

CORRECTED LEGISLATIVE BILL 352

Approved by the Governor April 24, 2019

Introduced by Morfeld, 46; Linehan, 39; McCollister, 20; Williams, 36.

A BILL FOR AN ACT relating to criminal procedure; to amend section 29-1912, Reissue Revised Statutes of Nebraska; to adopt requirements relating to testimony by jailhouse informants; to define terms; to create duties for prosecutors and provide for court orders for failure to comply with such duties; to change provisions relating to requests for discovery by criminal defendants; to harmonize provisions; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

Section 1. For purposes of sections 1 to 6 of this act:

(1) Benefit means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, immunity, financial payment, reward, or amelioration of current or future conditions of incarceration that has been requested by the jailhouse informant or that has been offered or may be offered in the future to the jailhouse informant in connection with his or her testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness; and

(2) Jailhouse informant means a person who offers testimony about statements made by a suspect or defendant while the suspect or defendant and jailhouse informant were in the custody of any jail or correctional institution and who has requested or received or may in the future receive a benefit in connection with such testimony.

Sec. 2. Sections 1 to 6 of this act apply to any case in which a suspect or defendant is charged with a felony.

Sec. 3. Each prosecutor's office shall undertake measures to maintain a searchable record of:

(1) Each case in which:

(a) Trial testimony is offered or provided by a jailhouse informant against a suspect's or defendant's interest; or

(b) A statement from a jailhouse informant against a suspect's or defendant's interest is used and a criminal conviction is obtained; and

(2) Any benefit requested by or offered or provided to a jailhouse informant in connection with such statement or trial testimony.

Sec. 4. (1) Except as provided in subsection (3) of this section, if a prosecutor intends to use the testimony or statement of a jailhouse informant at a defendant's trial, the prosecutor shall disclose to the defense:

(a) The known criminal history of the jailhouse informant;

(b) Any benefit requested by or offered or provided to a jailhouse informant or that may be offered or provided to the jailhouse informant in the future in connection with such testimony;

(c) The specific statements allegedly made by the defendant against whom the jailhouse informant will testify or provide a statement and the time, place, and manner of the defendant's disclosures;

(d) The case name and jurisdiction of any criminal case known to the prosecutor in which the jailhouse informant testified or a prosecutor intended to have the jailhouse informant testify about statements made by another suspect or criminal defendant that were disclosed to the jailhouse informant and whether the jailhouse informant requested, was offered, or received any benefit in exchange for or subsequent to such testimony; and

(e) Any occasion known to the prosecutor in which the jailhouse informant recanted testimony about statements made by another suspect or defendant that were disclosed to the jailhouse informant and any transcript or copy of such recantation.

(2) The prosecutor shall disclose the information described in subsection (1) of this section to the defense as soon as practicable after discovery, but no later than thirty days before trial. If the prosecutor seeks to introduce the testimony of a jailhouse informant that was not known until after such deadline, or if the information described in subsection (1) of this section could not have been discovered or obtained by the prosecutor with the exercise of due diligence at least thirty days before the trial or other criminal proceeding, the court may permit the prosecutor to disclose the information as soon as is practicable after the thirty-day period.

(3) If the court finds by clear and convincing evidence that disclosing information listed in subsection (1) of this section will result in the possibility of bodily harm to a jailhouse informant or that a jailhouse informant will be coerced, the court may permit the prosecutor to redact some or all of such information.

(4) If, at any time subsequent to the deadline in subsection (2) of this section, the prosecutor discovers additional material required to be disclosed under subsection (1) of this section, the prosecutor shall promptly:

(a) Notify the court of the existence of the additional material; and

(b) Disclose such material to the defense, except as provided in subsection (3) of this section.

Sec. 5. If a jailhouse informant receives leniency related to a pending charge, a conviction, or a sentence for a crime against a victim as defined in section 29-119, in connection with offering or providing testimony against a suspect or defendant, the prosecutor shall notify such victim. Prior to reaching a plea agreement, the prosecutor shall proceed as provided in subsection (1) of section 23-1201. For purposes of this section, leniency means any plea bargain, reduced or dismissed charges, bail consideration, or reduction or modification of sentence.

Sec. 6. If, at any time during the course of the proceedings, it is brought to the attention of the court that the prosecutor has failed to comply with section 4 of this act, or an order issued pursuant to this section, the court may:

- (1) Order the prosecutor to disclose materials not previously disclosed;
- (2) Grant a continuance;
- (3) Prohibit the prosecutor from calling a witness not disclosed or introducing in evidence the material not disclosed; or
- (4) Enter such other order as it deems just under the circumstances.

Sec. 7. Section 29-1912, Reissue Revised Statutes of Nebraska, is amended to read:

29-1912 (1) When a defendant is charged with a felony or when a defendant is charged with a misdemeanor or a violation of a city or village ordinance for which imprisonment is a possible penalty, he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint, to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:

(a) The defendant's statement, if any. For purposes of this subdivision, statement means a written statement made by the defendant and signed or otherwise adopted or approved by him or her, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the defendant to an agent of the prosecution, state, or political subdivision thereof, and recorded contemporaneously with the making of such oral statement;

(b) The defendant's prior criminal record, if any;

(c) The defendant's recorded testimony before a grand jury;

(d) The names and addresses of witnesses on whose evidence the charge is based;

(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof; and

(f) Documents, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority. ;

~~(g) The known criminal history of a jailhouse witness;~~

~~(h) Any deal, promise, inducement, or benefit that the prosecuting attorney or any person acting on behalf of the prosecuting attorney has knowingly made or may make in the future to the jailhouse witness;~~

~~(i) The specific statements allegedly made by the defendant against whom the jailhouse witness will testify and the time, place, and manner of the defendant's disclosures;~~

~~(j) The case name and jurisdiction of any criminal cases known to the prosecuting attorney in which a jailhouse witness testified about statements made by another criminal defendant that were disclosed to the jailhouse witness while he or she was a jailhouse witness and whether the jailhouse witness received any deal, promise, inducement, or benefit in exchange for or subsequent to such testimony; and~~

~~(k) Any occasion known to the prosecuting attorney in which the jailhouse witness recanted testimony about statements made by another criminal defendant that were disclosed to the jailhouse witness while he or she was a jailhouse witness and, if any are known, a transcript or copy of such recantation.~~

(2) The court may issue such an order pursuant to the provisions of this section. In the exercise of its judicial discretion, the court shall consider among other things whether:

(a) The request is material to the preparation of the defense;

(b) The request is not made primarily for the purpose of harassing the prosecution or its witnesses;

(c) The request, if granted, would not unreasonably delay the trial of the offense and an earlier request by the defendant could not have reasonably been made;

(d) There is no substantial likelihood that the request, if granted, would preclude a just determination of the issues at the trial of the offense; or

(e) The request, if granted, would not result in the possibility of bodily harm to, or coercion of, witnesses.

(3) Whenever the court refuses to grant an order pursuant to the provisions of this section, it shall render its findings in writing together with the facts upon which the findings are based.

(4) Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone. The statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(5) This section does not apply to jailhouse informants as defined in

~~section 1 of this act. Sections 1 to 6 of this act govern jailhouse informants. For purposes of subdivisions (1)(g) through (k) of this section, jailhouse witness means a person in the physical custody of any jail or correctional institution as (a) an accused defendant, (b) a convicted defendant awaiting sentencing, or (c) a convicted defendant serving a sentence of incarceration, at the time the statements the jailhouse witness will testify about were disclosed.~~

Sec. 8. Original section 29-1912, Reissue Revised Statutes of Nebraska, is repealed.