



State of New Jersey

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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2017-1

TO: Director, Division of Criminal Justice
Superintendent, New Jersey State Police
All County Prosecutors
All County Sheriffs
All Chief Law Enforcement Executives

FROM: Christopher S. Porrino, Attorney General

DATE: January 25, 2017

SUBJECT: Prevention of Victim and Witness Intimidation

1. Overview: The Critical Need to Address Victim and Witness Intimidation

Over the past two years, this Office has held a series of public meetings between citizens, community and religious leaders, and law enforcement officials. These forums have been held at churches, community centers, colleges, and elsewhere across New Jersey. Collectively they have been attended by thousands. Many productive ideas and themes have emerged from these meetings, which in turn have led to concrete policy changes, including: (1) adoption of revised and updated protocols for investigation of police-involved shooting incidents; (2) promulgation of a statewide body-worn camera policy and provision of over \$4 million to fund the purchase of over 6,000 body-worn cameras; and (3) development of a mandatory in-service training program for all law enforcement officers on de-escalation, cultural awareness, and implicit bias.

Throughout these meetings, law enforcement officials, community and religious leaders, and citizens alike have spoken out with one voice about a vexing challenge: the pervasive and deeply destructive practice of victim and witness intimidation, including tampering and retaliation. As law enforcement and community leaders have noted, such intimidation poses a grave threat both to the criminal justice system and to the communities we serve. Victim and witness intimidation can result in failure to report crime, refusal to



speak to law enforcement officers, recantation of statements, and refusal to provide grand jury and/or trial testimony. Worse yet, these effects are cyclical. When violent crimes occur, and witnesses fear coming forward, the ability of law enforcement to solve and charge those crimes is badly compromised. That inability to prosecute violent crimes undermines community protection and deterrence, in turn breeding more violence and damaging public trust and confidence in the police.

Witness intimidation is not new. A decade ago, the New Jersey Supreme Court noted that “witness intimidation is no stranger to New Jersey,” and that “[t]he persistent problem of witness intimidation cannot be denied.” State v. Byrd, 198 N.J. 319, 340-41 (2007). Like many longstanding threats, the problem of victim and witness intimidation has evolved over time and has taken on new dimensions, particularly in our modern cyber-oriented world. In recent years, some criminals have learned to leverage the Internet and social media to spread a message of intimidation. Technological advancements allow for the communication of threats with ease and anonymity, often to large audiences. Pictures and videos captured by smartphones can be posted to customized websites or social media and shared through emails or text messages. Simple Internet searches can afford access to personal information (e.g., address, phone number, place of employment, etc.) of victims and witnesses. Even a cursory search of public Internet and social media sources reveals an abundance of websites and posts dedicated to the “no snitching” ethic – many of which voice the disturbing mantra that “snitches get stitches.” In sum, our new cyber world provides almost limitless opportunity for ruthless criminals to terrorize victims and witnesses.

At the same time, the Bail Reform Law, N.J.S.A. 2A:162-15 et seq.—which became effective on January 1, 2017—provides a unique opportunity to address the problem of witness intimidation. In connection with this new law, I recently issued Attorney General Law Enforcement Directive 2016-6, which centrally emphasizes public safety and the rights of victims and witnesses. Prosecutors must work collaboratively with the police to ensure that the implementation of criminal justice reform achieves maximum protection of victims and witnesses, and does not unnecessarily expose victims and witnesses to the risk of intimidation.

While the problem of victim and witness intimidation cannot be solved with any single policy, it is imperative that law enforcement officials across the state take all available measures to combat this deeply-rooted and destructive practice. To properly address these complex problems, a comprehensive approach is necessary.

Therefore, pursuant to the authority granted to me under the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides 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, I, Christopher S. Porrino, hereby DIRECT all law enforcement and prosecuting agencies operating under the authority of the laws of the State of New Jersey to implement and comply with the following policies, procedures, standards, and practices.

2. Statewide Action Plan: Strategies to Prevent and Respond to Victim and Witness Intimidation

a. Seeking Appropriate Criminal Charges and Sentencing

The first order of business is straightforward: when charges of victim or witness intimidation can be substantiated, they should be prosecuted aggressively and to the maximum extent of the law. At the outset, therefore, it is imperative that prosecutors have a working knowledge of the existing criminal statutes prohibiting witness intimidation, tampering, and retaliation. In all cases, prosecutors should aggressively pursue all applicable criminal charges.

Most commonly applicable, N.J.S.A. 2C:28-5 proscribes a broad range of conduct that includes acts of tampering and retaliation.¹ Tampering involves causing a person—during an official proceeding or investigation—to:

- (1) Testify or inform falsely;
- (2) Withhold any testimony, information, document or thing;
- (3) Elude legal process summoning him to testify or supply evidence;
- (4) Absent himself from any proceeding or investigation to which he has been legally summoned; or
- (5) Otherwise obstruct, delay, prevent, or impede an official proceeding or investigation.

A person commits the offense of retaliation when—through an unlawful act—he or she harms another person in retaliation for or on account of that person’s service as a witness or informant.

In official proceedings or investigations involving crimes subject to the No Early Release Act, N.J.S.A. 2C:43-7.1, when an actor uses force or the threat of force, tampering carries first degree consequences and is punishable by ten to twenty years in state prison. In non-NERA cases, when force or the threat thereof is employed, tampering is a crime of the second degree. Retaliation is a crime of the second degree if force or the threat of force is used in its commission. Otherwise, tampering and retaliation are third degree crimes.

It is crucial that prosecutors understand that this statute expressly prohibits merger of convictions and requires consecutive sentencing. Thus, in all convictions of victim or witness tampering under N.J.S.A. 2C:28-5, the prosecutor shall seek a sentence consecutive to any other sentence imposed in the case.

It also is important that prosecutors file appropriate tampering or retaliation charges even if those charges are of a lower degree than other charges in a given case. First, and as discussed above, under N.J.S.A. 2C:28-5, any sentence must run consecutively to the

¹ See also N.J.S.A. 2C:29-3, which addresses hindering any person’s “detention, apprehension, investigation, prosecution, conviction or punishment” in matters involving motor vehicle violations or insurance fraud; N.J.S.A. 2C:29-4, which makes it unlawful to offer or accept (or agree to offer or accept) a pecuniary benefit in exchange for refraining from reporting or seeking the prosecution of criminal activity.

sentence imposed on other counts of conviction in the case. Second, it is vital that sentencing judges be made aware of the full extent of a defendant's obstructive conduct.

To further promote a nuanced and uniform understanding among prosecutors and police officers of all applicable laws relevant to combatting victim and witness tampering, the Division of Criminal Justice, working with the Attorney General's Advocacy Institute, shall, within 90 days of issuance of this Directive, develop a training course which shall be made available to prosecutors—including municipal prosecutors—and police officers online at NJ Learn. All prosecutors shall view the online course within 90 days of its posting.

b. Police Response to Witness Intimidation and Notice to Prosecutors

Just as it is incumbent on prosecutors to charge witness intimidation cases to the fullest extent of the law, law enforcement officers must place the highest priority on all reports of witness intimidation and must act upon those reports swiftly. Upon receipt of any complaint from a victim or witness, or upon receipt of any information indicating the reasonable probability of witness intimidation, an officer shall be assigned to conduct a threat assessment and an investigation into the allegations of any wrongful conduct. The assessment and investigation should include a comprehensive review of the alleged actor's criminal history, including all pending charges and gang affiliation.

If, based on the nature of the offense and/or the background of the defendant, a police officer making an arrest or participating in an investigation is aware of specific and articulable facts warranting a concern that the defendant or others associated with the defendant might attempt to threaten or otherwise intimidate a victim or witnesses (e.g., the defendant expressed threats to the victim or has expressed threats in the past, is a member of a violent street gang known to engage in witness intimidation, etc.), the officer shall promptly communicate those concerns to the prosecutor responsible for the case. Note that the standard for this notification is intended to be comparable to the "specific and articulable facts warranting heightened caution" standard used in New Jersey search and seizure case law; that is, more than an inarticulable hunch but less than the "reasonable articulable suspicion" standard commonly used in search-and-seizure case law and also used to authorize the collection and storage of criminal intelligence information. This notification is necessary so the prosecutor can take the appropriate charging and protective measures, including bail restrictions, outlined in this Directive.

c. Application for Conditions of Pretrial Release, Protective Orders, or Detention

If notification of case-specific victim/witness intimidation concerns is given to the prosecutor pursuant to item (b) above, or if a prosecutor otherwise has reason to believe that a defendant or his associates might engage in victim or witness intimidation, the prosecutor, in consultation with the police department, shall determine whether some form of restraint (e.g., no contact order, electronic monitoring of defendant's movements, etc.) should be imposed by the court as a condition of pretrial release. See N.J.S.A. 2A:162-17, and see Attorney General Law Enforcement Directive 2016-6, Section 6. The prosecutor must seek imposition of all such necessary restraints.

Further, in cases where such release conditions are necessary, the need for such conditions itself constitutes a basis for applying for a complaint-warrant notwithstanding that

the Court Rule and/or Attorney General Directive 2016-6 might otherwise establish a presumption of issuing a complaint-summons. See R. 3:3-1, and see Attorney General Law Enforcement Directive 2016-6, Section 4.3. In other words: whenever pre-trial release conditions are necessary to protect victims or witnesses from potential intimidation, the prosecutor must apply for a complaint-warrant so that the court may impose such conditions on the defendant.

In addition, in all such cases the prosecutor shall assess whether a protective order pursuant to N.J.S.A. 2C:28-5.1 is an appropriate option to address any concern that “the defendant or other person has injured or intimidated or is threatening to injure or intimidate any witness in the pending offense or member of the witness’ family with purpose to affect the testimony of the witness.” Unlike pretrial release conditions, the reach of these protective orders is elongated, extending beyond the defendant him/herself, and out to the defendant’s affiliates (e.g., family members, friends, criminal associates, and co-conspirators). Moreover, motions for protective orders may be made by the prosecution or by any witness. N.J.S.A. 2C:28-5.3. The burden of proof is by a preponderance of the evidence, and the rules of evidence do not apply to a protective order hearing. N.J.S.A. 2C:28-5.4. N.J.S.A. 2C:29-9 makes it crime of the fourth degree to violate any such protective order.²

d. Seeking Revocation of Pretrial Release if Act of Intimidation is Committed

If a prosecutor becomes aware of any conduct designed or reasonably likely to threaten or intimidate a victim or witness while the defendant is on pre-trial release, the prosecutor presumptively and immediately shall seek revocation of that defendant’s release. See N.J.S.A. 2A:162-18 to -19. If a judge denies the prosecutor’s motion for revocation in such an instance, the prosecutor shall report such denial to the Division of Criminal Justice through the existing online reporting portal pursuant to Section 8.8 of Attorney General Law Enforcement Directive 2016-6.

Further, if, as is likely, the conduct constituting intimidation constitutes a new crime, the prosecutor must charge that new offense and presumptively will seek pretrial detention on that new charge. Note that the automated Pretrial Risk Assessment is designed to measure the risk that a defendant will commit new criminal activity or violent criminal activity while on release, but is not designed specifically to measure the risk that a defendant might obstruct or attempt to obstruct the criminal justice process.

e. Protecting Victim and Witness Identifying Information in Preliminary Reports

With the advent of criminal justice reform, enhancements to the judiciary’s eCDR system enable law enforcement officers to quickly and efficiently prepare criminal complaints and supporting documents such as Affidavits of Probable Cause and Preliminary Law Enforcement Incident Reports (“PLEIR reports”). Police officers who issue complaint-summonses and apply for complaint-warrants must ensure that information that identifies the

² Criminal contempt prosecutions pursuant to N.J.S.A. 2C:29-9 also are viable for violations of restraining orders issued in other instances (e.g., restraining orders entered pursuant to the Prevention of Domestic Violence Act of 1991, N.J.S.A. 2C:25-17 et seq.; the Drug Offender Restraining Order Act, N.J.S.A. 2C:35-5.5 et seq.; and the Sexual Assault Survivor Protection Act of 2015, N.J.S.A. 2C:14-13 et seq.).

names and addresses of victims and civilian witnesses is not included in PLEIR reports. PLEIR reports will be provided automatically to defense counsel through the eCDR system. Police officers must be aware that the eCDR system is designed to capture victim contact information through a separate tab so that this information will be accessible to the judiciary (but not defense counsel) solely for the purpose of generating automated victim-notification communications, and will not be shared with anyone other than the prosecutor. It is imperative that officers who prepare these preliminary reports and those who review the same do not allow the accelerated pace to foster inattentiveness that might undermine the safeguarding of identifying information of victims and witnesses.

f. Protecting Victim and Witness Identifying Information in Charging Documents and Other Public Court Filings

It has come to my attention that, in drafting charging instruments such as complaint-warrants and indictments, and in other legal documents such as motion responses, prosecutors and police officers sometimes use initials rather than full names in an effort to protect the identities of victims and witnesses. This strategy, while well-intentioned, is problematic because often defendants easily can discern an individual's identity based on those initials. Therefore, prosecutors and police officers across the state must use anonymous pseudonyms—such as “John Doe” or “Jane Doe” (whose true identity is known to law enforcement) and “Victim #1,” or “Witness #2,” or some other anonymized moniker—when referencing victims and witnesses where the potential exists for intimidation, to the maximum extent permissible by the rules of evidence and the state's discovery and other disclosure obligations.

g. Protective Orders to Shield Victim and Witness Identifying Information from Discovery

If notification of case-specific victim/witness intimidation concerns is given to the prosecutor pursuant to item (b) above, or if a prosecutor otherwise has reason to believe that a defendant or his associates might engage in victim or witness intimidation, the prosecutor before providing discovery that would reveal the identity of a victim or civilian witnesses shall determine whether it is appropriate to seek a protective order shielding such information from discovery pursuant to Rule 3:13-3(e). (Note that a general or case-specific argument might be made that such specific information is not discoverable pursuant to Rule 3:4-2(c)(1)(B) to the extent that it does not constitute “statements or reports in its [the prosecutor's] possession relating to the pretrial detention application.”) As appropriate, the prosecutor should consult with the police department as to the need for any such protective order. Such consultation may occur at the time that notification of specific and articulable concerns is made pursuant to item (b) above.

h. Alert to Police Department When Identification is Revealed Through Discovery

If notification of case-specific victim/witness intimidation concerns is given to the prosecutor pursuant to item (b) above, or if a prosecutor otherwise has reason to believe that a defendant or his associates might engage in victim or witness intimidation, the prosecutor must notify the police department before producing discovery to defense counsel, if that discovery could reveal the identity of the victim or witness. Note that, under the new post-

bail reform process, prosecutors are required by Rule 3:4-2(c)(1)(B) to provide certain discovery upon moving for pretrial detention. Rule 3:13-3(a) also requires prosecutors to provide complete discovery at the time the prosecutor tenders a plea offer. It is essential that prosecutors provide this advance notice to police officers because defendants often first learn (or discern) the identity of victims or witnesses through discovery. Police officers therefore must have advance notice, before discovery is provided to a defendant, so they can take all necessary steps to warn, protect, and/or relocate any victims or witnesses who face potential intimidation.

i. Use of Forfeiture Funds for Victim and Witness Protection Relocation

In seemingly simple cases, law enforcement devotes significant time and resources to ensure that victims and witnesses provide testimony relevant to grand jury or trial proceedings. That onus is intensified when witness intimidation undermines and jeopardizes cooperation. The spectrum of problems that must be addressed is broad, ranging from meals and transportation to safe housing and protection. While at times burdensome, effective victim and witness management can make the difference between a successful prosecution and the dismissal of a case due to insufficient evidence.

In more complex or serious cases, a county prosecutor might determine that adequate protection will require relocation—either emergency, short-term, or permanent—of a victim or witness. It has come to my attention that, while the majority of county prosecutors currently utilize funds seized pursuant to N.J.S.A. 2C:64-1 et seq. (forfeiture funds) for costs associated with witness relocation when they are available, other county prosecutors do not use such forfeiture funds for witness relocation because they are under the impression that such expenditures are impermissible. By this Directive, I instruct that all county prosecutors may, and indeed should, use available forfeiture funds for the critical function of relocating victims and witnesses deemed necessary to protect those individuals against intimidation. See Attorney General Guidelines for Asset Forfeiture, issued October 1992.

j. Risk Assessment Tool for Domestic Violence Incidents to be Designated

Much of the decision-making framework in our new bail reform system is guided by a risk assessment instrument, known as the Public Safety Assessment or “PSA,” which has been approved by the Administrative Director of the Courts in accordance with N.J.S.A. 2A:162-25c. The PSA is objective and standardized, and was developed based upon analysis of empirical data and risk factors pertinent to an individual’s failure to appear in court and the level of danger to the community while on release. Although criminal justice reform is in its earliest stages, the PSA has proven to be a valuable resource for law enforcement officers and prosecutors regarding charging and pretrial detention determinations.

Similar risk assessment tools are utilized by law enforcement in domestic violence incidents in various jurisdictions outside of New Jersey specifically to calculate the likelihood that an individual who has committed an assault on a domestic partner will do so again in the future. Domestic violence incidents historically present complicated circumstances. For example, victims sometimes are reluctant to participate in investigations—sometimes due to a fear of reprisal from their attackers.

With the goal of preventing the re-victimization and intimidation of victims of domestic violence, the Director of the Division of Criminal Justice, in consultation with the Superintendent of the State Police and the County Prosecutors, within 60 days of issuance of this Directive, shall designate a risk assessment tool for domestic violence incidents. The risk assessment shall be utilized to predict which cases of domestic abuse have an increased likelihood of future violence. The assessment shall be actuarial, validated, and evidenced-based. In addition to consulting with law enforcement partners, the Director shall work with representatives of the New Jersey Administrative Office of the Courts to implement the chosen domestic violence risk assessment tool and integrate the same into the judiciary's eCDR system.

3. QUESTIONS

Any questions concerning the interpretation or implementation of this Directive shall be addressed to the Director of the Division of Criminal Justice, or his designee.

4. EFFECTIVE DATE

This Directive shall take effect immediately upon issuance. This Directive shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Christopher S. Porrino
Attorney General

ATTEST:



Elie Honig
Director, Division of Criminal Justice

Issued on: January 25, 2017