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**SUBSTITUTE SENATE BILL 5714**

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**State of Washington 66th Legislature 2019 Regular Session**

**By** Senate Law & Justice (originally sponsored by Senators Dhingra, Padden, Salomon, Kuderer, Billig, Darneille, Das, and Hasegawa)

AN ACT Relating to the reliability of evidence in criminal proceedings; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  INTENT. The legislature recognizes that prosecuting attorneys, law enforcement, and society at large strive for a criminal justice system that minimizes the risk actually innocent people will be convicted. The legislature further recognizes that mistaken identification by witnesses to crime and false testimony by informants who are given benefits in exchange for their testimony have contributed to the conviction of the innocent in Washington state. Through the development of best practices related to the collection of eyewitness evidence and the use of informant witnesses, and the adoption of model guidelines to implement those practices, the legislature aims to improve the quality of such evidence and reduce the risk of wrongful conviction related to these contributing factors.

NEW SECTION. **Sec.**  EYEWITNESS EVIDENCE. (1) A work group is established to adopt model guidelines and develop a training curriculum using evidence-based best practices for law enforcement to maximize the reliability of eyewitness evidence collected during criminal investigations.

(a) The president of the senate and the speaker of the house of representatives shall jointly appoint the members of the work group to include the following:

(i) One member representing the senate;

(ii) One member representing the house of representatives;

(iii) The chief of the Washington state patrol or the chief's designee;

(iv) One member representing the criminal justice training commission with expertise in developing law enforcement training curricula;

(v) The executive director of the Washington association of sheriffs and police chiefs or the executive director's designee;

(vi) Two members representing the Washington association of prosecuting attorneys, each from a diverse geographical location;

(vii) One member representing the Washington defender association;

(viii) One member representing the Washington association of criminal defense lawyers;

(ix) One member representing the Washington innocence project; and

(x) One member from the scientific community with expertise in eyewitness memory.

(b) The duties of the work group include, but are not limited to:

(i) Developing 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;

(ii) Designing and implementing statewide law enforcement training for the collection and documentation of eyewitness evidence based on the model guidelines developed pursuant to this subsection; and

(iii) Collecting local protocols required under subsection (2) of this section.

(c) The work group shall hold its initial meeting no later than July 31, 2019, and complete the model guidelines and training curriculum no later than November 30, 2019.

(d) The work group shall prepare and submit to the appropriate committees of the legislature a report including the model guidelines, training curriculum, and a summary of its work by November 30, 2019.

(e) The work group shall function within existing resources.

(f) Following the submission of the report required under (d) of this subsection, the work group shall reconvene every three years to revise the model guidelines as needed in accordance with science-based best practices for the collection of eyewitness evidence.

(2)(a) No later than December 31, 2020, each law enforcement agency shall adopt and implement a written local protocol for the collection of eyewitness evidence consistent with the model guidelines developed pursuant to subsection (1) of this section, and submit a copy of the local protocol to the work group established under subsection (1) of this section.

(b) If a law enforcement agency adopts the model guidelines, it has met the requirements of this subsection.

(c) If a law enforcement agency chooses to adopt its own local protocol, the protocol must:

(i) Be based on credible field, academic, or laboratory research on eyewitness memory;

(ii) Be designed to reduce erroneous eyewitness identifications and enhance the reliability and objectivity of eyewitness identifications; and

(iii) Include standards for (A) blind administration of the identification procedure; (B) filler selection; (C) instructions to the witness; and (D) documenting a statement of witness confidence immediately following any positive identification.

(3) Specialized training based on the training curriculum developed pursuant to subsection (1) of this section shall be made available to persons responsible for the collection of eyewitness identification evidence during criminal investigations. Training participants shall have the opportunity to practice skills and receive feedback from instructors.

NEW SECTION. **Sec.**  INFORMANTS. (1) For the purposes of this section, "informant" means any person who: (a) Was previously unconnected with the criminal case as either a witness or a codefendant; (b) claims to have relevant information about the crime; (c) is currently charged with a crime or is facing potential criminal charges or is in custody; and (d) at any time receives consideration in exchange for providing the information or testimony.

(2) A work group is established to adopt model guidelines and develop a training curriculum based on those guidelines to assist prosecuting attorneys in evaluating the reliability of information or testimony offered by an informant before it is used in connection with any criminal proceeding and in determining adequate preliminary disclosures to the defense.

(a) The president of the senate and the speaker of the house of representatives shall jointly appoint the members of the work group to include the following:

(i) One member representing the senate;

(ii) One member representing the house of representatives;

(iii) The executive director of the Washington association of sheriffs and police chiefs or the executive director's designee;

(iv) Two members representing the Washington association of prosecuting attorneys, each from a diverse geographical location;

(v) One member representing the Washington defender association;

(vi) One member representing the Washington association of criminal defense lawyers;

(vii) One member representing the Washington innocence project; and

(viii) One member of the board of the western states information network.

(b) The duties of the work group include, but are not limited to:

(i) Developing model guidelines to direct prosecutors in determining whether to use an informant in a criminal proceeding;

(ii) Designing and implementing statewide training for prosecutors and defense counsel based on the model guidelines; and

(iii) Collecting local protocols required under subsection (3) of this section.

(c) The work group shall hold its initial meeting no later than July 31, 2019, and complete the model guidelines and training curriculum no later than November 30, 2019.

(d) The work group shall prepare and submit to the appropriate committees of the legislature a report including the model guidelines, the training curriculum, and a summary of its work by November 30, 2019.

(e) The work group shall function within existing resources.

(3) No later than December 31, 2020, each county prosecuting attorney shall:

(a) Adopt and implement a written local protocol for the use of informants consistent with the model guidelines developed pursuant to subsection (2) of this section, and submit a copy of the local protocol to the work group established under subsection (2) of this section.

(i) If a county prosecutor adopts the model guidelines developed by the work group established under subsection (2) of this section, it has met the requirements of this subsection.

(ii) If a county prosecutor chooses to adopt its own local protocol, the protocol 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 that includes:

(A) The complete criminal history of the informant including pending criminal charges;

(B) Any consideration provided in exchange for the information or testimony;

(C) Whether the informant's information or testimony was modified or recanted;

(D) The number of times the informant has previously provided information or testimony in exchange for consideration; and

(E) The kind and quality of other evidence corroborating the informant's information or testimony;

(b) Establish and maintain a central record of informants used in the course of criminal proceedings as well as formal offers to give testimony or other information. This record is the confidential work product of the office of the prosecuting attorney.

(4) Specialized training based on the training curriculum developed pursuant to subsection (2) of this section shall be made available to prosecuting attorneys and criminal defense attorneys related to the use of informants in the criminal justice system.

(5) Nothing in this section diminishes federal constitutional disclosure obligations to criminal defendants or any related obligations under Washington case law, statutes, or court rules.

NEW SECTION. **Sec.**  The judge shall provide the jury with an instruction on exercising caution in evaluating the testimony of an informant. Unless the Washington pattern instructions committee adopts its own language by December 1, 2019, the instruction should be substantially similar to the following form:

"The testimony of an informant in exchange for a promise by the government, for money, or other advantage must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the informant's testimony has been affected by these circumstances, by the informant's interest in the outcome of the case, by prejudice against the defendant, or by the benefits that the informant has received. You should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict any defendant upon the unsupported testimony of an informant unless you believe that testimony beyond a reasonable doubt."

**--- END ---**