

HOUSE BILL REPORT

SSB 5714

As Passed House - Amended:

April 15, 2019

Title: An act relating to the reliability of evidence in criminal proceedings.

Brief Description: Concerning the reliability of evidence in criminal proceedings.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Dhingra, Padden, Salomon, Kuderer, Billig, Darneille, Das and Hasegawa).

Brief History:

Committee Activity:

Public Safety: 3/19/19, 3/28/19 [DPA].

Floor Activity:

Passed House - Amended: 4/15/19, 97-0.

Brief Summary of Substitute Bill (As Amended by House)

- Requires the Washington Association of Sheriffs and Police Chiefs to administer a work group on eyewitness identification procedures and requires the University of Washington School of Law to administer a work group on the reliability of informant testimony.
- Requires local prosecuting attorneys to adopt protocols for using informants.
- Authorizes a prosecuting attorney or defendant to request a jury instruction on exercising caution in evaluating informant testimony.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: Do pass as amended. Signed by 9 members: Representatives Goodman, Chair; Davis, Vice Chair; Klippert, Ranking Minority Member; Sutherland, Assistant Ranking Minority Member; Griffey, Lovick, Orwall, Pellicciotti and Pettigrew.

Staff: Kelly Leonard (786-7147).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Any person of sound mind and discretion may be a witness in a court proceeding. Witnesses, however, are prohibited from testifying to evidence that is inadmissible under court rule, statute, or the federal or state constitutions. The court makes pretrial determinations regarding the admissibility of evidence and the ability of certain witnesses to testify. Juries are generally instructed to judge the credibility of witnesses and the weight of the evidence.

Eyewitness Evidence.

An eyewitness is a person who has actually seen the defendant and/or the crime. During a criminal investigation, law enforcement may ask an eyewitness to identify a suspect from a lineup or an array of photos. Recent research suggests that these identification procedures may influence witnesses' memories. Eyewitness testimony, typically based on both the crime and any subsequent lineup or photo array, often plays a role in criminal prosecutions.

In 2015 the Washington Association of Sheriffs and Police Chiefs published a model policy for eyewitness identification procedures. The policy contains preferred procedures for lineups, instructions to witnesses, and minimizing suggestiveness and witness contamination.

Informants.

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* and subsequent case law, 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 impacting the credibility of the informant.

Summary of Amended Bill:

Eyewitness Evidence.

The Washington Association of Sheriffs and Police Chiefs must administer a work group for the purpose of maximizing the reliability of eyewitness evidence collected by law enforcement. The work group is composed of 11 members, jointly appointed by Speaker of

the House of Representatives and the President of the Senate and representing specified interests and organizations. The work group must:

- develop model guidelines for the collection of eyewitness evidence consistent with specified best practices and the model policies adopted in 2015 by the Washington Association of Sheriffs and Police Chiefs and the Washington Association of Prosecuting Attorneys (WAPA);
- design statewide law enforcement training for the collection and documentation of eyewitness evidence based on the model guidelines developed by the work group; and
- in consultation with the University of Washington Tacoma and the Criminal Justice Training Commission, design a pilot project for implementing and evaluating the training curriculum.

The work group must complete its tasks and report to the Legislature by November 30, 2019.

Informants.

"Informant" means any person who: was previously unconnected to the criminal case as either a witness or a codefendant; claims to have relevant information about the crime; is currently charged with a crime, is facing potential criminal charges, or is in custody; and at any time receives consideration in exchange for providing the information or testimony.

Work Group. The University of Washington School of Law, in consultation with the WAPA and the Washington Innocence Project, must administer a work group on the reliability of informant testimony. The work group is composed of nine members, jointly appointed by the Speaker of the House of Representatives and the President of the Senate and representing specified interests and organizations. The work group must:

- develop model guidelines to direct prosecutors in determining whether to use an informant in a criminal proceeding;
- design and implement statewide training for prosecutors and defense counsel based on the model guidelines developed by the work group; and
- collect locally adopted protocols on informants.

The work group must complete its tasks and report to the Legislature by November 30, 2019.

Local Protocols. By December 31, 2020, county prosecuting attorneys must adopt and implement a written protocol for the use of informants consistent with the model guidelines developed by the work group. If a county prosecuting attorney chooses to adopt different guidelines, the guidelines must articulate adequate preliminary disclosures to the defense and include a list of procedures for prosecuting attorneys to follow when evaluating the reliability of an informant. A list of mandatory disclosures is included. County prosecuting attorneys must also establish and maintain a central confidential record of informants used in the course of criminal proceedings as well as formal offers to give testimony or other information.

Training. The informant testimony work group, in consultation with specified entities, must make specialized training available to prosecuting attorneys and criminal defense attorneys.

Jury Instruction. If the testimony of an informant is admitted in a criminal proceeding, the prosecuting attorney or defendant may request a jury instruction on exercising caution in

evaluating the credibility of an informant. Except when otherwise determined by the court, the instruction should be substantially similar to the following:

"The testimony of an informant, given on behalf of the [State] [City] [County] in exchange for a legal advantage or other benefit, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You, the jury, must weigh the credibility of his or her testimony. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth."

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony:

(In support) There have been multiple legislative proposals on the subject of informants in recent years; however, there was not broad consensus as to how to address these issues. Legislators and stakeholders committed to coming together and building consensus. In the beginning, there was a lot of controversy and argument. After several meetings of two different informal work groups, it was agreed that the state should require model guidelines and best practices in order to ensure the best system possible.

The work groups have already completed many of the requirements. This bill will give the work groups structure and incentives going forward. Providing training is a critical next step.

Prosecutors already have an obligation to reveal information under *Brady v. Maryland*. Prosecutors want reliable witnesses and evidence, and they are often loath to use informants. That being said, they can do a better job of developing guidelines for determining when informants are necessary. This bill contains provisions regarding those guidelines.

There may be some concerns regarding the exact wording of the jury instruction requirement, but those can be addressed.

(Opposed) None.

(Other) The Washington Association of Sheriffs and Police Chiefs collaborated with the Innocence Project Northwest, prosecuting attorneys, and others to develop model guidelines for eyewitness evidence in 2015. Much of this work has already been completed, and law enforcement leaders support the use of best practices going forward. While there are no issues with the substantive policies in the bill, it is not necessary to reconvene the work group every three years.

There are some concerns relating to the jury instruction requirement, as it raises separation-of-powers issues. There seems to be a misapprehension as to how pattern instructions are

used—they are only guidelines. Individual trial courts modify them for specific proceedings. In addition, there may be other constitutional issues with a judge commenting on the credibility of evidence.

Persons Testifying: (In support) Senator Dhingra, prime sponsor; and Andy Miller, Benton County and Washington Association of Prosecuting Attorneys.

(Other) James McMahan, Washington Association of Sheriffs and Police Chiefs; and Dory Nicpon, Board for Judicial Administration.

Persons Signed In To Testify But Not Testifying: None.