against certain hazards; when breached, those hazards produce harmful outcomes.... Failure in an organization generally occurs "...when some operation, employee, policy or process produces results that deviate from expectations in substantial and disruptive ways. Failure encompasses accident, non-performance, corrupt performance and deviant behavior." When an organizational accident occurs, it typically takes on four dimensions—organizational factors, unsafe supervision, preconditions for unsafe acts, and unsafe acts—that consist of both active failures and latent conditions, which under context-specific situations align to allow a given hazard to breach each level of established defense (Shane 2013, p. 7).

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A Closer Look at Police Policy

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2016, XXIII, 112 p. 1 illus., Softcover

ISBN: 978-3-319-22251-6