

By: Whitmire

S.B. No. 1903

A BILL TO BE ENTITLED

1 AN ACT
2 relating to the state's continuing duty to disclose exculpatory,
3 impeachment, or mitigating evidence in a criminal case and
4 prohibited retaliation against local assistant prosecutors for
5 discharging that duty.

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

7 SECTION 1. Article 39.14(k), Code of Criminal Procedure, is
8 transferred to Chapter 2, Code of Criminal Procedure, redesignated
9 as Article 2.026, Code of Criminal Procedure, and amended to read as
10 follows:

11 Art. 2.026. CONTINUING DUTY OF STATE TO DISCLOSE
12 EXCULPATORY, IMPEACHMENT, OR MITIGATING EVIDENCE. Regardless of
13 the date the applicable offense was committed, if [(k) If] at any
14 time before, during, or after trial the state discovers any
15 exculpatory, impeachment, or mitigating [additional] document,
16 item, or information in the possession, custody, or control of the
17 state that tends to negate the guilt of the defendant or would tend
18 to reduce the punishment for the offense charged [required to be
19 disclosed under Subsection (h)], the state shall promptly disclose
20 the existence of the document, item, or information to the
21 defendant or the court.

22 SECTION 2. Chapter 41, Government Code, is amended by
23 adding Subchapter B-1 to read as follows:

24 SUBCHAPTER B-1. PROTECTION OF ASSISTANT PROSECUTORS FOR DISCLOSING

EVIDENCE FAVORABLE TO DEFENDANT

Sec. 41.151. DEFINITIONS. In this subchapter:

(1) "Assistant prosecutor" means an assistant prosecuting attorney employed by a prosecuting attorney.

(2) "Personnel action" means an action taken by an employer that affects an employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.

(3) "Prosecuting attorney" means a county attorney, district attorney, or criminal district attorney.

Sec. 41.152. PROHIBITED RETALIATION AGAINST ASSISTANT PROSECUTOR FOR CERTAIN ACTS. A prosecuting attorney may not suspend or terminate the employment of, or take other adverse personnel action against, an assistant prosecutor based on the assistant prosecutor:

(1) disclosing to the defendant evidence the state is required to disclose under Article 39.14(h), Code of Criminal Procedure, or under another law requiring disclosure of evidence favorable to the defendant; or

(2) after the prosecuting attorney or another supervising assistant prosecutor directs the assistant prosecutor to withhold evidence from the defendant in violation of Article 39.14(h), Code of Criminal Procedure, or another law requiring disclosure of evidence favorable to the defendant:

(A) refusing to withhold the evidence; or

(B) presenting the evidence to the trial court for the underlying criminal case in accordance with Section 41.158.

Sec. 41.153. RELIEF AVAILABLE TO ASSISTANT PROSECUTOR. (a)

1 An assistant prosecutor whose employment is suspended or terminated
2 or who is subjected to an adverse personnel action in violation of
3 Section 41.152 may bring an action against the prosecuting attorney
4 for:

5 (1) injunctive relief, including:

6 (A) reinstatement to the assistant prosecutor's
7 former position or an equivalent position; and

8 (B) reinstatement of fringe benefits and
9 seniority rights lost because of the suspension or termination;

10 (2) compensatory damages, including compensation for
11 wages lost during the period of suspension or termination;

12 (3) court costs; and

13 (4) reasonable attorney fees.

14 (b) In an action brought under Subsection (a), an assistant
15 prosecutor may not recover compensatory damages for future
16 pecuniary losses, emotional pain, suffering, inconvenience, mental
17 anguish, loss of enjoyment of life, and other nonpecuniary losses
18 in an amount that exceeds:

19 (1) \$50,000, if the county or counties where the
20 prosecuting attorney has jurisdiction have combined fewer than 101
21 employees for at least 20 calendar weeks in the calendar year in
22 which the action is brought or in the preceding calendar year;

23 (2) \$100,000, if the county or counties where the
24 prosecuting attorney has jurisdiction have combined more than 100
25 and fewer than 201 employees for at least 20 calendar weeks in the
26 calendar year in which the action is brought or in the preceding
27 calendar year;

1 (3) \$200,000, if the county or counties where the
2 prosecuting attorney has jurisdiction have combined more than 200
3 and fewer than 501 employees for at least 20 calendar weeks in the
4 calendar year in which the action is brought or in the preceding
5 calendar year; and

6 (4) \$250,000, if the county or counties where the
7 prosecuting attorney has jurisdiction have combined more than 500
8 employees for at least 20 calendar weeks in the calendar year in
9 which the action is brought or in the preceding calendar year.

10 (c) If more than one subdivision of Subsection (b) applies
11 to the county or counties where the prosecuting attorney has
12 jurisdiction, the amount of monetary damages that may be recovered
13 from the prosecuting attorney in an action brought under this
14 subchapter is governed by the provision that provides the greatest
15 damage award.

16 Sec. 41.154. WAIVER OF IMMUNITY. Sovereign and
17 governmental immunity to suit and liability is waived and abolished
18 to the extent of liability created by this subchapter.

19 Sec. 41.155. BURDEN OF PROOF; AFFIRMATIVE DEFENSE. (a) An
20 assistant prosecutor has the burden of proof for an action brought
21 under this subchapter.

22 (b) It is an affirmative defense to an action brought under
23 this subchapter that the prosecuting attorney would have taken
24 against the assistant prosecutor the adverse personnel action on
25 which the action is based solely in reliance on information,
26 observation, or evidence unrelated to the fact that the assistant
27 prosecutor engaged in an act described by Section 41.152.

1 Sec. 41.156. LIMITATION PERIOD. An assistant prosecutor
2 who seeks relief under this subchapter must bring the action not
3 later than the 90th day after the date the adverse personnel action
4 that allegedly violates Section 41.152 is taken.

5 Sec. 41.157. VENUE. An action brought under this
6 subchapter must be brought in a district court:

7 (1) of the county in which the cause of action arises;

8 or

9 (2) of any county in the same administrative judicial
10 region as the county described by Subdivision (1).

11 Sec. 41.158. ASSISTANT PROSECUTOR MAY SEEK COURT DECISION
12 ON REQUIRED DISCLOSURE; COURT'S DUTY TO ISSUE DECISION. (a) An
13 assistant prosecutor who is directed by the prosecuting attorney or
14 another supervising assistant prosecutor to withhold evidence from
15 the defendant in violation of Article 39.14(h), Code of Criminal
16 Procedure, or in violation of another law requiring the disclosure
17 of evidence favorable to the defendant, may present the evidence to
18 the trial court for the underlying criminal case, without notice to
19 the defendant or, if applicable, defendant's counsel, to obtain a
20 decision on whether disclosure is required under Article 39.14(h)
21 or similar law.

22 (b) The trial court shall promptly issue a written decision
23 to the presenting assistant prosecutor on whether the evidence
24 presented must be disclosed under a law described by Subsection
25 (a).

26 Sec. 41.159. PREREQUISITES TO BRINGING ACTION. (a) Except
27 as provided by Subsection (b), an assistant prosecutor may not

1 bring an action under this subchapter unless the assistant
2 prosecutor:

3 (1) presents the evidence to the trial court in
4 accordance with Section 41.158; and

5 (2) provides to the prosecuting attorney the court's
6 decision issued under that section.

7 (b) Subsection (a) does not apply if an assistant prosecutor
8 who engaged in an act described by Section 41.152 establishes in an
9 action brought under this subchapter:

10 (1) the assistant prosecutor did not have a reasonable
11 opportunity to present the evidence to the trial court in
12 accordance with Section 41.158 or provide the decision as required
13 by Subsection (a)(2) before the adverse personnel action was taken;
14 or

15 (2) good cause for failure to present the evidence to
16 the trial court or provide the decision.

17 Sec. 41.160. NONAPPLICABILITY OF OTHER LAW. Chapter 102,
18 Civil Practice and Remedies Code, does not apply to an action
19 brought under this subchapter.

20 SECTION 3. (a) Subchapter B-1, Chapter 41, Government
21 Code, as added by this Act, applies only to an act described by
22 Section 41.152, Government Code, as added by this Act, that occurs
23 on or after the effective date of this Act. An act that occurs
24 before that date is governed by the law in effect on the date the act
25 occurred, and that law is continued in effect for that purpose.

26 (b) Notwithstanding Section 41.156, Government Code, as
27 added by this Act, an assistant prosecuting attorney employed by a

1 county attorney, district attorney, or criminal district attorney
2 may bring a claim under Subchapter B-1, Chapter 41, Government
3 Code, as added by this Act, for an act described by Section 41.152,
4 Government Code, as added by this Act, that occurred before the
5 effective date of this Act, regardless of whether the attorney has
6 met the prerequisites to bringing an action under Section 41.159,
7 Government Code, as added by this Act, if the assistant prosecuting
8 attorney:

9 (1) brought an action claiming that an act described
10 by Section 41.152, Government Code, as added by this Act, led to the
11 attorney's suspension or termination, or otherwise affected the
12 compensation, promotion, demotion, transfer, work assignment, or
13 performance evaluation of the attorney before the effective date of
14 this Act and a final judgment has not been entered in the action
15 before the effective date of this Act; and

16 (2) brings an action under Subchapter B-1, Chapter 41,
17 Government Code, as added by this Act, not later than the 90th day
18 after the effective date of this Act.

19 SECTION 4. This Act takes effect September 1, 2021.