

# SENATE BILL REPORT

## ESSB 5038

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As of Third Reading

**Title:** An act relating to disclosures regarding incentivized evidence and testimony.

**Brief Description:** Concerning disclosures regarding incentivized evidence and testimony.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Padden, Pedersen, Kuderer, Darneille, Frockt and Angel).

**Brief History:**

**Committee Activity:** Law & Justice: 1/25/17 [DPS].

### Brief Summary of First Substitute Bill

- Requires a prosecutor to give the defendant advance notice and specific detailed information about any potential informant testimony.
- Requires the prosecutor's disclosure before the informant's testimony or statements are offered in evidence.
- Directs the prosecutor to provide the required disclosures as soon as possible but no later than 14 days prior to offering informant testimony in evidence at trial or any other criminal proceeding.
- Defines informant, benefit, and statement for purposes of the prosecutor's required disclosures.
- Authorizes court-ordered remedies for the defendant for a prosecutor who fails a timely disclosure.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5038 be substituted therefor, and the substitute bill do pass.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Angel, Darneille, Frockt and Wilson.

**Staff:** Melissa Burke-Cain (786-7755)

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Background:** Accomplices and criminal informants provide useful information during criminal investigations and may be important trial witnesses. Accomplices and informants may be unwilling to testify in court unless they receive something in return. Commonly, accomplices or informants agree to testify because the state offers a valuable incentive like a dismissed charge, immunity, or a plea bargain. A person already in custody, sometimes called a jailhouse informant, may come forward with an offer of information about a crime in exchange for favorable treatment.

Courts recognize the risk of false or exaggerated testimony when compensated witnesses testify for the state at criminal trials. However, the defendant may not know the criminal history of a proposed witness, if the proposed witness is an informant, and if a testifying informant stands to gain any benefit as an incentive to provide statements or testimony for the prosecution. The defendant may not be able to ask the court for timely court orders limiting the prosecution's evidence or seek appropriate jury instructions related to informant testimony if the prosecutor does not notify the defendant about potential informant testimony or statements in a timely manner.

**Summary of Bill:** New definitions are added to RCW 10.58:

- benefit means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for the informant's testimony, information, or statement with stated exclusions;
- informant means any criminal suspect, whether or not the informant is detained or incarcerated, who provides information or testimony in exchange for, or in expectation of, a benefit—an informant does not include an expert or a victim of the crime being prosecuted; and
- statement means an oral, written, or nonverbal communication related to the crime charged.

A prosecutor must notify the defendant and disclose any information or materials about potential informant testimony that the state knows or could reasonably discover from all of the following:

- information and material obtained through communication with the informant;
- review of internal material and information in the prosecutor's office; and
- the prosecutor's request for materials and information from the jurisdictions where the informant has a criminal record or pending charges.

If the prosecutor does not comply with the disclosure requirements, the court may:

- delay the trial;
- exclude the informant's testimony or statements from the case;
- dismiss the case against the defendant; or
- provide the defendant with other appropriate relief.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Draft Bill:** *Testimony from 2017 Regular Session.* *The committee recommended a different version of the bill than what was heard.* PRO: Past proposals dealt with jury instructions and pretrial hearings, but this proposal's focus is on disclosure mandates for the prosecution. Incentivized testimony is the single greatest cause of wrongful convictions. The current disclosures are inadequate and there are no good mechanisms to protect the defendant. The proposal creates uniformity across the state related to pretrial disclosures. Defense attorneys often lack crucial information about an informant's criminal history, the validity of the informant's prior testimony. This bill would prevent informants from gaming the system. Incentivized testimony is inherently risky testimony and is the leading cause of wrongful convictions in capital cases. The risk is well-recognized yet there is no qualification process for these witnesses. Expert witnesses must be disclosed and may be questioned about compensation. The defendant's protection is cross-examination, but cross-examination is only as good as the information the defense counsel has in hand to prepare for the examination. Other states are taking up this issue including California, Texas, Illinois, and Montana. In North Carolina, prosecutors must certify the validity of informant testimony. Washington's proposal is modest compared with what other states are doing to address the problem. Wrongful convictions are a personal tragedy, but important information is uncovered that permits the performance of the justice system to be monitored. The proposal is not an undue burden for prosecutors. This bill addresses concerns raised with last years' predecessor bill. The approach here does not block information from the jury, it makes disclosure responsibilities less ambiguous, and gives statewide uniformity.

CON: WAPA does not want informants gaming the system; it wants to preserve the integrity of the system. The bill needs to tighten the definition of informants to apply to the type of testimony causing the problem—the jailhouse informant, directed by the prosecution to gather information, and given a plea bargain. The term shouldn't include the many citizens who may be witnesses to a crime and offer to assist law enforcement. Their actions are a benefit to them because they hope to make their community safer. Should these witnesses be considered "informants" receiving a benefit? No. Is a witness is offered assistance by the prosecution to obtain a no-contact order gaining a benefit under this law? No, but it could be considered an inducement as the bill is written. The definition should be refined to apply to the persons creating the problem, a person paid or used to gather intelligence for the police, or the jailhouse snitch.

**Persons Testifying:** PRO: Kevin Curtis, Spokane, Washington Defender Association and Washington Association of Defense Counsel; Lara Zarowsky, UW School of Law and Innocence Project NW; Garrett Rutherford, UW School of Law Legislation Advocacy Clinic.

CON: Rich Weyrich, WAPA.

**Persons Signed In To Testify But Not Testifying:** No one.