Jailhouse informants are a tool of prosecution which have a concerningly outsized representation in cases of wrongful conviction. Jailhouse informants are detained or incarcerated individuals who provide testimony about a defendant, often about how a defendant confessed to a crime, and who request, receive, or may receive a benefit in return. Informants increase the risk of wrongful convictions for several reasons. First, the actual or perceived promise of leniency, reduced sentences, or other benefits creates strong incentives for an informant to fabricate evidence. Second, because of the secrecy surrounding the use of incentivized witnesses, legal procedures such as cross examination are ineffective at weeding out perjured informant testimony. Third, the use of informant testimony is largely unregulated by state legislatures or courts, despite many documented miscarriages of justice that have resulted from this type of evidence.

Assembly Bill 201 is a reasonable and effective solution to these issues. AB 201 has been built upon the legislative experience of other states, model policy developed by other District Attorneys and the American Legislative Exchange Council, and is supported by a wide range of stakeholders in Nevada. For these reasons, expounded upon in the information provided below, the Rocky Mountain Innocence Center and the Innocence Project respectfully request the Nevada State Senate Judiciary Committee pass Assembly Bill 201.

**Key Issues**

- **Lack of transparency/Potential for constitutional violations:** Defense attorneys cannot effectively utilize built-in safeguards against unreliable jailhouse informants—such as filing motions to suppress unreliable statements and cross-examination—unless the state discloses impeaching evidence on these witnesses.
The U.S. Supreme Court\(^1\) has ruled that prosecutors must disclose discrediting evidence on state witnesses to the defense, including promised benefits and their complete criminal history. When this information is disclosed late, incompletely, or not at all, the accused cannot prepare an adequate defense that raises credibility concerns to the judge and jury.

- **Inherently unreliable informants**: Jailhouse informants have strong incentives to lie because they typically expect leniency or other benefits in exchange for providing information on other inmates.

- **Potential for wrongful convictions**: Nationally, 185 innocent Americans have been wrongfully convicted due to jailhouse informants since 1989.\(^2\) Three Nevada exonerations involved false jailhouse informant testimony

### The Solution: AB201 Overview

**A) Ensures District Attorneys’ Offices maintain records of jailhouse informant testimony and benefits**: Offices should maintain records of each case in which a jailhouse informant provides testimony, and the benefits connected with his/her cooperation. This allows prosecutors to better proactively avoid using unreliable informants.

*National Picture:* Connecticut, Maryland, Nebraska, Oklahoma and Texas require each prosecutor’s office to maintain a central record of jailhouse informant testimony/benefits. Connecticut, Maryland and Oklahoma require prosecutors to report this information in a statewide tracking system.

**B) Clarifies what evidence related to jailhouse informants must be disclosed**: The law should clarify when and what types of jailhouse informant evidence the prosecution needs to disclose to the defense, including: benefits provided for testimony; their criminal history, including charges dismissed in exchange for testimony; and other known cases in which they provided jailhouse informant testimony.

*National Picture:* Connecticut, Florida, Illinois, Maryland, Nebraska, Oklahoma, Texas have laws to specify when and what types of jailhouse informant evidence must be disclosed to the defense.

\(^1\) *Giglio v. United States*, 405 U.S. 150 (1972).

\(^2\) National Registry of Exonerations. 5/22/20

http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA71}&FilterField1=Group&FilterValue1=JI
Wrongful Convictions Involving Jailhouse Informants In Nevada

DeMarlo Berry spent over 23 years in jail and prison for a 1994 Las Vegas murder he did not commit and to which another person would later admit. Despite this, he was picked out from a photo lineup and while Berry was in jail awaiting trial, an inmate named Richard Iden claimed to have heard him confess. Based on Iden’s testimony, Berry was convicted and sentenced to life in prison.

In 2014, Iden admitted that he lied about hearing Berry’s confession and was fed details by two detectives and the prosecution’s investigator. Iden also disclosed several other benefits he received for his testimony that had not been disclosed at trial. In addition, after Berry's conviction a man named Steven Jackson confessed to the murder and confirmed Berry had nothing to do with the crime. In 2016, the newly formed Conviction Review Unit in the Clark County District Attorney’s Office reinvestigated the case and the charges against Berry were dismissed the following year. In 2020, the court issued Berry a certificate of innocence finding Berry to be actually innocent.³

Fred Steese spent 21 years in prison after he was wrongfully convicted of the 1992 murder of Gerard Soules in Las Vegas. Mr. Steese is intellectually disabled and was interrogated for 5 hours without any sleep until he finally signed a confession. In addition, a jailhouse informant testified that Steese had confessed to the murder while both were in the Clark County jail. The informant denied that he had been promised or received any favorable treatment from the prosecution in exchange for his testimony. Years later, Steese’s lawyers would uncover evidence that the prosecution had in fact taken steps to help the informant resolve his own charges and failed to disclose that evidence to the defense. Steese was eventually granted a pardon based on innocence on November 8, 2017.

Legislative History: Efforts to Regulate Jailhouse Informants In Nevada

2008: The Nevada Advisory Commission on the Administration of Justice (ACAJ) examined the issue of informants. The criminal defense bar made the following recommendations:

1. Statutorily require prosecution offices to maintain an internal system, to disseminate to fellow prosecutors and defense attorneys, information for impeaching informants required under Brady.

³ Id.
2. Statutorily require prosecution to disclose in advance of trial any intent to use informants at trial for either the case-in-chief or rebuttal.

3. Statutorily require the corroboration of all informant informants.¹

In response, the Clark County District Attorney’s Office testified that there was no need for legislation requiring prosecution offices to maintain internal systems to disseminate information for impeaching informants because counties already had or were in the process of developing policies. At the time, the Clark County District Attorney’s Office said it was in the process of developing an inducement database and case management system to track rewards offered to informants. The Clark County District Attorney’s Office also testified that other items relative to an informant’s testimony were disclosed in advance of any intent to use informants at trial.⁵

2016: The Las Vegas Review-Journal finds that Clark County DA’s Office has not been tracking jailhouse informants.

The Las Vegas Review Journal investigated the voluntary informant index that the Clark County District Attorney claimed to have been developing in 2008. The publication reported that Clark County’s informant database had just 130 entries, while 330,000 criminal cases were prosecuted in the jurisdiction since 2008.⁶ These numbers suggested that voluntary adoption of informant tracking within the office has not been effective.

2018: Nevada District Attorneys Association votes for voluntary adoption of written jailhouse informant policies by every DA.

The ACAJ formed an Innocence Working Group to examine wrongful conviction issues, including jailhouse informants. While the group did not reach consensus on legislation, the Nevada District Attorneys Association voted to require all offices by January 2019 to adopt written policies on the use of jailhouse informants.⁷ The policy would require the tracking of jailhouse informant cooperation agreements to assist in disclosure of impeachment evidence, which is already constitutionally required under Brady v. Maryland.⁸

2020: Innocence Project survey of Nevada District Attorneys’ jailhouse informant policies shows uneven implementation.

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¹ MINUTES OF THE ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE July 7, 2008

⁵ Id.


⁸ Brady v. Maryland, 373 U.S. 83 (1963)
Between November 20th and December 7th, 2020, the Innocence Project submitted requests through the Nevada Open Records Act for the written jailhouse informant policies of all 17 District Attorney Offices. A summary of responses is below.

- **14 DA Offices responded**: 3 did not respond (*Esmeralda and Storey did not respond*)
- **4 DA Offices reported NOT having written jailhouse informant policies**: Eureka, Mineral, Nye, Pershing.
- **9 of 10 written policies included centralized tracking systems**. Lincoln’s policy states that “an attorney representing the state shall track the use of jailhouse informant testimony and benefits provided,” but does not describe how the materials shall be tracked or whether a centralized tracking system exists.

**Costs of Implementation**: How Have Other States Implemented Tracking Systems & What Did it Cost?

Connecticut enacted a law that establishes the nation’s first statewide jailhouse informant tracking system, which is maintained by the Office of Policy and Management (OPM). Texas, consistent with the Nevada District Attorneys Association’s 2018 policy and the provisions of AB201, requires each district attorney’s office to track each case in which a jailhouse informant testifies and benefits provided in connection with his or her testimony.

Below are the responses to questions about implementation and costs provided by the Office of Policy Management in Connecticut and the Dallas County and Tarrant County District Attorneys’ Offices in Texas.

**Connecticut**

**Overview:**
Effective in October 2019, Connecticut’s law requires each State’s Attorney’s Office to maintain a central record of jailhouse informant testimony/benefits, which is maintained and made available to prosecutors statewide through the Office of Policy and Management (OPM). OPM is the Governor's staff agency in Connecticut and is responsible for policy, planning, budgeting and management of state government.

OPM reported the following information regarding costs/implementation of the statewide jailhouse informant tracking system.

**Describe OPM’s statewide tracking system**: We are using a web/cloud application called *asp.net*. We already had a contract for the asp.net service and created it in-house.
How does the system work?: We worked with the Office of the Chief State’s Attorney to develop an online database that looks like a Microsoft Excel spreadsheet. Prosecutors can use this password protected application to fill in the spreadsheet. The fields within the database include jailhouse informants: first name, last name, date of birth, docket number, district name, summary of testimony, benefits.

How is the data protected?: OPM created a username and password with different permission levels to access and input the information. Each state’s attorneys’ office sent a list of the prosecutors and clerical staff who should be granted access. Users with “clerical” permission can only enter data but cannot view data for any other district other than their own judicial district. Users with “prosecutor” level permission can approve clerical entries, enter their own data, and also view any other entries statewide.

Costs:

- Building the System:
  - Purchase Costs: Because we already had a contract with asp.net for general data needs, there was no additional cost for creating the tracking system.
  - Labor Costs: Our developer estimates that for someone who knows this technology and development from the start, it takes about 25-30 hours. No additional staff needed to be hired and the task of building the database was absorbed into existing workload.

- Maintaining the System:

  No additional staff will be hired to maintain the database system. Since prosecutors are able to input data directly, maintenance should be minimal, and we created the system in a way that allows the Division of Criminal Justice to provide new hires with access. However, the system is still new so the exact hours of labor are to be determined.

Texas

Dallas County District Attorney’s Office (Texas)

Describe your office’s tracking system: Our office is currently using an Excel spreadsheet to track jailhouse informants.

How does the system work?: To comply with a separate criminal discovery law, the office hired a new Disclosure Compliance Assistant District Attorney, and the ADA will be responsible for maintaining the jailhouse informant record. Prosecutors can send the ADA information requests and data on jailhouse informant testimony for the ADA to input.
Costs:
- **Building the System:**
  - *Purchase Costs*: No additional expense.
  - *Labor Costs*: The jailhouse informant tracking database was absorbed into existing staff workloads in the Public Integrity Division. As far as hours of labor required to set up the tracking system, it took maybe an estimate of 8 hours. This includes time to set up the spreadsheet, creating the tracking form to be filled out by ADAs, and creating the policy and protocol for our office’s internal use.

Maintaining the System:

Maintenance of the tracking system has been absorbed into existing staff workload. The labor per month to maintain the tracking system varies, but on average, it would not even be an hour per month.

**Tarrant County District Attorney’s Office (Texas):**

**Describe your office’s tracking system:** Microsoft Excel spreadsheet.

**How does the system work?:** An Assistant District Attorney is responsible for maintaining the jailhouse informant spreadsheet. Prosecutors in the office are able to look up information directly. The ADA will notify prosecutors about a jailhouse informant’s previous testimony when they make an inquiry.

**Costs:**
- **Building the System:**
  - *Purchase Costs*: No additional expense.
  - *Labor Costs*: Approximately 10 hours to create the system, which was absorbed into the ADA’s existing workload.

- **Maintaining the System:**
  
  Estimated 10 hours per month to maintain the system, which will be absorbed into ADA’s existing workload.