

By: Ellis

S.B. No. 91

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) Subject to the restrictions provided by Article 39.15, 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 electronically recorded statements, 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

1 defendant believed to be a peace officer;  
2 (4) the defendant's prior criminal record;  
3 (5) any record of a criminal conviction admissible for  
4 impeachment under Rule 609, Texas Rules of Evidence, of a witness  
5 the attorney representing the state intends to call at the trial;  
6 (6) any affidavit, warrant, or return pertaining to a  
7 search or seizure in connection with the case;  
8 (7) any physical or documentary evidence that was  
9 obtained from or that belongs to the defendant or that the attorney  
10 representing the state intends to use at the trial and, on a showing  
11 of materiality by the defendant, the opportunity to test that  
12 evidence;  
13 (8) the names and addresses of the witnesses called to  
14 present evidence under Rules 702, 703, and 705, Texas Rules of  
15 Evidence, and the names of all other witnesses the attorney  
16 representing the state intends to call at the trial;  
17 (9) any report produced by or for an expert witness the  
18 attorney representing the state intends to call at the trial; and  
19 (10) any plea agreement, grant of immunity, or other  
20 agreement for testimony issued by the attorney representing the  
21 state in connection with the case. [~~Upon motion of the defendant~~  
22 ~~showing good cause therefor and upon notice to the other parties,~~  
23 ~~except as provided by Article 39.15, the court in which an action is~~  
24 ~~pending shall order the State before or during trial of a criminal~~  
25 ~~action therein pending or on trial to produce and permit the~~  
26 ~~inspection and copying or photographing by or on behalf of the~~  
27 ~~defendant of any designated documents, papers, written statement of~~

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

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

1 ~~must make the disclosure to the moving party, but in specifying the~~  
2 ~~time in which the other party shall make disclosure the court shall~~  
3 ~~require the other party to make the disclosure not later than the~~  
4 ~~20th day before the date the trial begins].~~

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

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

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

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

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

26 (4) the names and addresses of the witnesses called to  
27 present evidence under Rules 702, 703, and 705, Texas Rules of

1 Evidence, and the names of all other witnesses, other than the  
2 defendant, the defendant intends to call at the trial; and

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

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

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

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

1           (1) recorded proceedings of a grand jury, except as  
2 provided by Rule 615, Texas Rules of Evidence;

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

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

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

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

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

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

1 disclosing party shall inform the other party's counsel that the  
2 portion of material or information that is not subject to discovery  
3 has been excised and withheld. On request, the court shall conduct  
4 a hearing to determine whether the reasons for excision are  
5 justifiable. Material or information excised pursuant to judicial  
6 order shall be sealed and preserved in the records of the court and  
7 shall be made available to an appellate court in the event of an  
8 appeal.

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

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

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

17 (2) Article 62.001(5).

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

26 Sec. 7. IN CAMERA PROCEEDINGS. On request, the court may  
27 permit to be made in camera an excision hearing under Section 5(a),

1 a showing of good cause for denial or regulation of a disclosure  
2 under Section 6, or any portion of a proceeding. A verbatim record  
3 shall be made of a proceeding in camera. If the court excises a  
4 portion of the material or information or enters an order granting  
5 relief following a showing of good cause, the entire record shall be  
6 sealed and preserved in the records of the court and shall be made  
7 available to an appellate court in the event of an appeal.

8 Sec. 8. CONFERENCE. On request of the attorney  
9 representing the state or the defendant, the court shall hold a  
10 discovery hearing under Section 1(8), Article 28.01, not later than  
11 the 10th day before the date the trial begins, to:

12 (1) ensure that the parties are fully aware of their  
13 respective disclosure obligations under this article; and

14 (2) verify compliance by each party with this article.

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

22 (b) On a showing that a party has not made a good faith  
23 effort to comply with this article or a relevant court order, the  
24 court may make any order the court finds necessary under the  
25 circumstances, including an order related to immediate disclosure,  
26 contempt proceedings, delay or prohibition of the use of a defense  
27 or the introduction of evidence, or continuance of the matter. The



1 court may also inform the jury of any failure or refusal to disclose  
2 or any untimely disclosure under this article.

3 (c) The court may prohibit the use of a defense or the  
4 introduction of evidence under Subsection (b) only if all other  
5 sanctions have been exhausted or the discovery violation amounts to  
6 wilful misconduct designed to obtain a tactical advantage that  
7 would minimize the effectiveness of cross-examination or the  
8 ability to adduce rebuttal evidence. The court may not dismiss a  
9 charge under Subsection (b) unless authorized or required to do so  
10 by other law.

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

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

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

23 Sec. 11. DISCLOSURE TO THIRD PARTIES. Before the date on  
24 which the trial begins, the attorney representing the state, the  
25 attorney representing the defendant, or an investigator, expert, or  
26 other agent for the attorney representing the state or the attorney  
27 representing the defendant may not disclose, without obtaining

1 approval of the trial court, information or witness statements  
2 received from the opposing party to any third party, other than to  
3 an investigator, expert, or other agent for the attorney  
4 representing the state or the attorney representing the defendant,  
5 as applicable. Information or witness statements received under  
6 this article may not be made available to the public.

7 Sec. 12. PRO SE DEFENDANTS. This article, including the  
8 provisions regarding the nondisclosure of a witness statement or an  
9 offense report by law enforcement personnel, applies to a defendant  
10 who has elected to proceed pro se only to the extent approved by the  
11 court.

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

14 SECTION 2. The change in law made by this Act applies to the  
15 prosecution of an offense committed on or after the effective date  
16 of this Act. The prosecution of an offense committed before the  
17 effective date of this Act is covered by the law in effect when the  
18 offense was committed, and the former law is continued in effect for  
19 this purpose. For purposes of this section, an offense is committed  
20 before the effective date of this Act if any element of the offense  
21 occurs before the effective date.

22 SECTION 3. This Act takes effect September 1, 2013.