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# An Exploratory Study of the Use of Confidential Informants in New Jersey

A Report Commissioned by the American Civil Liberties Union of New Jersey in Partnership with the Criminal Law Reform Project of the American Civil Liberties Union

BY PRINCIPAL INVESTIGATORS

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## Executive Summary

Confidential informants (CIs) currently occupy a central role in law enforcement, particularly in the enforcement of drug laws, where officers, agents and prosecutors consider them indispensable to undercover and other operations. In virtually all types of criminal cases, state and federal sentencing schemes authorize reduced punishment for offenders<sup>1</sup> who provide “substantial assistance” in the prosecution of others. The focus of the current study was drug enforcement. The findings suggest that despite judicial and legislative support for the practice, the use of CIs during the investigation and prosecution of such cases needs substantial review, revision, auditing, and oversight.

While it has long been recognized that the use of criminal suspects to help enforce the law has the potential for significant benefit and abuse,<sup>2</sup> the current findings confirm that innocent civilians may also find themselves under immense pressure to give federal, state, or local authorities information about the criminal activities of their neighbors, friends, or family members. The findings indicate that fear of criminal prosecution, monetary incentives and other inducements may motivate both criminal suspects and non-criminals to provide information that is not totally accurate. Inaccurate information can lead to false accusations and wrongful convictions.<sup>3</sup> And, whether accurate or not, the provision of information may expose informants or their families to a substantial risk of bodily harm.

In some law enforcement agencies, the research revealed a substantial use of information from CIs, rather than independent police work, as part of the routine investigation of drug activity. Reports of this heavy reliance on the use of CIs were coupled with allegations of questionable ethics associated with that use, some of them quite serious. The more serious cases led to diminished confidence in the justice system,<sup>4</sup> and in some instances, substantial expense to taxpayers because of the monetary damages paid to those who were wrongfully accused or convicted.<sup>5</sup> In one municipality (Lower Township, Cape May County), allegations that an officer engaged in the inappropriate use of CI information have led to two waves of dismissals of multiple criminal cases since this research began.<sup>6</sup>

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<sup>1</sup> In New Jersey, certain drug offenders can escape mandatory incarceration sentences, with periods of parole ineligibility, if they “cooperate” with police and prosecutors. Under the *Brimage* Guidelines, this cooperation typically includes acting as an informant for one or more drug related investigations. In all cases, the sentencing scheme itself envisions that the willingness of an offender to cooperate with law enforcement will be considered as a specific mitigating factor at the time of sentencing. N.J.S.A. 2C:44-1(b)12.

<sup>2</sup> Donnelly, 1951; Natapoff, 2004, 2006, 2009.

<sup>3</sup> Warden, 2004.

<sup>4</sup> Schwartz, 2004 and Schulhofer, 1993.

<sup>5</sup> See *Maudsley v. State of New Jersey*, 323 N.J. Super. 579 (App. Div. 1999) and 357 N.J. Super. 260 (App. Div. 2003) and *Crane v. Sussex County Prosecutors Office*, Civ. A. No. 08-1641, 2010.

<sup>6</sup> Degener, 2010.

This study revealed that while written policies regarding the use of CIs exist at the state, county, and municipal levels of government, at the state level, the policies are disjointed, spread throughout various documents. The counties' policies differ from each other, sometimes substantially. And, contrary to the professional standards set by the Commission on Accreditation of Law Enforcement Agencies (CALEA), written policies do not exist in all of the municipal police departments. The research also revealed that even among the agencies intended to be governed by written policies, line officers are neither uniformly aware of the existence or terms of such policies, nor trained in them, leaving room for intentional and unintentional violations. Among law enforcement agents — both police and prosecutors — there was no clear agreement as to whether the written policies established by the Office of the New Jersey Attorney General are intended to be mandatory and binding on all agencies in the state or whether they are merely advisory. There also do not appear to be uniform, formal state, county, or municipal procedures for disciplining behavior among law enforcement that violates written CI policies.

Based on these and other findings, the authors of this report conclude that the establishment of a mandatory uniform system of minimum standards for regulating and monitoring the use of CIs is an essential step toward improving the quality of justice within the state. In our opinion, this system can be created mainly by consolidating and modifying policies and practices that currently exist in some combination at the state, county, or municipal levels.<sup>7</sup>

In consultation with the ACLU, the authors have developed a set of broader recommendations that appear beginning on page 59. We believe that the adoption of such recommendations will help make law enforcement more effective, limit misconduct, promote integrity and professionalism, and ensure the well-being of law enforcement officers, civilian informants, and society at large.

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<sup>7</sup> See for example the policy developed by the Morris County Prosecutor's Office, which could serve as a possible model policy, included here as Appendix O. Modifications must include, but are not limited to: 1) a uniform training component that meets or exceeds CALEA standards and provides for periodic

in-service re-training; 2) a clear designation of the entity responsible for ensuring that the minimum standards are consistently followed and documented; and, 3) a mechanism for enforcing the consolidated and revised policies, including a well-defined set of consequences for failure to follow them.

## Introduction

### *Why Study Law Enforcement's Use of Informants?*

For as long as there have been organized societies, authorities have relied on civilian informants to help apprehend, investigate, and prosecute perpetrators of crime. The United States Supreme Court observed that “Courts have countenanced the use of informers from time immemorial.”<sup>8</sup> The use of CIs is not simply seen as acceptable; in some contexts it is seen as necessary. “[I]n cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them.”<sup>9</sup>

Under modern sentencing practices, such arrangements have become quite formal. The Federal Sentencing Reform Act of 1984 expressly allows defendants to receive lesser sentences based on their “cooperation” with prosecutors.<sup>10</sup> In New Jersey, similar consideration is shown to defendants under the *Brimage* Guidelines.<sup>11</sup> In particular, *Brimage* allows prosecutors to offer reduced pleas to defendants in exchange for their cooperation in drug cases that would otherwise carry mandatory prison or jail time. Plea offers may include reductions in sentences, dismissal of some charges or counts, or reduction of the level of the offense(s) originally charged. The arrest of such defendants typically begins with an encounter between them and state, county, municipal, or federal police agents (or a task force representing all four). With their freedom at stake, many people who are arrested may see “cooperation” as the only means of avoiding incarceration. Since “cooperation” has been officially designated as an acceptable means of receiving more lenient treatment under the justice system, people who are arrested may be advised by police, prosecutors, and their own lawyers to do so. “Cooperation” may involve serving as a witness at a criminal trial, but most often involves providing information or assistance to the police or prosecutor under conditions of anonymity, or the promise thereof, to increase the likelihood that a single individual can be used in this capacity more than once.

Because the information or assistance provided to police and prosecutors is done secretly, it is often difficult to assess its credibility until and unless it results in a successful prosecution of someone else. As the government has waged a “War on Drugs” across the country, law enforcement’s reliance on these secret police-civilian relationships, where the

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<sup>8</sup> *Hoffa v. United States*, 385 U.S. 293, 311, (1966) (quoting *United States v. Dennis*, 183 F.2d 201, 224 (2nd Cir.1950), *aff’d*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951)).

<sup>9</sup> *Id.*

<sup>10</sup> United States Sentencing Guidelines § 5K1.1 states that, “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” U.S.S.G. § 5K1.1.

<sup>11</sup> first developed in 1998 and revised in 2004

civilian acts as a confidential informant (CI), has resulted in tragedies and miscarriages of justice that warrant further investigation, tighter regulation of existing policies and practices, and the implementation of reforms.<sup>12</sup>

This report:

- Documents the state of New Jersey’s CI system
- Identifies problem areas
- Highlights “best practices”
- Recommends model operating procedures for the recruitment, maintenance, and deployment of CIs.

This study is based on information from several sources, including a review of written CI policies submitted by law enforcement agencies;<sup>13</sup> responses to a survey of law enforcement personnel about awareness and adherence to CI policies; a review of cases and interviews with private attorneys and attorneys<sup>14</sup> from the New Jersey Office of the Public Defender; media accounts related to the use of CIs; and in-depth interviews with individual community members about their experiences with law enforcement officials related to the recruitment, maintenance, and use of civilians as CIs. It also relies on a continuing and fruitful dialogue among the authors, staff of the American Civil Liberties Union of New Jersey, and members of the New Jersey County Prosecutors’ Association.

By design, the working relationship between law enforcement agents and confidential informants is shrouded in secrecy, which made the attempt to study that relationship quite difficult. Both law enforcement agents and civilians were reluctant to discuss the topic. The information reported here involves the review of 56 drug case files, survey responses from

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<sup>12</sup> See cases involving the 2006 death of 92-year-old Kathryn Johnston in Atlanta, Georgia (CNN-US, 2006); the 2008 death of 23-year-old Rachel Hoffman in Tallahassee, Florida (Taylor and Corbett, 2008); the 2008, death of Det. Jarrod Shivers in Chesapeake, Virginia (Virginia Pilot, 2008); and, the 2004 death of Deshawn McCray in Newark, New Jersey (Kocieniewski, 2007). In some places, like Tulsa, Oklahoma, an internal

investigation led to policy changes (Gillham, 2010). Elsewhere, like in Tallahassee, only tragedy brought about change. (Poltilove, 2009)

<sup>13</sup> The Office of the New Jersey Attorney General, County Prosecutors Offices, and municipal police departments.

<sup>14</sup> In some instances investigators from the Public Defender’s Office were also part of the interviews.

59 law enforcement personnel, 66 interviews with community members, and interviews with private or public defense attorneys from 19 of New Jersey's 21 counties.<sup>15</sup> Written policies or forms were received from the Attorney General's Office and 78 municipal police departments. Written policies beyond those established by the AG were received from 16 of the 21 county prosecutors' offices.

Given that our sample sizes are small, this report does not attempt to generalize all findings to all locations in the state. It is intended as a first look at this vital area of law enforcement practice. Through the use of mixed data collection methods, the study has captured some limited information about CI use in each of the 21 counties. However, it cannot be used to assess how frequently any of the reported activity occurs. As we explain later in this report, some prosecutors' offices and police departments already have policies in place designed to effectively control and oversee CI usage. However, these models have not been adopted statewide and there has been no systematic assessment of how they work in practice. The review of information from the multiple sources utilized in this study revealed some "best practices" as well as a number of problem areas.

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<sup>15</sup> An exact number cannot be given because attorney interviews took place both individually and in groups. (No attorney interview information is recorded for Gloucester or Somerset counties).

## Summary of Overall Findings

### There is Insufficient Regulation and Oversight of the CI System At All Levels of New Jersey Law Enforcement

There is no mandated uniform statewide policy or procedure for recruiting, cultivating, and using CIs. While written policies exist at the state, county, and municipal levels, there is disagreement among authorities as to whether the state policy is mandatory or merely advisory. There is little consistency between the existing written policies, and there is evidence of insufficient oversight to achieve compliance with those policies.

The use of informants in drug law enforcement in New Jersey was found to be largely informal, undocumented, and unsupervised, and therefore vulnerable to error and corruption. Despite the fact that national standards established by the Commission on Accreditation for Law Enforcement Agencies (CALEA) require police agencies to have *written* policies governing both uniformed officers and officers conducting specialized investigations (e.g., gang units, stolen car units and narcotic units) as a condition of accreditation,<sup>16</sup> we found a dearth of such policies, and where policies do exist, we found significant ignorance or misunderstanding among law enforcement personnel intended to be guided by those policies.

There is apparently no statewide database of information to record how CIs are recruited, cultivated, or used. The State Police maintain an electronic database of their own informant pool, but county and local governments do not appear to have direct access to that data, nor does there appear to be a policy for granting state police access to county and municipal databases.<sup>17</sup>

There is apparently no central database of information about the role specific informants have played in drug arrests, prosecutions, or case outcomes. To the best of our knowledge, the Promis/Gavel system, which provides information about all court cases, is not currently configured to produce annual reports of this information.<sup>18</sup>

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<sup>16</sup> CALEA, 1998, p. 42-3; Schreiber, 2001.

<sup>17</sup> It should be noted that some counties have created databases that provide centralized information on the municipal and county level; but there exists no inter-county system for data sharing. Counties that have created such databases have found them to be useful tools to ensure policy compliance and increase the likelihood that registered CIs provide information that is reliable.

<sup>18</sup> The collection of systematic data about the criminal justice process can improve its quality. At least one author has advocated for “a workable facility for collecting and disseminating detailed, factual, organizational accident accounts of helpful errors” in the criminal justice system and the use of that data to drive reforms. (Doyle, 2010 (*From Error to Quality*); see also Doyle, 2010 (*Learning From Error*)). Of course, a central database is but a first step in such a process, and New Jersey lacks such a database.

Despite efforts by the former New Jersey Attorney General in 2002,<sup>19</sup> we were unable to confirm the existence of any central database containing information about the number of search warrant applications submitted to the courts in cases that involve the use of CIs.

Accounts from media sources, police officers, public defenders, and informants revealed that the shortcomings outlined above have resulted in the following recurring problems:

**Manufacturing and Overlooking Criminal Conduct** — Some law enforcement officers overlook the criminal conduct of CIs under their supervision. In addition, police officers have allowed CIs to participate in crime with other civilians and then arrested only the non-informant. In cases where a CI is encouraged to induce a civilian to engage in criminal activity, those actions might validly be subject to claims of entrapment.

**Financial Abuse** — Interviews revealed that some police agents use personal money or money confiscated from criminal suspects to fund CIs despite written policies prohibiting these practices. Engaging in such practices allows individual officers to recruit and deploy CIs without their departments' knowledge and outside the appropriate oversight — behavior that is also expressly prohibited by existing written policies.

**Physical and Verbal Abuse** — We learned from the community interviews that law enforcement officers sometimes assault or threaten civilians in order to coerce them or their friends and relatives to serve as CIs. Based on information provided by community members, who admitted to acting as CIs, “cooperation” achieved through such means has led individuals to fabricate information. This practice, while seemingly rare, is criminal. Reports of verbal abuse were more prevalent than reports of physical abuse. The reported verbal abuse included derogatory name calling and threats of civil action (such as child removal) if civilians refused to act as informants.

**“Burning” the CI** — Police officials fail to sufficiently safeguard information about the identities and locations of CIs or about their relationships with the police, thereby exposing civilians to risk of harm. At times, CIs perceive the “burning” as intentional punishment

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<sup>19</sup> On August 23, 2002, then First Assistant Attorney General Peter Harvey issued a memorandum in response to Attorney General Law Enforcement Directive 2002-2 issued by then Attorney General David Samson. Directive 2002-2 addressed “Approval of Search Warrant Applications, Execution of Search Warrants, and Procedures to Coordinate Investigative Activities Conducted by Multiple Law Enforcement Agencies.” With the August 23rd memorandum, Harvey distributed a sample “search warrant approval form” designed to

record information about search warrant applications including whether or not the “investigation involved [a] confidential informant or source” (item number twelve). To the best that these researchers have been able to determine, this form was never utilized. Or, if utilized, the information from this form was never systematically collected and entered into a state maintained database. The memorandum and form are included here as Appendix A.

for failing to cooperate as expected; other times it appears to be inadvertent — police or prosecutors carelessly make verbal statements or gestures in the presence of others (outside the police-informant relationship) from which an inference can be made that the civilian is “working for” the police.

**Use of Unreliable Informants** — Police survey responses and community interviews indicate that police sometimes take CIs at their word without first carefully and independently corroborating the veracity of their statements before attempting to make an arrest. Incentives offered to CIs, including leniency in their own criminal cases, increase the risk that CIs will provide unreliable information. The prevalent and repeated use of drug-addicted civilians as CIs increases the risk that the information they provide may be unreliable.

**Misuse of Juvenile Informants** — There is currently no absolute ban on using children as CIs. Current state, county, and municipal policies include age restrictions and requirements such as parental or prosecutorial consent prior to using juveniles as CIs,<sup>20</sup> but the policies are not uniform across the three levels of government. This means police may use underage persons as CIs, in some cases without consulting the juvenile’s attorney or legal representatives. Juvenile CIs by virtue of their age are even more vulnerable than the general population, when dealing with law enforcement and the criminal justice system.

**“Legal” Coercion** — Police “squeeze” criminal defendants by threatening them with additional charges or counts related to their own cases if they do not “cooperate” by becoming CIs.

**Using Big Fish to Catch Little Fish** — Police or prosecutors occasionally give upper-level drug dealers, traffickers, and manufacturers more lenient treatment because they can “give up” numerous less-serious offenders in the ranks below them. This means that the more culpable leaders of drug networks — the “kingpins” — may get less severe punishment than underlings who play a lesser role in the drug trafficking operation.<sup>21</sup>

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<sup>20</sup> The Attorney General Guidelines prohibit the use of juvenile informants under age 12 and require written parent/guardian consent for juvenile informants under age 18.

<sup>21</sup> This is a problem recognized in the federal system (see Schwartz, 2004 and Schulhofer, 1993). In New Jersey, the revised *Brimage* Guidelines are particularly designed to prevent such a scenario. In a July 15, 2004 letter from then Attorney General Peter C. Harvey, it is noted that,

“...the revised [*Brimage*] Guidelines will help to ensure that sentences imposed under New Jersey’s drug laws are fair and proportionate, reflecting the nature and seriousness of the offense and reserving the sternest punishment for the most culpable and dangerous drug offenders.” The revised guidelines represent a shift from the original guidelines created in 1998. The earlier guidelines were found to be inadequate in reducing disparities and achieving proportional sentencing.

Although procedural changes were made in 2004 to limit such situations in New Jersey,<sup>22</sup> some public defenders interviewed during this study reported that this situation still occurs, though less frequently.

**Failure to Protect the Safety of Lower-Level Informants** — The practice of allowing, encouraging, or coercing low-level offenders to actively participate in the investigation and apprehension of more serious or higher-level offenders exposes low-level offenders, their families, and their friends to the risk of serious physical harm if their identities become known. As reported in the public defender interviews, mere motor vehicle traffic violators were used in some cases to infiltrate criminal enterprises run by interstate drug traffickers.

**Failure to Put Agreements in Writing** — State guidelines require that cooperation agreements between the state and a defendant facing sentencing for a drug crime be in writing, pursuant to the Attorney General mandates that bind county prosecutors (the “*Brimage* Guidelines”) (See Appendix B).<sup>23</sup> There is substantial evidence that, with the exception of a few counties, this requirement is often not followed. In addition, the *Brimage* requirements do not apply in a variety of other contexts where the state seeks and obtains cooperation from witnesses. There is little evidence that written agreements are used in these other contexts, and it appears that New Jersey law enforcement officials consistently fail to comply with the dictates of *Brimage* when written cooperation agreements are required. In all contexts where CIs are used, the absence of a written agreement pits a CI’s word against that of a law enforcement agency, leading to disputes about what promises were made in return for cooperation, as well as the nature and duration of the expected cooperation.<sup>24</sup>

**Circumventing Search Warrant Requirements** — In urban areas, according to community respondents, CIs are sometimes used in place of search warrants to gain access to dwellings that the police believe contain evidence of drug sales. Rather than apply for a search warrant, the police send an informant to make a purchase at a residence they suspect of drug involvement. When an occupant opens the door to conduct a hand-to-hand transaction, the police push their way into the residence and conduct a search of the entire premises, not just the area within the arrestee’s immediate reach.

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<sup>22</sup> In New Jersey, the revised *Brimage* Guidelines are particularly designed to prevent scenarios in which the more culpable get dramatically less punishment because they provide information about the less culpable. See, supra footnote 21.

<sup>23</sup> Revised Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12, Attorney General Law Enforcement Directive 2004-2 Section 13 (July 15, 2004).

<sup>24</sup> This was a common complaint among the Public Defenders who were interviewed.

**Anonymous Accusers** — Several of the public defenders interviewed stated that they sometimes questioned the veracity of a CI's claim against a client or even whether a CI actually was involved in a particular investigation. Under the general legal rule, applicable in both federal and state courts, CIs with information that relates directly to a defendant's guilt or innocence cannot remain anonymous and may be called to testify.<sup>25</sup> In practice, the public defenders and private attorneys reported that they rarely succeed in compelling the disclosure of an alleged CI's identity.<sup>26</sup> In the rare case, where such a motion is successful, prosecutors elect to dismiss charges rather than reveal information about the informant.

**Street-Level Recruitment** — When police officers are allowed to recruit a CI on the street in lieu of arresting him or her, it increases their use of CIs and precludes the oversight mandated by written policies. The unregulated recruitment of individuals on the street and their participation in the act of informing undermine community cohesion and faith in fair law enforcement.<sup>27</sup>

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<sup>25</sup> *Roviaro v. United States*, 353 U.S. 53 (1957).

<sup>26</sup> See generally *State v. Surles*, No. A-4275-07T4, slip op. at 4 (N.J. App. Div. Jan. 23, 2009) ("The legislative policy of New Jersey favors protecting the identity of confidential informants in criminal cases, in recognition of their indispensable role in effective enforcement of the law"). There were a few reports of cases being dismissed because the police and prosecutor's office did not want to reveal the identity of the informant, in the rare instances where the motion to compel the identity was successful. In New Jersey, the disclosure of a confidential informant's name is rare, and is generally limited to

cases where the CI is a witness in the criminal trial (not just someone who provided investigative tips) and was an active participant in the underlying criminality, or where an entrapment defense is "reasonably plausible." See, e.g., *State v. Florez*, 261 N.J. Super. 12, 22-25 (App. Div. 1992), *aff'd*, 134 N.J. 570 (1994). Courts have also mandated the release of informants' names in civil cases alleging police and/or informant misconduct. See, e.g., *D'Orazio v. Washington Township*, 2008 WL 4307446 (D.N.J. Sep. 16, 2008).

<sup>27</sup> Natapoff, 2004, 2006 and 2009.

## Part I: Confidential Informant Policy in New Jersey

New Jersey's Attorney General (AG) has advisory<sup>28</sup> policies on confidential informants, which appear for the most part, in three locations:

- The *New Jersey Prosecutor's Manual (Prosecutor's Manual)*, published by the Division of Criminal Justice on January 2, 2001, specifically addresses CIs in the "Policy On the Use of Informants," contained in Section 21.8 under the heading "Investigations" (see Appendix C).
- The *Prosecutor's Manual*, Section 9.2, covers the accounting records and procedures for "Confidential Informants and Confidential Cooperating Witnesses." (See Appendix D); and
- The *New Jersey Law Enforcement Officer's Reference Manual: Handling Juvenile Offenders or Juveniles Involved in a Family Crisis* covers the use of CIs under age 18 in Section 3, titled "Law Enforcement Guidelines on the Use of Juveniles as Informants" (see Appendix E). When the use of juvenile informants takes place within schools, law enforcement action is governed by two additional policies — a) the *State Model Agreement between Education and Law Enforcement Officials* and b) chapter 5 of the *New Jersey School Search Policy Manual*. (See Appendix F).<sup>29</sup>

<sup>28</sup> In a series of telephone interviews, an attorney with the Attorney General's office indicated that the *New Jersey Prosecutor's Manual* (see Appendix C for Section 21, the January 2, 2001 edition) serves as "only a reference tool, and is not a collection of directives or guidelines." Indeed, the Preface to Volume 1 of the *Prosecutor's Manual* expressly states:

The manual is a sourcebook for an efficient and professional development of the Prosecutors' Offices in the State. It is not a collection of guidelines or directives... Procedures or practices recommended by the authors of individual sections are not intended to be construed as newly issued mandatory procedures or directives. [The manual] does not create any rights or promises. Nor does it vest enforcement rights in any person claiming non-compliance or deviation from the recommended policies and practices.

It is noted, however, that the wording in the policies related

to juveniles appears mandatory. For example, section 21.8.4(6) requires written consent of a parent or legal guardian before using an informant under age 18. Section 3.3.1 states that "under no circumstances shall a juvenile under the age of 12 be used as a juvenile informant" (at p. 87). And, chapter five of the *School Search Policy Manual* reads "...in no event should a student be recruited to infiltrate a gang or criminal operation or to go 'undercover'" (at p. 163). Similarly, in a telephone interview with another law enforcement official it was noted that, by virtue of judicial decisions, the Attorney General policies all have the effect of law as opposed to mere advice.

<sup>29</sup> This manual was produced in 1998 under former Attorney General Peter Verniero. In a footnote, page three of section 21.8 of the *Prosecutor's Manual* makes reference to "See Section 21.9, *Informants-Juveniles*." However, in all the documents that have been made available to the researchers, Section 21 ends at 21.8.15. Therefore, our discussion of guidelines for the use of juveniles as informants is based on the documents in Appendices C, D, E, and F.

The AG’s policy is problematic in two respects. Although section 21.8 establishes that the policy is intended to create “uniform” and “minimum” standards,<sup>30</sup> there is confusion as to whether the section is currently an advisory or mandatory policy and whether violations incur any disciplinary or other consequences. In addition, because it is spread over multiple documents, when both adult and juvenile informants are considered, the AG policy (or more accurately policies) has generated confusion among law enforcement agencies and officers. The solution, as we detail further in this report, is for the AG to issue specific, detailed, and mandatory policies enforceable by appropriate sanctions in a single comprehensive document to govern all law enforcement agencies statewide.<sup>31</sup>

### Overview of the Definition of a Confidential Informant and Applicable Policies

Under section 21.8.2 of the *Prosecutor’s Manual*, an informant is defined as:

**an individual who furnishes information purporting to disclose a violation of the laws of this State or of the United States to a representative charged with the duty of enforcing such laws; and that said individual’s identity is to remain confidential.**

The section goes on to note that informants may be: a) criminals, b) associated with criminals, or c) members of the legitimate public.<sup>32</sup>

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<sup>30</sup> The introduction to Section 21.8 of the *Prosecutor’s Manual* notes the need to “formulate guidelines to establish **uniform** [emphasis added] standards for informants and for law enforcement personnel when an informant relationship exists.” Section 21.8.1 goes on to state that, “[T]hese guidelines... are intended to establish a **minimum** [emphasis in original] standard of conduct for all law enforcement personnel.”

<sup>31</sup> New Jersey state law “provide[s] 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.” N.J.S.A. 52:17B-98. The Attorney General, however, has not always used these powers to the utmost; in some policy areas, compliance by local law enforcement is required and in some areas, substantial local discretion is preserved.

See supra footnote 28 and accompanying text. As an additional example, see the Attorney General’s Internal Affairs Policy and Procedures, page 11-5 of which sets forth several “policy requirements which the Attorney General has determined are critical in nature and must be implemented by every law enforcement agency.” The Policy and Procedures simultaneously declare that, “the manner in which these mandates must be implemented is a decision that is left to the discretion of individual law enforcement agencies.” Regardless of the desirability of local discretion in other policy areas, this research shows that there is a need for uniform policy with regard to CIs. For examples of more expansive claims of Attorney General authority, see *infra* footnote 92.

<sup>32</sup> The section distinguished this type of informant from a confidential cooperating witness (CCW) whose identity is shielded by the law enforcement agency for some period of time but whose identity may ultimately be disclosed during a criminal trial or civil litigation. See also footnote 26.

Section 21.8 includes 15 different subsections with multiple provisions, which, when combined with the accounting and juvenile policies mentioned previously, creates a state-level “policy” on the use of CIs that is quite extensive. Some highlights from this collection of documents include the following:

- Informants are not employees of law enforcement agencies and carry no police powers.
- Responsibility for the control and use of an informant is an agency function, not a personal function of individual officers.
- The identities of all informants should be made known to the supervisors designated for that purpose.
- All CI relationships should be documented in the agency’s confidential records established for that purpose.
- Motivation and reliability of informants must be evaluated by police agencies.
- Agencies should not make promises about prosecutorial consideration to informants without approval from the county prosecutor’s office.
- If an informant is under age 18, written consent from parents/guardians is required.
- Juvenile informants should be used only when there is no practicable alternative.
- Juveniles under the age of 12 may not be used.
- All monetary transactions with informants must be documented on the appropriate forms.
- All contact with criminal informants or informants who are receiving consideration (monetary or otherwise) must be documented.
- Informants are not authorized to initiate any plans to commit criminal acts.
- Informants are never to participate in any acts of violence.
- Agencies are not to take any action to conceal crime committed by their informants.
- Information from informants should be documented on approved forms.

- All personal data on CIs, including identifying code number, must be maintained by the agencies using them.

(See Appendices C, D, E, and F for full text.)

### Case Law on the Use of Confidential Informants

Although law enforcement policy throughout the United States supports the practice, New Jersey courts have recognized the inherent pitfalls of confidential informant use.<sup>33</sup> As referenced above, *State v. Brimage*<sup>34</sup> established guidelines requiring that cooperation agreements between the state and a defendant facing sentencing for a drug crime must be in writing. Significantly limiting the *Brimage* Guidelines, however, is the requirement that cooperation agreements only apply to cases in which prosecutors are officially negotiating a plea agreement in exchange for either information or testimony at trial — and not to the countless other instances in which police, not prosecutors, recruit informants to participate in undercover investigations or to provide information at the street level. The *Brimage* Guidelines apply, however, anytime a law enforcement agency seeks ongoing cooperation from a person pending sentencing on a *Brimage*-eligible offense. The AG’s policy and several of the county and municipal policies expressly indicate that police cannot make promises to informants, especially about the prosecutorial outcome of specific cases, without approval of the prosecutor’s office. The written agreements under *Brimage* are designed to specifically detail what a civilian is required to do and what consideration he expects in return for his or her performance.

While *Brimage* and other legislative and judicial outcomes expressly support the use of informants and the information that they provide, the New Jersey Supreme Court has also acknowledged potential issues related to the quality of information provided by informers. In *Wildoner v. Borough of Ramsey*, the court explained why the word of a criminal CI is generally less trustworthy than that of a citizen witness. The court noted that:

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<sup>33</sup> New Jersey courts also recognize the law enforcement benefits of the use of CIs. See, e.g., *State v. Milligan*, 71 N.J. 373, 381 (1976) (noting that “informers serve an indispensable role in police work”).

<sup>34</sup> 153 N.J. 1 (1998). In *Brimage*, the New Jersey Supreme Court instructed the Attorney General to promulgate guidelines (for use by county prosecutors) to ensure statewide uniformity in tendering plea offers that waive or reduce an otherwise mandatory term of imprisonment and parole ineligibility imposed upon conviction of certain drug offenses under N.J.S.A. 2C:35-12.

**A report by a concerned citizen, however, generally has not been viewed with the same degree of suspicion that applies to a tip by a confidential informant. “Different considerations obtain... when the informer is an ordinary citizen.”... There is an assumption grounded in common experience that such a person [a concerned citizen], in reporting criminal activity, would be motivated by factors which are consistent with law enforcement goals... Information given by the criminal informant is usually given in exchange for some “concession, payment or simply out of revenge against the subject,” whereas an ordinary citizen acts with “an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information.”<sup>35</sup>**

## County and Municipal Policies on Confidential Informants

From January 2007 to September 2009, the American Civil Liberties Union of New Jersey submitted Open Public Records Act (OPRA) requests to the 21 county prosecutors’ offices and 93 municipal police departments in an effort to obtain copies of their policies pertaining to the use of informants.

Each law enforcement agency was asked to provide:

- “All policies, procedures, rules, and/or memoranda regarding the use of confidential informants”; and
- “Other documents, not included in the request above, that guide your use of confidential informants.”

The responses to the OPRA requests illustrate the confusion among law enforcement agencies about CI policy. (See Table 1, below) Counties and municipalities which responded that they follow the “AG’s policy” provided or cited a variety of different sources for that policy. In response to the OPRA requests, many agencies provided

<sup>35</sup> *Wildoner v. Borough of Ramsey*, 162 N.J. 375, 390-91 (2000).

copies of only Section 21.8 of the *Prosecutor's Manual* as their source of the AG's policy. A few agencies provided copies of Section 21.8 and Section 3 (on juveniles) of the *Law Enforcement Officer's Reference Manual*, while others provided copies of Section 21.8 and Section 9 (accounting procedures) of the *Prosecutor's Manual*. Still others provided copies of only Section 3 of the *Law Enforcement Officer's Reference Manual*. And, one county prosecutor's office provided only a copy of Section 9 of the *Prosecutor's Manual*.

To confuse matters further, a few counties and municipalities provided or cited Chapter Five of *The New Jersey School Search Policy Manual* on "Informants and Confidential Sources of Information" in response to the OPRA requests. With the state's guidance spread across such a range of documents, it is little wonder that there is confusion about CI policy in the state.

With such a muddled state of affairs regarding policy at the state level, some counties and municipalities have formulated policies of their own. Sixteen of the 21 counties surveyed stated they have their own written policies regarding the use of CIs and do not rely solely on the policies established by the AG's office (Atlantic, Bergen, Burlington, Camden, Cape May, Essex, Gloucester,<sup>36</sup> Hunterdon, Middlesex, Monmouth, Morris, Ocean, Salem, Sussex, Union, and Warren). Four counties stated that they follow the AG's policy only (Cumberland, Hudson, Passaic, and Somerset). One county (Mercer) did not make a statement about following the AG guidelines but did send a copy of Section 9 (and nothing else). (See Appendix G for a matrix of policy provisions and the counties in which they apply.<sup>37</sup>)

Some of New Jersey's municipalities have no CI policy in place; others have CI policies that originate from different sources. Of the 93 municipalities to which OPRA requests were submitted, 30 stated that they follow a combination of the AG's policy, their county's policy, and their own policy; 21 stated that they have no policy in place; three sent forms without specifying their origin; and 11 municipalities declined to respond. Twenty-four municipalities provided copies of their written policies, exclusive of AG or county prosecutors' documents. (See Appendix H for a matrix of municipalities' policy provisions.) Four other municipalities responded with answers not relevant to the OPRA request made.

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<sup>36</sup> Received in June, 2010; became effective July, 2004.

<sup>37</sup> Due to the late receipt of Gloucester's policy, Appendix G reflects that County's adherence to the AG policy only.

**Table 1. Municipal responses to Open Public Records Act Requests for Confidential Informant Policies**

RESPONSE	NUMBER OF RESPONSES
<b>Did not answer</b> <sup>38</sup>	<b>11</b> Bayonne (Hudson), Deptford (Gloucester), Bridgeton (Cumberland), Dunellen (Middlesex), Englewood (Bergen), Hackensack (Bergen), Hamilton (Mercer), Magnolia (Camden), Mount Laurel (Burlington), Paramus (Bergen), Penns Grove (Salem)
<b>Combination of own or state/county policy</b> <sup>39</sup>	<b>30</b> Atlantic City (Atlantic), Berkeley (Ocean), Brick (Ocean), Bridgewater (Somerset), Camden (Camden), Clifton (Passaic), East Brunswick (Middlesex), Franklin (Somerset), Gloucester City (Camden), Linden (Union), Mahwah (Bergen), Middletown (Monmouth), Montclair (Essex), Neptune (Monmouth), North Bergen (Hudson), North Brunswick (Middlesex), Nutley (Essex), Ocean City (Cape May), Ogdensburg (Sussex), Pennsville (Salem), Salem City (Salem), Seaside Heights (Ocean), Stillwater (Sussex), Toms River (Ocean), Union Beach (Monmouth), Vernon (Sussex), Washington Borough (Sussex), Watchung (Somerset), Wayne (Passaic), West New York (Hudson)
<b>Forms only</b>	<b>3</b> Long Branch (Monmouth), New Brunswick (Middlesex), Passaic (Passaic)
<b>No policy</b>	<b>21</b> Andover (Sussex), Beachwood (Ocean), Byram (Sussex), Cherry Hill (Camden), Dover (Morris) Edison (Middlesex), Elizabeth (Union), Garfield (Bergen), Hardyston (Sussex), Kearny (Hudson), Jackson (Ocean), Lakewood (Ocean), Maplewood (Essex), Paterson (Passaic), Pemberton (Burlington), Perth Amboy (Middlesex), Sayreville (Middlesex), Stanhope (Sussex), Teaneck (Bergen), Union Township (Union), Washington Township (Warren)
<b>Has own policy</b>	<b>24</b> Asbury Park (Monmouth), East Orange (Essex), Evesham (Burlington), Fort Lee (Bergen), Howell (Monmouth), Irvington (Essex), Jersey City (Hudson), Lodi (Bergen), Manchester (Ocean), Maple Shade (Burlington), Newark (Essex), Parsippany-Troy Hills (Morris), Piscataway (Middlesex), Ramsey (Bergen), Seaside Park (Ocean), Sparta (Sussex), Stafford (Ocean), Tinton Falls (Monmouth), Union City (Hudson), Vineland (Cumberland), Wall (Monmouth), West Orange (Essex), Winslow (Camden), Woodbridge (Middlesex)
<b>Other</b>	<b>4</b> South Harrison (Gloucester; response related to IA, not CIs), Old Bridge (Middlesex; nonresponsive and irrelevant to question asked), Bloomfield (Essex; response made, records not located), and Millville (Cumberland; response made, records not located)

<sup>38</sup> Bayonne and Mount Laurel denied the OPRA request claiming that the requested information is confidential and exempt from disclosure under *N.J.S.A. 47:1A-1.1*. This was also the initial response from two of the county prosecutor's offices.

<sup>39</sup> Atlantic City and Bridgewater both initially responded that the material requested was exempt from the OPRA request. See note 38. These responses additionally highlight the confusion in the state over CI policy.

The AG's approach to CI regulation has resulted in inconsistent county and municipal policies.<sup>40</sup> The inconsistency is reflected in the field; there is confusion among law enforcement personnel about the substance of CI policy. Just as the *Brimage* Guidelines were put in place to ensure statewide uniformity in tendering plea offers in drug cases, we recommend that the AG's policies on the use of CIs be consolidated into a single document, be made more comprehensive and clearly state that they constitute the mandatory **minimum** standard for all law enforcement agencies in the state. Since some county and municipal law enforcement agencies have more comprehensive and protective CI-use standards than the AG policies, this recommendation is not intended to preclude county and local agencies from enforcing more stringent policies. We also recommend that the AG take a role in auditing CI-related law enforcement performance on the county and local levels.

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<sup>40</sup> At the municipal level in particular, in response to the OPRA requests, one agency sent a one page CI policy while another, larger agency sent a policy consisting of more than 60 pages.

## Part II: Attorney Interviews and Case File Results

Based on the information that is publicly available, New Jersey does not systematically track the role of CIs in the investigation and enforcement of drug cases.<sup>41</sup> Over the last five years, according to the Uniform Crime Reports (UCR), the statewide total for drug abuse violations has run at just over 50,000 arrests per year.<sup>42</sup> Figures provided by the New Jersey Office of the Public Defender indicate that public defenders and pool attorneys handle the cases concerning more than half of those arrests.<sup>43</sup> Specific details, such as the total number of drug arrests that resulted in indictments, convictions, dismissals and/or acquittals were unavailable. Likewise, statistics about the use of search warrants and CIs in drug cases were also unavailable.

Without official statistics, the researchers have had to rely on the impressions of defense attorneys handling cases within the various counties. These impressions may or may not accurately reflect the actual extent of CI use in the locations identified. This is a weakness of the state's failure to maintain an organized system for recording such information. In interviews with defense attorneys, estimates for the use of search warrants and CIs varied widely from county to county, depending on whether or not CI information was included in the determination of probable cause to issue the warrants.

Such estimates ranged from a reported low of less than 1 percent in Sussex County to a high of 25 percent in Cumberland. In Sussex, it was estimated that roughly half of all drug cases involved the use of CIs, although CI information there is rarely reported in search warrant affidavits. However, the reports out of Sussex County were contradictory. One attorney estimated that drug cases made up about 25 percent of all cases, with only "a handful" involving CIs. That attorney reported that CIs were more commonly used in "other kinds of cases."

In Bergen County, defense attorneys reported the use of search warrants as "the exception rather than the rule" and estimated their use in about 5 percent of drug cases or less.

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<sup>41</sup> The State Police may be an exception. During an in-person interview with Colonel Rick Fuentes and Major William Toms they described a formal and detailed process for using and maintaining records regarding the use of CIs. They indicated that more than 50 percent of their cases involve confidential "sources" and noted that they were moving towards a computerized database of such sources and the information that they provide.

<sup>42</sup> Of those arrests, about 40,000 were for drug possession and use, only (exclusive of sale or manufacturing charges).

<sup>43</sup> In 2007, when the UCR reports the state's total arrests for (indictable) drug abuse violations as 52,773, statistics from the case management system at the Public Defender's Office indicates that the office handled more than 35,000 drug cases. Ninety-six cases resulted in a guilty trial verdict; 35,232 cases resulted in guilty pleas. The number of cases resulting in acquittals or dismissals was not provided. In 2008, the office recorded 22,543 guilty pleas in drug cases and 21 guilty verdicts at trial.

An attorney who had worked in both Monmouth County and Mercer County reported an infrequent use of search warrants in those counties' drug cases. That attorney had substantial experience with clients who wanted to provide information to the police and prosecutors but saw fewer instances of the police initiating the contact for cooperation. It was also reported that those counties were more likely to allow clients' cooperation in drug distribution cases rather than in cases of simple possession. In Ocean County, attorneys estimated that generally about 15 to 20 percent of cases involve warrants and about 2 to 3 percent of drug cases involve CIs.

For Warren County, the use of search warrants was estimated at about 5 percent in drug cases and 2.5 percent in other kinds of cases. In Warren County, cooperating clients were also seen as more likely to be accepted as informants if they were willing to provide information about bigger distributors. Attorneys in Hunterdon County reported that the typical CI is someone who is arrested on drug charges and then asked by law enforcement to arrange to buy drugs. Unlike in Warren County, where CIs are reported as being utilized to interdict local drug dealing, it was reported that it is not uncommon for Hunterdon County CIs to arrange deliveries within the county of "hard drugs" to either informants or undercover agents from drug dealers who reside outside of the county (Newark and Trenton were towns specifically mentioned).<sup>44</sup> Salem County defense attorneys reported that drug cases are "the vast majority of cases in which CIs are used." In Cape May County, defense attorneys reported that, contrary to written policies, adult and juvenile clients reported being asked to cooperate with the New Jersey State Police without consulting the Cape May County Prosecutor's Office.

In addition to interviewing defense attorneys, we reviewed a sample of case files provided to us by private criminal defense attorneys and the Public Defender's Office in order to better understand how CIs are used against defendants during the investigation of drug cases. In total, we reviewed documents from 56 files.<sup>45</sup> The files involved arrests made in 25 municipalities, covering nine counties (Camden, Gloucester, Essex, Middlesex, Ocean, Monmouth, Burlington, Passaic, and Hudson) throughout all regions of the state (north, central, and south). The arresting agencies included the New Jersey State Police and county and municipal law enforcement agencies. While this was a small nonrandomized

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<sup>44</sup> It was noted that local dealers tend to be arrested for marijuana or small amounts of other drugs.

<sup>45</sup> Under the original design for this research, we expected that we would be able to review materials from at least one hundred files. A request to provide files was sent to each criminal defense attorney listed in the 2008 New Jersey Lawyers Diary and all attorney members of the Public Defender's Office criminal trial staff, including pool attorneys. However, once it was determined that the release of case file information required that clients

grant permission to release that information, after two years of data collection, permission could only be secured from 56 clients. Reasons given by clients for not wanting to have their cases reviewed by the researchers included: not wanting to get "burned" as CIs themselves; fear that their other open cases would not be treated favorably; a lack of understanding of the nature, scope and purpose of the research; fear of governmental retaliation; and not wanting to be seen as cooperating with the government in any way (including the Public Defender's Office).

convenience sample (see note 36 on next page), it provides some insights into patterns of CI use in the state.

Our sample of cases involving CIs (Table 2) included 97 arrestees.<sup>46</sup> Approximately 83 percent of the arrestees were male; 52 percent were black<sup>47</sup>; 36 percent were white; and 12 percent were Hispanic. The mean age was 31.

**Table 2. Case File Arrestee Profile**

Sex (n=97)	n	Percent
<b>Male</b>	<b>81</b>	<b>83.5%</b>
<b>Female</b>	<b>16</b>	<b>16.5%</b>

  

Race (n=95)	n	Percent
<b>Black</b>	<b>50</b>	<b>52.6%</b>
<b>White</b>	<b>34</b>	<b>35.8%</b>
<b>Hispanic</b>	<b>11</b>	<b>11.6%</b>

**Mean Age: 30.77**

Nearly half of the arrestees were charged with drug possession, possession of paraphernalia, conspiracy, or other drug related charges at the third-degree level or below. The majority of cases fell into these categories, suggesting that, in contrast to the impressions reported by defense attorneys practicing in Monmouth, Mercer, Warren, and Hunterdon counties, CIs in other locations seem to be routinely deployed in low-level drug enforcement. This focus on low-level drug enforcement is also reflected in the majority of the responses to the law enforcement survey and in the responses, detailed later, during community interviews. One possible explanation for this focus is that the sheer number of arrests made or cases cleared is a primary metric for the success of law enforcement personnel and agencies without necessarily weighing the impact of that arrest. Reported statistics count the arrest of a drug kingpin and a small-time dealer equally in quantitative terms, measuring each as one arrest despite the much higher qualitative impact of the former.<sup>48</sup>

<sup>46</sup> Some files included multiple defendants.

<sup>47</sup> Here we use the term black rather than African American in order to be inclusive of defendants who are of African ancestry and who may have been born in places other than the United States.

<sup>48</sup> This discussion does not discount the fact that a single large drug bust that nets substantial amounts of drugs, cash, and multiple perpetrators or that disrupts a large-scale drug network can be a career maker in and of itself.

We found the following patterns in the cases we examined:

**Lack of an immediate means of determining whether a CI is properly registered.** Of the 56 private attorney and public defender cases we examined, 72 percent reported CI use without including information about whether the CI was officially registered (Table 3), meaning the official reports did not bear a unique identifying number for the CI.

**Table 3. Is the CI Referenced with Confidential #? (n=54)**

Response	n	Percent
No	39	72.2%
Yes	15	27.8%

Instead, we found general statements such as, “*We were contacted by a CI...; We met with the CI...; We received information from a CI...*” When a CI is not assigned a unique number, there is no way to track his or her current status as active or inactive, history of use, or record of reliability, all of which are required under the policies of the AG as well as many municipalities.<sup>49</sup>

AG policy states that CIs should be documented before they are deployed.<sup>50</sup> This is in line with the national standards established by CALEA, which call for police agencies to establish a method to protect CIs’ identities and use that coded information in all transactions with them.<sup>51</sup> Some county prosecutors were concerned that if CI numbers appeared in police reports, defendants would be able to deduce the identity of individual CIs. In order to address this concern, we recommend that police reports should still contain language indicating that the CI is registered and that the necessary information, including the unique identifying number, is on file in a particular department. Prosecutors would be able to request access to those files and, if it were appropriate, would have to turn information over to defense counsel.<sup>52</sup>

<sup>49</sup> Because of increased violence against witnesses and non-witness informants, police and prosecutors state that they have stopped using informant identification numbers in discoverable materials such as police reports, warrant affidavits and investigation reports. Particularly for informants who are used multiple times, a comparison of discovery materials that have been made available to different defendants might provide enough information for defendants to figure out the identity of the person who is assigned the recurring number. While we did not find any official written policy authorizing this shift in law enforcement practice, we are told that it has occurred for protective reasons and

that the lack of an identifying number for CIs mentioned in case files does not necessarily mean that the CI mentioned in file documents are unregistered. While the safety of informants is a valid concern, some systematic procedure must be in place to insure that the safeguards of CI registration are not ignored.

<sup>50</sup> Page 4 of Section 21 of the *Prosecutor’s Manual*.

<sup>51</sup> CALEA, 1998, p. 42-4.

<sup>52</sup> For example, information in the file that tends to exculpate the defendant must be turned over. *Brady v. Maryland*, 373 U.S. 83 (1963).

Using unregistered CIs presents risks of corruption and liability for law enforcement agencies. Such CIs likely cannot be contacted if legal issues develop in the case; and, an unregistered CI may in fact be a non-existent CI. If the police are reporting use of CIs who do not exist, they are committing an offense themselves.

**Supervision could not be verified in some cases, counter to policy.** Accepted police practice is for a supervisor to review, approve, and endorse all official reports when they are submitted by the officer. Supervision increases the likelihood that the officer has followed official policy. Twelve of the case files we received from the New Jersey Office of the Public Defender included police reports without a supervisor's signature. This is a significant shortcoming that suggests inadequate oversight of police practices

**Police sometimes use the claim of working with a CI instead of obtaining search warrants.** In some of the case files that were reviewed, the investigating officers reported using a CI to target the defendant, but the information provided by the CI did not lead to a search or arrest warrant. In the absence of a unique identifying number, it is possible that the CI was not registered, as required under the AG policy, that the CI was cultivated on the street, or that there was no CI.

Several reports state that CIs have contacted police or that police have met with CIs to hold discussions about illegal narcotic sales that eventually led to either the CI or an undercover officer making a buy and an arrest being made immediately thereafter (a tactic known as a "buy/bust" operation). While this practice, which is common, may not be inherently problematic, a troubling and suspicious pattern begins to emerge when coupled with other facts reported in the files. Reason for suspicion about these investigations has developed in the past, in part because the documentation showing that the CI is registered has been either absent or equivocal. In those cases, the informant is referred to as "working with" the police, and reliability is reported as based simply on "past performance." Because of the reporting officers' failure to include a unique identifying number, it may be impossible to connect the CI's reliability to past work.

Data on whether or not a search warrant resulted from interactions with a CI (Table 4) suggest the police in New Jersey first employ a CI to confirm their suspicions and then subject the information to a higher level of judicial review. These cases are about evenly split as to whether or not the information produces a search warrant. While a search warrant may be preferred and represents good use of CIs, it is not always feasible. There may be instances where an arrest must follow immediately, such as if the operation is compromised and officer safety is jeopardized, or if the drug dealer has sold the balance of the product and may not get more. In those cases, the information from the CI does not produce a search warrant, but it does usually result in an arrest or search that is reported as consensual.

**Table 4. Was a Search Warrant Issued from the Confidential Informant’s Information? (n=53)**

Response	n	Percent
<b>No</b>	<b>25</b>	<b>47.2%</b>
<b>Yes</b>	<b>22</b>	<b>41.5%</b>
<b>Consent to search</b>	<b>6</b>	<b>11.3%</b>

In the 56 cases, there were 125 separate charges against 97 defendants (Table 5). Consistent with most narcotics investigations, 84 percent of defendants were charged with possession of a controlled dangerous substance (2C:35-10), distribution (2C:35-5), and distribution within 1,000 feet of school property (2C:35-7). The remaining defendants were charged with lesser drug offenses.

**Table 5. Criminal Charges Against Case File Arrestees (n=125)**

Charge	n	Percent
2C:35-10 (Possession, under the influence or unlawful disposition)	<b>45</b>	<b>36%</b>
2C:35-5 (Manufacturing, distributing or dispensing)	<b>41</b>	<b>32.8%</b>
2C:35-7 (Sale in or near 1000’ of school grounds)	<b>22</b>	<b>17.6%</b>
2C:36-6 (Possession or distribution of hypodermic needle)	<b>8</b>	<b>6.4%</b>
2C:35-11 (Imitation controlled dangerous substance)	<b>5</b>	<b>4%</b>
2C:36-2 (Possession of drug paraphernalia)	<b>4</b>	<b>3.2%</b>

On average, police made 1.04 buys of narcotics before they made an arrest, with a range from 0 to 4 (Table 6). There were ten cases where the number of prior buys before an arrest could not be determined. In circumstances where a search warrant was issued, there was an average of one prior buy. Although there is nothing specific in the Attorney General’s policy about how many prior buys a CI or undercover (UC) officer should make before applying for a search warrant or making an arrest, the accepted industry standard is to make more than one.<sup>53</sup> More

<sup>53</sup> Swanson, Chamelin and Territo, 1996, p. 727.

than one buy provides investigators with more corroborating details and credibility about the operation under investigation, giving police the opportunity to:

1. Learn more about the nature and extent of the operation, including whether a single type or multiple types of narcotics are being sold;
2. Observe and photograph the operation through surveillance, allowing them to determine:
  - a. The hours of operation
  - b. The presence of additional workers (e.g. lookouts, a “cash man,” enforcers, runners, females, juveniles, elderly) who could expand the network to build a wider case
  - c. The amount of police manpower needed to ensure public safety when shutting down the operation
  - d. The presence of additional buyers and their approach (e.g. routes of entry and exit and whether people mainly come by foot, bicycle, or car)
  - e. Whether it is primarily inside or outside. If inside, whether the location is fortified or booby-trapped and what the interior looks like; if outside, obvious escape routes
  - f. Where the cache of narcotics is kept
  - g. The presence of any weapons or vicious dogs
  - h. Other suppliers or any connection to other commercial or residential locations (e.g. transaction may take place on the street but the narcotics are hidden inside a nearby retail store)
  - i. Which vehicles may be connected to the operation (e.g. to hide or transport narcotics, weapons, paraphernalia, or proceeds)
3. Establish whether the seller is a one-off/opportunistic dealer<sup>54</sup>

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<sup>54</sup> Someone who may be a one-time-only seller and is not regularly engaged in drug dealing.

**Table 6. Number of Prior Buys before Arrest (n=46)**

Range	n	Percent
0	17	37%
1	14	30.4%
2	12	26.1%
3	2	4.3%
4	1	2.2%

**Mean Range: 1.04**

**Number of Prior Buys before a Search Warrant was Issued (n=14)**

**Mean Range: 1**

**Unregulated use of CIs can undermine Fourth Amendment rights.** Several police reports used similar non-specific language to describe what occurred during the investigation or arrest of defendants. Although the actors and incidents changed, the statements in the police reports remained substantively the same. Words describing the suspect becoming “extremely nervous,” making a “furtive movement,” or moving “swiftly” or “quickly” were included without more concrete descriptions of physical movements or gestures. The reports all seemed designed to give the impression that the officer sensed something unusual — perhaps criminal — developing under the circumstances. While police officers are expected to use their training and experience to identify criminal behavior, they must also be able to provide details to explain why they sense something criminal is afoot. Intuition alone is insufficient to satisfy the dictates of the Fourth Amendment. In the police reports, these statements were often followed by a notation that the officer performed a self-protective frisk for weapons or conducted a consent search. At other times, it was reported that the suspect made a spontaneous admission to being in possession of contraband during the course of the investigation. In these cases, the defendant’s behavior was reported in a way that set the stage for police action conforming to one of the legally recognized exceptions to the warrant requirement. Although the Fourth Amendment permits warrantless searches and seizures when a recognized exception is invoked, the results are less credible when police officers report that their attention to a particular suspect is directly linked to information provided by a CI who is working for them but whose registration status is not immediately known.

The review of the case files also resulted in some evidence of a reportedly prominent field tactic that lends itself to “efficient” outcomes through constitutionally questionable means. In eight cases, the police reports gave the impression that the arresting officer(s) might be “backing into probable cause” or fabricating a set of facts to legally support a search or seizure after an arrest (without probable cause) had already occurred. In such cases, the officer(s) reported facts necessary to establish reasonable suspicion for a stop and then probable cause for an arrest. The officer(s) reported those facts as if they occurred before the arrest, denying the facts as they actually occurred. Said differently, the police reports in question create an impression that officers undertook an illegal search or seizure, discovered contraband, and then created an account of the facts that legally justified their actions. At the time the arrest was made, the totality of the circumstances were already known, and by working backwards, officers were able to fill in the previously unknown gaps that existed before they acted. Under these circumstances officers must perjure themselves first in the official report, then again at the Grand Jury, then again in open court by testifying to a fact pattern where the ordering of the events are not accurate, or at least the facts as reported were not known to them *before* they took action.<sup>55</sup>

While it is impossible to confirm from these reports whether the officers fabricated the facts in question, the tone of the reports suggest — at a minimum — a cavalier approach to using CIs, preparing official documents and following policy. Such reporting can contribute to a diminished public perception of the integrity and trustworthiness of police practice.

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<sup>55</sup> Such action has been described as “noble-cause” corruption — where the officer believes that the ends justify the means — because, as some police see it, it is more important to rid the community of a drug dealer than to respect constitutional rights. *See Crane v. Sussex County Prosecutors Office*, 2010, Caldero & Crank, 2005; Kleinig, 2002.

### Part III: Law Enforcement Compliance with CI Policies

The results of a survey completed by 59 current and former law enforcement personnel allow this report to assess compliance with CI policies at the municipal, county, and state levels (see Appendix I). Based on the survey responses (Table 7; See Appendix J for more complete tables), we conclude that there is significant confusion and inconsistency in law enforcement’s compliance with all policies governing use of CIs. Our findings suggest that local law enforcement agents are often unaware of existing policies. While not surprising given the fragmentary and inconsistent policies regarding use of CIs across jurisdictions, it is problematic.

Nearly half of the survey’s respondents said they were not aware of the AG having policy on the use of CIs, and nearly two-thirds responded that they did not know what the AG policy specifically includes.

**Table 7. Are you aware of the NJ Attorney General’s policy on the use confidential informants? (n=56)**

Response	n	Percent
<b>No</b>	<b>25</b>	<b>44.6%</b>
<b>Yes</b>	<b>31</b>	<b>55.4%</b>

**Do you know what the policy mandates? (n= 54)<sup>56</sup>**

Response	n	Percent
<b>No</b>	<b>35</b>	<b>64.8%</b>
<b>Yes</b>	<b>19</b>	<b>35.2%</b>

### Law Enforcement Survey Results

The law enforcement officials surveyed readily identified the kinds of problems that arise from the practice of using CIs (Table 8): difficulty maintaining contact with CIs (cited by 22 percent of respondents), the possibility of dishonesty by CIs (17 percent), and CIs’ continuing engagement in criminal conduct (12 percent). Consistent regulation and effective oversight of the CI system might alleviate some of these problems, as would adequate CI and police officer training.

<sup>56</sup> Where, as here, there are fewer responses than survey respondents, it is because some respondents did not answer all questions.

**Table 8. Types of Problems Encountered Using Confidential Informants (n=59)**

Problem	n	Percent
Maintaining consistent contact	13	22%
Lying/Dishonesty	10	16.9%
Reoffending	7	11.9%
CI believes he/she controls the situation	5	8.5%
Preventing other agencies from luring CI with more money	5	8.5%
Having the CI follow instructions	5	8.5%
Keeping their identities confidential	4	6.8%
Lack of commitment	3	5.1%
Keeping the CI free from warrants	3	5.1%
Punctuality	2	3.4%
CI's fear of being labeled a "rat"	2	3.4%

(Multiple-response answer)

The AG's CI guidelines encourage police agencies to promulgate their own policies on handling CIs. Although 81 percent of respondents said their agency had its own policy, 22 percent of these respondents said it was not in writing (Tables 9 and 10). An unwritten policy makes it difficult to set performance standards, establish organizational accounting procedures, and hold police officers accountable for their conduct.

### **Confusion and Inconsistent Implementation**

Our survey found that unwritten policies result in inconsistent policy implementation among law enforcement. Nearly one-third of those surveyed said that officers did not follow the policy, only sometimes followed the policy, or were unsure whether policy was followed (Table 11). Thirteen percent said the policy was somewhat or widely misunderstood or totally ignored, while 14 percent thought there was no established policy (Table 12). Our analysis shows that those who responded that their agency had a written policy were far more likely to say that officers follow the policy. These results support the proposition that written policies foster compliance.

Table 9. Does your agency have a policy on handling confidential informants? (n=59)

Response	n	Percent
No	10	16.9%
Yes	48	81.4%
Follow county prosecutor's policy	1	1.7%

Table 10. Is the agency policy in writing? (n=59)

Response	n	Percent
No	13	22%
Yes	43	72.9%
Don't know	3	5.1%

Table 11. Overall, is the policy followed by officers? (n=58)

Response	n	Percent
No	8	13.8%
Yes	41	70.7%
Sometimes	1	1.7%
Don't know	8	13.8%

Table 12. To what degree do officers understand the policy? (n=55)

Response	n	Percent
Totally ignored	1	1.8%
Widely ignored	3	5.5%
Somewhat misunderstood	3	5.5%
Somewhat understood	18	32.7%
Widely understood	22	40%
No policy established	8	14.5%

The following are examples of the problems resulting from a lack of written policy:

- The two survey respondents who admitted paying CIs from personal funds worked for agencies that do not have written CI policies. Paying CIs from personal funds allows officers to engage CIs without the knowledge of supervisory personnel and may raise the risk of corruption.
- Only 4 percent of respondents were aware that the AG policy suggests that adult CIs should not be used in certain situations, e.g., when the CI is a fugitive, on probation or parole, under indictment, or has been released on bail;<sup>57</sup> 25 percent were not aware of any suggested limitations on use of adult CIs.

### Training

The respondents’ answers pointed out a glaring deficiency: lack of training (Table 13). Nearly 63 percent said they did not receive any training on how to use CIs. The AG’s policy does not mandate any training, but the basic police officer training guidelines for recruits — the entry-level course for officers entering a police academy — set by the New Jersey Police Training Commission (PTC) offer some coverage on handling informants. The first section relating to CIs deals with New Jersey law as it pertains to perjury and other falsification in official matters (PTC, 2006, p. 3-49); the second section applying to CIs deals with developing probable cause based on a criminal informant (PTC, 2006, p. 5-7); and the third section deals with developing sources of information (PTC, 2006, p. 12-14). However, this course is offered to police recruits, not incumbent officers. With such a large proportion of officer survey respondents indicating that they received no training related to the use of CIs, CI training is an area that needs to be reviewed and addressed.

**Table 13. Are officers trained in the use of confidential informants? (n=59)**

Response	n	Percent
<b>No</b>	<b>37</b>	<b>62.7%</b>
<b>Yes</b>	<b>22</b>	<b>37.3%</b>

<sup>57</sup> Division of Criminal Justice, 2001, p. 3.

If yes, how many hours do they receive? (n=3)

Response	n	Percent
2 hours	2	3.4%
40 hours	1	1.7%

The lack of in-service training for all law enforcement agencies on other topics has been an ongoing issue.<sup>58</sup> In-service training has traditionally been a responsibility shouldered by each individual law enforcement agency for its own officers. Departments that hold in-service training sessions disseminate materials, but there is no “train the trainer” component nor mechanisms to track the frequency and type of training conducted. New Jersey currently has 21 police training facilities certified by the Police Training Commission but those facilities focus on recruit training. There is very little mandatory training after an officer completes the recruit class, with negative consequences reflected in the survey results.<sup>59</sup>

A majority of respondents who answered this question (65 percent) reported that organizational recordkeeping, paperwork, and documentation were the most burdensome parts of CI policy (Table 14).<sup>60</sup> This result is consistent with research, which suggests that police culture sometimes treats documentation and paperwork as onerous, not as important, or not as well-rewarded aspects of the job. A functional CI system, however, requires sound recordkeeping. Officers’ and supervisors’ attitudes about paperwork requirements could be improved through more training about why it is important, how to balance it with other critical duties, and how it supports policing objectives. Officers should also be asked for input on how to reduce paperwork without jeopardizing efficiency and effectiveness.<sup>61</sup>

<sup>58</sup> BART Review, 2009 (citing lack of training and clear policy in the shooting death of a person by transit police); MacNamara, 1950, p. 181-189 (citing lack of training for police); Winton, 2009 (citing lack of training for the ‘May Day’ incident where police clashed with protesters and journalists).

<sup>59</sup> A recent exception is Morris County. There, all law enforcement officers who seek to utilize a CI are required to be trained on the County’s Source Directive (Appendix O). At a March 11, 2011 “Train the Trainers” session, the County Prosecutor told the officers that 1) The Prosecutor would not authorize search warrant affidavits for any officer who had not been trained on the Directive and 2) the minimum consequence for a violation of the Directive would be dismissal of the case. Every municipality in Morris County sent a representative

to “Train the Trainer” sessions in March of 2011. The PowerPoint presentation from one such training is attached as Appendix P.

<sup>60</sup> More than half of the eligible respondents (those that answered “yes” their agency has a written policy), did not respond to this question.

<sup>61</sup> Chatterton, 1989. It is imperative that the ongoing importance of recordkeeping be communicated from the top of each agency down. Not only must chiefs “buy in” to the need to comply with recordkeeping obligations, but good record keeping needs to be rewarded. Since proper recordkeeping protects the integrity of the agency, not only must this be a priority, but it must remain a priority and one which results in positive acknowledgement by management.

**Table 14. What is the most burdensome part of the policy? (n=21)**

Response	n	Percent
Record keeping and general documentation	13	65%
Awaiting CI review or court approval	2	10%
Audit process	1	5%
Convincing CI to “formally” sign up (Reluctance)	1	5%
No part is particularly burdensome	3	15%

### The Reliability of Information

The vast majority of respondents said they corroborate information delivered from CIs (Table 15). However, only 26 of the 56 respondents who reported corroborating information from a CI answered the follow-up question about how they corroborate information from the CI, potentially undermining the credibility of the initial response. Those who answered the follow-up question stated that they rely almost exclusively on information supplied from other sources, such as other officers or other informants, instead of through their own surveillance or other sources independent of CI usage (e.g., information from civilians who are not seeking prosecutorial consideration). While other officers may have knowledge about a particular CI’s reputation for reliability, this may have little bearing upon the instant case.

**Table 15. Do you corroborate the information the confidential informants delivers? (n=58)**

Response	n	Percent
No	2	3.4%
Yes	56	96.6%

If yes, how so? (n=26)

Response	n	Percent
Other police officers’ experience	13	50%
Other informants	7	26.9%
Past records	6	23.1%

(Multiple-response answer)

No Response (n=30)

Although many of the written policies at the state, county, and local levels require or suggest the county prosecutor approve the use of a CI, the vast majority of respondents said they “never” or “rarely” seek such approval (Table 16).<sup>62</sup> This overall pattern suggests that at the early stages of an investigation, the police make most decisions about the way and extent to which they will use a CI.

**Table 16. How often do you seek approval from the county prosecutor’s office before utilizing confidential informants? (n=59)**

Response	n	Percent
<b>Never</b>	<b>18</b>	<b>31%</b>
<b>Rarely</b>	<b>30</b>	<b>51.7%</b>
<b>Frequently</b>	<b>7</b>	<b>12.1%</b>
<b>Always</b>	<b>3</b>	<b>5.2%</b>

Section 21.8 of the AG policy (pp. 5-6) states that when a CI commits a crime during deployment, the law enforcement agency in question should not conceal the crime but rather notify the county prosecutor. Forty-five percent of respondents, however, said that CIs are frequently involved in independent criminal activity and 70 percent said that the majority of CIs are “never” or “rarely” charged with a crime while acting as an informant (Tables 17 and 18).

**Table 17. How often does an active confidential informant become involved in independent criminal activity, whether or not they are charged? (n=58)**

Response	n	Percent
<b>Never</b>	<b>3</b>	<b>5.2%</b>
<b>Rarely</b>	<b>16</b>	<b>27.6%</b>
<b>Frequently</b>	<b>26</b>	<b>44.8%</b>
<b>Don’t know</b>	<b>13</b>	<b>22.4%</b>

<sup>62</sup> Because the *Brimage* Guidelines require written cooperation agreements signed by a prosecutor’s office in order for an informant to receive prosecutorial consideration, each county theoretically requires the

prosecutor’s approval before using a CI. See Appendix K for a summary of additional provisions applicable to individual counties.

**Table 18. How often is an active confidential informant charged with a crime they commit while acting as a confidential informant for your agency? (n=59)**

Response	n	Percent
<b>Never</b>	<b>8</b>	<b>13.6%</b>
<b>Rarely</b>	<b>33</b>	<b>55.9%</b>
<b>Frequently</b>	<b>6</b>	<b>10.2%</b>
<b>Always</b>	<b>3</b>	<b>5.1%</b>
<b>Don't know</b>	<b>9</b>	<b>15.3%</b>

The relatively high percentage of CIs engaging in criminal conduct may reflect the fact that they receive no training regarding their roles as CIs. Untrained CIs may not know that they should not engage in conduct that could jeopardize the case they are working on. Almost 19 percent of respondents said that CIs receive no training or orientation, though the AG policy under Section 21 along with many county and municipal policies require such training (Table 19).

**Table 19. Are the confidential informants trained or given orientation on their legal obligations? (n=59)**

Response	n	Percent
<b>No</b>	<b>11</b>	<b>18.6%</b>
<b>Yes</b>	<b>45</b>	<b>76.3%</b>
<b>Don't know</b>	<b>3</b>	<b>5.1%</b>

**If yes, how so? (n=26)**

Response	n	Percent
Police and CI responsibilities and legal obligations are written and explained	<b>22</b>	<b>84.6%</b>
Told they may have to testify	<b>3</b>	<b>11.5%</b>
Use NJ Attorney General's confidential informant worksheet	<b>1</b>	<b>3.8%</b>

The *Brimage* Guidelines require cooperation agreements for defendants facing sentencing to be in writing and, where applicable, be signed off by defendants' attorneys. However, approximately 37 percent of respondents said they "never," "rarely," or "did not know" how often written forms were used to document agreements with CIs (Table 20). Our interviews

with community members and public defenders indicated that the existence of formal written agreements did not preclude informal (i.e., undocumented) police-CI relationships.

**Table 20. Must confidential informants sign a written agreement before they can be utilized? (n=59)**

Response	n	Percent
<b>No</b>	<b>14</b>	<b>23.7%</b>
<b>Yes</b>	<b>39</b>	<b>66.1%</b>
<b>Don't know</b>	<b>6</b>	<b>10.2%</b>

**How often are the written forms actually used? (n=57)**

Response	n	Percent
<b>Never</b>	<b>9</b>	<b>15.8%</b>
<b>Rarely</b>	<b>4</b>	<b>7%</b>
<b>Frequently</b>	<b>6</b>	<b>10.5%</b>
<b>Always</b>	<b>30</b>	<b>52.6%</b>
<b>Don't know/Unknown</b>	<b>8</b>	<b>14%</b>

Although the vast majority of respondents said CIs must be registered<sup>63</sup> before they can be utilized, 12 percent said that CIs do not have to be registered (Table 21).

**Table 21. Must confidential informants be registered with the agency before they can be utilized? (n=59)**

Response	n	Percent
<b>No</b>	<b>7</b>	<b>11.9%</b>
<b>Yes</b>	<b>51</b>	<b>86.4%</b>
<b>Don't know</b>	<b>1</b>	<b>1.7%</b>

<sup>63</sup> To “register” an informant means to formally document the CI’s identity, check for outstanding warrants, and take a photograph, among other things. See the Newark Police Department’s policy (Appendix L) as an example.

The AG's policy suggests that contacts, financial transactions, and other actions between the police and a CI should be documented, archived, and maintained by the agency. Additionally, 74 percent of respondents indicated CI records are primarily kept in a central or special division, such as narcotics, general investigations, or gang units (Table 22). However, some respondents (15 percent) said individual officers maintain their own records. Allowing officers to maintain their own records violates the principle that the CI functions on behalf of the agency, not the individual officer, a central premise of many policies. It also precludes agency recordkeeping and oversight.

**Table 22. Where are confidential informant records stored? (n=62)**

Response	n	Percent
<b>Narcotics division</b>	<b>22</b>	<b>35.5%</b>
<b>General investigative division</b>	<b>17</b>	<b>27.4%</b>
<b>Individual officers</b>	<b>9</b>	<b>14.5%</b>
<b>Other</b>	<b>7</b>	<b>11.3%</b>
<b>Gang division</b>	<b>6</b>	<b>9.7%</b>
<b>Organized crime division</b>	<b>1</b>	<b>1.6%</b>

(Multiple-response answer)

Half of the respondents stated that CIs are active participants (Table 23); in other words, they take part in some behavior that constitutes criminal activity or encourage it in others. This puts the CI in a position where his or her identity may have to be revealed in court. It further suggests the police rely heavily on the activity of CIs and the information they supply as the basis for investigations and charges against other civilians.

**Table 23. Describe the confidential informant's most frequent role? (n=72)**

Response	n	Percent
<b>Active participant</b>	<b>36</b>	<b>50%</b>
<b>Passive observer</b>	<b>24</b>	<b>33.3%</b>
<b>Introduces undercover officer</b>	<b>11</b>	<b>15.3%</b>
<b>Other</b>	<b>1</b>	<b>1.4%</b>

(Multiple-response answer)

The majority of respondents classified the typical CI as a street-level operative<sup>64</sup> recruited to gather information against individuals or organizations that the police already suspect of being involved in criminal activity. Nearly half of respondents said that CIs are used predominantly in drug enforcement operations (Table 24).

The street-level CI is the lowest-level operative possible. Approximately half of the respondents stated that their typical use of CIs is for street-level operations.<sup>65</sup> This means cases involving personal use or street-level dealing, where drug weight is usually measured in grams. If the frequency reported in the responses is accurate, many law enforcement agencies are not learning about the hierarchies, associations, or inner workings of many large-scale criminal enterprises or organizations.

**Table 24. What level classification<sup>66</sup> is the typical confidential informant? (n=69)**

Response	n	Percent
<b>Street level</b>	<b>33</b>	<b>47.8%</b>
<b>Associate</b>	<b>27</b>	<b>39.1%</b>
<b>Membership</b>	<b>8</b>	<b>11.6%</b>
<b>Top echelon</b>	<b>1</b>	<b>1.4%</b>

(Multiple-response answer)

Almost all respondents stated that CIs “rarely” or “never” appear in court. However, the New Jersey Public Defender’s Office is understandably concerned that shielding the identity of virtually all CIs prevents defendants from testing CIs’ reliability. As noted previously in this report more than once, the lack of judicial scrutiny of police practices pertaining to CIs enables the police to claim that CIs were used in cases where none actually existed and provides other opportunities for police corruption in their CI practices, costing taxpayers hundreds of thousands of dollars because of failed, corrupt, or improperly regulated investigations.

<sup>64</sup> It is noted, however, that in a directive dated April 9, 2007, the Newark Police Department, which previously used the terms “street sources,” declared that street sources would be no longer be utilized by that agency (Appendix L).

<sup>65</sup> Only eight respondents said the typical CI is a member of a criminal organization and only one said the typical CI is a top echelon operative. The notion that much of CI utilization results in the arrest of predominantly low-level drug offenders is further borne out by the majority of

the responses in the community interviews conducted as part of this research and covered in the next section of the report.

<sup>66</sup> A street-level CI may be unknown or known only by name or sight to members of an organization or to the immediate target/suspect. An associate is friendly with members of an organization but is not a member of the organization. A top echelon CI is a senior member of an organization.

Without better regulation and implementation of CI policy, the potential exists for extreme abuses, like the one below. While such an example is atypical, it illustrates the risk of what can occur without improved controls.

Commercial fisherman Charles Maudsley owned a 90-foot boat, which he used in the waters around Cape May, New Jersey. A CI characterized by the police as a “reliable source of information” told the police that Maudsley’s boat had just arrived from Florida carrying many kilos of cocaine in the hold and a heavily armed four-man crew from Cuba. The CI claimed to have seen the cocaine and the firearms.

A team of 25 law enforcement officers, including state troopers, stormed the boat, kicked Maudsley repeatedly, “squeeze[ed] and twist[ed] his testicles,” and held him at gunpoint for 30 to 40 minutes. He was left terrorized. But there was nothing: “No drugs, weapons, or Cuban nationals were found as a result of the search.” *Maudsley v. State of New Jersey*, 323 N.J. Super. 579 (App. Div. 1999) and 357 N.J. Super. 360 (App. Div. 2003).

A court awarded the innocent fisherman and his wife almost \$270,000. In 2003, an appeals court modified the award, leaving taxpayers on the hook for roughly \$250,000 on the basis of false information from a supposedly “reliable” informant.

Source: *Maudsley v. State of New Jersey*, 323 N.J. Super. 579, 587-88 (App. Div. 1999).

## Why Informants May Assume the Risks

Almost 23 percent of law enforcement respondents said their active CIs have only disorderly persons (DP)<sup>67</sup> offenses pending against them. Ordinarily it might be assumed that people who agree to assume the risk of being CIs believe the potential benefits will outweigh the potential risks involved. However, DP offenders face little risk of onerous punishment in the criminal justice system,<sup>68</sup> raising the question of what benefits such low-level offenders think they will gain in exchange for assuming the risk of informing against more serious offenders.

<sup>67</sup> See N.J.S.A. 2C:1-4, Classification of Offenses

<sup>68</sup> Although the statute authorizes a custodial sentence for a term of imprisonment of no more than 6 months

(N.J.S.A. 2C:1-4), there is a presumption of non-incarceration for first-time offenders and jail sentences are not typically imposed unless the accused has an extensive record.

We have learned from interviews with regional public defenders' offices of cases where low-level offenders faced with motor vehicle charges or matters pending in family court have volunteered or been asked to act as CIs against more serious offenders with unrelated types of charges. For example, as mentioned previously, in a small number of incidents, respondents noted that motor vehicle violators agreed to act as informants against interstate drug traffickers because they could not afford to lose their driver's licenses or to pay automobile insurance surcharges potentially assessed because of their traffic offenses. These incidents indicate that the CI system may exert more pressure on people in desperate economic circumstances than those who are more financially stable.

### **Perilous Gaps in the Knowledge, Observance, and Enforcement of CI Policy**

Mandatory, clearly written CI policies that are regularly enforced protect the community and all parties in the CI relationship, including members of law enforcement. As history has shown and the current research confirms, working with CIs is inherently risky for law enforcement officers and agencies.<sup>69</sup> Productive CI relationships (i.e., those that result in valid and sustainable indictments and arrests) require law enforcement agents to rely on criminal suspects and interact with them regularly. However, without the proper controls in place, establishing trusting, reciprocal relationships between criminal suspects and police and prosecutorial agents can sow the seeds of official misconduct and collusion.

Clear guidelines outlining acceptable behavior and protocols when establishing police-CI relationships can prevent lapses of conduct that potentially threaten law enforcement personnel's personal safety, professional integrity, and individual careers. However, the guidelines cannot work without meticulous supervision, monitoring and enforcement. Without clear dictates and limitations, law enforcement officers may feel an incentive to prioritize productivity, most frequently measured by arrests, over ethical standards of conduct, potentially exposing law enforcement to both professional and physical detriments.<sup>70</sup> While drifts in the direction of policy violations or unethical conduct may be gradual, if left unchecked they may grow over time, particularly where law enforcement officers believe their conduct is contributing to a greater cause — whether advancement of their own career or what they see as improved conditions in the communities they police.<sup>71</sup>

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<sup>69</sup> Schreiber, 2001.

<sup>71</sup> Caldero, 2000; Kleinig, 2002; Stein, 2010.

<sup>70</sup> For example, in Chesapeake, Virginia, a veteran officer responding to bad information from an informant was killed in the line of duty while executing a raid on a suspected marijuana grower's home. See, *supra*, footnote 12.

If an officer believes that the informant works directly for him or her (although most written policies prohibit it), the officer may jealousy guard the informant from other officers or members of police management tasked with objectively evaluating the relationship as per the existing written policies. Often the officer-informant relationship becomes cozier after successful deployment.<sup>72</sup> For example, the officer may relax his or her responsibilities under the policy in an effort to give the CI more leeway, and may escalate the seriousness of the type of cases in which the informant is utilized, or increase the frequency of use for an informant who the officer believes is reliable. The use of such an informant may expand into “bigger” or more work the officer believes is more “profitable” (e.g. cases of a higher statutory degree of severity that garner more professional recognition). As the relationship continues, those shortcuts and other prohibited forms of conduct become normalized, to the point where such actions are a matter of accepted routine practice (e.g. overlooking a CI’s criminal conduct, manufacturing crimes of entrapment, paying the CI with drugs, sex, or confiscated or personal money).

When deployment of CIs is subject to minimal internal regulation (e.g. weak agency policy, supervision or monitoring); insufficient or no external auditing or oversight; and little or no accountability for violations, it creates a dangerous organizational climate where the agency fails to protect officers from the pitfalls of dealing with informants and fails to protect civilians from unauthorized police and prosecutorial action. Of course, the converse is also true: good internal regulations set up the proper relationships between law enforcement and CIs. As currently constructed, there is little external oversight or auditing articulated by the AG’s guidelines, and there are no consequences designated for their violation. These shortcomings weaken protections against prohibited conduct.

Officer safety is further compromised by policy that is ambiguous, not widely distributed, or little-known by officers, which appears to be due, in substantial part, to little or no training on policy application. Individual officers who remain ignorant about their obligations may flout policy constraints in pursuit of an arrest, unaware of the policy’s tenets. Such internal shortcomings can be avoided through adequate training, supervision, and management. However, there may be little incentive for officers to know and understand the policies since no tenet seems to address the subject of disciplinary action for policy violations.

**Case in point:** The facts alleged in the federal lawsuit settlement *Crane v. Sussex County Prosecutor’s Office*<sup>73</sup> represent an example of a case that involves virtually all of the aforementioned perils of CI usage, especially regarding systems without proper policies and checks. In that case, law enforcement agents at both the county and municipal level

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<sup>72</sup> See *Crane v. Sussex County Prosecutors Office*, Civ. A. No. 08-1641, 2010.

<sup>73</sup> See *id.* and accompanying text.

were drawn into the deceptive practices of a CI they came to rely on in the investigation of drug activity. The CI, who had initially proved reliable, subsequently began to fabricate evidence against his friends and relatives. His deception even included substituting crushed drywall for alleged drugs, which he turned over to a local police officer. The officer then claimed in police reports that the “substance” field-tested positive for illicit drugs. It was several weeks before the State Police Laboratory reported that the substances turned over to the police officer by the CI was not, in fact, illicit drugs. By that time, multiple innocent defendants had been arrested in a well-publicized drug raid. The arrests involved the county’s narcotics prosecutor and multiple local police agencies. Though unconfirmed at the time of this report, news accounts suggested this incident resulted in employment termination and professional reprimands for the law enforcement agents involved. In a subsequent interview with the CI, he claimed that his false allegations against relatives and close acquaintances was a result of pressure from his handler (a local police officer) and the desire to gain leniency in connection with recurrent criminal charges of his own.

## Part IV: The Impact of CIs in the Community

A wide body of legal and social science research suggests that significant community damage comes from using CIs.<sup>74</sup> This research also suggests the police should reassess their use of CIs to ensure that the benefits outweigh the damage to the community. There must be particular attention paid to the fact that most CIs seem to come from specific communities and demographic groups. Thus, not surprisingly, the majority of our respondents to the community interviews were male (60 percent) and black (68 percent), and a large percentage was below age 35 (49 percent).

Professor Alexandra Natapoff of Loyola Law School suggested in a 2004 law review article that one in four black men between ages 20 and 29 is behind bars, on probation, or on parole and therefore also under pressure to “snitch.”<sup>75</sup> She went further to suggest that one in 12 black men in the highest-crime neighborhoods are in fact “snitching.”

The widespread use of CIs in African-American communities has contributed to a pervasive distrust of law enforcement. This is apparent in the unfortunate resonance of the infamous “Stop Snitchin’” campaign, which discourages not just informants seeking more lenient treatment, but also general community cooperation with law enforcement.

Professor Natapoff maintains that overuse of CIs causes African Americans to lose faith in the government’s ability to maintain community safety and well-being:

**Active informants impose their criminality on their community while at the same time compromising the privacy and peace of mind of families, friends, and neighbors. Informants also are a vivid reminder that the justice system does not treat suspects evenhandedly and may even reward antisocial or illegal behavior.<sup>76</sup>**

<sup>74</sup> Not the least of which are wrongful convictions (Warden, 2004; Brown, 2007; Natapoff, 2004, 2006 and 2009).

<sup>75</sup> As noted earlier, under the AG’s definition, informants may be criminals, associates of criminals or noncriminals. In the definition under section 21.8 a major distinction between informants and CCWs (confidential cooperating witnesses) is whether or not the individuals will be expected to testify in subsequent court proceedings. The New Jersey State Police distinguish

between class 1 or criminal informants and class 2 (non-criminal) private citizens. The term “snitch” may be applied to any one who provides law enforcement officials with information about the criminal conduct of others. Scholar Marc Lamont Hill makes a distinction between “wet snitching” — criminals informing on other criminals and “dry snitching” — crime reporting by innocent civilians ([www.popmatters.com](http://www.popmatters.com)).

<sup>76</sup> Natapoff, 2004, p. 649.

When a community develops a jaundiced view of the role of law enforcement, it is little wonder that the “Stop Snitchin’” message gains a loyal following. Effective law enforcement depends on a positive relationship with community members, and a positive relationship is all but impossible when use of CIs goes unchecked.

The authors of this study tried through interviews with community respondents<sup>77</sup> to determine the extent to which people in the various communities feel pressure to become informants and the extent to which they feel victimized by the way law enforcement deploys CIs.

Because becoming a “snitch” is a sensitive subject, our attempts to recruit subjects to participate in this part of the study met with considerable resistance. There was a strong awareness of the phrase “snitches get stitches.” In fact, once the interviews got underway, more than one community respondent (CR) reported stories about informants or witnesses who were threatened, seriously injured, or killed because of their cooperation with the police.

Due to these considerations, only 17 of the 66 respondents we interviewed were willing to acknowledge acting as a CI on one or more occasions. Of those 17, seven admitted that the information that they provided to the police was not always truthful. Others reported that although they initially agreed to act as informants, they later reneged on the agreement by making themselves unavailable to the police or by absconding with the money that police gave them to make drug purchases. In at least one case, which was the subject of a settled federal lawsuit, three community respondents were the victims of another informant’s fabrication of evidence against them in order to continue to receive the benefits of being a CI.<sup>78</sup> In this portion of the study, even the community respondents who did not admit to ever acting as informants were able to provide valuable and detailed information about the process used in recruiting, cultivating, and handling informants. They reported based on their own experiences and the experiences of their friends, relatives, and acquaintances.<sup>79</sup>

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<sup>77</sup> Sixty-six community respondents participated in the interviews and were each compensated \$30 for their time. The majority of community respondents were Black males. The racial breakdown was 45 Blacks; 13 Whites; six Latinos; and two people who reported that they were racially or ethnically mixed. The respondents included 40 men and 26 women, with an age range from 20 to 59. The majority in both gender groups tended to be in his or her 30s or 40s and over his or her lifetime had spent from a few months to 10 or more years in state prison. The majority of the community respondents had been arrested for a drug related charge (41 out of the 66).

<sup>78</sup> This case, *Crane v. Sussex County Prosecutor’s Office*, Civ. A. No. 08-1641, was filed in federal court April 2, 2008. On March 24, 2010, the case settled, with the Sussex County Prosecutor’s Office paying plaintiffs \$225,000. The complaint alleges that once the laboratory reports

regarding the alleged drugs proved that the substance provided by the informant was not crack cocaine, charges were administratively dismissed against the defendants. One defendant had served 100 days in jail and another was bailed out only after his teenage son sold the ATV he had gotten for his recent birthday.

<sup>79</sup> While an initial set of structured questions was prepared to guide these interviews, they could not be effectively used with a majority of interviewees. Community Respondents varied widely in their ability to recall specifics of reported events and their ability to effectively articulate the information reported. To overcome these differences and general reluctance to speak about the topic of informing, the interviewer allowed respondents to deliver narrative accounts to a more general question: “can you tell me about a situation in which you or someone you know were asked to act as a confidential informant?”

Community respondents provided information about confidential informant practices in the following counties (Table 25):<sup>80</sup>

**Table 25. County Distribution of Community Respondents**

County	Number of CRs
Atlantic	8
Burlington	6
Camden	14
Cape May	4
Cumberland	1
Essex	19
Gloucester	3
Hudson	3
Hunterdon	1
Monmouth	3
Ocean	4
Somerset	1
Sussex	5
Union	1

The law enforcement agencies involved included municipal police, county prosecutors' office task forces, the New Jersey State Police, federal agencies, and interagency task forces where federal, state, and local law enforcement agents worked together on narcotics and other enforcement (e.g., gang activity, burglaries, and auto thefts). The responses included activity from 25 municipalities across 14 counties (Table 26).

<sup>80</sup> It is noted that six community respondents reported on practices in more than one county, therefore the total exceeds 66.

**Table 26. Law Enforcement Agencies Reported about in Community Responses<sup>81</sup>**

Agency Type	Agency Name
<b>Municipal Police (N=25)</b>	Aberdeen (Monmouth), Andover (Sussex), Atlantic City (Atlantic), Burlington (Burlington), Camden (Camden), Depthford (Gloucester), East Orange (Essex), Hamburg (Sussex), Hazlet (Monmouth), Jersey City (Hudson), Keansberg (Monmouth), Lakewood (Ocean), Merchantville (Camden), Mount Holly (Burlington), Newark (Essex), Parsippany (Morris), Pennsauken (Camden), Perth Amboy (Middlesex), Red Bank (Monmouth), Seaside Heights (Ocean), Sparta (Sussex), Stafford (Ocean), Stillwater (Sussex), Wildwood (Cape May), Willingboro (Burlington)
<b>New Jersey State Police (N=4)</b>	
<b>Federal (N=4)</b>	HIDA, DEA, ATF, Unspecified
<b>Task Forces (N=9)</b>	Camden County (4), Cape May County, Essex County, Monmouth County, Ocean County, Sussex County

Community respondents expressed an intense fear of having their identities revealed; they thought that it was fairly easy to ascertain an informant’s identity through conversations with the police or court papers. In less populated areas of the state, public defenders indicated that, through discovery,<sup>82</sup> they could typically develop a “pretty good” idea of the identities of informants in the cases against their clients.

According to the community respondents, when the names of individuals “appear in the paperwork,”<sup>83</sup> defendants assume that those individuals have given incriminating information against them. The incriminating information may either be a verbal or found in a written statement that can be traced back to the speaker using details about the context and circumstances under which the statement was made or a description of the person making the statement, even if his or her name is withheld. This unintentional “burning” of the CI can be harmful to those who are willing to cooperate with the police. Community respondents reported that copies made of such paperwork, often made available to clients by attorneys, is sometimes posted by detained defendants on bulletin boards in common areas of county jails to let inmates know who among them is a “snitch.” Several of the community respondents and public defenders raised questions about whether police view CIs as disposable, only useful as grist for the drug enforcement mill.

<sup>81</sup> Questions were not time-bounded. Older respondents may have reported on practices that have been modified over time. A specific example would include the Newark Police Department’s policy change that eliminated the use of “street sources” from its officially authorized practice.

<sup>82</sup> Case information required to be shared with opposing counsel.

<sup>83</sup> Case documents turned over during the discovery process.

**Case in point:** Former criminal defense attorney Paul Bergrin (now disbarred) was charged with the unthinkable — helping orchestrate the murder of witnesses and confidential informants against his clients. Bergrin, the son of a former New York City police officer, was indicted by federal authorities for charges that include: racketeering, wire fraud, murdering a federal witness, Travel Act violations, and conspiracy to commit each of these offenses. According to a special agent’s court filing from May 2009, the government had preliminarily calculated Bergrin’s sentencing exposure to include a maximum penalty of death and a mandatory minimum penalty of life imprisonment.

Bergrin, who maintained offices in Newark, New Jersey, and who served as the attorney to several popular rap artists, also had a significant number of alleged gang members and drug dealers as clients. He was accused of having learned the identities of witnesses and informants against his clients and bribing or intimidating the witnesses into not testifying or testifying falsely. He and some of his clients were also accused of having participated in arranging or attempting to arrange the death of more than six people who could present damning evidence at trial. Ironically, information from CIs, one or more of whom agreed to wear wires, led to Bergrin’s ultimate arrest and indictment. On more than one occasion Bergrin was quoted as stating: “No witness, no case.”

The midday execution of Deshawn McCray, an informant also known as “Kemo,” on a Newark public street, garnered substantial press coverage. In that case, according to the federal authorities, Bergrin’s client discerned the identity of the informant based on factual allegations contained in the complaint. Bergrin’s client, who was awaiting trial on federal drug charges, gave the informant’s nickname to Bergrin, who in turn passed the name onto his client’s drug associates. While passing the name on, Bergrin is quoted as saying, “No Kemo, no case.” It is reported that Bergrin also gave his client’s associates information regarding how to find “Kemo.” Less than four months after Bergrin’s client gave Bergrin the name, Deshawn McCray was shot three times in the back of the head.

In a subsequent Monmouth County case involving one of his other clients, Bergrin is recorded saying that the homicide needed to look like a robbery rather than a hit. The client in that case had also been arrested on drug charges. It is reported that killing witnesses and informants was a tactic Bergrin used to win cases.

Up until his indictment on these charges, Bergrin had been permitted to continue practicing criminal law in New Jersey despite having pled guilty to another federal indictment for running a New York escort service while his client, who had previously run the service, was serving time in jail. The escort agency, which operated out of lower Manhattan, is reported as having been aptly named “NY Confidential.” Bergrin was sentenced to probation on that charge.<sup>84</sup>

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<sup>84</sup> Details of the charges against Bergrin, including a copy the federal indictment can be found at:

[http://www.usdoj.gov/dea/pubs/states/newsrel/2009/nwko52009\\_certification.pdf](http://www.usdoj.gov/dea/pubs/states/newsrel/2009/nwko52009_certification.pdf). See also, Kocieniewski, 2007.

Community respondents reported that pressures to act as informants continued once they were inside jails and prisons. They noted that correctional staff encouraged, enticed, or coerced inmates to inform on fellow inmates as well as members of the staff. Inducements to act as an informant once inside correctional facilities were reported as: the promise of better food (for example, food from the outside), special work assignments, or other “privileges.” Coercive techniques included the withholding of various privileges or services (including access to the infirmary or items for personal hygiene); threats to put the word out that a non-cooperating inmate is a “snitch”; or threats not to protect an inmate from potential harm from other inmates.

### **Informant Use in the Community**

Interviews with community members revealed that although many law enforcement agencies have formal written policies governing the use of CIs, much of that use is informal, occurs spontaneously during street-level arrests or investigations, and is unsupervised. In contrast to express provisions of Section 21.8.4 of the AG policy indicating that CI use should occur sparingly, after an assessment of “the likelihood that information which an informant could provide is not readily available through other sources of a more direct means,” the community interviews indicated that CI use is a routine part of police work. As one CR described the process: “Informing is like the game of tag; if you get arrested, then you are ‘it.’”

Out of 66 community respondents, only five definitively<sup>85</sup> reported that when they were arrested they were not asked to give information about the criminal acts of others. Community respondents reported feeling like the police wanted community members to do the job of the police and absorb risks the police were paid to absorb. They noted that the police were requiring community members to take on these risks without the benefit of either a badge or a gun. Four of the community respondents reported being well-acquainted with individuals who were murdered either after serving as witnesses at criminal trials or after it became known that the person was providing information to aid police investigations.

Large urban cities, such as Newark and Camden, were particularly prone to informal, unsupervised, street-level recruitment, cultivation, and use of CIs, although Newark has recently taken steps to prohibit these practices.

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<sup>85</sup> Eight respondents gave equivocal answers to this question, leading the interviewer to believe that they had been asked and probably did act as an informant at one time or another. Because of the equivocal nature of their

responses, they are not counted among those who were not asked and they are not counted among those who admitted to acting as informants.

There are four typical scenarios in which police, mostly patrol officers and officers involved in special enforcement units (though some detectives were implicated as well), approach known drug users on the street and offer to pay them in drugs, money, or both to assist in a dealer's arrest:

- 1) The drug user is told to find and purchase drugs on the street and, once the transaction is over, point out or describe the seller to the officers.
- 2) The drug user is told to attempt a drug buy from a person or location identified by the police.
- 3) The drug user is asked to introduce an undercover officer to someone he or she says sells drugs or take the undercover officer to a location where he or she knows drugs are sold, for the purpose of facilitating a drug transaction between a seller and the police.
- 4) The drug user rides around in an unmarked unit and points out to the officer individuals from whom the addict has purchased drugs in the past.

On average, drug-addicted CIs reported being given between \$20 and \$100 to make the drug purchases, and the dealers whose arrests they facilitated were typically caught with 10 to 20 bags or vials of drugs. (The CIs said they were able to ascertain this information from the officers they “worked” for or in subsequent conversations with the arrestees, who did not know that the community respondent was responsible for the arrest).

The respondents who admitted they were addicted to drugs when they were informants admitted that if they were particularly “fiending” for their drug of choice and didn’t have any real information to give to police at the time that they were stopped, they might make up a description or name of a seller or make up an address in order to get the drugs or money being offered by the police. They said that they would then leave the area before the police discovered that the information was “bad” (inaccurate or made-up). For anyone unfortunate enough to fit the made-up description or be in the made-up location, the false information given by the informant might lead to an arrest by coincidence — that is, the defendant happened to fit the made-up description and held contraband on that particular day. Those who were innocent might endure police attention and all that it entails — including stopping, questioning, frisking, searching, and handcuffing. Or, if the fabricated information involved a location, an innocent person might risk having his or her property damaged by a forced entry.

Four of the 11 community respondents who said they were drug-addicted and had acted as CIs reported that on more than one occasion they were given target addresses at which to attempt to purchase drugs. Once they got the occupant to open the door to complete the transaction, the police came up from behind and pushed in, arresting the occupant and searching the entire premises without a warrant.<sup>86</sup>

Some of the community respondents who said they were drug-addicted informants reported that they were on a first-name basis with the officers who used them most often. A few even reported “getting high” with officers, officers observing them “getting high” or officers “getting them high” without arresting them. A few also indicated that officers paid them using money or drugs that the officers confiscated from drug dealers during arrests. While this practice appears rare, this type of police-informant relationship is a form of corruption prohibited by written policies that would result in vigorous prosecutions if detected according to the County Prosecutors Association.

Other forms of corrupt practices related to CI recruitment reported during the community interviews included:

**“Putting a Charge on” Someone** — Charging innocent civilians with cases because they refused to inform on others. The most common form of this practice occurred when police came into an area and found drugs “stashed” rather than in the possession of any one individual. If no one would tell who the drugs belonged to, a person could be selected at random to “wear” the drug possession charge. More than one community respondent reported being told by the police, “If you don’t tell who these drugs belong to, then they are yours.” Their subsequent silence would result in them being arrested.

**Holding Open Warrants** — Police officers ride around looking for civilians who they know have open warrants, typically someone they have arrested before or a known drug addict who has failed to appear in court on an open charge. The person is taken into custody or placed in the patrol car based on the open warrant but then told that he or she will not “have to go to jail” if the person gives the police officer some “information” or does “some work” for the officer. Typical scenarios involved pointing out alleged drug dealers, making

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<sup>86</sup> Longstanding Fourth Amendment jurisprudence expresses the preference for searches conducted pursuant to a search warrant from a judge. This requirement is particularly preferred when law enforcement agents seek to search a private home. In the absence of a search warrant, the arrest of someone at the doorway of a home, should be limited in scope. Case law suggests that the authority to search would be limited to the arrestee’s immediate area and perhaps a “protective sweep” of the entire location to

insure the protection of the police officers involved in the arrest. However, the case law also permits law enforcement officers to seize (without a warrant) any contraband that they see in plain sight during such procedures. By making these “doorway” arrests, police officers are intentionally putting themselves in a position to “see” inside the homes without requesting a search warrant first. (*See Chimel v. California*, 395 U.S. 752 (1969)).

drug buys, or pointing out drug-dealing locations. If a police officer could make an arrest from the CI's "information" or "work," the officer "paid" the CI by foregoing the arrest on the open warrant and "let him go," but without resolving the open warrant. This means that the warrant remains open, providing the officer with an opportunity to arrest that individual again (sometimes even the very next day) to repeat the process of using him as a CI. More than one participant reported that when CIs have gotten tired of being used in this way and refused to cooperate during these stops, police have threatened to reveal the CI's identity to people that person has informed on.

**Threatening Innocent Civilians with Unwarranted Criminal or Civil Action** — Participants reported that police officers threatened to charge civilians they suspected of witnessing crimes with obstructing justice or hindering prosecution if they refused to give or gather information about a particular crime. For single mothers, it was reported that they commonly threatened that their children would be taken away by the Division of Youth and Family Services (DYFS) if they did not cooperate.

**Demanding Sexual Favors in Lieu of Information** — It was reported that police officers in one Central New Jersey county detained prostitutes expecting them to act as informants to avoid being arrested and demanded free sex if they would not act as an informant. In exchange for sex, the prostitutes would be released without criminal processing on the prostitution charge.

**Use of Informants with Known Mental Health Problems or Developmental Disabilities** — Roughly 5 percent of community respondents either reported having worked as CIs despite a history of mental instability or exhibited symptoms of mental health deficiency during the interviews. One interviewee reported that members of the Narcotics Task Force, including federal agents, were waiting for him when he was released from a psychiatric hospital and asked him to continue to work as an informant in a new location. Though not specifically noted by respondents, many offenders are developmentally disabled and may easily fall under the influence of officers seeking CI assistance. Persons with developmental disabilities may be hard to identify, yet they will be more susceptible to the admonishment of an officer, because they seek to please and be accepted. Those circumstances are ripe for misuse by officers who are not trained to identify these issues. Many offenders who have both mental illness and developmental disabilities often self-medicate, resulting in addiction. Often documentation of these conditions is not available, but officers need to be able to identify symptoms of these disabilities and evaluate the reliability and credibility of a CI who falls into these categories.

Whether potential CIs are criminal suspects or not, the community respondents typically reported that local law enforcement officers tended to be aggressive in their recruitment of informants. Most community respondents reported that people were made to feel as if they did not have a choice “not to tell” (i.e., act as an informant). In two Southern New Jersey counties, respondents were particularly afraid of situations where the police indicated that they would make others in the community think that individuals were acting as informants when they were not. Such behavior on the part of the police intentionally puts civilians at risk for violent retaliation based on false information from the police.

**Recruitment as Part of Arrest** — Most of the community respondents reported that when arrested they were asked to give the police information about the criminal offenses of others; only five community respondents definitely said they were not asked such questions. Thus a substantial majority was asked to cooperate with the police in order to help themselves, help the police, or help “the community” (in the words of police). In a few instances, the police sought information about open homicides or shooting cases; the vast majority of requests from police asking civilians to act as informants were related to drug crimes.

Most of the community respondents denied cooperating with the police or supplying the police with useful information about the criminal activities of others. Most reported that the police became angry when they refused to cooperate. Some officers shouted and called them names, and used racial epithets. A few respondents in Northern and Southern New Jersey reported that they were physically assaulted by the police when they refused to “play the game.” Virtually all of those who refused to cooperate reported that they were told that as a result things would be “bad for them” in court. Several reported they thought they received longer prison terms than equally culpable co-defendants, whom they believed cooperated with the police.

There was some evidence that arrestees who were male and white tended to fare better than others in the CI recruitment process. The majority of the white males who responded to the questions (four out of six) reported that they were either not asked to serve as an informant when they were arrested or that the request from police was equivocal (i.e., “you can try to work off the charge or not”). One white male reported turning down an initial request to become an informant from the Narcotics Task Force and noted that he did not suffer any repercussions for his refusal. When he was arrested on a second drug charge, he sought out the officer who originally asked him to work as an informant. He learned the officer had been reassigned to a different duty and subsequently contacted the county prosecutor’s office to find out which officer from his local area was then serving on the task force. The respondent made contact with the new officer, who made arrangements for him

to “work” locally, and he ultimately began working as a federal informant earning \$1,000 to \$1,200 per month.<sup>87</sup>

Taken in tandem with the public defender interviews, case file reviews, policy reviews, and law enforcement survey results, the community responses make clear the significant failures to comply with existing policy and outright abuses that exist within New Jersey’s current CI system. It is imperative that reforms be implemented to curtail the systemic injudiciousness inherent to the unregulated, unmonitored, and unsupervised use of informants.

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<sup>87</sup> Although they were not specific about the race or gender, the New Jersey State Police also acknowledged paying some informants on a steady basis.

## Part V: Best Practices

Law enforcement agencies in New Jersey may rely on some existing models to achieve uniform and effective practices. For example, in our assessment, the Newark Police Department contains one of the best definitions to clarify who is and who is not a confidential informant. Under the Newark policy (excerpts of which are attached as Appendix L), a confidential informant is:

A person approved by the department and registered with the Criminal and Gang Investigative Unit, who through a confidential relationship with a contact officer furnishes the department with information specifically requested, and such person:

1. Expects monetary consideration for information supplied, or
2. Has a prior criminal history or associates with known criminals,<sup>88</sup> or
3. Has demonstrated reliability by providing information of value on more than one occasion.

The policy defines the “contact officer” as: a member of the department who has developed a confidential relationship with an informant and defines the “confidential informant file” as a file maintained in order to document all information that pertains to confidential informants. In subsequent sections, the policy provides details for the establishment of the informant file system, registration of informants, general guidelines for handling confidential informants, and procedures for payment to confidential informants. In April 2007, the department issued a memorandum eliminating the use of “street sources” as informants. Additionally, the policy provides for the periodic auditing of the informant file system.

The policies of two departments in Monmouth County, although shorter than Newark’s 60 plus-page policy, go into a similar level of detail. The 12-page Asbury Park policy (included as Appendix M), which includes its applicable forms, is clear and precise about officer roles and responsibilities related to “informants and intelligence.” The policy specifies what the chief of

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<sup>88</sup> And hence is presumptively seeking current prosecutorial consideration or such consideration in the near future.  
“The Essex County Prosecutor’s policy defines a CI as: an

individual who furnishes information pertaining to criminal activity and who is seeking a benefit in exchange for the information.”

police, the “officer in charge,” detectives, and other police personnel should appropriately do. It requires at least two officers to be involved when there is confidential informant contact. There is an extensive set of procedures specified for “confidential informant information and management” and “control and use of confidential funds.” Similarly, the Tinton Falls Police Department policy (included as Appendix N) does an admirable job of pulling together several pieces of the disjointed AG’s policy into one place. The Tinton Falls policy includes specific sections on “documentation and corroboration of information received from informants,” detailed sections on the “requirements for” and “limitations on use of” juvenile informants, and “operations on school property,” in addition to other important regulations.

It is also worth noting that upon reviewing a draft of this report the Morris County Prosecutor’s Office developed comprehensive policies to address the use of CIs (included as Appendix O). Similar reform efforts are being undertaken by the Salem and Cumberland County Prosecutors. The leadership demonstrated by these offices is commendable, and these kinds of detailed policies will provide the framework for a binding and enforceable statewide policy on CIs.

The Attorney General Directive 1998-1: Prosecuting Cases Under the Comprehensive Drug Reform Act (original *Brimage* Guidelines) specifically provides that:

**All plea agreements that are offered in exchange for a defendant’s promise to provide future cooperation shall be in writing and shall set forth the reasonable expectations and obligations of both the defendant and the state in sufficient detail so that those expectations and agreed-upon responsibilities are clearly understood and can be reviewed upon request by the Division of Criminal Justice and enforced by a court if necessary.**

Yet, through our interviews with the public defenders, only the Atlantic County Prosecutor’s Office<sup>89</sup> could confirm consistent adherence to the directive over a substantial period

<sup>89</sup> Like other defense attorneys, members of the Public Defender’s Office in Atlantic County did report law enforcement activity that they perceived as local law enforcement agency efforts to circumvent the requirement for written agreements. They noted that clients reported being told by police not to tell their lawyers about their acting as informants because “they will mess up the deal.” They also reported having clients who claimed to have done substantial work for the police and prosecutor’s office prior to being

assigned to the Public Defender’s Office for legal representation. Members of the Atlantic County Public Defender’s Office reported allowing their clients to talk to police, hoping that they would be able to enter into written agreements, but after the initial interviews the clients were told that the police “already knew” the information provided. When there was no way to refute or confirm these claims, clients were often not offered a written agreement.

of time.<sup>90</sup> A copy of the Atlantic County policy and a redacted version of its cooperation agreement form are attached here as Appendix Q. Several of the public defenders' offices reported that they were not aware of the requirement for written agreements and had never signed such agreements on behalf of their clients. As late as 2004 a memorandum was circulated to the Camden County Public Defender's Office about the failure of the Camden County Prosecutor's Office to provide public defender clients with such forms.

This lack of adherence to CI requirements established under *Brimage* in 1998 provides another example of the need for establishing uniformity and oversight to CI policy in the state. It also illustrates why written policies are a necessary but insufficient mechanism for achieving CI-use reform and procedural compliance.

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<sup>90</sup> Several county prosecutors insisted that they do follow the directive; the reasons for the disconnect between public defenders' perceptions and prosecutors' representations

is unknown. One possible explanation is that we did not speak to public defenders in every county.

## **Part VI: Recommendations**

### **Uniform and Mandatory Policy**

The AG should establish a single, comprehensive, statewide, and mandatory policy governing the use of CIs, covering county prosecutors, municipal prosecutors, law enforcement officers (whether state, county, local, college, or bi-state agency police forces), and all levels of corrections officers. It should be codified in a single location and communicated to all applicable persons through a comprehensive training regimen. Such a policy and its accompanying training regimen would enable law enforcement officials to effectively do their jobs and avoid suppression of evidence, ward off possible disciplinary action, and protect against potential civil lawsuits.

### **Policy Content**

The policy should incorporate and include:

- The requirements found in Section 21 of the New Jersey Prosecutor’s Manual.
- The requirements found in Section 9 of the New Jersey Prosecutor’s Manual.
- The requirements found in Section 3 of the New Jersey Law Enforcement Officer’s Reference Manual.
- The requirements found in Chapter 5 of the New Jersey School Search Policy Manual and Companion Reference Guide.
- A uniform requirement that law enforcement agencies obtain approval from the county prosecutor’s office before engaging the assistance of an informant.
- A requirement that all agreements between CIs, whether or not they are awaiting sentencing, and prosecutors or police be written and signed by both parties.
- A requirement that written agreements include any and all promises of a plea bargain, leniency, or other benefits (including monetary) the prosecutor or police may have made to the informant.
- A requirement that the informant be provided a complete and legible copy of the agreement.
- A requirement that county prosecutors establish a process for timely review and approval or denial of law enforcement applications to use informants.
- A prohibition against any law enforcement personnel promising or suggesting to a current or prospective CI any type of immunity from prosecution without the express written agreement of the prosecuting attorney.

- A requirement that before a CI provides any assistance, the substantial assistance agreement must include a description of what work the informant will be doing, the length of service, and what benefits the informant will be receiving.
- A requirement that local law enforcement follow AG guidelines and protocols to prepare a record of all contacts with CIs and maintain it confidentially.
- A requirement that all law enforcement agencies utilizing confidential informants follow AG protocols governing training, implementation, and enforcement.
- A requirement that all police incident reports and search warrant affidavits contain a section establishing the confidential informant's reliability by answering these questions:
  - How the informant has been used in the past, or whether this is the informant's first time being used;
  - The nature and character of the previous investigations for which the informant has been used (e.g., narcotics, guns, stolen property, burglary);
  - How many times the information has proved to be true and accurate;
  - Whether the information led to the arrest of the target for which the informant supplied information;
  - Whether the information led to a search warrant for the person, place, or object for which the informant supplied information;
  - Whether the subsequent prosecution led to conviction or dismissal; and
  - A complete description of the informant's personal observations, assuming such information would not reveal the CI's identity, documenting:
    - What the informant saw, heard, smelled, tasted, or touched;
    - The length of time the informant spent with the target-person, target-place, or target-object;
    - Unique identifiers of the target person, place, or object (e.g., height, weight, scars, marks, tattoos, address, description of the place or object, license plate number);
  - Precise location where the contraband is concealed.

## Age of Informants

Given the potential danger and risk to juveniles who are used as CIs, such use should be extremely limited. It should be instituted only as a last resort (i.e., when there are no other reasonable avenues to obtain evidence of the crime being investigated) and should require written approval of both the county prosecutor and the juvenile's parent or guardian. No juvenile should be used as a CI unless the juvenile is subject to criminal charges or subject to having criminal charges filed against him or her. Under no circumstances should a juvenile below the age of 16 be used as a CI. If a juvenile is used, then a parent or guardian must sign a consent waiver.

## Guidelines for Appropriate Use of Confidential Informants

CIs should be used only when the information that an informant can provide is not readily available through other sources or by more direct means, and only when the target offense is proportional to the offense the informant is suspected of committing, arrested for, or convicted for. This protects low-level informants from being pressured into associating with higher-level, more violent criminals, and it helps prevent the use of higher-level informants reporting on “small fish.”<sup>91</sup>

When using a CI, law enforcement must make every effort to consider the ability of the CI to safely perform the task requested. In making this determination, law enforcement considerations shall include, but not be limited to:

- The age, maturity, mental and emotional stability, and relevant experience of the CI;
- The criminal history of the CI, including both the number and nature of any prior offenses;
- The benefits promised to the CI;
- The nature of assistance sought from the CI;
- The age and maturity of the target offender;
- The criminal history of the target offender, including both the number and nature of any prior offenses and the nature of the target offense; and
- The propensity of the target offender for violence.

Law enforcement should, whenever possible, avoid using CIs with no history of violent conduct against targets known or suspected to have engaged in felony-level violence. Law enforcement may not use CIs without first fully assessing and addressing with the CI his or her potential exposure to a risk of serious bodily harm flowing from acting in this capacity. The greater the level of risk, the more protection the potential CI should be afforded, including time to consult with an attorney before agreeing to serve as a CI.

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<sup>91</sup> We are mindful, however, that not all informants are criminal suspects.

## Legal Remedies

A policy is but an empty promise to the people it is intended to protect if no meaningful consequences result from its violation. Accordingly, the following protections should be effectuated to prevent violations of CI policies:

- 1. Establish, either administratively or legislatively, that evidence resulting from a violation of the CI Guidelines be excluded from admission as evidence in a criminal proceeding.**
- 2. Adopt legislation clearly establishing that, in a civil action against an individual or agency, for negligent or purposeful action that placed the CI at risk and which ultimately resulted in harm to the CI, failure to adhere to the CI Guidelines shall constitute a prima facie showing of negligence.**
- 3. Currently, it is unclear whether the AG has adequate mechanisms to enforce the CI guidelines regulating police officers, nor is it clear whether the AG's Office has the authority to discipline officers for violations thereof. An effective enforcement mechanism, such as a licensing and decertification process (as other states have in place), must be adopted.<sup>92</sup>**

## Audit and Record Keeping

Local law enforcement must follow AG guidelines<sup>93</sup> and protocol to prepare and confidentially maintain a record of all contacts with confidential informants.

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<sup>92</sup> The Attorney General has not hesitated to claim the ability to use regulatory authority over local police departments to enforce — and if necessary, punish — transgressors of AG directives. For example, violations of the November 2009 *Policy on the Use of Conducted Energy Devices* can result in the Attorney General “temporarily or permanently suspend[ing] or revok[ing] the authority of the department, or any officer, to possess or use conducted energy devices” and “institute[ing] disciplinary or criminal prosecution proceedings.” In a similar vein, N.J. Adm. Code § 13:57-1.4(a)(3) provides that departments that fail in their obligations to submit monthly crime statistics can face

“suspension or termination of eligibility to receive forfeiture moneys and/or award of grant funds provided to the law enforcement agency by or through the Department of Law and Public Safety, and additional notice of such action may be sent to the respective county prosecutor’s office, including authorizing the prosecutor to exercise direct oversight.

<sup>93</sup> These would be in addition to the current requirements of the *Prosecutor’s Manual*, Section 9.2, included here as Appendix D.

The AG shall develop a uniform reporting system and collect reports from county prosecutors on a quarterly basis. These reports shall contain anonymous identifiers and be available under the Open Public Records Act. Reporting shall include:

- Number of CIs used each quarter by case category
- Monetary payments to CIs
- Non-monetary benefits to CIs
- The disposition of all charges brought against target offenders
- The disposition of all charges brought against CIs
- Documentation of corroborating evidence that accompanied informants' statements or testimony from trials utilizing informants as the government's primary witnesses.

The AG shall conduct an annual audit evaluating the effectiveness of CI use in New Jersey and issue the findings publicly. While budgetary constraints may preclude the immediate use of AG employees to conduct this audit, the state should explore other possibilities for conducting this audit, including using Office of Inspector General personnel and seeking and receiving federal grants for this purpose. Conducting such audits is at least as important as the other myriad civil advocacy and law enforcement activities that the AG performs.

### **Confidential Informants Receiving Treatment or CIs on Parole or Probation**

No member of law enforcement shall permit a person to serve as a CI if he or she is currently participating in a court-ordered drug or substance abuse treatment program without the approval of the supervising court. The supervising court should take into account whether the person's participation as a CI may jeopardize the success of his or her treatment. No one in a non-court ordered treatment program shall be permitted to serve as a CI without the approval of the county prosecutor of the jurisdiction of the law enforcement agency that is considering the use of the CI. Prior to approval, the prosecutor shall consult with the person's treatment provider, giving strong weight to the provider's professional opinion about whether the person's participation as a CI may jeopardize the success of his or her treatment.

When law enforcement is contemplating the use of a CI currently on parole or probation, law enforcement must inform and obtain the approval of the AG or county prosecutor of the jurisdiction of the law enforcement agency that is considering the use of the confidential informant and the parole or probation officer supervising the informant before using the person as a confidential informant.

Persons with a history of psychiatric or other mental health treatment shall not be used as confidential informants. If a law enforcement agent becomes aware of potential mental health problems with an individual that law enforcement has been using as a CI, the agent must discontinue use of the CI until that person has been found to be mentally sound. Similarly, people diagnosed with a developmental disability (including but not limited to mental retardation, cerebral palsy, autism spectrum disorders, Down Syndrome, Fragile X disorder, and the like) should not be use as CIs.

### **Corroboration**

No county prosecutor shall bring a criminal prosecution where each element of the offense is solely dependent on the information from a CI.

### **Training**

Any law enforcement official authorized to work with a CI must have undergone CI training, as determined by the AG, and must attend periodic in-service refresher courses made available through the AG's office or county police academy through a curriculum approved by the Attorney General's office. Each member of a law enforcement agency must be familiar with the agency's policy on the use of informants and sign the directive and each amendment to it, confirming awareness of any changes to the policy as they occur.

### **Consent of Defense Counsel**

If a potential CI is represented by counsel, before entering into any cooperation agreement with law enforcement agencies, the defense attorney must be informed that his client's cooperation is being sought and the nature and extent of that cooperation. The defense attorney must also be advised of the nature and extent of the consideration that the client is to receive in return for the cooperation. The defense attorney must be provided with a copy of the proposed agreement. There must be an opportunity for the defense attorney to advise the client prior to the signing of any such agreement; and unless waived by the

client, the agreement must be signed by defense counsel. Suggested language, based on the *Brimage* Guidelines, may be:

“A person who law enforcement solicits to act as an informant in exchange for leniency concerning a criminal offense must be provided full opportunity to consult with counsel. If the person is represented by counsel at the time he is solicited or volunteers to act as an informant, law enforcement must advise the person of the right to speak to counsel and provide full opportunity to consult with counsel prior to entering into a Substantial Assistance Agreement and using the person as a confidential informant. If the person is not represented by counsel, law enforcement must advise the person of the right to speak with counsel and provide the person full opportunity to consult with counsel prior to entering into a Substantial Assistance Agreement and using the person as a confidential informant.”

These recommendations are not to suggest that the provisions of the current AG policies are without fault. Our critique of the current provisions of section 21.8 (reprinted in full at Appendix C) includes the following potential strengths and weaknesses:

- In section 21.8.3 (Confidentiality), the policy purports to make the use of CIs an agency function, rather than a function of individual officers or agents. However, since according to our community interviews much CI work is taking place at the “street” level, (i.e., police are recruiting and utilizing civilians as CIs at the moment of arrest) this activity is difficult to monitor. The possibility for oversight only arises when officers file arrest reports or apply for search warrants alleging that a CI was used during the course of the arrest or investigation. Under the AG’s policy, when a claim of CI usage appears in writing, this should alert the policing agency to the need for documentation and adherence to a set of rules that have been established in advance by a designated supervisor. Typically, that supervisor is also required to sign off on such reports and/or the requests to use or pay such CIs, which according to the policy, should have been made in advance of such use.

In our case file analysis, roughly 20 percent of the cases (12 out of 56) where the police claimed that a CI was used during the course of the investigation that led to the arrest, no supervisory signature appears on the documents that we were sent for review. In addition, while the AG’s policy requires that the identities of all informants used by an agency “should” be made known to an appropriate supervisor, in large urban areas the spontaneous utilization of informants on the street, most often specifically for drug interdiction, makes it highly unlikely that such relationships are being documented or reported.

- In section 21.8.4 (Evaluation of informants), the AG policy indicates, perhaps not strongly enough, that information from informants is not to be used as a substitute for independent police work. The language of the section creates an expectation that informants will be used when the information that they can provide is not readily available through other, “more direct” means. However, our community interviews indicated that in the large urban areas, the cultivation and use of CIs on the street was standard practice, used even when police could have easily made arrests based on their own efforts through the use of ordinary observation or public surveillance.

Also, while the AG policy indicates a preference for minimal use of information from informants, the *Brimage* Guidelines’ specific mention of “cooperation” as a means for favorable consideration at sentencing inevitably pressures people who face possible conviction to give over information without regard for the police’s ability to gather such information on their own.

- Section 21.8.5 (Verification of Informant) as written seems to exclude the necessity for a background check when an informant is not seeking some form of compensation in return for their information or when that person is not already known to have a criminal record. This exclusion can be problematic. It does not seem to take into consideration that an otherwise “innocent” informant could be motivated by jealousy or biases (racial or otherwise) to supply factually inaccurate information against individuals or groups that he or she finds personally undesirable. The policy should unequivocally require criminal background checks as standard procedure when dealing with all informants to determine their motivations for informing. The Newark Police Department under its revised written policy (excerpts included as Appendix L) requires “renewals” of all of its confidential informants. Such renewals should also include quarterly background checks.
- Section 21.8.6 (Documentation of Information Received from Informants), uses the word “should” with reference to an agency’s obligation to have a system in place that keeps records of the information provided by informants. Therefore, a law enforcement agency is at liberty to follow or ignore the recommendation for uniform and systematic maintenance of such records. To support the utilization of only reliable informants and accurate information, the policy should make such record-keeping mandatory.

- In section 21.8.7 (Documenting Contacts with Informants), an interesting distinction is made between informants receiving benefits and those with a criminal status (presumably that designation would apply to both those receiving benefits and those who are not). This section uses the word “shall” rather than “should” in requiring documentation of law enforcement contact with such persons, whether or not the contact results in the receipt of information. It seems that the provision may be designed to protect agencies from possible claims of corruption or from false claims that a CI relationship exists between a civilian and an agency. As section 21.8.6 and 21.8.7 are currently written, the AG’s office seems to be more concerned with protecting law enforcement agencies from civilians than ensuring the integrity of the information used by such agencies in their investigative and enforcement functions.

Although the section requires that all contacts with informants be documented, our community interviews indicated that this mandate is not being followed when recruitment, cultivation, and utilization of informants occurs on the street. This provision only takes effect in the formal arrangements dictated by the *Brimage* Guidelines during larger-scale ongoing investigations and ongoing informant relationships where monetary or other substantial compensation is provided by law enforcement agencies. It is noted that in 2007, the Newark Police Department eliminated the category “street sources” from its definition of informants. Our understanding is that this was in part to cut down on the number of undocumented (and perhaps “undocumentable”) contacts the agency had with informants. The AG’s policy might have a greater impact if it also expressly prohibited spontaneous “street” cultivation and utilization of informants.

- Section 21.8.8 (Payments to Informants) mentions keeping records of payments to CIs in a manner established by the agency. It does not provide a framework or minimum standards for such record-keeping nor mandate a periodic audit of the payment files. To be effective, this section should at least mandate annual monitoring of CI files regarding the efficacy and accuracy of information; the number, nature, and quality of contacts; and the amount and frequency of payments. These audits would not be able to take into account the activities of individual police officers who have contact or make payments in violation of the established protocols. Therefore, there would need to be a mechanism for imposing sanctions against such officers when supervisors become aware that they

are acting outside of the established rules. Such sanctions should include graduated disciplinary action and criminal prosecutions for any officers engaged in criminal activity such as paying CIs with drugs in lieu of money.

- Section 21.8.9 (Promises of Consideration) states that it should be mandatory for any law enforcement agency looking to utilize a person as a CI to tell that person that any considerations related to criminal liability can only be made by the prosecutor's office or AG once an arrest has occurred. However, the AG policy's emphasis on "prosecutive" functions leaves wide-open the opportunity for corruption and overreaching by police at the arrest stage when dealing with community members as potential informants. Our data reveal that police often barter with civilians on the street, offering to refrain from making an arrest or formally processing a suspect in exchange for information or a specific performance (often either "making a buy" or "setting up" a dealer). As currently written, the AG policy does not preclude this process or offer any potential for its curtailment.

## Part VII: Limitations and Directions for Future Research

### Limitations

#### *Self-Report Surveys*

Like many studies, this one used subjective self-report surveys as the primary data source. A fundamental goal of survey research is to elicit accurate responses from participants to draw valid inferences about a larger population of interest. Quantitative research that relies on self-report data is subject to method variance to some extent, although the validity and reliability of self-report surveys has been used in previous research to measure other sensitive attributes, such as criminal careers and offending, and in testing theory.<sup>94</sup>

Some of the limitations of self-report surveys include problems with memory and recall, the desire of participants to present themselves in a positive light, and participants' use of ambiguous or unclear language. The *Confidential Informant Survey* administered to law enforcement agents in this study depends on data obtained from active or retired police officers who have the potential to influence the appearance of police practice by fabricating their answers or because of recall error.<sup>95</sup> The survey was designed to measure various aspects of police officers' policy and practice environment that are likely to illuminate problems, something participants may consciously try to avoid. Similar evaluations could be made of the interviews with community respondents, who may purposefully or unwittingly give inaccurate answers that skew the data.

The validity of self-report data are always questionable due to response bias, which occurs if participants alter their responses to meet the real or perceived needs of the researcher. Because participants in the current survey primarily reported on their knowledge and conformance to policy, it is possible the validity of the data could be compromised by response bias. Moreover, if this assumption is correct, then the results of any statistical tests conducted on these data may be biased because the findings and inferences are wholly dependent on how well the variables have been measured. Similar critiques could potentially be made about the CRs' interviews. Despite the limitations, self-report measures have been widely regarded as reasonable reflections of actual behavior, attesting to their validity and reliability.<sup>96</sup>

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<sup>94</sup> Fungler-Tas and Marshall, 1999

<sup>96</sup> Blackmore, 1974; Clark and Tiff, 1966; Hindelang, Hirschi and Weis, 1981

<sup>95</sup> Horney and Marshall, 1992

### *Sample Selection*

The survey uses a non-probability snowball sample (i.e., convenience sample), not a random sample. Random sampling permits every element in the population to have an equal chance of being selected and often employs a table of random numbers or a random-number generator program to produce the sample, which reduces systematic bias.<sup>97</sup> A non-probability sample selects elements of the population based on their availability (e.g., soliciting volunteers) or due to some qualitative judgment of representative elements. The result is that an unknown segment of the population is excluded (e.g., those who did not volunteer). The survey data were collected from a non-probability sample of active and retired police officers from various police divisions (e.g., gangs, narcotics, patrol, vice). The sample consisted of men and women from different age groups, racial groups, and ethnic backgrounds.

Because some elements of the population have no chance of being sampled, the extent to which a convenience sample, regardless of its size, actually represents the entire population cannot be known. This introduces systematic bias, and the inferences based on this type of data must be accepted with caution. Strictly speaking, inferences cannot be drawn from a non-probability sample about the proportion of the population exhibiting or not exhibiting a particular characteristic. However, the protections afforded human subjects (e.g., not forcing them to participate against their will), the practical limitations of police field research (e.g., a police agency sufficiently large to have a cadre of officers who have dealt with confidential informants), and other agency considerations of using active police officers (e.g., administrative subversion)<sup>98</sup> limit the use of a probability sample in this research.

Community respondents, too, were selected using non-random selection. As such, care should be taken when drawing inferences about the prevalence of various complaints and observations.

### *Sample Size*

The sample size is not large enough to perform inferential statistics. This means, the sample size is not large enough to predict officer behavior as it comports with confidential informant policy. Typically, all else being equal, larger samples lead to increased precision in estimates of various properties of the population. Because the sample size is small, generalizability is threatened. Generalizability is the extent to which inferences can be drawn about the data so “general” conclusions from the narrow sample can be applied to

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<sup>97</sup> Maxfield and Babbie, 2001, p. 230

<sup>98</sup> See Bergstrom, 1985; Rice, 1985; Weiss and Boruch, 1996

the broader police community in New Jersey and beyond about their use of confidential informants. Many police officers in New Jersey were not sampled, and no officers outside New Jersey were sampled. Likewise, the information gleaned from CRs cannot be generalized because of the limited sample size.

Despite the limitations, this study is the first in New Jersey to examine the gap between confidential informant policy and practice. Although a single study does not provide definitive evidence in support of its findings, it does lend credence to the belief there is a degree of implementation failure and a lack of oversight.

### **Directions for Future Research**

The results of this study suggest a few directions for future research that could improve the understanding of the relationship between confidential informant policy and police practice. Future research should seek a larger sample. A larger sample of agencies and officers would enable inferences to be drawn about police practice while controlling for other influences, which cannot be done with this particular report. Using stratified random sampling to first select police agencies based on size, then randomly selecting officers to participate would improve confidence in the findings. Going beyond New Jersey would also widen the picture about using confidential informants to a regional or national scope, allowing more uniform policy to be crafted across the law enforcement field.

## **Part VIII: Conclusion**

While significant efforts have been made by the New Jersey Attorney General's Office, county prosecutors' offices, and municipal police departments to provide written and clear policies that instruct police officers in the acceptable methods for utilizing the invaluable tool of confidential informants, the use of CIs by law enforcement in the state is, in reality, marred by complex, ineffectively monitored procedures, when they are known and monitored at all. The ambiguity and variance among law enforcement officials when it comes to recruiting, utilizing, and safeguarding civilian informants create stress for law enforcers and civilians alike. Guidance through written policies is inconsistent and questionable in scope and application; even when adhered to, they provide minimal protection for those who inform. This ambiguity has led to inconsistent and ethically questionable practices, and in some instances downright corruption and serious criminality by those charged with enforcing the law. Whether intentional or inadvertent, the unregulated and unsupervised use of informants causes harms that must be addressed through training and enforcement.

While most written policies begin with some statement about the essential role that informants play in the investigation of crime, current record-keeping practices regarding use of informants and their information do not provide for the comprehensive collection of information received through confidential sources nor include ways to assess their efficiency and effectiveness. The emphasis on the usefulness of CI information without adequate attention given to guidance, checks, or balances serves as an incentive to rely on CI use as a means of solving crimes without regard for those who are asked to serve in the role of informant. With few exceptions, the one-sided power dynamic in the law enforcement-informant relationship thrives despite some legislative attempts, on both state and local levels, to bring the practice under formal regulation and control.

Consequently, New Jersey needs a CI system that does not prey on the poor, the weak, or communities of color that can also adequately protect the interests of civilians who have been accused of crimes; the integrity and well-being of law enforcement agents; and the rights and well-being of ordinary citizens. If legislators and the judiciary are going to continue to provide and support incentives for lawbreakers and the law-abiding to cooperate with law enforcers, a system must be devised that can lead to safe and consistent means of seeking and conferring ethical benefits for that cooperation. Without a uniform, carefully monitored system, the benefits or detriments that a person may receive for cooperating with policing authorities will continue to vary based on the racial, ethnic or class status of the informers; the demographics of where they live; and, the personal and professional integrity and procedural knowledge of the individual law enforcement officer.

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## Appendices

Appendix	Description
A.	Memorandum of Attorney General Peter Harvey, Aug. 23, 2002, re: Search Warrant Application Form
B.	Excerpt from Attorney General Guideline 1998-1, Prosecuting Cases under the Comprehensive Drug Reform Act (“Brimage Guidelines”)
C.	New Jersey Prosecutor’s Manual, Jan. 2, 2001, Section 21.8, Policy on the Use of Informants
D.	New Jersey Prosecutor’s Manual, Section 9.2, Confidential Informants and Confidential Cooperating Witnesses
E.	New Jersey Law Enforcement Officer’s Reference Manual: Handling Juvenile Offenders or Juveniles Involved in a Family Crisis, Section 3, Law Enforcement Guidelines on the Use of Juveniles as Informants
F.	New Jersey School Search Policy Manual and Companion Reference Guide, Chapter 5, Informants and Confidential Sources of Information
G.	Matrix of Counties and Confidential Informant Policies
H.	Matrix of Municipalities and Confidential Informant Policies
I.	Survey Form for Current and Former Law Enforcement Personnel
J.	Table of Responses to Law Enforcement Personnel Survey
K.	Summary of Individual County Confidential Informant Policies
L.	Excerpts from Newark Police Department Confidential Informant Policy
M.	Asbury Park, NJ Police Department, Policies and Procedures, Informants and Intelligence
N.	Tinton Falls Police Department, Use of Informants Procedures
O.	Office of the Morris County Prosecutor Directive on the Use of Confidential Sources, Informants & Cooperating Witnesses
P.	Office of the Morris County Prosecutor PowerPoint Presentation for “Train-the-Trainer” Program
Q.	Office of the Prosecutor, County of Atlantic, Informant Policy and Cooperation Agreement Form



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