

HOUSE BILL REPORT

SSB 5714

As Reported by House Committee On:
Public Safety

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].

**Brief Summary of Substitute Bill
(As Amended by Committee)**

- Requires the University of Washington Tacoma to convene a work group on eyewitness identification procedures, and requires the Washington Innocence Project, through the University of Washington School of Law, to convene a work group on the reliability of informant testimony.
- Requires local law enforcement agencies to adopt protocols for eyewitness identification procedures, and requires local prosecuting attorneys to adopt protocols for using informants.
- Requires the Criminal Justice Training Commission to provide specialized training on eyewitness identification procedures, and requires the work group on the reliability of informant testimony to provide specialized training on the use of 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.

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.

Staff: Kelly Leonard (786-7147).

Background:

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.

Work Group. The University of Washington Tacoma (UW-Tacoma) must convene 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 the model policies adopted in 2015 by the Washington Association of Sheriffs and Police Chiefs and the Washington Association of Prosecuting Attorneys (WAPA);
- design and implement statewide law enforcement training for the collection and documentation of eyewitness evidence based on the model guidelines developed by the work group; and
- collect locally adopted protocols on eyewitness identification.

The work group must complete its tasks and report to the Legislature by November 30, 2019; in addition, the work group must reconvene every three years to revise the model guidelines.

Local Protocols. By December 31, 2020, law enforcement agencies must adopt and implement a written protocol for the collection of eyewitness evidence consistent with the model guidelines developed by the work group. If a law enforcement agency chooses to adopt different guidelines, those guidelines must:

- be based on credible field, academic, or laboratory research on eyewitness testimony;
- be designed to reduce erroneous eyewitness identifications and enhance the reliability and objectivity of eyewitness identifications; and
- include standards for: a blind administration of the identification procedure; filler selection; instructions to the witness; and documenting a statement for witness confidence immediately following any positive identification.

Training. Beginning October 1, 2020, the Criminal Justice Training Commission (CJTC), in consultation with the eyewitness evidence work group and the UW-Tacoma, must provide specialized training based on the training curriculum developed by the work group to persons responsible for the collection of eyewitness identification evidence during criminal investigations.

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 Washington Innocence Project, through the University of Washington School of Law, and in consultation with the WAPA, must convene 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."

Amended Bill Compared to Substitute Bill:

Certain entities are assigned the responsibility of carrying out the requirements in the underlying bill. The work group on eyewitness evidence must be convened by the UW-Tacoma. The CJTC, in consultation with certain entities, must provide the specialized training on eyewitness identification evidence. The work group on the reliability of informant testimony must be convened by the Washington Innocence Project, through the University of Washington School of Law, in consultation with the WAPA. The work group on the reliability of informant testimony, in consultation with certain entities, must make available the specialized training on informant testimony.

Provisions pertaining to the jury instruction are modified. A prosecuting attorney or defendant may request a jury instruction on exercising caution in evaluating the credibility of an informant (rather than requiring a judge to provide a jury instruction on exercising caution in evaluating the testimony of an informant).

The requirement for the Washington Pattern Instructions Committee's development of a jury instruction is removed. Instead, the jury instruction provided in the bill should be used unless otherwise determined by the court. The language of the jury instruction is replaced.

Structural and technical changes are made. Cross-references to the definition of "informant" are added in related sections. Provisions are reorganized into different sections. Provisions are codified into a new chapter in Title 10 RCW.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 28, 2019.

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.