

46.3 Defendant as Confidential Informant.

Defendants under the supervision of the probation and pretrial services office under an order of this court may not be used as confidential informants, or in a manner that would violate any release condition, including any “association” restrictions, without first obtaining an order modifying the release conditions to allow for the proposed governmental assistance.

(a) Request for Use as Confidential Informant.

The procedure for obtaining an order to permit a defendant's participation as a confidential informant and any necessary modifications of conditions of pretrial release follows.

(1) Requesting Agency's Initial Duty.

Before asking the court to approve defendant's use as a confidential informant and any necessary modifications of the defendant's pretrial release conditions, a representative of the law enforcement agency requesting the defendant's assistance must:

- (A) conduct an in-depth discussion with the defendant and the defense attorney concerning:
 - (i) the anticipated relationship between the defendant and the federal law enforcement agency;
 - (ii) the intended targets of the federal agency's investigation;
 - (iii) the anticipated manner and operation of the defendant's assistance in the investigation; and
- (B) if time permits, meet with a probation and pretrial services officer to determine which conditions of pretrial release must be modified if the defendant is to perform duties as a confidential informant for the agency.

(2) Presentation and Content.

The agency's request must be presented through the government and submitted ex parte to the magistrate or district judge assigned to the case. In case of emergency, any magistrate or district judge in this district may consider the request for modification. The request

must contain:

- (A) an explanation of how the law enforcement agency intends to use the defendant under pretrial supervision;
- (B) the instructions the agency will provide to that defendant for carrying out the proposed assistance;
- (C) the agency’s proposed administrative controls over the defendant and the circumstances the defendant may encounter in assisting with the government’s investigation;
- (D) an evaluation of the risk posed to the defendant and the community by using the defendant as a confidential informant, the government’s plan to ameliorate that risk, and an explanation of why the potential benefit to the government outweighs the risk created by the defendant’s re-involvement with criminal associates;
- (E) the identity of any targets of the investigation already under this court’s supervision;
- (F) the specific time period of the proposed investigation; and
- (G) the names of the law enforcement personnel who will oversee the defendant’s work and conduct.

(b) Judicial Review.

(1) Consult with Probation and Pretrial Services.

The judge considering the request must consult with probation and pretrial services before granting the request unless:

- (A) due to time constraints, the judge cannot reasonably obtain an assessment from probation and pretrial services; or
- (B) the court, in its discretion and at the request of the federal law enforcement agency seeking the defendant’s assistance, decides that (i) the case is extremely sensitive and (ii) overriding circumstances justify placing the defendant under the law enforcement agency’s supervision and ceasing probation and pretrial services supervision.

(2) In Camera Review; Sealed Order.

The review of the agency's request must be conducted in camera, and the order granting or denying the request must be filed under seal.

(c) Term of Assistance.

(1) Timing.

If the court grants the agency's request, the defendant's services as a confidential informant may begin when a court order grants the request and may continue as specified in the court's order for a term of up to 90 days. Probation and pretrial services must advise the court 14 days before the end of that term that the defendant's term as a confidential informant is ending. Absent emergency circumstances, an extension of the term must (1) be requested in writing 7 days before the term ends and (2) include an explanation of why more time is needed.

(2) Emergency.

If an emergency exists requiring use of the confidential informant in order to protect life or prevent substantial property loss, to apprehend or identify a fleeing defendant, or to prevent the imminent loss of evidence before court approval can reasonably be obtained, the law enforcement agency (A) may, upon notice to the supervising officer or the officer's supervisor, use the defendant as a confidential informant for no more than 4 hours and (B) must notify the court as soon as possible.

(3) Termination of Service; Notice.

When the defendant's services as a confidential informant are complete, the agency must provide written notice to the court, probation and pretrial services, and the defendant that the defendant's services as a confidential informant are terminated. The defendant must provide a written receipt for the notice.

(d) Supervision of Defendant.

When the court approves a defendant's use as a confidential informant, the law enforcement agency obtaining the defendant's services must:

- (1) with the assistance of probation and pretrial services, advise the defendant (A) to abide by all pretrial release conditions set by the court, including modified conditions, and (B) that the defendant may not participate in any criminal activity without prior court approval;
- (2) take all necessary and reasonable precautions to ensure the safety of the defendant and the community;
- (3) during the term of the defendant's service as a confidential informant, advise the court directly or through probation and pretrial services of any violations of the defendant's pretrial release conditions, including any criminal activity; and
- (4) inform the probation and pretrial services office when the law enforcement agency believes any person is or may be in danger due to the defendant's activities.

(e) Report at Sentencing.

The law enforcement agency that requested the defendant's services as a confidential informant must, directly or through the government's attorney, provide a report to the sentencing judge that (1) outlines the extent of the defendant's cooperation and effectiveness in the investigation and (2) states whether the defendant received financial remuneration or other consideration or reward. All reports must remain sealed until it is appropriate to make the defendant's cooperation known.

(f) Records.

All records identifying the defendant as a confidential informant are confidential and may only be viewed by the court and probation and pretrial services officers.