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hand, did not so limit the circumstances of admission. The usefulness of polygraph evidence on the *Zeiger* facts is not so apparent, and the evidence should have been excluded. However, the usefulness of the evidence in the narrow circumstances under which *Ridling* and *A v. B* allowed admissibility is apparent. The experience gained from such admissions may then be used to guide the courts in determining whether the admissions door should be opened wider.

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Evidence—Testimony of Government Informers in Narcotics Cases

The practice of using informers in an effort to apprehend narcotics peddlers and as a source of information is openly admitted by prosecutors and police officials.[1] This standard technique is considered "essential" in combating the drug traffic since there are no complaining witnesses or victims—only willing sellers and willing buyers—a fact that forces law enforcement officers to "initiate cases" to combat the drug trade.[2] It has been estimated that almost ninety-five percent of all federal narcotics convictions are obtained as the result of the work of informers[3] and that any government success in penetrating large selling organizations has been possible only through the use of informers and undercover agents.[4]

In order for the government to infiltrate the illicit drug traffic, it must use leverage to obtain the cooperation of reluctant participants in the traffic.[5] An informant usually is a person who is facing criminal charges and who is induced into cooperating with the government in order to receive a "break" in the criminal process.[6] If an informant is

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[1]A. LINDESMITH, THE ADDICT AND THE LAW 36 (1965) [hereinafter cited as LINDESMITH]; U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 8 (1967) [hereinafter cited as TASK FORCE REPORT].

[2]TASK FORCE REPORT 8.

[3]Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 403 (1959).

[4]*Id.*; LINDESMITH 43. The Bureau of Narcotics operates on the premise that the more "buys" set up and the more violators enlisted as informers, the deeper the government will penetrate into organized crime. Comment, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J.L. & SOC. PROB. 47 (1966).

[5]LINDESMITH 35.

[6]TASK FORCE REPORT 8. The "break" given informants is usually a reduction in charges.

not facing criminal charges, his motivation for supplying information may arise out of revenge or monetary reward.[7]

Because drug addicts are considered crime-prone[8] and are directly involved in the drug trade, they make up a large percentage of the government's informers.[9] Although drug addiction itself is not a crime,[10] the addict cannot maintain his habit without violating some criminal laws against purchase and possession of narcotics. Thus the addict is in perpetual violation of one or several criminal laws,[11] and the government has enormous leverage in securing his cooperation through the threat of heavy mandatory penalties.[12] Additionally, arrests of addicts, whether based on legitimate charges or for harassment purposes,[13] provide the government with an extremely persuasive means of "inducing" cooperation by bribing the addict with drugs[14] or forcing the beginnings of withdrawal symptoms.[15]

A danger arises, however, in the fact that the addict-turned-informer is useless unless he provides meaningful tips or arranges sales that lead to prosecution. Therefore, an informer whose primary interest is in obtaining drugs to support his habit and avoiding punishment might commit perjury, "frame" another addict, or make a false identification to make a case.[16] Since the informer is usually motivated by his own self-interest, the problem is further complicated when the government prosecutor relies heavily on the testimony of such an informer. The credibility of the informer is questionable, and the need for protecting the defendant's rights through impeachment and jury instructions as to the informer's credibility raises several difficult questions: to what extent should the court allow the defense to impeach the credibility of the informer, when should cautionary instructions be given about the informer's credibility, and what should be included in such instructions? The answer to these questions must recognize the government's need to use informers effectively in narcotics cases and the defendant's right to be protected against fabricated charges and entrapment.

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[7] *Id.*

[8] *Id.* at 10.

[9] *E.g.*, LINDESMITH 35-36; TASK FORCE REPORT 8.

[10] Robinson v. California, 370 U.S. 660 (1962).

[11] TASK FORCE REPORT 10.

[12] LINDESMITH 35.

[13] *Id.* at 36-38.

[14] T. DUSTER, THE LEGISLATION OF MORALITY 194-95 (1970).

[15] *Id.*; LINDESMITH 38.

[16] LINDESMITH 50; Comment, 2 COLUM. J.L. & SOC. PROB., *supra* note 4, at 48-49.

The Supreme Court in *On Lee v. United States*[17] recognized that the government's use of informers may give rise to serious questions of credibility entitling a defendant "to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."[18] In a recent federal decision, *United States v. Kinnard*,[19] the approach put forth in *On Lee* was further examined by the District of Columbia Circuit as to paid addict informers.

In *Kinnard* two defendants, Kinnard and Payne, were convicted for possession and sale of heroin and failure to pay tax through the efforts of a government informer who had arranged a sale between government agents and the defendants.[20] The informer admitted that he was a narcotics user and that prior to the time he became an informer he was in custody in the District of Columbia charged with four counts of possession of narcotics, sale of narcotics, and burglary. After he became an informer, the charges were reduced to two misdemeanors to which the informer pleaded guilty and received two years probation. The informer also received at least two hundred dollars, and his family was relocated at the government's expense.

After his release, the informer arranged a sale with the defendant Payne for the benefit of the informer's friend, who in reality was a narcotics agent. There was no evidence as to the nature of the negotiations between the informer and Payne except the informer's account, which indicated that Payne was a willing seller.[21] The actual sale transpired at a parking lot in which Payne, the informer, and his "friend" met with Payne's source, Kinnard, who brought the heroin and consummated the sale. This transaction was witnessed by the undercover agent acting as the informer's friend and another agent who observed from a distance and identified the two defendants.[22]

Although neither defendant testified in his own behalf, they both raised the defense of entrapment by impeachment of the government's informer on cross-examination.[23] The trial judge precluded cross-examination of a narcotics agent as to the general reliability of addicts and refused to give any special instructions on the unreliability of ad-

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[17]343 U.S. 747 (1952).
[18]*Id.* at 757 (dictum).
[19]465 F.2d 566 (D.C. Cir. 1972) (per curiam).
[20]*Id.* at 568 (Bazelon, C.J., concurring).
[21]*Id.* at 576.
[22]*Id.* at 569.
[23]*Id.*

dicts. Defense counsel then sought to impeach the credibility of the informer, who denied being an addict, by examining the needle marks on the informer's arms and by introducing extrinsic evidence to prove the frequency of his drug use. Since the informer admitted being a user, the trial judge denied a request for a dermatology examination as raising collateral issues.

Although each judge wrote his own opinion, the majority of the court agreed that the trial judge erred in denying defense counsel the opportunity to develop extrinsic evidence as to whether the government informer was an addict.[24] The majority reasoned that although extrinsic evidence ordinarily may not be used to impeach a witness's general credibility or his specific testimony on a collateral matter, when the government relies on the testimony of a paid informer about whom there is suspicion of narcotic addiction, the evidence is probative of a special motive to lie or fabricate a case against the defendant[25] and is therefore admissible.[26]

Judge Bazelon in his concurring opinion argued that the defendants should automatically be entitled to a special cautionary instruction as to the unreliability of addict informers once the informer's status as an addict is established.[27] He would not require that a request for special instruction be made by counsel but would make it mandatory for the court to submit such instructions to counsel as a routine set of instructions once the status of the informer is established.[28] Since the cross-examination that might have established status was erroneously excluded, the majority assumed for purposes of appeal that the informer was an addict. In Judge Bazelon's view, the trial court's failure to provide the special instructions constituted error.[29] Judge Leventhal on the other hand would not find the defendants entitled to special instructions even if addict status were established unless counsel made a request for such instructions and the informer's testimony was not corroborated in any material aspect.[30] Although the special cautionary instructions had not been requested by counsel in accordance with Rule

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[24] *Id.*

[25] *Id.* at 574 (Bazelon, C.J., concurring), 579-80 (Leventhal, J., concurring).

[26] *Id.* at 573-74 (Bazelon, C.J., concurring), 579-80 (Leventhal, J., concurring).

[27] *Id.* at 569.

[28] *Id.* at 573.

[29] *Id.* at 575.

[30] *Id.* at 577.

30 of the Federal Rules of Criminal Procedure,[31] the majority of the court recognized that the trial judge as a practical matter had foreclosed a request from defense counsel by announcing his intention to refuse to give such instructions during the trial in anticipation of counsel's later request.[32]

The court held that the trial judge's failure to give the cautionary instruction did not constitute reversible error unless it worked a "substantial prejudice" on the defendants.[33] Judge Bazelon applied the following test: "Failure to give the instruction is prejudicial when the addict-informer's testimony contributes a material aspect of the prosecution's case, and it is not fully corroborated by other witnesses."[34] Under this test, the majority found that there was sufficient corroboration of the informer's testimony as to Kinnard's involvement for the jury to have found he was not induced but was predisposed to commit the crimes.[35] The majority also found that the only evidence that Payne was a willing seller was the informant's account of his negotiations with Payne to make the sale. Since it took several attempts to get Payne to make the sale, the court concluded that Payne could have been induced against his will and therefore failure to give the cautionary instruction was prejudicial error calling for reversal of Payne's conviction and a new trial.[36]

Judge Adams, dissenting, would have affirmed Payne's conviction as well. Despite the limitations on cross-examination, the dissent felt that defense counsel had developed a considerable amount of evidence to impeach the informant's credibility and that the trial judge did not

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[31]Rule 30 provides that any party may file a written request for court instructions to the jury at the end of the evidence or as the court reasonably directs. The requests must be written and no party may assign as error "any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." FED. R. CRIM. P. 30.

[32]465 F.2d at 567-69. The dissent rejected the argument that a request in accordance with Rule 30 for a cautionary instruction would have been futile because of defense counsel's statement that he was not requesting an instruction on addicts or their reliability. Assuming that the issue of adequacy of instructions was properly preserved for appeal, the dissent felt the addict-informer instruction was properly withheld because it had not been established that the informer was an addict. *Id.* at 583 (Adams, J., dissenting).

[33]*Id.* at 575 (Bazelon, C.J., concurring).

[34]*Id.* The only difference in Judge Leventhal's test for determining reversible error appears to be one of semantics. Judge Bazelon determines if there is error and then if it is reversible error while Judge Leventhal just determines if there is reversible error leaving out the intermediate step.

[35]*Id.* at 577 (Bazelon, C.J., concurring).

[36]*Id.* at 576-77 (Bazelon, C.J., concurring), 580 (Leventhal, J., concurring).

abuse his discretion to limit the scope of cross-examination since it did not harm the defendants' cases.[37] The defense counsel's inquiry regarding the informant's needle marks was excludable as collateral,[38] according to the dissent, because it tended to show only that he lied about the frequency of his use of narcotics and did not go "directly to defendants' commission of the prescribed acts, their willingness to commit such acts, or to the informer's credibility . . . ."[39] Had the trial judge allowed the defense to bring in an expert to interpret the needle marks on the informer's arms, the dissent felt that the prosecutor would have brought in an expert to give a different interpretation. Such "a trial-within-a-trial [is] the very result the collateral impeachment rule is designed to prevent . . . ."[40]

Both concurring opinions that made up the majority were based on judicial opinions that supported the necessity of a cautionary instruction when paid government informers testify in criminal cases.[41] Both opinions relied on an earlier District of Columbia Circuit decision, *Fletcher v. United States*,[42] in which the court recognized that paid informers have a self-interest motive to lie that creates the need for a special cautionary instruction on their credibility in order to protect the defendant's rights. The *Fletcher* court reversed the defendant's conviction that had been based on the uncorroborated testimony of a paid government informer who was also an addict and a narcotics peddler who had previously been convicted and sentenced for violating the narcotics laws. The court held that the trial judge's refusal to grant defendant's request for a special cautionary instruction as to the testimony of a paid informer was a prejudicial error:

> [W]here the entire case depends upon [a paid informer's] testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness's own interest. Here, admittedly, the usefulness of the witness—and for which he received pay-

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[37] *Id.* at 581-82.

[38] The general rules of evidence prohibit extrinsic evidence to contradict a witness on collateral matters. MCCORMICK ON EVIDENCE § 47, at 98 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; 3A J. WIGMORE, EVIDENCE § 1001 (J. Chadbourn rev. 1970) [hereinafter cited as WIGMORE].

[39] 465 F.2d at 582.

[40] *Id.*

[41] *Id.* at 570 (Bazelon, C.J., concurring), 577 (Leventhal, J., concurring).

[42] 158 F.2d 321 (D.C. Cir. 1946).

> ment from the agent—depended wholly upon his ability to make out a case. No other motive than his own advantage impelled him in all that he did.[43]

The *Fletcher* court further noted the fact that the informer was an addict and stated that it was a "well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned . . . ."[44] Considering that the informer was both an addict and paid by the government, the court held that the defendant's rights could only be protected by either corroboration of the informer's testimony or a special cautionary instruction to the effect that the testimony should be "received with suspicion" and "acted upon with caution."[45] Although the District of Columbia Circuit later interpreted *Fletcher* as applying to paid informers generally whether or not they are addicts,[46] one circuit appears to have limited *Fletcher* to its facts.[47]

Other federal circuits have followed the basic principles set forth in *Fletcher*,[48] which were similarly expressed by the later Supreme Court decision, *On Lee v. United States*,[49] and have applied them to informers whose testimony may have been influenced by various sources of bias such as narcotics addiction[50] or use,[51] being paid,[52] subjection to pending criminal charges,[53] and numerous combinations of these sources of bias.[54] Although most decisions in this area have turned on whether the

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[43]*Id.* at 322.

[44]*Id.*

[45]*Id.*

[46]Godfrey v. United States, 353 F.2d 456 (D.C. Cir. 1965) (per curiam).

[47]*See* United States v. Green, 327 F.2d 715 (7th Cir. 1964).

[48]*See*, e.g., Orebo v. United States, 293 F.2d 747 (9th Cir. 1961); Joseph v. United States, 286 F.2d 468 (5th Cir. 1960); United States v. Masino, 275 F.2d 129 (2d Cir. 1960).

[49]343 U.S. 747 (1952). Although *On Lee* dealt with a "wired for sound" informer who did not testify at the trial of defendant, the dictum noted in the text accompanying note 18 *supra* has provided courts with guiding principles by which to deal with the testimony of any government informer.

[50]*See, e.g.*, United States v. Gilbert, 447 F.2d 883 (10th Cir. 1971); Young v. United States, 297 F.2d 593 (9th Cir. 1962).

[51]*See, e.g.*, Todd v. United States, 345 F.2d 299 (10th Cir. 1965) (informer also had been convicted of armed robbery, escaped from prison and associated with men of lewd character).

[52]*See, e.g.*, Sartain v. United States, 303 F.2d 859 (9th Cir. 1962); Orebo v. United States, 293 F.2d 747 (9th Cir. 1961).

[53]*See, e.g.*, United States v. Green, 327 F.2d 715 (7th Cir. 1964) (unindicted co-conspirator); United States v. Masino, 275 F.2d 129 (2d Cir. 1960) (issue raised as to informer's use of narcotics). All cases in which an accomplice testifies for the government as an informer would fall within this area.

[54]*See, e.g.*, United States v. Griffin, 382 F.2d 823 (6th Cir. 1967) (paid and addict); Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 984 (1965) (paid

informer's testimony is corroborated or not,[55] some decisions have divided on the issue of whether or not a request for a cautionary instruction must be properly submitted by counsel and refused by the trial judge before there are grounds for reversal.[56] In *United States v. Griffin*[57] the Sixth Circuit held that a cautionary instruction was mandatory when the testimony of a paid government informer, who was also a narcotics addict, was crucial and uncorroborated even though the defense failed to make a request for the special instruction. Although the District of Columbia Circuit has held in a case involving a paid-addict-informer that a cautionary instruction must be given when requested unless there is corroboration of the informant's testimony,[58] it has urged trial courts to caution the jury about the unreliability of informant testimony even in absence of a request.[59] In *Kinnard* Judge Bazelon indicated that the better rule in the case of an addict informer would be to have the court give the cautionary instruction on its own motion.[60] This view provided the major difference between the concurring opinions in *Kinnard*, for Judge Leventhal followed the view that only upon a proper request should a special cautionary instruction be available.[61] Since the United States Supreme Court has held that the conviction of a defendant based solely on the testimony of a government informer would be allowed to stand even in absence of substantial corroboration,[62] a mandatory cautionary instruction would add a condition on the use of government

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and addict); Joseph v. United States, 286 F.2d 468 (5th Cir. 1960) (paid and serving a prison term for narcotics violations).

[55]*See, e.g.*, Todd v. United States, 345 F.2d 299 (10th Cir. 1965); Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 984 (1965). The concern over corroboration of the informer's testimony stems in many cases from the possibility of the defendant being forced or entrapped into committing a crime. Where the government merely affords opportunities or facilities for the commission of an offense, it does not defeat the prosecution; however, when the criminal design originates not with the accused, but is conceived in the mind of government officials and the accused is, by persuasion, deceitful representation or inducement, lured into commission of the criminal act, the government is precluded from prosecuting. *See* Sorrells v. United States, 287 U.S. 435 (1932). *See also* Williams, *supra* note 3.

[56]*See, e.g.*, Young v. United States, 297 F.2d 593 (9th Cir. 1962); Joseph v. United States, 286 F.2d 468 (5th Cir. 1960).

[57]382 F.2d 823, 829 (6th Cir. 1967).

[58]Hardy v. United States, 343 F.2d 233 (D.C. Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 984 (1965).

[59]Cratty v. United States, 163 F.2d 844 (D.C. Cir. 1947).

[60]465 F.2d at 569, 572.

[61]*Id.* at 577.

[62]*See* Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1952).

informers that the Supreme Court has not required. The dictum in *On Lee* acknowledges only that the defendant is "entitled" to have the issue of the informant's credibility submitted to the jury, not that it "must" be submitted automatically without request.[63]

Although most federal cases in this area have not been faced with the issues involving the scope of impeachment on cross-examination of an informant that were raised in *Kinnard*, such problems were examined in *United States v. Masino*.[64] In that case the defendant's conviction was based almost entirely upon the uncorroborated testimony of a paid informer and the defendant's accomplice. The defendant contended on appeal that the trial court erred in restricting cross-examination of the two witnesses, in admitting improper rebuttal testimony, and in refusing to give a cautionary instruction to the jury.[65]

The informer admitted that he was a former addict on cross-examination but claimed that he was no longer a user. The defense sought to show that the informer was still a user, that the informer was arrested and charged with possession of a syringe and hypodermic needle, and that the charges against the informer were subsequently dropped on request of the prosecutor. However, the trial judge excluded both the proffered evidence of the charge and its subsequent disposition. The appellate court held that the trial judge committed substantial error in restricting cross-examination of the informer since the testimony sought was highly relevant to the informer's motives for testifying as a government witness.[66] As in *Kinnard*, the court in *Masino* recognized that cross-examination that is directed at revealing bias or interest on the part of the witness is proper and that the widest possible latitude should be allowed in cross-examination where a witness is being questioned as to possible motives for testifying falsely.[67] The *Masino* court also found substantial error in the trial judge's failure to give a requested cautionary instruction as to the credibility of the informer and the accomplice since the government's case depended almost entirely upon the testimony of the two witnesses and was uncorroborated.[68]

In both *Masino* and *Kinnard* the trial judges felt that cross-examination of the informant as to his addiction and use of narcotics

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[63]See text accompanying note 18, *supra*.
[64]275 F.2d 129 (2d Cir. 1960).
[65]*Id.* at 131.
[66]*Id.* at 132.
[67]*Id.*
[68]*Id.* at 133.

was collateral to the issues in the case. A court's fear of undue delay and a trial-within-a-trial on collateral issues is a very legitimate concern, as the dissent in *Kinnard* noted.[69] However, by the classical approach to determining what is collateral, the appellate court reversals in both cases were correct. Whether the defense counsel's theory of impeachment is based on impeachment by contradiction, as the dissent in *Kinnard* indicated,[70] or by prior inconsistent statements, the test for collateralness provides that facts which are independently provable by extrinsic evidence to impeach a witness are not "collateral."[71] One type of facts which meet this test are those which show bias or self-interest.[72]

Courts have long recognized that facts introduced to impeach credibility by showing bias are admissible and provable by extrinsic evidence,[73] but have divided as to the foundation required before extrinsic evidence can be introduced to show bias. The majority approach requires that before a witness can be impeached by calling other witnesses to prove acts or declarations showing bias, the witness under attack must first be asked about these facts on cross-examination.[74] A minority of courts does not impose this requirement.[75] The reason for the majority approach is often said to be based on fairness to the witness, for he might be able to explain the facts without extrinsic evidence.[76] However, the most logical reason is the time saved by making extrinsic evidence unnecessary if the witness adequately explains the acts or declarations.[77] It is acknowledged, however, that when the main circumstances from which the bias proceeds have been proved, the trial judge has discretion to determine how far the details, whether on cross-examination or by other witnesses, may be allowed to be brought out.[78]

The dissent in *Kinnard* recognized this discretion in the trial judge and argued that enough evidence had been introduced on cross-examination of the informant to have impeached the informant's credibility and that any further questions into the area would have been

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[69]465 F.2d at 582.

[70]*Id.*

[71]McCORMICK § 36, at 70-71, § 47, at 98 & n.49; WIGMORE §§ 1003, 1020.

[72]McCORMICK § 36, at 71, § 47, at 99; WIGMORE §§ 1005, 1022.

[73]McCORMICK § 40, at 78; WIGMORE § 948.

[74]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[75]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[76]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[77]McCORMICK § 40, at 80; WIGMORE §§ 953, 1025-28.

[78]McCORMICK § 40, at 81; WIGMORE § 951.

merely cumulative. However, the numerous sources of bias brought out on cross-examination of the informant—prior drug use, being paid, and pending criminal charges[79]—would not justify limiting cross-examination as to the informant's addiction. Each source of bias is different, and to say that establishing the informer's addiction after his admitting prior use of drugs would be merely cumulative completely ignores the major difference between an addict, who must have drugs to exist,[80] and a user who may exist without them. A number of courts, in emphasizing the need for a cautionary instruction, have noted that an addict (not merely a user) is an inherent perjurer when it comes to his own interest.[81]

Although it may be argued that court rules should not tamper unduly with the system of using informers to combat today's drug problems for fear of sacrificing the security of society, the serious unreliability problems which government informers create require that the balance be struck in favor of protecting the rights and liberties of the defendant. In order to protect the rights of the defendant, the courts should allow a wide latitude on cross-examination of the informer in the area of impeachment by bias. The more facts brought out relating to different sources of bias, the greater the informant's motive to fabricate or lie and therefore the defendant should be allowed increasing flexibility to reveal these facts to the jury.

The fact that an informant is paid or is subject to pending criminal charges provides motive to fabricate or lie, but the fact that the informant is an addict creates a far greater motive to fabricate or lie because his habit, of necessity, requires that he remain free and out of jail. Rarely would an addict not be subject to pending criminal charges when he is induced into providing his services, so this double factor provides an awesome threat to the rights of a defendant to a fair trial. The mandatory cautionary instruction requirement advocated by Judge Bazelon would provide the best means of protecting the defendant's rights. As pointed out by Judge Bazelon,[82] the cautionary instructions should be mandatory in the sense that the trial judge would automatically

[79]465 F.2d at 581-82. Informer also lied at an identification hearing, sold drugs and had a prior conviction for robbery.

[80]TASK FORCE REPORT 10.

[81]*E.g.*, United States v. Griffin, 382 F.2d 823, 828 (6th Cir. 1967); Fletcher v. United States, 158 F.2d 321, 322 (D.C. Cir. 1946).

[82]465 F.2d at 572-73.

submit such instructions to the defense counsel as a part of the trial court's routine set of instructions, and at this point the defendant could object to the instructions if they in any way prejudiced his defense.[83] A mandatory cautionary instruction rule would be easy for the trial judge to apply because the question of adequacy of corroboration would not be an issue he would have to resolve in determining whether to give the special instructions upon a request from defense counsel. In addition, as also pointed out by Judge Bazelon,[84] the problem of court-appointed attorneys who may not specialize in criminal cases and are not familiar with criminal rules of procedure would not work to the defendant's disadvantage if there was a failure to request special instructions in accordance with procedural rules.[85]

Under Judge Bazelon's approach, special instructions would become mandatory once the addiction status of a paid informer under pending criminal charges was established. However, regardless of whether an informer is an addict or not, the fact that the informer is either paid or under pending criminal charges should be sufficient to activate the mandatory cautionary instruction rule since there is sufficient motive to fabricate or lie without combination of all these sources of bias. The cautionary instructions should instruct the jury to scrutinize the informant's testimony closely for the purpose of determining whether it tends to place guilt upon a defendant in furtherance of the informer's own interest by noting the different sources of bias brought out on cross-examination that would supply such interest.

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[83]For example, where the defendant himself is an addict or all his witnesses are addicted to drugs, a cautionary instruction as to the unreliability of addict informers may prejudice his case. *See* Godfrey v. United States, 353 F.2d 456, 458 (D.C. Cir. 1966).

[84]465 F.2d at 573.

[85]It should be noted that the mandatory cautionary instruction approach does not provide for the strategical move which could be used by an experienced criminal attorney, having knowledge of his defendant's rights, of deliberately failing to request a cautionary instruction after realizing the trial judge has forgotten to submit the cautionary instruction to him and then upon return of the verdict arguing for a new trial based on the trial judge's oversight. However, if it could be shown that the attorney deliberately failed to request the instruction after realizing the trial judge's oversight, he may be estopped from claiming error on appeal. Proof of knowledge would be difficult to show but could be inferred from the attorney's background and experience in criminal law. In addition, the trial judge's oversight might not be reversible error on appeal due to substantial corroboration of the informant's testimony.