

By: Dutton

H.B. No. 1168

A BILL TO BE ENTITLED

AN ACT

relating to discovery in a criminal case.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 39.14, Code of Criminal Procedure, is amended to read as follows:

Art. 39.14. DISCOVERY[~~-~~]

Sec. 1. DISCLOSURE BY STATE. (a) As soon as practicable after receiving a timely request from the defendant, the attorney representing the state shall disclose to the defendant's counsel and permit inspection, photocopying, and photographing of the following materials and information in the possession, custody, or control of the state or any of its agencies:

(1) any exculpatory or impeachment evidence material to the defendant's guilt or punishment;

(2) any written or recorded statements that are made by the defendant or by any witness the attorney representing the state intends to call at the trial and that are related to the case charged, including offense reports by law enforcement personnel and grand jury testimony, if any;

(3) any written record containing the substance of any oral statement that is made by the defendant and that is related to the case charged, whether made before or after the defendant's arrest, in response to interrogation by any person whom the defendant believed to be a peace officer;

1 (4) the defendant's prior criminal record;

2 (5) any record of a criminal conviction admissible for
3 impeachment under Rule 609, Texas Rules of Evidence, of a witness
4 the attorney representing the state intends to call at the trial;

5 (6) any affidavit, warrant, or return pertaining to a
6 search or seizure in connection with the case;

7 (7) any physical or documentary evidence that was
8 obtained from or that belongs to the defendant or that the attorney
9 representing the state intends to use at the trial and, on a showing
10 of materiality by the defendant, the opportunity to test that
11 evidence;

12 (8) the names and addresses of the witnesses called to
13 present evidence under Rules 702, 703, and 705, Texas Rules of
14 Evidence, and the names of all other witnesses the attorney
15 representing the state intends to call at the trial;

16 (9) any report produced by or for an expert witness the
17 attorney representing the state intends to call at the trial; and

18 (10) any plea agreement, grant of immunity, or other
19 agreement for testimony issued by the attorney representing the
20 state in connection with the case. [~~Upon motion of the defendant~~
21 ~~showing good cause therefor and upon notice to the other parties,~~
22 ~~the court in which an action is pending shall order the State before~~
23 ~~or during trial of a criminal action therein pending or on trial to~~
24 ~~produce and permit the inspection and copying or photographing by~~
25 ~~or on behalf of the defendant of any designated documents, papers,~~
26 ~~written statement of the defendant, (except written statements of~~
27 ~~witnesses and except the work product of counsel in the case and~~

1 ~~their investigators and their notes or report), books, accounts,~~
2 ~~letters, photographs, objects or tangible things not privileged,~~
3 ~~which constitute or contain evidence material to any matter~~
4 ~~involved in the action and which are in the possession, custody or~~
5 ~~control of the State or any of its agencies. The order shall~~
6 ~~specify the time, place and manner of making the inspection and~~
7 ~~taking the copies and photographs of any of the aforementioned~~
8 ~~documents or tangible evidence; provided, however, that the rights~~
9 ~~herein granted shall not extend to written communications between~~
10 ~~the State or any of its agents or representatives or employees.~~
11 ~~Nothing in this Act shall authorize the removal of such evidence~~
12 ~~from the possession of the State, and any inspection shall be in the~~
13 ~~presence of a representative of the State.]~~

14 (b) If the defendant gives notice of a defense under Section
15 2(b), the attorney representing the state shall disclose to the
16 defendant's counsel as soon as practicable the names of the
17 witnesses of whom the state has knowledge and whom the state intends
18 to use to rebut the defense or the testimony of any of the
19 defendant's witnesses called to establish that defense [On motion
20 ~~of a party and on notice to the other parties, the court in which an~~
21 ~~action is pending may order one or more of the other parties to~~
22 ~~disclose to the party making the motion the name and address of each~~
23 ~~person the other party may use at trial to present evidence under~~
24 ~~Rules 702, 703, and 705, Texas Rules of Evidence. The court shall~~
25 ~~specify in the order the time and manner in which the other party~~
26 ~~must make the disclosure to the moving party, but in specifying the~~
27 ~~time in which the other party shall make disclosure the court shall~~

1 ~~require the other party to make the disclosure not later than the~~
2 ~~20th day before the date the trial begins].~~

3 (c) This article does not authorize the removal of physical
4 evidence from the possession of the state, and any inspection of
5 physical evidence shall be conducted in the presence of a
6 representative of the state.

7 Sec. 2. DISCLOSURE BY DEFENDANT. (a) As soon as
8 practicable after receiving the initial disclosure under Section 1
9 from the attorney representing the state, the defendant shall
10 disclose to the attorney representing the state and permit
11 inspection, photocopying, and photographing of the following
12 materials and information:

13 (1) any written or recorded statement by a witness,
14 other than the defendant, that is related to the offense charged, if
15 the defendant intends to call the witness at the trial;

16 (2) any record of a criminal conviction admissible for
17 impeachment under Rule 609, Texas Rules of Evidence, of a witness,
18 other than the defendant, the defendant intends to call at the
19 trial, if that information is known to the defendant;

20 (3) any physical or documentary evidence that the
21 defendant intends to use at the trial and, on a showing of
22 materiality by the attorney representing the state, the opportunity
23 to test that evidence;

24 (4) the names and addresses of the witnesses called to
25 present evidence under Rules 702, 703, and 705, Texas Rules of
26 Evidence, and the names of all other witnesses, other than the
27 defendant, the defendant intends to call at the trial; and

1 (5) any report produced by or for an expert witness the
2 defendant intends to call at the trial.

3 (b) On a request by the state, a defendant planning to offer
4 evidence of one or more defenses listed in Chapter 8 or 9, Penal
5 Code, or evidence of an alibi defense, shall file a good faith
6 notice of intent to raise the defense with the court and the
7 attorney representing the state not later than the 30th day before
8 the date the trial begins or as soon as practicable after the date
9 the defendant receives a disclosure under Section 1 to which the
10 defense is responsive, whichever is later. If the defendant
11 intends to raise an alibi defense, the notice must include the place
12 at which the defendant claims to have been at the time of the
13 alleged offense and the names of the witnesses the defendant
14 intends to use to establish the alibi. Any notice provided under
15 this subsection is for purposes of discovery only and is not
16 admissible at trial unless the court finds that the contents of the
17 notice were not made in good faith.

18 (c) After the filing of the indictment or information, the
19 court may require the defendant to submit nontestimonial evidence
20 to the state. This subsection does not limit any law enforcement
21 agency or prosecutor's office from seeking or obtaining
22 nontestimonial evidence to the extent permitted by law.

23 Sec. 3. EXCEPTIONS TO DISCLOSURE. (a) Neither the
24 attorney representing the state nor the defendant is required to
25 disclose materials or information that is:

26 (1) recorded proceedings of a grand jury, except as
27 provided in Section 1(a)(2) and Rule 615, Texas Rules of Evidence;

1 (2) a work product other than an offense report by law
2 enforcement personnel, including a report, memorandum, or other
3 internal document of the attorney representing the state, the
4 attorney representing the defendant, or an investigator or other
5 agent of the attorney representing the state or the attorney
6 representing the defendant that is made in connection with the
7 investigation, prosecution, or defense of the case; or

8 (3) privileged under a rule of evidence, an express
9 statutory provision, the Texas Constitution, or the United States
10 Constitution.

11 (b) This article does not authorize disclosure of the name,
12 address, or telephone number of a victim in violation of Chapter 57.

13 (c) A victim impact statement is subject to disclosure
14 before the testimony of the victim is taken only if the court
15 determines that the statement contains exculpatory material.

16 Sec. 4. CONTINUING DUTY TO DISCLOSE. If, before a trial
17 begins, but subsequent to compliance with this article or a
18 relevant court order, a party discovers additional material or
19 information subject to disclosure, the party shall immediately
20 notify the other party's counsel of the existence of the additional
21 material or information.

22 Sec. 5. EXCISION. (a) Except as provided by Subsection
23 (b), if a portion of material or information is subject to discovery
24 under this article and a portion is not subject to discovery, only
25 the portion that is subject to discovery must be disclosed. The
26 disclosing party shall inform the other party's counsel that the
27 portion of material or information that is not subject to discovery

1 has been excised and withheld. On request, the court shall conduct
2 a hearing to determine whether the reasons for excision are
3 justifiable. Material or information excised pursuant to judicial
4 order shall be sealed and preserved in the records of the court and
5 shall be made available to an appellate court in the event of an
6 appeal.

7 (b) Excision of a witness statement produced in accordance
8 with Rule 615, Texas Rules of Evidence, is governed by that rule.

9 (c) Notwithstanding any other provision of this article,
10 the attorney representing the state, without a protective court
11 order or a hearing before the court, may excise from an offense
12 report or other report any information related to the victim of an
13 offense that is listed under:

14 (1) Section 3g, Article 42.12; or

15 (2) Article 62.001(5).

16 Sec. 6. PROTECTIVE ORDERS. On a showing of good cause, the
17 court may at any time enter an appropriate protective order that a
18 specified disclosure be denied, restricted, or deferred. "Good
19 cause," for purposes of this section, includes threats, harm,
20 intimidation, or possible danger to the safety of a victim or
21 witness, possible loss, destruction, or fabrication of evidence, or
22 possible compromise of other investigations by law enforcement or a
23 defense offered by a defendant.

24 Sec. 7. IN CAMERA PROCEEDINGS. On request, the court may
25 permit to be made in camera an excision hearing under Section 5(a),
26 a showing of good cause for denial or regulation of a disclosure
27 under Section 6, or any portion of a proceeding. A verbatim record

1 shall be made of a proceeding in camera. If the court excises a
2 portion of the material or information or enters an order granting
3 relief following a showing of good cause, the entire record shall be
4 sealed and preserved in the records of the court and shall be made
5 available to an appellate court in the event of an appeal.

6 Sec. 8. CONFERENCE. On request of the attorney
7 representing the state or the defendant, the court shall hold a
8 discovery hearing under Section 1(8), Article 28.01, not later than
9 the 10th day before the date the trial begins, to verify compliance
10 by each party with this article.

11 Sec. 9. COMPLIANCE; SANCTIONS. (a) The disclosures
12 required under this article may be performed in any manner that is
13 mutually agreeable to the attorney representing the state and the
14 attorney representing the defendant or that is ordered by the court
15 in accordance with this article. The order issued by the court may
16 specify the time, place, and manner of making the required
17 disclosures.

18 (b) On a showing that a party has not complied with this
19 article or a relevant court order, the court may make any order the
20 court finds necessary under the circumstances, including an order
21 related to immediate disclosure, contempt proceedings, delay or
22 prohibition of the use of a defense or the introduction of evidence,
23 or continuance of the matter. The court may also inform the jury of
24 any failure or refusal to disclose or any untimely disclosure under
25 this article.

26 (c) The court may prohibit the use of a defense or the
27 introduction of evidence under Subsection (b) only if all other

1 sanctions have been exhausted or the discovery violation amounts to
2 wilful misconduct designed to obtain a tactical advantage that
3 would minimize the effectiveness of cross-examination or the
4 ability to adduce rebuttal evidence. The court may not dismiss a
5 charge under Subsection (b) unless authorized or required to do so
6 by other law.

7 (d) The failure of the attorney representing the state or
8 the defendant to comply with this article is not a ground for a
9 court to set aside the conviction or sentence of the defendant,
10 unless the court's action is authorized or required by other law.

11 Sec. 10. COSTS. (a) All reasonable and necessary costs
12 related to a disclosure required under this article, including the
13 photocopying of materials, shall be paid by the requesting party.

14 (b) The commissioners court of the county in which the
15 indictment, information, or complaint is pending may not, as a
16 result of any payment by the defendant of the costs required by this
17 article, reduce the amount of money provided by the county to the
18 office of the attorney representing the state.

19 Sec. 11. DISCLOSURE TO THIRD PARTIES. Neither the attorney
20 representing the state nor the attorney representing the defendant
21 may disclose without obtaining approval of the trial court
22 information or witness statements received from the opposing party
23 to any third party, including the defendant, other than to an
24 investigator, expert, or other agent for the attorney representing
25 the state or the attorney representing the defendant, as
26 applicable. Information or witness statements received under this
27 article may not be made available to the public.

1 Sec. 12. PRO SE DEFENDANTS. This article, including the
2 provisions regarding the nondisclosure of a witness statement or an
3 offense report by law enforcement personnel, applies to a defendant
4 who has elected to proceed pro se only to the extent approved by the
5 court.

6 Sec. 13. CONFLICT OF LAW. To the extent of any conflict,
7 this article prevails over Chapter 552, Government Code.

8 SECTION 2. The change in law made by this Act applies to the
9 prosecution of an offense committed on or after the effective date
10 of this Act. The prosecution of an offense committed before the
11 effective date of this Act is covered by the law in effect when the
12 offense was committed, and the former law is continued in effect for
13 this purpose. For purposes of this section, an offense is committed
14 before the effective date of this Act if any element of the offense
15 occurs before the effective date.

16 SECTION 3. This Act takes effect September 1, 2009.