AD HOC REPORT

OF THE

SUPREME COURT COMMITTEE

ON

CRIMINAL PRACTICE

2021 – 2023 TERM

DECEMBER 15, 2021

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I. Introduction

The Criminal Practice Committee considered whether the Part III court rules should be amended to address the discovery obligation relating to jailhouse informants. The issue was referred to the Committee in response to Attorney General Law Enforcement Directive No. 2020-11 ("AG Directive"), which set forth procedures to "provide additional clarity to prosecutors when deciding whether to call a jailhouse informant as a witness."

In addition, several high-profile incidents across the country highlighted the risks associated with such informant testimony, including a case in Florida that was profiled in the December 2019 edition of *The New York Times Magazine ("How this Con Man's Wild Testimony Sentenced Dozens to Jail, and 4 to Death Row")*[1]. After multiple death row inmates were exonerated, the Florida Supreme Court adopted revisions to R. Crim. Proc. 3.220 ("Discovery") to require prosecutors to provide information on any deals made with an informant witness as part of their discovery obligation.

[1] https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html

II. Proposed Rule Amendment to R. 3:13-3 to include Jailhouse Informants

A. Summary of Rule Proposal

The Committee is recommending that the Court adopt amendments to R. 3:13-3, including the creation of a new paragraph (K) under R. 3:13-3(b)(1), to provide enhanced guidance on the discovery obligations related to jailhouse informants.

Paragraph (K) sets forth procedures to address the special category of witnesses known as jailhouse informants. The Committee proposes including jailhouse informants as a standalone category in R. 3:13-3(b)(1) because it fits within the dynamic of post-indictment discovery. Moreover, the discovery obligation post-indictment is only triggered by the prosecutor's decision to call a witness in the context of a particular case.

Because the court rules and caselaw do not provide a definition for "jailhouse informant" a definition has been added to paragraph (K). The Committee used the same definition of "jailhouse informant" that was used in the AG Directive. "Jailhouse informant" is defined as "a person who lacks firsthand knowledge of a defendant's alleged criminal conduct but offers to testify for the State at a trial or hearing that the informant heard the defendant made inculpatory statements while detained or incarcerated in the same facility as the informant."

Paragraph (K) details the specific information that must be provided when the State expects to call a jailhouse informant as a witness at trial, mirroring language that is contained in R. 3:13-3(b)(I) that requires the prosecutor to provide "names and addresses of each person whom the prosecutor expects to call to trial as an expert witness…" in addition to defense counsel's reciprocal obligation to provide discovery. The Committee intentionally borrowed concepts from this section of the rule because the language triggers the obligation to provide material that can be used to impeach a witness at trial. This is distinct from the affirmative obligation created in Brady v. Maryland, 373 U.S. 83 (1963), to provide exculpatory evidence that is not contingent upon calling a particular witness at trial.

Paragraph (K) also addresses additional discovery requirements that are specific to jailhouse informant witnesses. The State must provide information concerning "any known prior recantation." The Committee felt that it was prudent to incorporate some of the elements from the AG Directive into the court rule to codify those protections in the event the Directive is amended or revoked.

The Committee also included language that requires disclosure of "[t]he case name and jurisdiction of any criminal case known to the State in which the jailhouse informant testified, or in a case in which the prosecution intended to have the informant testify … and whether the jailhouse informant was offered or received any benefit in exchange for, or subsequent to, such testimony." In an effort to protect

against the situation described in the *New York Times Magazine*[2] article involving a serial jailhouse informant who supplied false testimony in exchange for consideration from the prosecution, the Committee included language broad enough to encompass the informant's history of providing testimony as well as situations where that individual received a benefit from the State without having to testify.

The Committee did not feel that it was necessary to include a cross-reference to other paragraphs because all aspects of the discovery rule are still applicable to paragraph (K).

B. Committee Discussion

The Committee was sharply divided concerning the necessity of an amendment to the rule. Some members argued that a rule amendment is necessary because information pertaining to jailhouse informants is often provided too close to trial and not as part of normal discovery. There was also support for a rule amendment that more clearly articulates the type of information that is required to be disclosed in advance of trial, particularly under the current landscape of remote jury selection, which makes last minute modifications to procedures impracticable.

Concerns were raised over disagreements during the discovery phase about what constitutes discoverable information pursuant to Brady v. Maryland, 373 U.S.

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[2] https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html

83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Some members felt that it was important to delineate criteria in the discovery rule because most times the discovery pertaining to jailhouse informants is limited to the informant's statement. Members in support of an amendment emphasized the importance of discovering whether the informant was offered a benefit for their testimony, especially since this information would not necessarily appear in discovery absent a specific mandate in the rule. It was also argued that a lack of uniformity across counties and judges necessitates a rule amendment, particularly since the AG Directive is only binding upon prosecutors and not the court.

Members who opposed the rule amendment urged that revisions to the court rules are not necessary in light of New Jersey's broad discovery requirements for prosecutors to disclose information by rule and as articulated under case law, citing to State v. Hernandez, 225 N.J. 451 (2016). These members were not convinced that this subcategory of witnesses require a granular approach to justify a potential rule amendment for circumstances already covered by the existing rule. Members in the minority expressed concern that there was not an established deficiency that necessitated amending the current rule. Such amendments would disincentivize prosecutors from providing additional information that falls outside of the rule, especially because the AG Directive can impose policy requirements that go beyond the law.

Because of the lack of unanimity, and the significant substantive and procedural concerns identified by members, the Committee voted to form a subcommittee to explore the necessity of an amendment to the New Jersey discovery rule to address jailhouse informants.

The subcommittee reviewed the discovery rule, AG Directive, case law and jailhouse informant laws in other states to inform its recommendation. Subcommittee members in favor of a rule amendment felt that it would be beneficial to specifically articulate the prosecutor's obligation to turn over discovery related to jailhouse informants. They also felt that the current rules impose an undue burden on defense to submit a discovery request to uncover potential jailhouse informants. The majority also recognized that prosecutors may rely on the protective order provision of R. 3:13-3(e) to avoid turning over information that is privileged or would endanger the witness' safety.

The subcommittee minority opposed a rule amendment because they believed that existing case law and R. 3:13-3 already provide guidance to prosecutors with respect to discovery obligations relating to jailhouse informants. Those members also expressed concerns surrounding potential separation of powers issues if the Court limits by court rule who can be called as a witness. The court rules were drafted for general application and amending the rule for a specific category of witness would run counter to the requirement that every witness be subject to the

guidelines established in the court rules. Those members opposed restructuring the court rule around a specific witness type when N.J.R.E. 601[3] assumes witness competence.

The subcommittee majority voted to advance a rule proposal to the full Committee. Members drafted amendments to R. 3:13-3 that were ultimately submitted to the full Committee for a vote. The Committee unanimously supported the subcommittee's proposal with only minor modifications to the proposed rule amendment.

For the reasons noted above, the Committee recommends amendments to R. 3:13-3 as follows.

[3] N.J.R.E. 601: Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the court and any jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) as otherwise provided by these rules or by law.

R. 3:13-3. Discovery and Inspection

(a) … no change.

(b) Post-Indictment Discovery.

(1) Discovery by the Defendant. Except for good cause shown, the prosecutor's discovery for each defendant named in the indictment shall be provided by the prosecutor's office, upon the return or unsealing of the indictment. Good cause shall include, but is not limited to, circumstances in which the nature, format, manner of collation or volume of discoverable materials would involve an extraordinary expenditure of time and effort to copy. In such circumstances, the prosecutor may make discovery available by permitting defense counsel to inspect and copy or photograph discoverable materials at the prosecutor's office, rather than by copying and delivering such materials. The prosecutor shall also provide defense counsel with a listing of the materials that have been supplied in discovery. If any discoverable materials known to the prosecutor have not been supplied, the prosecutor shall also provide defense counsel with a listing of the materials that are missing and explain why they have not been supplied.

If the defendant is represented by the public defender, defendant's attorney shall obtain a copy of the discovery from the prosecutor's office prior to the arraignment. However, if the defendant has retained private counsel, upon written request of counsel submitted along with a copy of counsel's entry of appearance and

received by the prosecutor's office prior to the date of the arraignment, the prosecutor shall, within three business days, send the discovery to defense counsel either by U.S. mail at the defendant's cost or by e-mail without charge, with the manner of transmittal at the prosecutor's discretion.

A defendant who does not seek discovery from the State shall so notify the prosecutor, and the defendant need not provide discovery to the State pursuant to sections (b)(2) or (f), except as required by R. 3:12-1 or otherwise required by law.

Discovery shall include exculpatory information or material. It shall also include, but is not limited to, the following relevant material:

(A) … no change.

(B) … no change.

(C) … no change.

(D) … no change.

(E) … no change.

(F) … no change.

(G) … no change.

(H) … no change.

(I) names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such

expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except as otherwise provided in R. 3:10-3, if this information is not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial; [and]

(J) all records, including notes, reports and electronic recordings relating to an identification procedure, as well as identifications made or attempted to be made; and

(K) the name of any jailhouse informant whom the prosecutor expects to call as a witness at trial. A jailhouse informant for the purposes of this subsection is defined as a person who lacks firsthand knowledge of a defendant's alleged criminal conduct but offers to testify for the State at a trial or hearing that the informant heard the defendant make inculpatory statements while detained or incarcerated in the same facility as the informant. The prosecutor also shall provide the known criminal history of the jailhouse informant, including any pending charges; any records of 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(s) to the jailhouse informant; any information relevant to the jailhouse informant's credibility as required to be disclosed by law or rule, including but not limited to any consideration or promises made to, or sought by, the jailhouse

informant, in exchange for truthful testimony; any prior recantation known to the prosecution in which the jailhouse informant recanted the defendant's statement, to include the time, location and manner of any such recantation; and the case name and jurisdiction of any criminal case known to the prosecutor in which the jailhouse informant testified, or in a case in which the 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.

(2) … no change.

(A) … no change.

(B) … no change.

(C) … no change.

(D) … no change.

(E) … no change.

(3) … no change.

(c) … no change.

(d) … no change.

(e) … no change.

(1) … no change.

(2) … no change.

(f) … no change.

Note: Source--R.R. 3:5-11(a) (b) (c) (d) (e) (f) (g) (h). Paragraphs (b) (c) (f) and (h) deleted; paragraph (a) amended and paragraphs (d) (e) (g) and (i) amended and redesignated June 29, 1973 to be effective September 10, 1973. Paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (b) amended July 22, 1983, to be effective September 12, 1983; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d) and (f) amended and redesignated paragraphs (c), (d), (e), (f) and (g) respectively and former paragraph (e) deleted July 13, 1994 to be effective January 1, 1995; rule redesignation of July 13, 1994 eliminated December 9, 1994, to be effective January 1, 1995; paragraphs (c)(6) and (d)(3) amended June 15, 2007 to be effective September 1, 2007; subparagraph (f)(1) amended July 21, 2011 to be effective September 1, 2011; new subparagraph (c)(10) adopted July 19, 2012 to be effective September 4, 2012; paragraph (a) amended, paragraph (b) text deleted, paragraph (c) amended and renumbered as paragraph (b)(1), paragraph (d) amended and renumbered as paragraph (b)(2), new paragraphs (b)(3) and (c) adopted, paragraphs (e) and (f) renumbered as paragraphs (d) and (e), paragraph (g) amended and renumbered as paragraph (f) December 4, 2012 to be effective January 1, 2013; paragraph (b)(1)(I) amended July 27, 2015 to be effective September 1, 2015; paragraph (b) amended April 12, 2016 to be effective May 20, 2016; paragraph (c) amended August 1, 2016 to be effective September 1, 2016; subparagraph (b)(1) amended July 30, 2021 to be effective September 1, 2021. New paragraph (K) adopted ___ to be effective ___.

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