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Michelle Feldman, Innocence Project
Testimony Supporting House Bill 2544
Preventing Wrongful Convictions Based on Jailhouse Witnesses
House Judiciary Committee Hearing
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My name is Michelle Feldman and I am the state campaigns director for the Innocence Project. We are a national organization that works to exonerate the wrongfully convicted with our local partner in Kansas, the Midwest Innocence Project. I want to start by thanking 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.

House Bill 2544 is another important step in preventing wrongful convictions involving false jailhouse witness testimony. The promise of leniency creates a strong motivation for jailhouse witnesses to lie, which increases the risk of wrongful conviction.

The bill is also about public safety. You will hear examples of jailhouse witnesses in Kansas who get arrested for violent crimes, testify for the state to get out of jail or prison, and then go on to commit more violent crimes. What does it say to crime victims when the person who harmed them gets out of jail early because he testified for the state? When testimony is rewarded with leniency, the victims of the jailhouse witness's crimes are denied justice.

The best solution would be to stop giving deals for testimony. However, this legislation doesn't stop the use of jailhouse witnesses, it simply implements safeguards and transparency surrounding their testimony.

Definition of Jailhouse Witness

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

The bill applies to a very small but risky group of incentivized witnesses. There 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. We limited the definition to address safety concerns. 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. We limited the bill to a jail or prison setting because these witnesses are already being placed in protective custody if they are at risk of being harmed.

1. Tracking

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First, 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. The idea is to give prosecutors better information before putting a potential witness on the stand. There are serial jailhouse witnesses who continuously get arrested and offer testimony about other inmates 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.

Last year, Connecticut became the first state to implement a statewide jailhouse witness tracking system. Texas and Nebraska recently passed laws requiring each district attorney's office to centrally track the use of jailhouse witness testimony.

District attorney offices that I've contacted in these states are using excel spreadsheets to maintain the information, so there haven't been additional costs. They have actually saved money because prosecutors don't have to waste resources investigating their own jailhouse witnesses—all the information is in one place.

2. Enforcing Constitutional Disclosure Requirements

Second the bill would enforce the prosecution's existing constitutional obligation under *Giglio* to disclose discrediting evidence on jailhouse witnesses to the defense. To avoid confusion and possible constitutional claims on the backend, the bill spells out 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.

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

3. Pre-trial Reliability Hearings

Third, 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. Ironically, there are academic jailhouse witness experts who have pass a pre-trial hearing, but the jailhouse witnesses themselves do not. 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

Fourth, there would be a jury instruction alerting jurors to specific factors to consider when assessing a jailhouse witness's testimony.

A number of states including California, Connecticut, Massachusetts, Maryland, Oklahoma and Utah have specific jury instruction for jailhouse witnesses

5. Victim Notification



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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. *This is provision was passed in Nebraska's law last year.*

House Bill 2455 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. There are fewer appeals and wrongful conviction payouts. This bill would benefit all sides of the criminal justice system and we hope you will support it.