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**TO:** Director, Division of Criminal Justice  
Superintendent, New Jersey State Police  
All County Prosecutors  
All County Sheriffs  
All Police Chiefs  
All Law Enforcement Chief Executives

**FROM:** John J. Hoffman, Acting Attorney General

**DATE:** November 26, 2014

**SUBJECT:** Directive Requiring Prosecutorial and Judicial Approval of the Proactive Use of Probationers To Conduct Law Enforcement Investigations

It has been brought to my attention that there have been instances where law enforcement officers or agencies have used persons on probation to engage proactively in law enforcement operations such as “controlled buys” of illicit drugs. Although these probationers are not being asked to commit a criminal offense, see N.J.S.A. 2C:3-3(c)(2),<sup>1</sup> their proactive activities on behalf of law enforcement may require them to violate a condition of probation that they not associate with persons involved in criminal activities. Furthermore, and most significantly, the practice of using a probationer in this manner may undermine the process of rehabilitation, especially if the probationer is drug or alcohol dependent and has been sentenced to special probation (“Drug Court”) pursuant to N.J.S.A. 2C:35-14. Accordingly, pursuant to my authority under the Criminal Justice Act, N.J.S.A. 52:17B-97 et seq., to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, it is appropriate to impose limitations on the authority of police and prosecutors to use probationers proactively to support law enforcement investigations.

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N.J.S.A. 2C:3-3(c)(2) provides that conduct is justifiable (*i.e.*, is not criminal under the New Jersey Code of Criminal Justice), “[w]hen the actor reasonably believes his conduct to be... authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.”



1. General Rule Prohibiting Proactive Use of Probationers Without Prior Authorization

A law enforcement officer or agency operating under the laws of the State of New Jersey shall obtain approval from the County Prosecutor or the Director of the Division of Criminal Justice and from the Assignment Judge or other appropriate judicial authority designated by the Assignment Judge before using, instructing, encouraging, or authorizing a probationer to proactively support a law enforcement investigation. Any violation of this requirement shall be reported immediately to the Attorney General or his designee.

2. Definitions

For purposes of this Directive:

“Probationer” means a person presently serving a term of regular probation pursuant to N.J.S.A. 2C:45-1 or special probation pursuant to N.J.S.A. 2C:35-14 (Drug Court).

“Proactively support a law enforcement investigation” means to commit any act or engage in any course of conduct at the express request of a law enforcement officer or agency where that act or course of conduct 1) would constitute a criminal offense, or an attempt or conspiracy to commit a criminal offense, if committed or engaged in by a person not expressly authorized by a law enforcement officer or agency to commit that act or engage in that course of conduct, or 2) would constitute a violation of a term or condition of probation. Examples of proactive support of a law enforcement investigation include but are not limited to purchasing illicit drugs to be turned over to a law enforcement officer or agency (*i.e.*, a “controlled buy”), or wearing an electronic surveillance device supplied by a law enforcement officer or agency during a meeting or conversation with a subject or target of an investigation. The term does not include providing information to law enforcement authorities about past, ongoing, or future criminal acts committed by others provided that the officer or agency has not used, instructed, encouraged, or authorized a probationer to violate any term or condition of probation, including the requirement to refrain from associating with specified persons or persons involved in criminal activity. Nor does the term include testifying as a cooperating witness.

“Law enforcement officer or agency” means any law enforcement officer or agency acting under the authority of the laws of the State of New Jersey.

“County Prosecutor” includes an assistant prosecutor designated in writing by the County Prosecutor to approve the proactive use of a probationer pursuant to Section 1 of this Directive.

“Director of the Division of Criminal Justice” includes an assistant or deputy attorney

general designated in writing by the Director to approve the proactive use of a probationer pursuant to Section 1 of this Directive.

“Appropriate judicial authority” means the Assignment Judge of the county where defendant’s probation is being supervised, or another Superior Court judge or probation officer designated or otherwise authorized by the Assignment Judge to approve a County Prosecutor’s application to use a probationer to proactively support a law enforcement investigation.

3. Standard for Prosecutorial Approval

A County Prosecutor or the Director of the Division of Criminal Justice shall not approve the use of a probationer to proactively support a law enforcement investigation unless the prosecutor or Director determines that there are compelling public safety reasons that justify the risk of undermining the person’s rehabilitation. If the County Prosecutor or Director approves the use of the probationer to proactively support a law enforcement investigation, the prosecutor or Director shall then apply to the appropriate judicial authority for approval of the proposed use of the probationer to proactively support a law enforcement investigation.

4. Scope of Directive

Nothing in this Directive shall be construed to limit the authority of a prosecutor to use a probationer as a cooperating witness.

Nothing in this Directive shall be construed to limit the authority of a law enforcement officer or agency to receive from a probationer information concerning past, ongoing, or planned criminal activities of which the probationer is aware, provided however that except as authorized under Section 1 of this Directive, the officer or agency shall not use, instruct, encourage, or authorize a probationer to violate any term or condition of probation, including any requirement that the probationer refrain from associating with specified persons or persons involved in criminal activity.

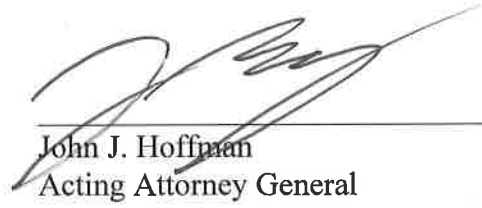
Nothing in this Directive shall be construed to amend the provision in the Attorney General “Law Enforcement Guidelines on the Use of Juveniles as Informants” that requires the consent of a parent/legal guardian before a juvenile may be used as a confidential informant.

5. Questions

Any questions concerning this Directive shall be addressed to the Director of the Division of Criminal Justice, or his designee.

6. Effective Date

This Directive shall take effect immediately, and shall remain in force and effect unless and until rescinded or modified by Order of the Attorney General.



John J. Hoffman  
Acting Attorney General

DATED: November 26, 2014