

Elizabeth Powers, Innocence Project
Testimony Supporting House Bill 2366
Preventing Wrongful Convictions Based on Jailhouse Witnesses
House Judiciary Committee Hearing
March 16, 2021

The Innocence Project is a national organization dedicated to exonerating wrongfully convicted people through postconviction DNA testing and reforming the criminal justice system to prevent future injustice. We work with our local partners across the country, including the Midwest Innocence Project in Kansas, on policies that prevent and address wrongful conviction. The Innocence Project strongly supports HB 2366. We thank the many lawmakers on this committee who have worked hard to address innocence issues in recent years, including eyewitness identification reform, recording interrogations, and exoneree compensation. HB 2366 is another important step in preventing wrongful convictions involving jailhouse witness testimony. The promise of leniency creates a strong motivation for jailhouse witnesses to lie, which increases the risk of wrongful conviction.

According to the National Registry of Exonerations, there have been 200 exonerations since 1989 where a jailhouse witness has contributed to the wrongful conviction. The most recent exoneration in Kansas was that of Olin “Pete” Coones Jr., wrongfully convicted in part due to false jailhouse witness testimony.

HB 2366 will help prevent wrongful convictions as well as increase public safety. This proposal is supported by victim’s rights organizations who understand deeply not just the threat of wrongful conviction, but also the impact it has on crime victims to know that the person who committed a crime against them or their loved one received leniency for offering false testimony that led to a wrongful conviction. In these instances everyone is denied justice - the wrongfully convicted, the victim of the crime who thought they had closure but learned the wrong person was held responsible, and the crime victim of the jailhouse witness’s crime who learns their perpetrator was offered benefits to contribute to this injustice.

This legislation doesn’t stop the use of jailhouse witnesses, it simply implements safeguards and transparency surrounding their testimony to help prevent wrongful convictions.

Definition of Jailhouse Witness

The legislation is based on transparency measures that have been endorsed by the American Legislative Exchange Council (ALEC) and implemented in several other states.

The bill applies to a very small but risky group of incentivized witnesses. There are 3 criteria in the definition of “jailhouse witness:”

1. First the person must either provide, or the prosecutor intends the person to provide testimony.
2. Second, the testimony must be about statements made when the jailhouse witness and the defendant were incarcerated together.
3. Third, the testimony must be given in connection to a benefit.

The definition explicitly excludes confidential informants, codefendants and accomplices. The prosecution is already required to disclose benefits and discrediting evidence on jailhouse witnesses to the defense under the U.S. Supreme Court’s ruling in the *Giglio* case, so nothing in this bill increases safety risks that don’t already exist.

The bill also applies only to jailhouse witness testimony about statements made by the defendant when he was incarcerated with the jailhouse witness. The bill is limited to a jail or prison setting where witnesses can be placed in protective custody if they are at risk of being harmed.

Elements of the HB 2366

1. Tracking

The bill would require each district attorneys’ office to track the use of and benefits provided to jailhouse witnesses. That information would be made available to prosecutors throughout the state through KBI. This will allow prosecutors access to information before putting a potential witness on the stand. There are jailhouse witnesses who continuously get arrested and offer testimony about other incarcerated people confessing to them. A statewide tracking system allows a prosecutor in Leavenworth County to see if an inmate who is offering testimony has a pattern of doing the same thing in neighboring counties. Again, only prosecutors would have access to this information.

Connecticut, Texas, and Nebraska all have laws requiring each district attorney’s office to track the use of jailhouse witness testimony. The Innocence Project previously had contact with district attorney offices in these states and learned they are using excel spreadsheets to maintain the information, so there haven’t been additional costs related to the technology of tracking. They have actually saved money on investigating the jailhouse witnesses in their cases.

Connecticut, Maryland, Nebraska, Oklahoma, and Texas require prosecutors to track the use of jailhouse witnesses.

2. Enforcing Constitutional Disclosure Requirements

The bill would enforce the prosecution’s existing constitutional obligation under *Giglio* to disclose discrediting evidence on jailhouse witnesses to the defense. The bill details which types of discrediting jailhouse witness evidence must be disclosed, including their complete criminal history, any promised or

expected benefits, and other cases in which they provided jailhouse witness testimony. This has an added benefit of protecting against possible constitutional claims in the future.

Connecticut, Florida, Illinois, Maryland, Nebraska, Oklahoma, and Texas have all adopted similar enhanced disclosures measures.

3. Pre-trial Reliability Hearings

The bill would require pre-trial reliability hearings before a jailhouse witness can testify in murder and rape cases. Right now, judges hold pre-trial hearings to decide whether expert witnesses can testify. In high stakes murder and rape cases, there should be extra screening for the riskiest witnesses.

Illinois and Connecticut both require pre-trial reliability hearings before jailhouse witness testimony is admissible in the most serious cases.

4. Jury Instructions

The bill would put in place a jury instruction alerting jurors to specific factors to consider when assessing a jailhouse witness's testimony. Without such information a juror may not understand that jailhouse witnesses may receive benefits for testifying which could influence their incentive to lie.

California, Connecticut, Maryland, Oklahoma and Utah have specific jury instruction for jailhouse witnesses

5. Victim Notification

Finally, there is a provision that requires the victims of a jailhouse witness's crimes to be notified if the jailhouse witness is getting leniency for testifying. It is an incredible injustice that someone guilty of a crime may be offered leniency to testify against an innocent person. In instances where someone will receive such leniency, the victims in their crimes deserve to know.

Maryland and Nebraska include this provision in their statutes on regulating jailhouse witnesses.

House Bill 2366 would improve transparency and efficiency in the justice system. When everything is done right at trial, there are more accurate outcomes, public safety is enhanced and the innocent are protected. Additionally, there are fewer appeals and less money paid out to compensate those wrongly convicted. This bill would benefit the entire criminal justice system and we hope you will support it.

Thank you for your consideration. Any questions or comments can be directed to Beth Powers at epowers@innocenceproject.org.