

## **BILL ANALYSIS**

C.S.H.B. 301  
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Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Discovery is the process by which evidence is exchanged between the defense and the prosecution prior to trial. Generally, discovery in criminal cases is far more limited than in civil cases. Criminal case discovery most often does not include information on witnesses, police reports, or mitigating and aggravating evidence.

In recognition of a growing state and federal trend toward expanding pretrial discovery in criminal cases, the American Bar Association (ABA) in 1994 issued new standards related to criminal discovery. The ABA encouraged states to adopt rules that closely mirrored the ABA standards, which allow both defense and prosecution to adequately prepare for trial.

In Texas, the failure to disclose unprivileged, pertinent, and relevant information in criminal cases has affected the outcomes of trials and the sentences imposed after conviction. To prevent wrongful convictions and to improve efficiency in the criminal justice system, the legislature should mandate expansive discovery laws at the pretrial phase and ensure that such laws be uniform and enforced.

C.S.H.B. 301 provides for early access to information in a criminal case while imposing duties to disclose on the prosecution and the defense.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 301 amends provisions of the Code of Criminal Procedure relating to discovery in a criminal court case. The bill requires the state's attorney, as soon as practicable after receiving a timely request from a defendant, to disclose to the defendant's counsel and permit inspection, photocopying, and photographing of certain evidential materials and information in the possession, custody, or control of the state or any of its agencies. The bill requires the state's attorney, if the defendant gives notice of a defense to prosecution listed in certain Penal Code provisions relating to criminal responsibility, to disclose to the defendant's counsel, as soon as practicable, the names of state witnesses of whom the state has knowledge and whom the state intends to use to rebut the defense or the testimony of any of the defendant's witnesses called to establish the defense. The bill specifies that its provisions do not authorize the removal of physical evidence from state possession and requires any inspection of physical evidence to be conducted in the presence of a representative of the state. The bill removes provisions to make conforming changes.

C.S.H.B. 301 requires a defendant, as soon as practicable after receiving initial disclosure from the state's attorney, to disclose to the attorney and permit inspection, photocopying, and photographing of certain evidential materials and information. The bill requires a defendant

planning to offer evidence of one or more defenses to prosecution listed in certain Penal Code provisions relating to criminal responsibility or evidence of an alibi defense, on a request by the state, to file a good faith notice of intent to raise the defense with the court and the state's attorney not later than the 30th day before the date the trial begins or as soon as practicable after the date the defendant receives a disclosure to which the defense is responsive, whichever is later. The bill requires the notice, if the defendant intends to raise an alibi defense, to include the place at which the defendant claims to have been at the time of the alleged offense and the names of witnesses the defendant intends to use to establish the alibi. The bill specifies that any notice provided under these circumstances is for the purposes of discovery only and is not admissible at trial unless the court finds that the contents of the notice were not made in good faith. The bill authorizes the court, after the filing of the indictment or information, to require the defendant to submit nontestimonial evidence to the state and specifies that the authorization does not limit any law enforcement agency or prosecutor's office from seeking or obtaining nontestimonial evidence to the extent permitted by law.

C.S.H.B. 301 sets forth materials and information excepted from disclosure and specifies that its provisions do not authorize disclosure of the name, address, or telephone number of a victim in violation of provisions on the confidentiality of identifying information of sexual offense victims. The bill subjects a victim impact statement to disclosure before the victim's testimony is taken only if the court determines that the statement contains exculpatory material.

C.S.H.B. 301 requires a party to immediately notify the other party's counsel of the existence of the additional material or information if, before a trial begins but subsequent to compliance with a disclosure order or a relevant court order, a party discovers additional material or information subject to disclosure.

C.S.H.B. 301 specifies that if a portion of material or information is subject to discovery and a portion is not, only the portion that is subject to discovery must be disclosed and requires the disclosing party to inform the other party's counsel that any information not subject to discovery has been excised and withheld. The bill sets forth the procedures for the court in determining whether the reasons for excision are justifiable, requires material or information excised pursuant to judicial order to be sealed and preserved in the court records and made available to an appellate court in the event of an appeal, and authorizes the state's attorney, without a protective court order or hearing, to excise from an offense report any information related to the victim of certain sexual, assaultive, or murderous offenses.

C.S.H.B. 301 authorizes a court, on a showing of good cause, at any time to enter an appropriate protective order that a specified disclosure be denied, restricted, or deferred and defines "good cause" for the purposes of the protective order. The bill authorizes a court, on request, to permit an excision hearing, a showing of good cause for denial or regulation of a disclosure for a protective order, or any portion of a proceeding to be made in private and requires the court to make a verbatim record of such a proceeding. The bill requires the entire record, if the court excises a portion of the material or information or enters an order granting relief following a showing of good cause, to be sealed and preserved in the court records and made available to an appellate court in the event of an appeal.

C.S.H.B. 301 requires the court, on request of the state's attorney or the defendant's attorney, to hold a pre-trial discovery hearing not later than the 10th day before the date the trial begins to verify compliance by each party with discovery procedures.

C.S.H.B. 301 authorizes required disclosures to be performed in any manner that is mutually agreeable to the state's attorney and the defendant's attorney or that is ordered by the court and authorizes the court order to specify the time, place, and manner of making the required disclosures. The bill authorizes the court, on a showing that a party has not complied with required discovery procedures or a relevant court order, to make any order the court finds necessary under the circumstances and to inform the jury of any failure or refusal to disclose or

any untimely disclosure. The bill authorizes the court, in making such an order, to prohibit the use of a defense or the introduction of evidence only if all other sanctions have been exhausted or if the discovery violation amounts to willful misconduct designed to obtain a tactical advantage that would minimize the effectiveness of cross-examination or the ability to adduce rebuttal evidence. The bill prohibits the court from dismissing a charge for a discovery violation unless authorized or required to do so by other law and specifies that the failure of the state's attorney or the defendant's attorney to comply with the discovery procedures is not a ground for a court to set aside the conviction or sentence of the defendant, unless the court's action is authorized or required by other law.

C.S.H.B. 301 requires all reasonable and necessary costs related to a disclosure to be paid by the requesting party and prohibits the commissioner's court of the county in which the action is pending from reducing the amount of money provided by the county to the office of the state's attorney, as a result of collecting any payment by the defendant of such costs.

C.S.H.B. 301 prohibits the state's attorney, the defendant's attorney, or an investigator, expert, or other agent for the state's attorney or the defendant's attorney, before the date on which the trial begins, from disclosing without approval of the trial court information or witness statements received from the opposing party to any third party, other than to an investigator, expert, or other agent for the state's attorney or the defendant's attorney, as applicable. The bill prohibits information or witness statements received for discovery purposes from being made available to the public.

C.S.H.B. 301 provides that its provisions apply to a defendant who has elected to represent himself or herself without the assistance of an attorney only to the extent approved by the court, and that, to the extent of any conflict, the bill's provisions prevail over Government Code provisions relating to the disclosure of public information.

#### **EFFECTIVE DATE**

September 1, 2009.

#### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 301 differs from the original by removing language included in the original that included grand jury testimony consisting of a statement related to a case made by a defendant or any witness the attorney representing the state intends to call at the trial in the evidential materials and information the attorney representing the state is required to disclose, and by making a conforming change. The substitute adds language not included in the original specifying that the prohibition against disclosing certain case information to third parties without obtaining approval of the trial court applies before the date on which the trial begins. The substitute removes language in the original including the defendant as a third party to whom the specified persons are prohibited from disclosing certain case information. The substitute differs from the original by adding to the persons prohibited from disclosing information to third parties an investigator, expert, or other agent for the state's attorney or the defendant's attorney.