



State of New Jersey

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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2020-11

TO: All County Prosecutors
Director, Division of Criminal Justice
Director, Office of Public Integrity & Accountability
Insurance Fraud Prosecutor

FROM: Gurbir S. Grewal, Attorney General

DATE: October 9, 2020

SUBJECT: Directive Regarding Testimony of Jailhouse Informants

Prosecutors have a special obligation to ensure that the testimony they elicit from witnesses is honest and accurate. This includes a responsibility to disclose to the defendant any evidence that may be used to impeach a government witness. *State v. Carter*, 91 N. J. 86, 111 (1982); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963). In December 2019, the Attorney General reiterated these requirements in Law Enforcement Directive 2019-6 (the “Statewide Brady-Giglio Directive”), which mandated that each County Prosecutor’s Office establish policies to ensure compliance with discovery obligations under *Brady* and *Giglio*.

One particular category of witnesses deserve special consideration: jailhouse informants. Generally speaking, a jailhouse informant has no firsthand knowledge of the defendant’s alleged crime, but instead proffers that he or she heard the suspect confess to the crime or give other inculpatory statements while detained at the same jail or prison as the suspect.

When a jailhouse informant possesses credible, independently verifiable information, his or her testimony can play an important role in advancing the truth-seeking mission of the criminal justice system. However, in recent years, a number of high-profile incidents across the country have highlighted the risks that these particular witnesses could present. In response, a number of states have enacted additional procedural safeguards to ensure the reliability of jailhouse informant testimony. *See, e.g.*, Conn. Acts 19-131 (eff. Oct. 1, 2019); Neb. Laws L.B. 352 (eff. Apr. 24, 2019); Ill. Laws 100-1119 (eff. Jan. 1., 2019); Tex. Sess. Law Serv. 686 (H.B.



34) (eff. Sep. 1, 2017). This Directive is designed to provide additional clarity to prosecutors when deciding whether to call a jailhouse informant as a witness.

Therefore, pursuant to the authority granted to me under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I hereby direct all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey to implement and comply with the procedures outlined below.

I. Definitions

- A. **“Jailhouse Informant”** means a person who lacks firsthand knowledge of a defendant’s alleged criminal conduct but offers to testify for the government at a trial or evidentiary hearing that the informant heard the defendant make inculpatory statements while detained or incarcerated in the same facility as the informant.
- B. **“Prosecution team”** refers to the attorney(s) assigned to prosecute a particular case. In a County Prosecutor’s Office, this will typically be an Assistant Prosecutor; in the Division of Criminal Justice (DCJ), the Office of Public Integrity & Accountability (OPIA), and the Office of the Insurance Fraud Prosecutor (OIFP), this will typically be a Deputy Attorney General or an Assistant Attorney General.
- C. **“County Prosecutor”** refers to the acting or confirmed County Prosecutor who oversees a County Prosecutor’s Office.
- D. **“Director”** refers to the head of an office: DCJ (the DCJ Director), OIFP (the Insurance Fraud Prosecutor), or OPIA (the OPIA Executive Director).

II. Testimony of Jailhouse Informants

- A. **Approval by County Prosecutor¹ or Director.** Prior to calling a jailhouse informant as a witness, the prosecution team must obtain the approval of the County Prosecutor or Director. In seeking approval, the prosecution team must supply to the Prosecutor or Director the following information:
 - 1. **Criminal history.** The known criminal history of the jailhouse informant, including any pending charges;
 - 2. **Benefits for testimony.** Any benefit offered or provided to a jailhouse informant, or that may be offered or provided to the jailhouse informant in the future, in connection with the jailhouse informant’s testimony against the defendant;

¹ The County Prosecutor may delegate this authority to the First Assistant County Prosecutor.

3. **Defendant's alleged statements.** Any statements allegedly made by the defendant and heard by the jailhouse informant and, to the extent known, the time, location, and manner of their alleged disclosure to the jailhouse informant;
4. **Any known prior recantations.** The time, location, and manner of any recantation known to the prosecution team in which the jailhouse informant recanted the defendant's statement;
5. **Any known prior testimony by informant.** The case name and jurisdiction of any criminal case known to the prosecution team in which the jailhouse informant testified (or a prosecutor intended to have the informant testify) about statements made by another suspect or criminal defendant while detained or incarcerated, and whether the jailhouse informant was offered or received any benefit in exchange for or subsequent to such testimony;
6. **Any other information relevant to the jailhouse informant's credibility;**
7. **Evidence corroborating informant's testimony.** A summary of any evidence corroborating the jailhouse informant's testimony, including any independent evidence that the defendant in fact made the inculpatory statements alleged by the informant; and
8. **Publicly known facts.** A summary of the facts publicly known about the defendant's case at the time that the defendant allegedly made the inculpatory statements to the jailhouse informant, and a comparison of those facts to the information subsequently proffered by the jailhouse informant to law enforcement.

In deciding whether to approve the use of the jailhouse informant as a witness, the County Prosecutor or Director shall ensure that the prosecution team has satisfied its discovery obligations and that there is independent, credible evidence corroborating the informant's testimony.

- B. ***Disclosure of Informant's Impeachment Evidence.*** The prosecution team shall ensure compliance with the State's discovery obligations, including *Brady* and *Giglio*. Generally speaking, the State's discovery obligations relating to a jailhouse informant will include, at a minimum, the information described in Sections II.A.1 to II.A.6. (The State's analysis performed in connection with Sections II.A.7 and II.A.8 will typically include attorney work-product that is not subject to disclosure, although the prosecution team should make an assessment of its discovery obligations on a case-by-case basis.) The prosecution team shall consider the New Jersey Supreme Court's ruling in *State v. Hernandez* 225 N.J. 451 (2016) when considering its discovery obligations.

- C. ***Retention of Records.*** Each County Prosecutor’s Office, as well as DCJ, OIFP, and OPIA, shall maintain a record of any jailhouse informant whose testimony has been approved by the County Prosecutor or Director. Although recordkeeping procedures may vary, this Directive recommends that each Office maintain in a centralized location a copy of the material submitted by the prosecution team to the County Prosecutor or Director for approval. If the State ultimately calls the jailhouse informant to testify, the prosecution team should consider requesting a copy of the transcript and adding it to the Office’s file.

III. Other Provisions

- A. ***Non-enforceability by third parties.*** This Directive is issued pursuant to the Attorney General’s authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.
- B. ***Severability.*** The provisions of this Directive shall be severable. If any phrase, clause, sentence or provision of this Directive is declared by a court of competent jurisdiction to be invalid, the validity of the remainder of the Directive shall not be affected.
- C. ***Questions.*** Any questions concerning the interpretation or implementation of this Directive shall be addressed to the Director of the Division of Criminal Justice, or their designee.
- D. ***Effective date.*** This Directive shall take effect November 1, 2020, and shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Gurbir S. Grewal
Attorney General

ATTEST:



Andrew Bruck
First Assistant Attorney General
Dated: October 9, 2020