

SENATE BILL REPORT

SB 6503

As of February 2, 2016

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

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

Sponsors: Senators Padden and Frockt.

Brief History:

Committee Activity: Law & Justice: 1/26/16.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Lindsay Erickson (786-7465)

Background: Accomplices and criminal informants provide useful information during criminal investigations and may be important trial witnesses. Accomplices and informants may be unwilling to testify in court unless they receive something in return. Commonly accomplices or informants agree to testify because the state offers a valuable incentive like a dismissed charge, immunity, or a plea bargain. A person already in custody, sometimes called a jailhouse informant, may come forward with an offer of information about a crime in exchange for favorable treatment.

Courts recognize the risk of false or exaggerated testimony when compensated witnesses testify for the state at criminal trials. Courts reduce the risk by telling the jury to use extra caution when evaluating compensated testimony or unverified accomplice testimony. The federal Ninth, Fifth, and Seventh Circuit Courts of Appeals allow a court to tell the jury that a witness received something valuable in exchange for testifying whether the witness testifies for the state or for the defendant because the credibility risk may be the same.

The federal Ninth Circuit Court of Appeals uses a model jury instruction to inform the jury when a compensated witness has testified for the state or the defendant, and to advise the jury to consider the testimony with extra care because the compensation may influence the reliability of the evidence.

Current Washington laws do not address the potential for undue influence over a compensated witness's testimony. A recommended criminal jury instruction addresses accomplice testimony. This jury instruction says that accomplice testimony should be

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carefully examined in light of the other evidence and acted on with great caution. The instruction must be given if the accomplice testifies for the state and the defendant requests it or if the accomplice testimony is not corroborated by other evidence. It is not given when an accomplice testifies for the defendant.

Summary of Bill: New definitions are added to chapter 10.58 RCW:

- "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.
- "Informant" means any criminal suspect or suspected accomplice, whether or not he or she is detained or incarcerated, who provides information or testimony in exchange for, or in expectation of, a benefit. An informant does not include an expert or a victim of the crime being prosecuted.
- "Statement" means an oral, written, or nonverbal communication related to the crime charged.

Unless waived by the defense and at the discretion of the court, before the state may introduce any live or prior testimony of an informant in a trial or other criminal proceeding, the court may assess the informant's statement to determine whether the time and place, substance, and circumstances provide sufficient indicia of reliability to be considered by the jury.

The court may make this determination outside the presence of the jury by considering the following nonexclusive factors:

- the complete criminal history of the informant, including any pending criminal charges or investigations in which the informant is a suspect;
- any benefit the state has provided or may provide in the future to the informant;
- the substance of any statement allegedly given by the defendant to the informant and the substance of any informant statement to law enforcement implicating the defendant in the crime charged;
- the time and place of the statement allegedly given by the defendant to the informant, the time and place of the disclosure of the informant's statement to law enforcement officials, and the names of all persons present when the statement was allegedly given by the defendant to the informant;
- whether, at any time, the informant modified or recanted his or her testimony or statement and, if so, the time and place of the modification or recantation, the nature of the modification or recantation, and the names of the persons who were present at the modification or recantation;
- other cases in which the informant offered to provide information to or testify for the state in exchange for a benefit, whether or not a benefit was received;
- other cases in which the informant testified, including those in which the informant received any benefit in exchange for or as a result of that testimony;
- if known, the relationship between the defendant and the informant, including the amount of time they were incarcerated in the same custodial section of the jail or prison;
- whether the informant's statement or prior testimony is corroborated by other evidence not offered by an informant tending to connect the defendant with the crime charged; and

- any other information the court considers relevant to the reliability of the informant or the informant's testimony.

After considering these factors, the court may exclude the informant's testimony unless the court finds sufficient indicia of its reliability. The court must state on the record the basis for its decision.

Appropriation: None.

Fiscal Note: Requested on January 22, 2016.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Under the current system, a prosecutor can offer an incentive to an informant in return for that informant's testimony. For a defense attorney to do that would be witness tampering. There is a high degree of false testimony offered by these witnesses. The right to a fair trial is a bedrock in our criminal justice system, and it has always been at the initial determination of the court to decide relevancy and related issues prior to trial. This hearing provided in the bill can be waived by the defense and would assist the court in gauging the reliability of incentivized testimony. The federal system provides a relevant jury instruction but the Washington State pattern jury instructions do not; Washington only has an accomplice instruction. There are a number of states that regulate this type of testimony, either in statute or in case law. Illinois did mandate this in capital cases, but the death penalty has since been abolished in that state. California, Texas, and Florida have passed statutes to increase discovery requirements to turn over the type of information covered in this bill. Nevada and Oklahoma have common law provisions addressing this issue. The role of false incentivized testimony was a factor in five out of 14 exonerations in which the IPNW has been involved. This bill would align with the free exchange of information.

CON: This is the wrong solution for a legitimate concern. This issue has been before the courts. The U.S. Supreme Court case *Giglio* said that agreements with witnesses need to be provided in discovery to the defense. There has been a comparison to expert testimony, but that testimony is different because they are able to offer opinion testimony. These witnesses would offer fact testimony, which is very different. The trier of fact gets to determine the credibility of a witness, and this bill is a departure from that. There are no states that provide for this type of hearing in statute, and there is no federal statute either. This type of hearing was required in death penalty cases in Illinois, but they abolished the death penalty in 2011, so it's unclear if the provision is still in statute. Child hearsay statements go through a similar hearing, but the child is not going to be present in trial and not subject to cross examination. In this situation covered by the bill, the witness will be present before the jury.

Persons Testifying: PRO: Kevin Curtis, defense attorney; Lara Zarowsky, Innocence Project Northwest (IPNW); David Hession, IPNW; Richard Devenport, IPNW.

CON: Tom McBride, WA Assoc. of Prosecuting Attorneys.

Persons Signed In to Testify But Not Testifying: No one.