

LEGISLATURE OF NEBRASKA  
ONE HUNDRED FIFTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 878**

Introduced by Ebke, 32.

Read first time January 08, 2018

Committee: Judiciary

1 A BILL FOR AN ACT relating to criminal procedure; to amend section  
2 29-1912, Reissue Revised Statutes of Nebraska; to adopt requirements  
3 relating to testimony by jailhouse informants; to state intent; to  
4 define terms; to create duties for prosecutors and provide for court  
5 orders for failure to comply with such duties; to provide for a  
6 hearing to determine reliability; to provide for a jury instruction;  
7 to change provisions relating to requests for discovery by criminal  
8 defendants; to harmonize provisions; and to repeal the original  
9 section.

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

1           Section 1.   (1) The Legislature finds and declares that the  
2 interests of justice may be thwarted by unreliable testimony at trial.  
3 There is a compelling state interest in providing safeguards against the  
4 admission of testimony when the reliability of such testimony may be or  
5 has been compromised through inducements.

6           (2) The Legislature further finds and declares that the testimony of  
7 a jailhouse informant is sometimes unreliable. A jailhouse informant, due  
8 to the receipt or promise of a benefit, is presumed to provide testimony  
9 that may be unreliable.

10          Sec. 2.   For purposes of sections 1 to 8 of this act:

11          (1) Benefit means any plea bargain, bail consideration, reduction or  
12 modification of sentence, or any other leniency, immunity, financial  
13 payment, reward, or amelioration of current or future conditions of  
14 incarceration in return for, or in connection with, the jailhouse  
15 informant's:

16           (a) Participation in any information-gathering activity,  
17 investigation, or operation; or

18           (b) Testimony in the criminal proceeding in which the prosecutor  
19 intends to call him or her as a witness; and

20          (2) Jailhouse informant means a person who is or was in the custody  
21 of any jail or correctional institution as (a) a person accused of a  
22 crime, (b) a person convicted of a crime and awaiting sentencing, or (c)  
23 a person convicted of a crime and serving a sentence of incarceration, at  
24 the time the statements the jailhouse informant will testify about or  
25 provide information about were disclosed.

26          Sec. 3.   This act applies to any case in which a suspect or  
27 defendant is charged with a felony or when a suspect or defendant is  
28 charged with a misdemeanor or a violation of the ordinance of a political  
29 subdivision for which imprisonment is a possible penalty.

30          Sec. 4.   A prosecutor shall keep a record of:

31          (1) The use of testimony or information provided to the prosecutor

1 by a jailhouse informant against a suspect's or defendant's interest  
2 while the jailhouse informant was imprisoned or confined in the same jail  
3 or correctional institution as the suspect or defendant, if known by the  
4 prosecutor; and

5 (2) Any benefits offered or provided to a jailhouse informant in  
6 exchange for testimony or information about a suspect or defendant.

7 Sec. 5. (1) If a prosecutor intends to use the testimony or  
8 statement of a jailhouse informant at a defendant's trial, the prosecutor  
9 shall disclose to the defense any information in the possession, custody,  
10 or control of the prosecutor or the state or political subdivision that  
11 is relevant to the credibility of the jailhouse informant, including:

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

13 (b) Any deal, promise, inducement, or benefit that the prosecutor or  
14 any person acting on behalf of the prosecutor has knowingly made or may  
15 make in the future to the jailhouse informant;

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

19 (d) The case name and jurisdiction of any criminal case known to the  
20 prosecutor in which a jailhouse informant testified or a prosecutor  
21 intended to have the jailhouse informant testify about statements made by  
22 another criminal defendant that were disclosed to the jailhouse informant  
23 while he or she was a jailhouse informant and whether the jailhouse  
24 informant received any deal, promise, inducement, or benefit in exchange  
25 for or subsequent to such testimony; and

26 (e) Any occasion known to the prosecutor in which the jailhouse  
27 informant recanted testimony about statements made by another criminal  
28 defendant that were disclosed to the jailhouse informant while he or she  
29 was a jailhouse informant and a transcript or copy of such recantation.

30 (2) The prosecutor shall disclose the information described in  
31 subsection (1) of this section to the defense as soon as practicable

1 after discovery, but no later than thirty days before trial. If the court  
2 finds that the jailhouse informant was not known, or that the information  
3 described in subsection (1) of this section could not have been  
4 discovered or obtained by the prosecutor with the exercise of due  
5 diligence at least thirty days before the trial or other criminal  
6 proceeding, the court may permit the prosecutor to disclose the  
7 information as soon as is practicable after the thirty-day period.

8 (3) If the court finds by clear and convincing evidence that  
9 disclosing information listed in subsection (1) of this section will  
10 result in the possibility of bodily harm to a jailhouse informant or that  
11 a jailhouse informant will be coerced, the court may permit the  
12 prosecutor to not disclose to the defense some or all of such  
13 information.

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

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

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

22 Sec. 6. If the prosecutor intends to use the testimony or statement  
23 of a jailhouse informant, the court shall conduct a hearing to determine  
24 whether such testimony or statement is reliable, unless the defendant  
25 waives such hearing. If the prosecutor fails to show by clear and  
26 convincing evidence that the jailhouse informant's testimony or statement  
27 is reliable, the court shall not allow the testimony or statement to be  
28 presented at trial. The court shall consider the factors enumerated in  
29 subsection (1) of section 5 of this act and any other factors related to  
30 reliability.

31 Sec. 7. If, at any time during the course of the proceedings, it is

1 brought to the attention of the court that the prosecutor has failed to  
2 comply with section 5 of this act, or an order issued pursuant to this  
3 section, the court may:

4 (1) Order the prosecutor to disclose materials not previously  
5 disclosed;

6 (2) Grant a continuance;

7 (3) Prohibit the prosecutor from calling a witness not disclosed or  
8 introducing in evidence the material not disclosed; or

9 (4) Enter such other order as it deems just under the circumstances.

10 Sec. 8. If the testimony or statement of a jailhouse informant is  
11 admitted into evidence, a cautionary instruction shall be provided to the  
12 jury in substantially the following form:

13 That the testimony or statement of a jailhouse informant who  
14 provides evidence against a defendant must be examined and weighed with  
15 greater care than the testimony or statement of an ordinary witness; that  
16 jailhouse informants may expect, and in practice often receive, benefits  
17 that have not been formally promised to them prior to trial; and that the  
18 reliability factors enumerated in subsection (1) of section 5 of this  
19 act, to the extent they apply in such case, shall be considered when  
20 determining whether the testimony or statement of the jailhouse informant  
21 has been affected by interest or prejudice against the defendant.

22 Sec. 9. Section 29-1912, Reissue Revised Statutes of Nebraska, is  
23 amended to read:

24 29-1912 (1) When a defendant is charged with a felony or when a  
25 defendant is charged with a misdemeanor or a violation of a city or  
26 village ordinance for which imprisonment is a possible penalty, he or she  
27 may request the court where the case is to be tried, at any time after  
28 the filing of the indictment, information, or complaint, to order the  
29 prosecuting attorney to permit the defendant to inspect and copy or  
30 photograph:

31 (a) The defendant's statement, if any. For purposes of this

1 subdivision, statement means a written statement made by the defendant  
2 and signed or otherwise adopted or approved by him or her, or a  
3 stenographic, mechanical, electrical, or other recording, or a  
4 transcription thereof, which is a substantially verbatim recital of an  
5 oral statement made by the defendant to an agent of the prosecution,  
6 state, or political subdivision thereof, and recorded contemporaneously  
7 with the making of such oral statement;

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

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

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

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

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

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

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

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

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

31 ~~(k) Any occasion known to the prosecuting attorney in which the~~

1 ~~jailhouse witness recanted testimony about statements made by another~~  
2 ~~criminal defendant that were disclosed to the jailhouse witness while he~~  
3 ~~or she was a jailhouse witness and, if any are known, a transcript or~~  
4 ~~copy of such recantation.~~

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

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

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

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

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

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

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

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

30 ~~(5) For purposes of subdivisions (1)(g) through (k) of this section,~~  
31 ~~jailhouse witness means a person in the physical custody of any jail or~~

1 ~~correctional institution as (a) an accused defendant, (b) a convicted~~  
2 ~~defendant awaiting sentencing, or (c) a convicted defendant serving a~~  
3 ~~sentence of incarceration, at the time the statements the jailhouse~~  
4 ~~witness will testify about were disclosed.~~

5       Sec. 10. Original section 29-1912, Reissue Revised Statutes of  
6 Nebraska, is repealed.