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## Judiciary Committee

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### HB 2654

**Title:** An act relating to the reliability of incentivized evidence and testimony.

**Brief Description:** Concerning the reliability of incentivized evidence and testimony.

**Sponsors:** Representatives Orwall, Shea, Walkinshaw, Zeiger, Springer, Moscoso, Farrell, Muri, Riccelli, Goodman, Kagi, Stokesbary, Haler, Kilduff and Appleton.

#### Brief Summary of Bill

- Requires a trial court to assess the reliability of an informant's testimony before allowing the state to introduce the testimony as evidence in a criminal proceeding, unless waived by the defendant.
- Requires a court in a post-conviction proceeding to address the reliability of an informant's trial testimony if the trial court did not make this reliability determination and if the defendant shows by newly discovered evidence that the informant's testimony included a false material statement that potentially affected the outcome of the trial.

**Hearing Date:** 1/28/16

**Staff:** Edie Adams (786-7180).

#### Background:

Under both statute and court rule, any person of sound mind and discretion may be a witness in a court proceeding. Witnesses, however, may be prohibited from offering certain types of testimony that present evidence that is inadmissible under court rule or statute or due to constitutional violations, and there are procedures for the court to make pre-trial determinations about the admissibility of evidence, or the ability of certain witnesses to testify.

Juries are generally instructed that they are to judge the credibility and weight of the evidence, and may consider a number of factors, including any personal interest the witness has, any bias

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or prejudice the witness shows, or other factors impacting the jury's belief of the witness or testimony. The rules of evidence do not specifically address the issue of testimony offered by informants, although there is a jury instruction that can be used in the case of accomplice testimony.

In the case of accomplice testimony given on behalf of the state, the court may provide a jury instruction that directs the jury to subject the accomplice's testimony to careful examination, and to act upon the testimony with great caution. The instruction further provides that the jury should not find the defendant guilty upon the accomplice's testimony alone unless after careful consideration the jury is satisfied beyond a reasonable doubt of its truth. This instruction is mandatory in cases where the prosecution relies solely on the uncorroborated testimony of the accomplice. Washington appellate courts have ruled that a trial court is not required to give a jury instruction cautioning the jury regarding informant testimony.

Under *Brady v. Maryland*, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. This obligation extends not only to exculpatory evidence, but also to evidence impeaching the credibility of a government witness. In the case of an informant, the prosecution is obligated to disclose to the defense any benefit or advantage the informant receives, as well as other material evidence that impacts the credibility of the informant.

#### **Summary of Bill:**

A process is created for a court to assess the reliability of informant testimony before allowing the state to introduce the testimony as evidence in a criminal proceeding.

"Informant" is defined as any criminal suspect or suspected accomplice, whether or not detained or incarcerated, who provides information or testimony in exchange for, or in expectation of, a benefit. "Benefit" means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony. "Statement" means an oral, written, or nonverbal communication related to the crime charged.

Unless waived by the defendant, the court must assess an informant's statement outside the presence of the jury to determine whether the time and place, substance, and circumstances of the statement provide sufficient indicia of reliability to be considered by the jury.

The court must consider a number of nonexclusive factors in making this assessment, including:

- the informant's complete criminal history and any pending charges or investigations;
- any benefit the state has provided or may provide in the future to the informant;
- the substance, and time and place, of any statement by the defendant to the informant, and by the informant to law enforcement implicating the defendant in the crime charged;
- the names of all persons present when the defendant's statement was given to the informant;
- whether the informant has at any time modified or recanted his or her testimony or statement, and if so, the nature of and circumstances surrounding the modification or recantation;
- other cases in which the informant offered to provide information or testify for the state in exchange for a benefit;

- other cases in which the informant testified, including ones where the informant received a benefit in exchange for the testimony;
- any known relationship between the defendant and the informant, including time incarcerated in the same custodial section of a jail or prison; and
- whether the informant's statement or prior testimony is corroborated by other evidence not offered by an informant that tends to connect the defendant with the crime charged.

The court must exclude an informant's testimony unless the court finds sufficient indicia of its reliability, and the court must state on the record the basis for its decision.

In cases where a trial court did not make the required reliability determination, the court in a post-conviction proceeding must make the reliability determination if the defendant shows by newly discovered evidence that an informant's trial testimony included a false material statement that potentially affected the outcome of the trial. If the court determines the informant's testimony was unreliable, the court must order a new trial.

**Appropriation:** None.

**Fiscal Note:** Requested on 1/21/16.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.