**5038-S.E AMS PADD S3036.1 - NOT FOR FLOOR USE**

**ESSB 5038** - S AMD **327**

By Senator Padden

Strike everything after the enacting clause and insert the following:

"NEW SECTION. **Sec.**  The definitions in this section apply throughout this section and sections 2 and 3 of this act unless the context clearly requires otherwise.

(1) "Benefit" means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to a witness in exchange for his or her testimony, information, or statement. "Benefit" does not include (a) a court-issued protection order, or (b) assistance that is ordinarily provided to both a prosecution and defense witness to facilitate his or her presence in court including, but not limited to, lodging, meals, travel expenses, or parking fees.

(2) "Incentivized hearsay witness" means any individual who, in exchange for or in reliance upon any benefit, provides a statement or testimony in the present case that is based upon statements or communications made by the defendant. "Incentivized hearsay witness" does not include an expert witness or a victim of the crime being prosecuted.

(3) "Statement" means an oral, written, or nonverbal communication related to the crime charged.

NEW SECTION. **Sec.**  (1) Before the prosecuting attorney may introduce any testimony or statement of an incentivized hearsay witness in a trial or other criminal proceeding, the prosecuting attorney must:

(a) Request the material and information in subsection (2) of this section from (i) the investigative agency, and (ii) the incentivized hearsay witness;

(b) Review the Washington state courts judicial information system and any regularly available database reflecting criminal charges and convictions to determine the jurisdictions in which the incentivized hearsay witness has a criminal record or pending criminal charges;

(c) Request the material and information in subsection (2) of this section from state prosecutors and investigative agencies in Washington state jurisdictions where the judicial information system shows that the incentivized hearsay witness has a criminal record or pending criminal charges;

(d) Request the material and information in subsection (2) of this section from both the office of the United States attorney for the eastern district of Washington and the office of the United States attorney for the western district of Washington, when the search required under (b) of this subsection shows that the incentivized hearsay witness has a criminal record or pending criminal charges in either of those jurisdictions; and

(e) Disclose to the defendant (i) the product of the requests in (a), (c), and (d) of this subsection, (ii) the prosecutor's determination in (b) of this subsection, and (iii) any other material and information in subsection (2) of this section that is known or reasonably available to be obtained from a review of material and information internal to the office of the prosecuting attorney.

(2) The following material and information must be requested and the product of those requests disclosed pursuant to subsection (1) of this section:

(a) The complete criminal history of the incentivized hearsay witness, including any pending criminal charges;

(b) Any benefit the state has provided or may provide in the future to the incentivized hearsay witness in the present case, including any written agreement related to a benefit, and information related to the incentivized hearsay witness's breach of any conditions contained within the agreement;

(c) The substance, time, and place of any statement allegedly given by the defendant to the incentivized hearsay witness, and the substance, time, and place of any statement given by the incentivized hearsay witness to an investigative agency implicating the defendant in the crime charged, including the names of all persons present when any statement was allegedly given by the defendant to the incentivized hearsay witness;

(d) Any instance that the incentivized hearsay witness modified or recanted his or her testimony or statement, the time and place of the modification or recantation, the nature of the modification or recantation, and the names of the persons who were present at the modification or recantation;

(e) All other state and federal cases in jurisdictions within the state of Washington in which the incentivized hearsay witness provided information or testified for the prosecution in exchange for or in reliance upon a benefit, or in which the incentivized hearsay witness received any benefit as a result of that testimony;

(f) All other state and federal cases in jurisdictions outside the state of Washington, that are known or discovered through the prosecuting attorney's ordinary duty to investigate, in which the incentivized hearsay witness testified in exchange for or in reliance upon a benefit, or in which the incentivized hearsay witness received any benefit as a result of that testimony;

(g) The relationship between the defendant and the incentivized hearsay witness, including the amount of time they were incarcerated in the same custodial section of the jail or prison;

(h) All evidence corroborating the incentivized hearsay witness's testimony or statement implicating the defendant in the crime charged; and

(i) Any other material or information in the knowledge, possession, or control of the state that bears on the credibility or reliability of the incentivized hearsay witness or the incentivized hearsay witness's statement.

(3)(a) The prosecuting attorney must disclose to the defendant any materials and information obtained under subsections (1) and (2) of this section as soon as practicable after discovery.

(b) The prosecuting attorney may not introduce any testimony or statement of an incentivized hearsay witness in a trial or other criminal proceeding unless the materials and information required to be requested and disclosed in subsections (1) and (2) of this section are disclosed in accordance with this subsection (3).

(4) Nothing in this chapter precludes the court from ordering the state to request and disclose the materials and information in subsections (1) and (2) of this section related to any witness who provides a statement or testimony in the present case in exchange for, or in reliance upon, a benefit.

NEW SECTION. **Sec.**  If the prosecuting attorney fails to disclose information received in response to the requests required under section 2 of this act, then the court must order the prosecuting attorney to immediately request and disclose the material and information, and may:

(1) Grant a continuance, unless waived by the defendant;

(2) Preclude the incentivized hearsay witness from testifying or the prior statement from being introduced;

(3) Dismiss the action; or

(4) Enter such other order as it deems just under the circumstances.

NEW SECTION. **Sec.**  (1) Nothing in sections 1 through 3 of this act diminishes federal constitutional disclosure obligations to criminal defendants or any related obligations under Washington case law, statutes, or court rules.

(2) Nothing in sections 1 through 3 of this act requires the disclosure of information that is the subject of a court-issued protective order regarding disclosure or that is otherwise not subject to disclosure under statute or court rule.

NEW SECTION. **Sec.**  Sections 1 through 4 of this act are each added to chapter 10.58 RCW.

NEW SECTION. **Sec.**  If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."

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On page 1, line 2 of the title, after "testimony;" strike the remainder of the title and insert "and adding new sections to chapter 10.58 RCW."

EFFECT: Narrows the required disclosures by changing the definition from "incentivized witness" to "incentivized hearsay witness" so that the disclosures apply only to a witness providing evidence based upon a defendant's statements or communications.

Authorizes court discretion to order the court to seek out and disclose information regarding other incentivized witnesses.