88R116 TSS-F

By:  Thompson of Harris H.B. No. 311

A BILL TO BE ENTITLED

AN ACT

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

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

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

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

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

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 2.026 or 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 2.026 or 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) An assistant prosecutor whose employment is suspended or terminated or who is subjected to an adverse personnel action in violation of Section 41.152 may bring an action against the prosecuting attorney for:

(1)  injunctive relief, including:

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

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

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

(3)  court costs; and

(4)  reasonable attorney's fees.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sec. 41.158.  ASSISTANT PROSECUTOR MAY SEEK COURT DECISION ON REQUIRED DISCLOSURE; COURT'S DUTY TO ISSUE DECISION. (a) An assistant prosecutor who is directed by the prosecuting attorney or another supervising assistant prosecutor to withhold evidence from the defendant in violation of Article 2.026 or 39.14(h), Code of Criminal Procedure, or in violation of another law requiring the disclosure of evidence favorable to the defendant, may present the evidence to the trial court for the underlying criminal case, without notice to the defendant or, if applicable, defendant's counsel, to obtain a decision on whether disclosure is required under Article 2.026 or 39.14(h) or similar law.

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

Sec. 41.159.  PREREQUISITES TO BRINGING ACTION. (a) Except as provided by Subsection (b), an assistant prosecutor may not bring an action under this subchapter unless the assistant prosecutor:

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

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

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

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

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

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

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

(b)  Notwithstanding Section 41.156, Government Code, as added by this Act, an assistant prosecuting attorney employed by a county attorney, district attorney, or criminal district attorney may bring an action under Subchapter B-1, Chapter 41, Government Code, as added by this Act, for an act described by Section 41.152, Government Code, as added by this Act, that occurred before the effective date of this Act, if the attorney brings the action not later than the 90th day after the effective date of this Act, regardless of whether the attorney:

(1)  has met the prerequisites to bringing an action under Section 41.159, Government Code, as added by this Act; or

(2)  has brought an action claiming that an act described by Section 41.152, Government Code, as added by this Act, led to the attorney's suspension or termination, or otherwise affected the compensation, promotion, demotion, transfer, work assignment, or performance evaluation of the attorney before the effective date of this Act that has been dismissed.

SECTION 4.  This Act takes effect September 1, 2023.