
Judiciary Committee

ESSB 5038

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 Summary of Engrossed Substitute Bill

- Requires the state, prior to introducing any testimony or statement of an informant in a criminal proceeding, to disclose to a defendant certain information relating to the informant and the circumstances surrounding any statement or information provided by the informant.
- Establishes remedies that a court may impose if a prosecuting attorney fails to comply with required disclosure of materials and information relating to an informant.

Hearing Date: 3/21/17

Staff: Edie Adams (786-7180).

Background:

Under both statute and court rule, any person of sound mind and discretion may be a witness in a court proceeding. Witnesses, however, may be prohibited from offering certain types of testimony that present evidence that is inadmissible under court rule or statute or due to constitutional violations, and there are procedures for the court to make pretrial determinations about the admissibility of evidence, or the ability of certain witnesses to testify.

Juries are generally instructed that they are to judge the credibility and weight of the evidence and may consider a number of factors, including any personal interest the witness has, any bias or prejudice the witness shows, or other factors impacting the jury's belief of the witness or

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testimony. The rules of evidence do not specifically address the issue of testimony offered by informants, although there is a jury instruction that can be used in the case of accomplice testimony.

In the case of accomplice testimony given on behalf of the state, the court may provide a jury instruction that directs the jury to subject the accomplice's testimony to careful examination and to act upon the testimony with great caution. The instruction further provides that the jury should not find the defendant guilty upon the accomplice's testimony alone unless after careful consideration the jury is satisfied beyond a reasonable doubt of its truth. This instruction is mandatory in cases where the prosecution relies solely on the uncorroborated testimony of the accomplice. Washington appellate courts have ruled that a trial court is not required to give a jury instruction cautioning the jury regarding informant testimony.

Under *Brady v. Maryland* and subsequent case law, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. This obligation extends not only to exculpatory evidence, but also to evidence impeaching the credibility of a government witness. In the case of an informant, the prosecution is obligated to disclose to the defense any benefit or advantage the informant receives, as well as other material evidence that impacts the credibility of the informant.

Summary of Bill:

New requirements governing the use of testimony or statements of an informant in a criminal trial or proceeding are established. "Informant" means any incarcerated person or criminal suspect who provides information or testimony in exchange for, or in expectation of, a benefit. "Benefit" means any deal, payment, promise, leniency, inducement, or other advantage offered by the state to an informant in exchange for his or her testimony, information, or statement, but does not include a court-issued protection order or assistance ordinarily provided to facilitate the presence of a witness, such as lodging, meals, travel expenses, or parking fees. "Statement" means an oral, written, or nonverbal communication related to the crime charged.

Before the state may introduce any testimony or statement of an informant in a criminal proceeding, the state must disclose specified material and information that is known or reasonably available to be discovered by the state. Material and information is reasonably available to be discovered if it is obtained through: (a) communication with the informant; (b) review of internal material in the office of the prosecuting attorney; or (c) requests from prosecutors and investigative agencies where the informant has a criminal record or pending charges.

The state must disclose the required materials and information as soon as practicable after discovery but no later than 14 days before the testimony or statement is introduced in a criminal proceeding. The material and information the state must request and disclose to the defense are:

- the informant's complete criminal history and any pending charges or investigations;
- any benefit the state has provided or may provide to the informant in the present case, including any breach of conditions of the agreement;
- the substance, time, and place of any statement by the defendant to the informant, and by the informant to law enforcement implicating the defendant in the crime charged;

- the names of all persons present when the defendant's statement was given to the informant;
- whether the informant has at any time modified or recanted his or her testimony or statement, and if so, the nature of and circumstances surrounding the modification or recantation and the persons present;
- other cases in which the informant offered to provide information or testify for the state in exchange for a benefit;
- other cases in which the informant testified in exchange for a benefit or in which the informant received any benefit in exchange for the testimony;
- the relationship between the defendant and the informant, including time incarcerated in the same custodial section of a jail or prison;
- all corroborating evidence of the informant's testimony or statement implicating the defendant in the crime charged; and
- any other material or information in the possession, custody, or control of the state that bears on the credibility or reliability of the informant or the informant's statement.

The state may not introduce any testimony or statement of an informant unless the materials and information are disclosed to the defendant as required. If the state fails to disclose the materials and information, the court must order the state to immediately disclose the materials and information. In addition, the court may grant a continuance, preclude the informant from testifying or the statement from being introduced, dismiss the action, or enter another order the court deems just.

Nothing in the act diminishes federal constitutional disclosure obligations to defendants or related obligations under Washington case law, statutes, or court rules.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.