

SUBJECT: Pre-trial hearing on admissibility of in-custody informant testimony

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Collier, K. Bell, Cason, Cook, Crockett, Murr, Vasut

0 nays

2 absent — Hinojosa, A. Johnson

WITNESSES: For —Ed Heimlich, Informed Citizens; Mike Ware, Innocence Project of Texas; John Nolley; (*Registered, but did not testify*: Lauren Johnson, ACLU of Texas; Angelica Cogliano, Austin Lawyers Guild; M. Paige Williams, for Dallas County Criminal District Attorney John Creuzot; Scott Henson, Just Liberty; Shea Place, Texas Criminal Defense Lawyers Association; Maggie Luna, Texas Criminal Justice Coalition; Emily Gerrick, Texas Fair Defense Project; Cynthia Simons, Texas Women's Justice Coalition; Rebecca Bernhardt, The Innocence Project; Michael Morton)

Against — (*Registered, but did not testify*: Ray Hunt, HPOU)

BACKGROUND: Code of Criminal Procedure art. 39.14(h-1) requires prosecutors to disclose to criminal defendants certain information about someone with whom the defendant was incarcerated and to whom the defendant made a statement against the defendant's interests if the prosecutor intends to use the person's testimony at a trial. The prosecutor must disclose any information that is relevant to the person's credibility, including:

- the person's criminal history, including charges that were dismissed or reduced as part of a plea bargain;
- any grant, promise, or offer of immunity from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the person's testimony; and
- information about other criminal cases in which the person has testified, or offered to testify, against a defendant with whom the

person was incarcerated, including grants, promises, or offer as described above given by the state in exchange for the testimony.

DIGEST:

HB 2631 would establish requirements for when the testimony of an in-custody informant would be admissible against a defendant in trials for certain criminal offenses. The requirements would apply in both the guilt or innocence phase and punishment phase of trials for 14 offenses, including: murder; capital murder; kidnapping; continuous sexual abuse of a young child; indecency with a child; sexual assault; aggravated assault; injury to a child, elderly or disabled individual; arson; robbery; and burglary.

Admissibility hearing. The testimony would not be admissible unless at least 21 days before the trial the prosecutor notified the defendant of the intention to have the informant testify and the judge held a hearing outside the presence of the jury. The judge would have to find by clear and convincing evidence that:

- any benefit offered to the informant was not one that would unduly influence the testimony;
- the informant could be found by a rational juror to be reliable and credible; and
- the value of the testimony was not outweighed by the danger of causing unfair prejudice to the defendant, causing unnecessary complication of the issues for the jury, or misleading the jury.

Factors considered at hearing. The court would have to consider numerous factors at the hearing, including any benefit offered or provided to the in-custody informant.

The court also would have to consider the time, date, location, and substance of any statement allegedly made by the defendant to the informant and any informant statement given to a law enforcement agency, prosecutor, other state official that implicated the defendant and whether the informant changed the informant's statement. If an informant's statement had been changed the court would have to consider several

factors about how it had changed.

Other factors the court would have to consider at the hearing include:

- the criminal history of the informant, including charges that were dismissed or reduced as part of a plea bargain;
- previous prosecutions in which the informant testified or offered to testify against a defendant with whom the informant was confined and any benefits offered or provided to the informant;
- information relevant to the credibility of the informant and the informant's statement; and
- information relevant to the informant's character relating to truthfulness or untruthfulness.

The judge also would have to consider expert testimony the court considered useful to make the findings, including testimony about the practices of the law enforcement agency, prosecutor, or state regarding in-custody informants; the use of in-custody informant testimony in similar cases; or risk factors associated with characteristics particular to the informant or the case.

The judge could not inform the jury of the judge's ruling from the admissibility hearing.

The defendant would have the right to call the in-custody informant as a witness at the admissibility hearing.

Information sharing. The prosecutor would have to give the defendant all information and records that the state intended to offer at the admissibility hearing. The prosecutor would have to provide the information not later than 10 days before the admissibility hearing began, unless good cause was shown.

Jury instructions. If testimony of an in-custody informant was admitted at trial, the court would have to instruct the jury to disregard the informant's testimony unless the jury determined that any benefit granted,

promised, or offered to the informant did not unduly influence the testimony and that the testimony was truthful.

The bill would take effect September 1, 2021, and would apply to the admissibility of evidence in a criminal proceeding that began on or after that date.

**SUPPORTERS
SAY:**

HB 2631 would help ensure fair criminal trials in Texas by having judges examine testimony from jailhouse informants for admissibility before trials for certain serious criminal offenses. False testimony from jailhouse informants has contributed to wrong convictions in Texas, and HB 2631 would help prevent such cases.

The bill would treat jailhouse informants similar to experts and other witnesses who are screened by judges. Like paid experts, jailhouse informants can be compensated for their testimony and should be screened. Judges have a better understanding than jurors of how incentives can work for jailhouse testimony and can provide an appropriate safeguard to unreliable or false jailhouse testimony. Examining this testimony before a trial would not infringe on the responsibilities of juries to evaluate testimony or their ability to do so.

The jury instruction that the bill would require would give jurors information to help them evaluate the testimony but would not create any obstacle to juries' evaluation of it. Prosecutors would have to provide information to defendants about such testimony, ensuring defendants were on equal footing to address the testimony in a trial. Testimony coming to light within the deadline set by the bill could be addressed through other procedures.

**CRITICS
SAY:**

HB 2631 could shift decisions about whether some witnesses in certain criminal trials are credible to the judge, something best reserved for juries. Juries are the fact-finders in trials and evaluate witness testimony, just as they do other evidence. Requiring judges to hold pre-trial admissibility hearings in some cases would infringe on this core role of juries and give defendants an extra avenue to make their case.

The instruction to the jury that would be required by the bill could be confusing and would set up a new hurdle for the jury to overcome when evaluating the testimony.

**OTHER
CRITICS
SAY:**

The bill's requirement that jailhouse testimony be brought before a judge within a certain time frame before trial could be too restrictive, and the bill should have a process to handle such situations.