

SENATE BILL NO. 249

INTRODUCED BY N. SWANDAL

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS REGARDING INFORMANT AND ACCOMPLICE TESTIMONY; PROVIDING DEFINITIONS; REQUIRING RECORDING OF ALL INFORMANT STATEMENTS; REQUIRING NOTICE OF INFORMANT TESTIMONY; PROVIDING FOR A HEARING ON RELIABILITY; PROVIDING A JURY INSTRUCTION; PROVIDING FOR A NEW TRIAL IF NEW EVIDENCE IS DISCOVERED; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Legislative findings -- purpose.** (1) The legislature finds that evidence and testimony from accomplices and criminal informants are inherently suspect because a system in which accomplices and criminal informants are rewarded produces dangerous incentives to manufacture or fabricate evidence.

(2) The purpose of this act is to prevent unreliable accomplice and informant testimony from being admitted as evidence in the courts of the state by informing a court, to the maximum extent possible, of the circumstances surrounding the unreliable evidence and testimony before the court determines its admissibility.

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 7], the following definitions apply:

(1) "Accomplice" means a person who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime.

(2) "Benefit" means a deal, payment, promise, leniency, inducement, or other advantage offered by the prosecution to an informant in connection with the informant's testimony.

(3) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, entire, full, complete, and unaltered record of a statement by an informant.

(4) (a) "Informant" means an individual, including a criminal suspect or suspected accomplice, whether or not the suspect or accomplice is detained, charged, or incarcerated, who provides information or testimony in exchange for, in expectation of, or in connection with a benefit.

1 (b) The term does not include an expert or a victim of the crime being prosecuted.

2 (5) "Statement" means an oral, written, sign language, or nonverbal communication related to the crime
3 charged against the accused or concerning the accused that is made to law enforcement personnel, to a person
4 acting on the prosecutions's behalf, or to another person and reported to law enforcement personnel.

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6 **NEW SECTION. Section 3. Electronic recording of statements by informant.** (1) All statements
7 made by an informant relating to a felony crime must be electronically recorded by audio or visual means.

8 (2) If a visual recording is not practicable, an audio recording is an acceptable alternative.

9 (3) Each electronic recording of a statement by an informant must be authentic, accurate, entire, full,
10 complete, and unaltered, as determined by law enforcement personnel.

11 (4) Each electronic recording must be clearly identified and catalogued by law enforcement personnel.

12 (5) Each electronic recording must be preserved by law enforcement personnel and all others acting on
13 behalf of law enforcement or the prosecution until all appeals, postconviction relief, and habeas corpus
14 proceedings connected to the testimony are final or until the time within which these types of proceedings must
15 be brought has expired.

16 (6) Upon motion by the accused, the court may order that a copy of the recording be preserved for a
17 period beyond the expiration of all appeals.

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19 **NEW SECTION. Section 4. Timely notice and disclosure of material relating to informant's**
20 **testimony.** (1) In a case relating to a felony crime, as soon as the prosecution is aware of the existence of an
21 informant, the prosecution shall:

22 (a) disclose in writing, to the court and to the accused or the accused's counsel, notice of the intent to
23 introduce the testimony of an informant; and

24 (b) provide, to the accused or the accused's counsel, authentic, accurate, entire, full, complete, and
25 unaltered copies of all electronic recordings of all statements by the informant.

26 (2) In addition to the discovery to be disclosed as required by statute and the Montana constitution, the
27 prosecution must also disclose to the accused or the accused's counsel, as soon as the prosecution is aware of
28 the existence of an informant, the following information relating to all informants:

29 (a) the complete criminal history of the informant, including pending criminal charges or investigations
30 in which the informant is a suspect;

- 1 (b) personal history and characteristics of the informant including but not limited to:
- 2 (i) whether the informant is a substance abuser or has a history of substance abuse; and
- 3 (ii) the informant's medical, hospital, psychological, counseling, and treatment examinations, evaluations,
- 4 reports, and records that may be relevant to the reliability and credibility of the informant. In the event of a claim
- 5 of privilege for any of this information, the prosecution must state the name and address of any person, agency,
- 6 or facility with whom the alleged privilege lies.
- 7 (c) any deals, promises, inducements, or benefits that the offering party has made or might make in the
- 8 future to the informant;
- 9 (d) the substance of the statements made by the accused to the informant;
- 10 (e) the substance of any statements by the informant to law enforcement personnel implicating the
- 11 accused in the crime charged;
- 12 (f) the time and place of the statements given by the accused to the informant, the time and place of the
- 13 disclosure of the informant's statements to law enforcement personnel, and the names of all persons present
- 14 when the statements by the accused and the informant were allegedly made;
- 15 (g) whether at any time the informant modified or recanted the testimony or statement and, if so, the time
- 16 and place of the modification or recantation, the nature of the modification or recantation, and the names of the
- 17 persons who were present at the modification or recantation;
- 18 (h) other cases in which the informant offered to provide information to or testify for the prosecution in
- 19 exchange for a benefit, whether or not a benefit was received;
- 20 (i) other cases in which the informant testified, including those in which the informant received a promise,
- 21 inducement, or benefit in exchange for, or as a result of, that testimony, or subsequent to that testimony or
- 22 statement;
- 23 (j) the relationship between the accused and the informant, including the amount of time the two were
- 24 incarcerated in the same custodial section of the jail or prison;
- 25 (k) whether the informant's statement or prior testimony is corroborated by other evidence not offered
- 26 by an informant but tending to connect the accused with the crime charged; and
- 27 (l) any other information relevant to the reliability of the informant, to the reliability of the informant's
- 28 testimony, or to the informant's credibility.

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30 NEW SECTION. **Section 5. Pretrial reliability corroboration and credibility hearings.** (1) (a) Before

1 a trial or proceeding in which the prosecution intends to introduce the testimony of an informant, the court shall
2 hold a pretrial hearing to assess the existence and strength of corroboration and the reliability and credibility of
3 the content of informant testimony relating to a felony crime, unless the accused waives such a hearing.

4 (b) If the prosecution provides evidence sufficiently corroborative of the proposed testimony of the
5 informant, the prosecution must then show by clear and convincing evidence that the informant testimony in itself
6 is reliable and that the informant is credible.

7 (c) In the event the prosecution fails to satisfactorily prove the three conditions of reliability, corroboration,
8 and credibility, the court shall render the testimony inadmissible. The court shall state in writing or on the record
9 the basis for its decision.

10 (2) At the pretrial hearing, the court shall consider all of the factors and information enumerated in
11 [section 4(2)] as well as the following factors related to reliability, corroboration, and credibility:

12 (a) whether the informant's statement led to the discovery of new evidence previously unknown to law
13 enforcement; and

14 (b) whether the informant's statement includes an accurate description of the details of the crime that
15 are not easily surmised, have not been reported publicly, and can be independently corroborated; and

16 (c) whether the informant is credible, particularly in consideration of the informant's prior crimes or
17 wrongful acts that may reflect the informant's propensity for dishonesty and untruthfulness.

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19 **NEW SECTION. Section 6. Jury instructions.** If the court determines that the informant testimony is
20 admissible according to the provisions of [section 5], it shall provide the jury with the following instruction:

21 "The testimony of an informant should be viewed with caution and close scrutiny. In evaluating the
22 testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation
23 of, any benefits from the party calling that witness. The specific factors that may have influenced the testimony
24 in this case are: [list all applicable factors, including whether the informant has any prior felony convictions]. This
25 does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you
26 find it to be entitled in light of all the evidence in the case."
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28 **NEW SECTION. Section 7. New evidence.** If, in a case in which the district court did not make
29 corroboration, reliability, and credibility determinations as required in [section 5], the accused shows by newly
30 discovered evidence that an informant's trial testimony included a false material statement that potentially affected

1 the outcome of the trial, the court shall order a new trial.

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3 **NEW SECTION. Section 8. Codification instruction.** [Sections 1 through 7] are intended to be codified
4 as an integral part of Title 46, chapter 16, part 2, and the provisions of Title 46, chapter 16, part 2, apply to
5 [sections 1 through 7].

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7 **NEW SECTION. Section 9. Applicability.** [This act] applies to prosecutions commenced on or after
8 [the effective date of this act].

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