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NYSACDL
NEW YORK STATE ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

Publication of the
**New York State Association of
Criminal Defense Lawyers**

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Parole Release Decisions and the Rule of Law

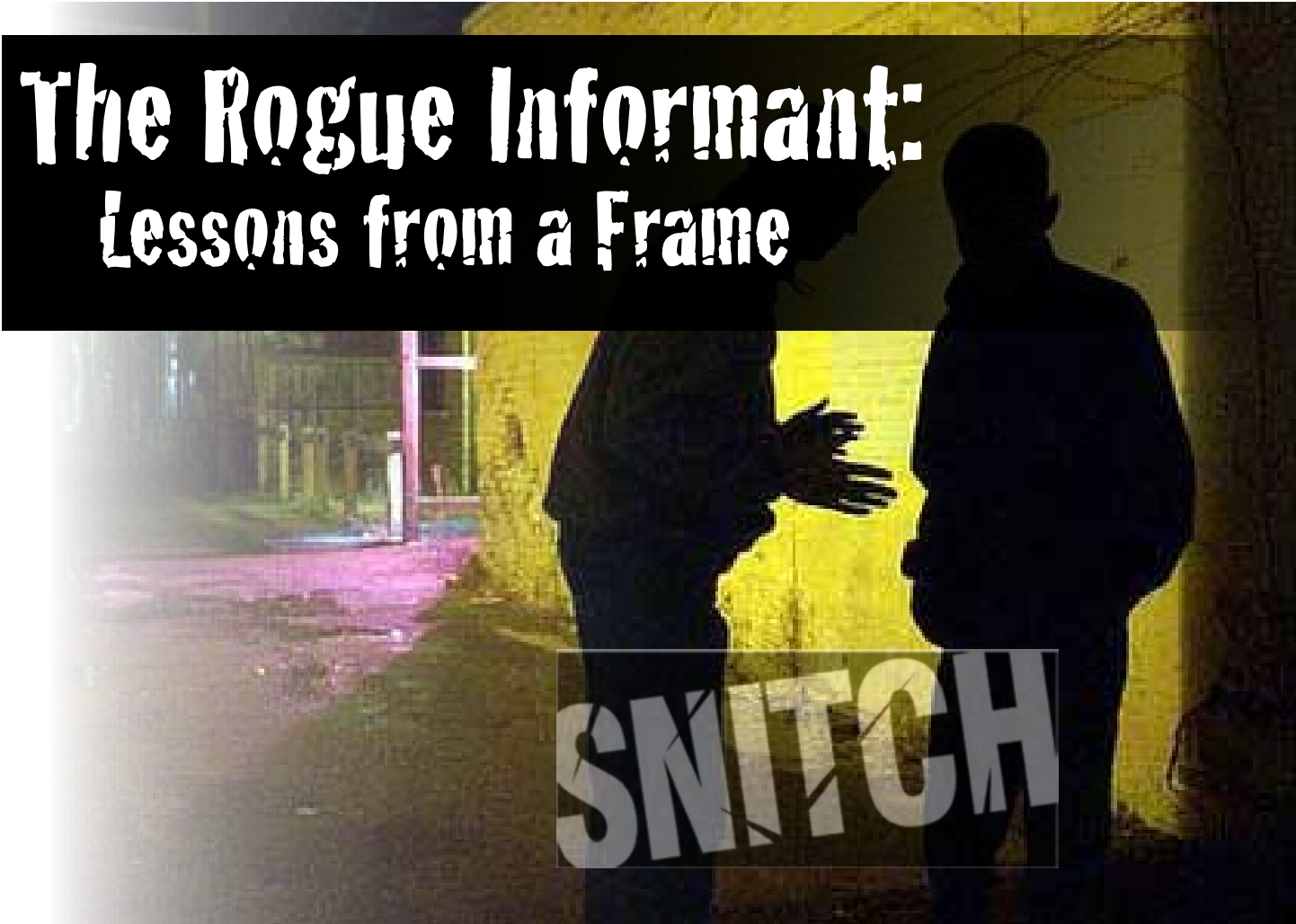
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6th Amendment: Speedy Trial by an Impartial Jury (1791)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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The Rogue Informant: Lessons from a Frame



SNITCH

By Rick Collins

CONFIDENTIAL OR MATERIAL INFORMANTS have been a key asset of law enforcement in the 40-year-old War on Drugs. Informants are typically people who are arrested on drug charges and, in return for leniency from the prosecutor or judge, cooperate with law enforcement agents to help arrest others, such as by making controlled buys. In a typical controlled buy, an informant meets with the supervising law enforcement agents and is searched to ensure he is not in possession of money or contraband. Then the informant is provided with “buy money” in prerecorded bills and a hidden recording device. The transaction itself is monitored to ensure the integrity of the evidence, as informants have been known to lie or steal to serve their own interests. The universal axiom among drug police is, “Never trust an informant.” After all, deceitfulness is what makes a successful informant.

There are so many possible variables involved that there exist no formal, universally accepted protocol standards for controlled buys. While some law enforcement handbooks provide general guidance and suggestions, specific procedures are largely left to individual police departments and agencies. The nature and quality of train-

ing may vary greatly. If agents do a bad job of supervising an informant during a controlled buy, the evidence can be compromised. An informant can steal a portion of the buy money or drugs. At its worst, poor monitoring can even make it possible for a rogue informant to frame a totally innocent person.

We've all seen movies in which a totally innocent person is "set up" by the police or their agents and accused of a crime. Drama ensues as the unjustly accused protagonist struggles to prove his or her innocence. The narrative may take liberties with legal principles and practices, and the story may become unrealistic. But the real life potential for an innocent person to be framed for a crime is not quite as far-fetched as one might think, especially in the case of an insufficiently supervised controlled buy.

My criminal practice is national in scope and centered on the health, fitness and sports fields, including competitive bodybuilding, and often involves performance enhancing drug allegations. I have the privilege of practicing in myriad jurisdictions across America, with able local counsel assisting. A recent case I defended involving a client we'll call "Jane" (not her real name) provides an excellent opportunity to examine what can go wrong during a controlled buy.



Jane is a very muscular competitive female bodybuilder in a very small town in a southwestern state. She was arrested by the local drug task force for selling an anabolic steroid to an undercover "material informant" inside the gym she owned and managed. She had never been in any type of legal trouble before. She contacted me to defend her, swearing that she was absolutely innocent of the charges.

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Streamlining the relevant facts for the purposes of this examination, the case began when the informant, who had signed a cooperation agreement with the local authorities in hopes of getting his own felony drug charges reduced to a misdemeanor plea, "cold called" Jane at her gym. After this telephone conversation with Jane, he reported to the task force detective he was working with that Jane had agreed to sell him a 10 cc vial of testosterone, an anabolic steroid and a controlled substance. More specifically, he told them that the price was \$100; that he was instructed to come by the gym the next day to conduct the transaction; and that she would conceal the steroid vial inside a bottle of multivitamins. Less than 24 hours later, the informant met with his supervising detectives. They patted him down for money or drugs and did a quick search of his car. Finding nothing, they gave him the cash, put a hidden high-sensitivity recording device on him, and let him drive to the gym

Rogue Informant


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while they followed in their car and then waited nearby. They watched as the informant entered the gym, and reemerged a half hour later. He had given the money to Jane and she had given him the multivitamin bottle. He handed the vitamin bottle to the detectives. They opened it and, just as expected, inside was the thumb-sized 10 cc vial of testosterone. The detectives viewed it as an open and shut case, as did the prosecutor, who offered my client the standard first-time offender “no jail” felony plea. However, as was the local policy, if the plea was not accepted at the first appearance post-arraignment the offer would be withdrawn and no further offers would be extended. Jane would be facing substantial prison time.

While the pressure of the plea policy was unsettling, I had the advantage of two discovery procedures. First, I promptly demanded and was provided a copy of the hidden recorder audiotape of the transaction. When I listened to it, I understood what the informant had done. Second, I demanded to interview the informant before trial. The opportunity to interview or depose a prosecution witness other than in a pre-trial court hearing or during the trial itself is not afforded in most jurisdictions. Luckily for Jane, this was one of the few jurisdictions permitting it (another takeaway from this case is the importance of pretrial depositions to ensure justice for the innocent, rather than the “trial by ambush” scheme that exists in New York and most states).

The audiotape of the transaction spanned the entire half hour that the informant was inside the gym. The vast majority of the interaction took place in a small sales office, where the informant and Jane discussed virtually every conceivable aspect of bodybuilding and nutrition, with Jane pitching him on the benefits of personal training sessions. While there was some general discussion of steroids for building muscle, there was no verbal reference to any transaction. Only at the very end of the conversation did the informant ask about “the multivitamins” and the exchange took place. The critical moment in the transaction, however, occurred after the informant received the multivitamin bottle but before he delivered it to the police. He asked Jane if he could use the bathroom. Then he went in the bathroom with the bottle and closed the door. Shortly afterward he left the gym and turned over the bottle to the detectives.

Why couldn't he have waited just five more minutes to use the rest room – until after he delivered the evidence? After all, this was the key evidence in the case, he had been instructed to deliver it forthwith, and the detectives were close by. I had the opportunity to ask him during my interview. The reason, he claimed, was a pressing need to urinate. I cross-examined him on the point, asking what level of urinary intensity would justify taking the essential evidence into a room where nobody



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could see what he was doing with it? I pressed him further and he took the bait. Under my prodding, he droned on about the uncomfortable urgency of his problem, ultimately agreeing to my description of a bladder swollen to mythical proportions. Finally, we detailed together his glorious relief. But he'd walked into a trap. The highly sensitive wire he had been wearing was still recording in the bathroom. Everything that happened in there, and everything that *didn't*, was preserved on audio. When I played the recording for everyone in the room, the prosecutor's face turned ashen. There wasn't a "tinkle" to be heard. No liquid hit that bowl, not one drop. Instead, there was the clear and unmistakable sound of small, hard tablets hitting porcelain as the informant dumped them into the bowl, making space in the multivitamin bottle for him to insert the testosterone vial and frame Jane. Obviously, the informant had forgotten that the recorder was still on, and that the closed space of the bathroom would make the sound quality especially crisp and clear. The informant began howling for his lawyer. Client exonerated, and case rightfully dismissed.



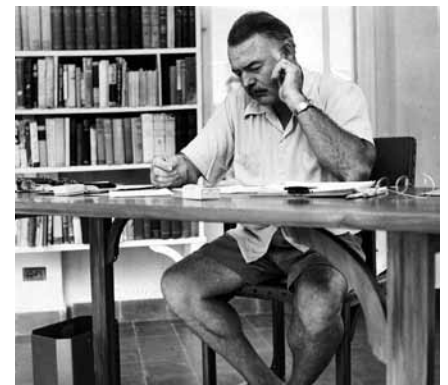
In this case, justice was done. The audiotape, designed as a way to bolster the prosecution's case, turned out to be Jane's salvation. But the unusual facts of Jane's case created the opportunity for proving her innocence. I can see other scenarios in which a rogue informant might more successfully engineer a frame of an innocent person. What broader lessons can be learned from Jane's ordeal to improve our system of justice?

1) The initial set-up call must be monitored. The informant's initial phone conversation with Jane was not monitored or recorded. It was his word, and his uncorroborated word alone, as to what was discussed. In truth, it was actually a conversation about personal training and multivitamin recommendations. Had the detectives insisted that no calls to targets be made without their supervision, the investigation would have ended right there. Law enforcement agents should never allow informants to make unmonitored set-up calls to targets. When the informant approached them with his claim, and before they acted on it, they should have made him follow up with a monitored and recorded call, purportedly confirming or changing some term of the exchange, but corroborating at least one element of an illegal transaction.

2) Thorough pre-transaction searches must be conducted. The extent of the pre-transaction search of an informant should be defined by the size and nature of the anticipated contraband involved. In a transaction involving a suitcase filled with kilos of cocaine, a less stringent body search might be appropriate. But where the contraband is a thumb-sized glass vial, a simple pat-down is woefully insufficient to ensure that the informant isn't bringing his own contraband to the scene. An object so small could be easily secreted and missed in a pat-down. Further, when the contraband involved is so small, allowing the informant to drive his own car to the scene is improper. A perfunctory car search is insufficient; there are simply too many places all over an automobile for a tiny object to be hidden (the police log reports

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“ *The most essential gift for a good writer is a built in, shock proof, shit detector. This is the writer's radar and all great writers have had it.* ”
— Ernest M. Hemingway (1958)



in Jane's case showed that the pre-transaction search of both the informant and his car took only one minute).

3) Post-transaction review is essential. In Jane's case, the informant presented the detectives with exactly what they were expecting, so they neglected to do the minimal necessary follow up. They never found out that he had taken the evidence into the bathroom because they failed to question him after the transaction (and he obviously didn't volunteer it) and they failed to even listen to the tape. The first time the primary detective heard the audio of the transaction was when I played it during my interview of the informant. That's simply inexcusable. Had

they listened, they would have known that the informant violated their instruction to return directly with the evidence.

4) Informant agreements shouldn't give quotas. The terms of informant agreements vary by jurisdiction. Often, no specific number of controlled buys or targeted defendants is required. But in some jurisdictions, like Jane's, the informant is given a specific number of people he must set up in order to get his deal. In Jane's case it was three. He had not met his quota despite nearly a year of cooperating, and may have been running out of time. In desperation, he likely saw Jane, with her remarkable muscularity, as a believable mark for a steroid

frame. While cooperation deals without specific bust numbers can allow agents to keep informants working off their cases endlessly, specific agreements can serve as an invitation for the kind of abuse that occurred here.

Hopefully, informant frame-ups of innocent clients are rare, and can be further minimized by attention to the suggestions presented. But it's important to recognize that these sorts of nightmares can and do take place, and that ultimately it's the job of the criminal defense attorney to be prepared to challenge the procedures involved. The lessons from Jane's case should be instructive for defense counsel in evaluating the viability of a "frame" defense and in cross-examining both the informant and the detectives. ■

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