SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2017 - 2018 Regular

Bill No:	AB 359	**Hearing Date:**	June 27, 2017
Author:	Jones-Sawyer		
Version:	March 16, 2017		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***In-Custody Informants***

HISTORY

Source: American Civil Liberties Union
California Attorneys for Criminal Justice
Northern California Innocence Project

Prior Legislation: SB 687 (Leno) Chapter 152, Stats. 2011
SB 1589 (Romero) Vetoed 2008
SB 609 (Romero) Vetoed 2007
AB 276 (Floyd) Chapter 901, Stats. 1989

Support: Courage Campaign; Friends Committee on Legislation of California; Prison Law Office

Opposition: California District Attorneys Association; California Police Chiefs Association; California State Sheriffs' Association; Los Angeles County District Attorney's Office; Peace Officers Research Association of California; San Diego County District Attorney

Assembly Floor Vote: 59 - 12

PURPOSE

The purpose of this bill is to increase the amount of money that may be given to an in-custody informant and requires the prosecution to disclose additional information.

Existing law provides that a jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant. (Penal Code §111.5)

Existing law defines an "in -custody informant as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." (Penal Code § 1127a (a).)

Existing law requires the court to provide a jury instruction, as specified, upon the request of a party, in any criminal trial or proceeding in which an in-custody informant testifies as a witness. (Penal Code § 1127a (b).)

Existing law requires the prosecution, when calling an in-custody informant as a witness in a criminal trial, to file with the court a written statement setting out any and all consideration, as defined, promised to, or received by, the in-custody informant. (Penal Code § 1127a (c).)

Existing law provides that a law enforcement or correctional official shall not give, offer, or promise to give any monetary payment in excess of fifty dollars in return for an in-custody informant's testimony in a criminal proceeding. (Penal Code § 4001.1 (a).)

This bill authorizes a member of the prosecution, law enforcement, or corrections to give, offer, or promise to give a monetary payment, property, gifts, financial assistance, benefits, rewards, or amelioration of current or future conditions of incarceration with a combined value not to exceed $100 in return for or in connection with an in-custody informant's cooperation in a criminal proceeding, as specified.

This bill provides that a prosecutor is not prohibited from giving or offering any plea bargain, bail consideration, reduction or modification of sentence, or immunity in consideration for cooperation and these types of consideration are not subject to the $100 limit, but must be documented.

This bill requires the prosecution, when intending to call an in-custody informant as a witness in a criminal trial, to file a statement with the court which includes the following:

1) The substance of all communications between the informant and any member of the prosecution, law enforcement, or corrections regarding the informant's possible testimony or information gathering;

2) Any and all consideration impliedly or expressly offered or promised to, requested or received by, the in-custody informant;

3) Information regarding any current or previous cases in which the in-custody informant has participated, as specified;

4) Whether the informant, while providing testimony or information to assist in the investigation of a suspect or the defendant, has recanted or modified the testimony or statement given;

5) The informant's complete criminal history including pending charges or investigations in which the informant is a suspect;

6) Whether the informant is a substance abuser or has a history of substance abuse;

7) Any known or readily available information about the informant's mental health; and

8) Any other information relevant to the informant's credibility.

This bill requires the statement to be provided to the defendant or the defendant's attorney no less than 30 days prior to the preliminary hearing.

This bill requires any member of the prosecution, law enforcement, or corrections who gives, expressly or impliedly offers or promises consideration to, or receives a request for consideration from, an in-custody informant to document the substance of all communications.

This bill provides that the documentation must be transmitted, as specified, to the district attorney and requires the district attorney to maintain a searchable electronic record of all documentation.

This bill defines an "in-custody informant" as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator who provides testimony or information for use in the investigation or prosecution of a suspect or defendant based upon statements made by the suspect or defendant while both the suspect or defendant and the informant are housed within a correctional institution."

This bill defines "consideration" as "any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's participation in any information gathering activity, investigation or operation, or in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness."

COMMENTS

1. Need for This Bill

According to the author:

> Whereas jailhouse informants are widely used as a beneficial tool by law enforcement and prosecution, there are extreme concerns with their credibility and the accuracy of information they provide. Informants have a motive to fabricate corroborating stories with prosecution because of the inherent system which rewards them with money and special treatment for their information gathering and witness testimony. In short, AB 359 strengthens existing law by limiting incentives to jailhouse informants, increasing transparency requirements to ensure fair trials, and preventing the misuse of taxpayer funds.

2. Reliability of In-Custody Informants

Due to the nature of being incarcerated, in-custody informants are subject to pressures that may undermine the reliability of their testimony and the information that they provide. In-custody informants are motivated to leverage their information for consideration such as sentence reductions, financial assistance, and other benefits. These forms of consideration may incentivize informants to fabricate information or solicit information wrongfully, such as trading information between informants, pretending to be jailhouse lawyers for confessions, and even stealing legal documents from the cells of other inmates. (Rohrlich, *Jailhouse Snitches: Trading Lies for*

Freedom (Apr. 16, 1989) L.A. Times <http://articles.latimes.com/1989-04-16/news/mn-2497_1_veteran-jailhouse-informants-jailhouse-snitches [as of March 15, 2017].)

Furthermore, there is a history of exploitation of in-custody informants by law enforcement, prosecution, and corrections officers. In-custody informants, once they are deemed cooperative, can become serial informants. While it is legal for law enforcement to use these informants, it is illegal for them to be deployed to coax incriminating statements from a defendant who's already been charged and has the constitutional right to an attorney and to remain silent. (*Massiah v. U.S.* (1964) 377 U.S. 201, 204; Pen. Code, § 4001.1, subd. (b).). A recent scandal in Orange County has demonstrated this exact type of abuse and exploitation. Several informants were allegedly moved in order to neighbor specific cells and wrongfully draw confessions from other inmates. In addition, the system in place lacked the transparency for defendants to know about these serial informants and how this information was gathered. This discovery has had severe consequences, causing demands for new trials, plea deals, and dropped charges. (Brown, *Jailhouse Informant Scandal Rocking Criminal Justice System in Orange County* (Oct. 22, 2011) ABC 7 <http://abc7.com/news/jailhouse-informant-scandal-rocking-oc-criminal-justice-system/1046811/> [as of March 15, 2017].)

This bill would address these issues by creating a system that tracks the use of in-custody informants so that defendants may better address the reliability of the evidence used against them. Under current law "an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant" in determining the admissibility of evidence. *(Illinois v. Gates* (1983) 462 US 213, 241-242.) Judges must currently evaluate the use of in-custody informant testimony and information by asking:

1) whether the police informant's statement is factual rather than conclusory;
2) whether it rests on personal knowledge (*Alexander v. Superior Court* (1973) 9C3d 387, 391-392; *People v. Murphy* (1974) 42 CA3d 81, 87);
3) whether the police informant is credible; or
4) whether the informant is reliable (*People v. Johnson* (1990) 220 CA3d 742, 749.)

The required disclosures in this bill would assist the court in assessing the admissibility of in-custody informant testimony and ensure that the defendant has access to information needed to fairly rebut allegations.

3. Consideration for Testimony

This expands the forms of compensation that are limited to include gifts, benefits, financial assistance, benefits, rewards, or amelioration of current or future conditions of incarceration. Unlike a monetary payment, these forms of compensation may be difficult to assign exact values for. This may lead to difficulty in assessing whether the new $100 limit (it was $50) was complied with but on the other hand it makes it clear that these things should be included when determining consideration which is not the cause under existing law.

In addition, other forms of consideration are still available from prosecutors, such as plea bargains, bail consideration, and sentence modification. This compensation and information about the informant will still have to be recorded and filed, but it is not included in the $100 limitation.

4. Increased Disclosure for Prosecution and Law Enforcement

Current law requires the prosecution to provide a written statement including only the consideration promised to or received by the informant. (Penal Code § 1127a (c).) This bill will significantly expand the information required to be disclosed and the requirements for filing and maintaining this information from informants. Some of the required information, such as information concerning the informant's mental health and abuse of substances, may be difficult to obtain and verify due to confidentiality laws. This bill will also require an electronic database to be maintained by the district attorney.

Although these changes may be burdensome, these requirements are tailored to address the specific reoccurring problems with reliability and in-custody informants. The need for disclosure is based on a balance of the public's need to protect the flow of information and an individual's right to prepare his defense. (*Rovario v. U.S.* (1957) 353 U.S. 53, 62). In the context of in-custody informants, the ability to prepare a defense is significantly harmed and increasing the disclosure requirements can counter that harm.

5. Argument in Support

According to the *Northern California Innocence Project (NCIP)*

> Incentivized jailhouse informants are a major cause of wrongful convictions. Of the 349 DNA exonerations nationwide, 17% of these cases involved convictions based on statements by incentivized jailhouse informants. This issue is very real to our work and our clients: NCIP's longest-held client has been wrongly imprisoned for 32 years behind the testimony of two career jailhouse informants. He will have an evidentiary hearing in April to prove his innocence. We have other clients who were also wrongfully convicted based on informant testimony. AB 359 is an important measure which will place additional safeguards to ensure that statements by jailhouse informants are at least properly evaluated and monitored.
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> Under current law, law enforcement may not provide monetary compensation to jailhouse informants in excess of a specific monetary value. The limit is a critical safeguard against the risk of incentivizing false testimony. However, current law fails to specifically impose the same restriction on non-monetary compensation (such as access to phone calls, television privileges, or other discretionary privileges). AB 359 would provide clarity that such a prohibition also applies to non-monetary benefits or incentives as well.
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> This bill also makes clear that important information about jailhouse informants is turned over to the defense prior to trial, ensuring greater transparency in the criminal justice system. The recent scandal in Orange County which revealed that the Orange County Sheriff's Department had been operating a secret informant network, exemplifies the need for such transparency. This problem is not unique to Orange County.
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> Furthermore, to ensure that prosecutors are fulfilling their obligations to turn over discovery to the defense and to ensure that the reliability of jailhouse informants is fairly vetted by the courts and juries, AB 359 also requires that each district

attorney's office maintains a central electronic file containing information regarding the incentives and use of jailhouse informants by their agency and others.

AB 359 will provide necessary transparency to improve the integrity of criminal investigations and help restore the trust between law enforcement and the public. It will also ensure that constitutional rights of the accused are preserved, that guilty people are held accountable, and that the innocent are not wrongfully convicted.

6. Argument in Opposition

The San Diego County District Attorney opposes this bill stating:

Currently, the law requires disclosure of all of the materials encompassed by AB 359 that are in the possession of the prosecution team, favorable to the defendant, and material to the outcome of the case, pursuant to *Brady v. Maryland* and it progeny. Additionally, the law requires the prosecutor to turn over all statements of the defendant, except where the court finds good cause to deny, restrict, or defer the disclosure, such as where there are "threats or possible danger to the safety of a victim or witness, the possible loss of destruction of evidence, or the possible compromise of other investigations by law enforcement." (Cal. Pen. Code § 1054.7.)

As 359 requires discovery above and beyond the rules of discovery enacted through the passage of Proposition 115, and does so in a manner that requires the prosecution to unreasonably search well beyond jurisdictional boundaries, and puts the safety of witnesses, and ongoing investigations in jeopardy. Indeed, it does so in a manner as to completely eliminate the practicality of using in-custody informants by making its terms not only impractical, but by their very nature, impossible.

First, it is important to note that AB 359 applies even when the credibility of an informant is not an issue, such as where there is tape recorded evidence of statements made by the defendant and heard by the informant.

Additionally, the requirement in AB 359 to file in court a written statement setting out "the substance of all communications between the informant and any member of the prosecution, or law enforcement or correctional agency, regarding the informant's possible testimony or participation in information gathering" is *extremely broad and dangerous.* If the in-custody informant is also providing information on an active and on-going investigation that is tangentially related but not material to the charge before the court, disclosure could be devastating to the investigation and deadly to the cooperator.

Further, the disclosure of all cases in which the in-custody informant participated does not appear to be limited to situations where the informant provided information as an "in-custody" informant. In other, words, if the informant was a victim in a prior case and testified, the prosecution would have to search that and find it, regardless of the jurisdiction in which it occurred. If, in the past, the informant provided a lead on identifying a murderer, but that investigation went

cold, the prosecution would be required to disclose the information and forever compromise the cold-case investigation.

AB 359 would require the disclosure of information that goes well and beyond that which is relevant and material to the credibility of a witness, disclosure of which is already required under criminal discovery laws.

Finally, the timing of the disclosure is contrary to logic where it required 30 days prior to a preliminary hearing, which is statutorily set within 10 days, or immediately upon possession.

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