

ESSB 5038 - S AMD 601

By Senator Padden

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The definitions in this section apply
4 throughout this section and sections 2 and 3 of this act unless the
5 context clearly requires otherwise.

6 (1) "Benefit" means any deal, payment, promise, leniency,
7 inducement, or other advantage offered by the prosecuting attorney or
8 investigative agency to a witness in exchange for his or her
9 testimony, information, or statement. "Benefit" does not include: (a)
10 A court-issued protection order; or (b) assistance that is ordinarily
11 provided to both a prosecution and defense witness to facilitate his
12 or her presence in court including, but not limited to, lodging,
13 meals, travel expenses, or parking fees.

14 (2) "Incentivized witness" means any incarcerated person, or any
15 suspect whether or not he or she is detained or incarcerated, who
16 provides a statement, information, or testimony in the crime charged
17 in exchange for or in reliance upon any benefit. "Incentivized
18 witness" does not include an expert witness, a defendant who gives a
19 proffer in the course of pleading guilty in his or her own case and
20 does not offer testimony, information, or a statement against another
21 person in any case, or a victim of the crime being prosecuted.

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

24 (4) "Suspect" means any person charged with a criminal offense or
25 under suspicion or investigation for having committed a criminal
26 offense, provided that the charged or suspected conduct is a material
27 term of any benefit offered to the witness in exchange for a
28 statement, information, or testimony in the crime charged.

29 NEW SECTION. **Sec. 2.** (1) Before the prosecuting attorney may
30 introduce any testimony or statement of an incentivized witness in a
31 trial or other criminal proceeding, the prosecuting attorney must:

1 (a) Request the material and information in subsection (2) of
2 this section from: (i) The investigative agency with jurisdiction
3 over the crime charged; and (ii) the incentivized witness;

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

9 (c) Request the material and information in subsection (2) of
10 this section from the prosecuting attorney and investigative agencies
11 in jurisdictions where the search in (b) of this subsection shows
12 that the incentivized witness has a criminal record or pending
13 criminal charges; and

14 (d) Disclose to the defendant:

15 (i) The product of the requests in (a) and (c) of this
16 subsection;

17 (ii) The prosecuting attorney's determination in (b) of this
18 subsection; and

19 (iii) Any other material and information identified in subsection
20 (2) of this section that is known or reasonably available to be
21 obtained from a review of material and information internal to the
22 office of the prosecuting attorney.

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

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

28 (b) Any benefit the prosecution and investigative agency has
29 provided or may provide in the future to the incentivized witness in
30 exchange for information, a statement, or testimony in the present
31 case, including any written agreement related to a benefit, and
32 information related to the incentivized witness's breach of any
33 conditions contained within the agreement;

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

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

6 (e) All state and federal cases identified in (b) of this
7 subsection in which the incentivized witness provided information, a
8 statement, or testimony for the prosecution in exchange for or in
9 reliance upon a benefit, or in which the incentivized witness
10 received any benefit as a result of providing that information,
11 statement, or testimony;

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

15 (g) All evidence corroborating the incentivized witness's
16 testimony or statement implicating the defendant in the crime
17 charged; and

18 (h) Any other material or information in the knowledge,
19 possession, or control of the state that bears on the credibility or
20 reliability of the incentivized witness or the incentivized witness'
21 statement.

22 (3)(a) The prosecuting attorney must disclose to the defendant
23 any materials and information obtained under subsections (1) and (2)
24 of this section as soon as practicable after discovery but before the
25 testimony or statement is introduced in a trial or other criminal
26 proceeding.

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

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

37 NEW SECTION. **Sec. 3.** If the prosecuting attorney fails to
38 disclose information received in response to the requests required
39 under section 2 of this act, then the court must order the

1 prosecuting attorney to immediately request, review, and disclose the
2 material and information, and may:

- 3 (1) Grant a continuance, unless waived by the defendant;
- 4 (2) Preclude the incentivized hearsay witness from testifying or
5 the prior statement from being admitted;
- 6 (3) Dismiss the action; or
- 7 (4) Enter such other order as it deems just under the
8 circumstances.

9 NEW SECTION. **Sec. 4.** (1) Nothing in sections 1 through 3 of
10 this act diminishes federal constitutional disclosure obligations to
11 criminal defendants or any related obligations under Washington case
12 law, statutes, or court rules.

13 (2) The prosecuting attorney has fulfilled the affirmative duties
14 established under this act if the prosecuting attorney has made a
15 good faith effort to discover the material and information identified
16 in section 2(2) of this act. A good faith effort is demonstrated if
17 the prosecuting attorney:

18 (a) Reviews material and information internal to the office of
19 the prosecuting attorney;

20 (b) Requests and reviews the information identified in section
21 2(1) (a) through (c) of this act; and

22 (c) Discloses to the defendant the product of the inquiries in
23 accordance with section 2(1)(d) of this act.

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

28 NEW SECTION. **Sec. 5.** Nothing in this chapter prevents the
29 prosecuting attorney from providing incentives to a witness in
30 accordance with existing case law, statutes, or court rules.

31 NEW SECTION. **Sec. 6.** Sections 1 through 5 of this act are each
32 added to chapter 10.58 RCW.

33 NEW SECTION. **Sec. 7.** If any provision of this act or its
34 application to any person or circumstance is held invalid, the
35 remainder of the act or the application of the provision to other
36 persons or circumstances is not affected."

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1 On page 1, line 2 of the title, after "testimony;" strike the
2 remainder of the title and insert "and adding new sections to chapter
3 10.58 RCW."

EFFECT: Changes the term "state" to "prosecuting attorney and investigative agency." Changes the term "informant" to "incentivized witness." Changes the definition of incentivized witness to a person who provides a statement, information, or testimony in the crime charged in exchange for or in reliance upon any benefit. Clarifies that the term "incentivized witness" does not include a defendant who gives a proffer in the course of pleading guilty in his or her own case and does not offer testimony, information, or a statement against another person in any case. Adds a definition of the term "suspect." Adds clarifying language regarding requests from prosecuting attorneys. Provides that a court may order a prosecuting attorney to request and disclose information in the bill. Provides that a prosecutor has fulfilled the affirmative duties in the bill if the prosecutor has made a good faith effort to make the requests and provide the disclosure required under the act. Clarifies that nothing in the bill prevents the prosecuting attorney from providing incentives to a witness in accordance with existing case law, statutes, or court rules. Makes other technical changes.

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