**5038-S.E AMS PADD S5219.2 - NOT FOR FLOOR USE**

**ESSB 5038** - S AMD **601**

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 prosecuting attorney or investigative agency 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 witness" means any incarcerated person, or any suspect whether or not he or she is detained or incarcerated, who provides a statement, information, or testimony in the crime charged in exchange for or in reliance upon any benefit. "Incentivized witness" does not include an expert witness, 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, or a victim of the crime being prosecuted.

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

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

NEW SECTION. **Sec.**  (1) Before the prosecuting attorney may introduce any testimony or statement of an incentivized 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 with jurisdiction over the crime charged; and (ii) the incentivized 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 witness has a criminal record or pending criminal charges;

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

(d) Disclose to the defendant:

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

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

(iii) Any other material and information identified 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 witness, including any pending criminal charges;

(b) Any benefit the prosecution and investigative agency has provided or may provide in the future to the incentivized witness in exchange for information, a statement, or testimony in the present case, including any written agreement related to a benefit, and information related to the incentivized 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 witness, and the substance, time, and place of any statement given by the incentivized 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 witness;

(d) Any instance that the incentivized 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 state and federal cases identified in (b) of this subsection in which the incentivized witness provided information, a statement, or testimony for the prosecution in exchange for or in reliance upon a benefit, or in which the incentivized witness received any benefit as a result of providing that information, statement, or testimony;

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

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

(h) Any other material or information in the knowledge, possession, or control of the state that bears on the credibility or reliability of the incentivized witness or the incentivized witness' 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 but before the testimony or statement is introduced in a trial or other criminal proceeding.

(b) The prosecuting attorney may not introduce any testimony or statement of an incentivized 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 prosecuting attorney 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, review, 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 admitted;

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

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

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

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

(3) 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.**  Nothing in this chapter prevents the prosecuting attorney from providing incentives to a witness in accordance with existing case law, statutes, or court rules.

NEW SECTION. **Sec.**  Sections 1 through 5 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: 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.