In-Custody Informant Regulation: National Landscape

This document describes various efforts throughout the country to regulate in-custody informant testimony.

1. **Central Index of In-Custody Informants**: District/county attorneys should have written policies governing the use of in-custody informants and should maintain a central index system with a file on each in-custody informant that includes his criminal history, benefits promised or expected in exchange for testimony, all cases in which he has testified or offered to be a witness and benefits promised or expected in those cases, and other information related to credibility, including history of substance abuse or mental health issues.

   Prosecutors may consider a policy similar to the one adopted by the ***Los Angeles District Attorney's Office*** in 2005. The policy requires approval by an internal committee before an in-custody informant can be used as a prosecution witness. A written request must be made to the committee with information on the evidence being offered by the informant, corroborating evidence, the complete criminal history of the informant, any benefit promised to the informant by any member of law enforcement or employee of the district attorney's office and previous cases in which the informant offered to be a witness or testified. The Los Angeles District Attorney's Habeas Corpus Litigation Team maintains a central index of in-custody informants who have offered to, or who have been used as witnesses. This is one model that has been in place for over a decade, and there may be other practices that improve on this policy.

2. **Pre-trial disclosure requirements**. ***Florida, Illinois, Nebraska and Oklahoma*** have court rules or statutes that specify the types of information related to the credibility of a jailhouse informant that must be disclosed to the defense before trial including: the informant's criminal history, any benefits promised in exchange for testimony, and other cases in which the informant acted as, or offered to act as, an informant and benefits promised in those cases.

Florida (Rule of Criminal Procedure 3.220) Based on the recommendations of the Florida Innocence Commission, the Florida Supreme Court amended Rule of Criminal Procedure 3.220 in 2014 to require that when informants offer testimony—whether or not they are in-custody—the following information must be disclosed by the prosecution: 1) the substance of any statement allegedly made by the defendant about which the informant witness may testify, 2) a summary of the criminal history record of the informant witness, 3) the time and place under which the defendant's alleged statement was made, 4) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony, and 5) the informant witness' prior history of cooperation, in return for any benefit, as known by the prosecutor.[1]

Illinois (725 ILCS 5/115-21 (2009)) Upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a statute imposing disclosure requirements if the prosecution attempts to introduce in-custody informant testimony in capital cases including: 1)

[1] *In Re: Amendments to Florida Rule of Criminal Procedure 3.220., No. SC13_1541* (May 29, 2014).

the complete criminal history of the informant; any deal, promise, inducement or benefit that the offering party has made or will make in the future to the informant; 2) the statements made by the accused; 3) the time and place of the statements and their disclosure to law enforcement, and the names of all individuals present when the statements were made; 4) whether the informant recanted statements; 5) other cases the informant has testified in and any incentives he received for that testimony; and 6) any other information relevant to the informant's credibility.[2]

Nebraska (LB 465 (2008)) A statute was enacted requiring that before informant testimony is admissible in court (whether or not the informant is in-custody), prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant's criminal history, any benefit that has or may be offered, any other cases where the informant testified or offered statements and any benefits received in those cases.[3]

Oklahoma (*Dodd v. State* (2000)): In *Dodd v. State*, the Oklahoma Criminal Court of Criminal Appeals ruled that before in-custody informant testimony is admissible in court, prosecutors must disclose certain information to the defense at least 10 days before trial such as the informant's criminal history, any benefit that has or may be offered, any other cases in which the informant testified or offered statements and any benefits received in those cases.[4]

3. **<u>Pre-trial & pre-sentencing reliability hearings for informants</u>.** Illinois requires pre-trial reliability hearings when in-custody informant testimony is used in capital murder cases and Nevada requires pre-sentencing reliability hearings in certain instances before a jury can hear informant testimony in the penalty phase of a case.

Illinois (725 ILCS 5/115-21 (2009)) Upon the recommendation of the Illinois Commission on Capital Punishment, the legislature enacted a law that requires pre-trial reliability hearings when informants are used in capital murder cases.[5] The statute states "the court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial." The statute directs the court to consider any factors relating to reliability.

Nevada (*D'Agostino v. State (1992))* In *D'Agostino v. State* the Supreme Court of Nevada recognized the inherent problems with informant testimony and ruled that in specific instances during the penalty phase of a case, judges must hold reliability hearings before informant testimony can be heard by a jury. "We now hold that testimony in a penalty hearing relating to supposed admissions by the convict as to past homicidal criminal conduct may not be heard by the jury unless the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission."[6]

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[2] 725 ILCS 5/115-21 (2009).
[3] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).
[4] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000). L.B. 465, 100th Leg., Sess. (Neb. 2008).
[5] 725 ILCS 5/115-21 (2009)
[6] D'Agostino v. State, 823 P.2d 283, 285 (Nev. 1992)

4. **Jury instructions** ***California, Colorado, Illinois, Montana, Oklahoma, Ohio, and Wisconsin*** all require that when in-custody informant testimony is admitted into evidence, juries must receive a cautionary instruction.[7] Below is the jury instruction mandated in Oklahoma by *Dodd v. State*.

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.[8]

5. **Corroboration of Informant Testimony**: California and Texas prohibit criminal convictions based solely on the testimony of an in-custody informant; such testimony must be corroborated with other evidence.

California (Cal. Penal Code 1111.5 (2011)) "The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant shall not be provided by the testimony of another in-custody informant unless the party calling the in-custody informant as a witness establishes by a preponderance of the evidence that the in-custody informant has not communicated with another in-custody informant on the subject of the testimony."

Texas (Tex. Code Crim. Pro. art. 38-075 (2009)) "A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. Corroboration is not sufficient for the purposes of this article if the corroboration only shows that the offense was committed."

[7] The Justice Project. "Jailhouse Snitch Testimony: A Policy Review" (2007).
[8] *Dodd v. State,* 993 P.2d 778, 785 (Okla.Crim.App.2000);