

By: Ellis, Duncan

S.B. No. 1611

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, beginning no later than 30 days after the initial appearance of 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 all law enforcement agencies, investigatory agencies, and prosecutors' offices, any other governmental entity, or any non-governmental entity contracting for work with any government entity involved in the investigation of the crimes alleged or in the prosecution of the defendant,

(1) any evidence relevant to the defendant's guilt or punishment;

(2) any written or recorded statement made by the defendant, any witness, any law enforcement officer, or any other person that is related to the case charged, including offense reports by law enforcement or other government 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;

(4) the defendant's prior criminal record. If disclosure of a specific document reflecting the defendant's criminal history is not permitted by state or federal law, then the content of the defendant's criminal history shall be disclosed in writing. A judge shall on request issue an order requiring disclosure of the records if a court order is required for disclosure by state or federal law;

(5) any record of a criminal conviction or other criminal history admissible for impeachment under the Texas Rules of Evidence, of a witness the attorney representing the state intends to call at the trial, or has reason to believe may be called as a witness at trial by the State;

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

(7) any physical or documentary evidence related to the case charged that was obtained from or that belongs to the defendant or that the attorney representing the state intends to use against the defendant in the case charged and, on a showing of materiality by the defendant, the opportunity to test that evidence;

(8) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence;

(9) any document or recording produced by or for an

expert witness related to the case charged; and

(10) any plea agreement, grant of immunity, benefit promised or conferred, or other agreement for testimony or assistance issued by the attorney representing the state or any law enforcement officer or agency in connection with the case. [Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted shall not extend to written communications between the State or any of its agents or representatives or employees. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in the presence of a representative of the State.]

(b) The state shall give to the defendant, at the beginning of jury selection, a written list of the names of all witnesses who the State reasonably expects to call during trial, as well as the criminal histories of those witnesses, in a manner consistent with state and federal law. Following the disclosure of a witnesses name, any party may request the court to order, on a showing of good cause, the disclosure of the last known address for the witness. A court, on request, may, and on a showing of good cause shall, order earlier disclosure of the names and addresses of all witnesses who the State reasonably expects to call during trial. [On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins].

(c) If the defendant gives notice of an alibi under Section 2(c)(2), the attorney representing the state shall disclose to the defendant's counsel as soon as practicable the names of the witnesses of whom the state has knowledge and whom the state intends to use to rebut the alibi or the testimony of any of the defendant's witnesses called to establish the alibi.

(d) On a timely basis, law enforcement and investigatory agencies shall make available to the attorney representing the state and the attorney representing the state shall request a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this article. Investigatory agencies that obtain information and materials listed in subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor's office on a timely basis for

disclosure to the defendant.

(e) Except as otherwise permitted by this article, this article does not authorize the removal of physical evidence from the possession of the state, and any inspection of physical evidence shall be conducted in the presence of a representative of the state. A court shall, when requested and as necessary under the circumstances, order specific inspection procedures necessary to protect the integrity of the evidence and the ability to inspect it in a manner that does not compromise a defendant's ability to maintain confidentiality of work product and the attorney client privilege.

Sec. 2. DISCLOSURE BY DEFENDANT. (a) After receiving the initial disclosure under Section 1 from the attorney representing the state, the defendant shall disclose to the attorney representing the state and permit inspection, photocopying, and photographing of the following materials and information:

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

(2) any physical or documentary evidence that the defendant intends to use in its case in chief and, on a showing of materiality by the attorney representing the state, the opportunity to test that evidence;

(3) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence; and

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

(b) The defense shall give the state, at the beginning of jury selection, a written list of the names of all lay witnesses who the defense reasonably expect to call during trial. Following the disclosure of a witnesses name, any party may request the court to order, on a showing of good cause, the disclosure of the last known address for the witness.

(c) (1) If requested in writing by the attorney representing the state, a defendant who may assert one or more defenses or affirmative defenses listed in Chapter 8 or 9, Penal Code, shall provide the state with written notice that the defendant may assert the statutory defense or affirmative defense. Notice shall be provided by the defendant not later than the 30th day before the date that jury selection begins or as soon as practicable after the date the defendant receives a disclosure under Section 1 to which the defense is responsive, whichever is later. If the State amends the information or indictment or files a new information or obtains a new indictment within 30 days of the beginning of jury selection, the defendant shall be allowed not less than 10 days after being served with an amended or new information or indictment, or having received actual notice of the amendment in open court, to amend or supplement an existing notice or provide an initial notice. Any notice provided under this subsection is for purposes of discovery only and is not admissible at trial.

(2) If requested in writing by the attorney representing the state, and if the attorney representing the state provides the defendant in such written request with the specific date, time, and place of the alleged offense, a defendant who will assert an alibi shall provide the state, not later than 20 days before the beginning of jury selection, a written response including the location at which the defendant claims to have been at the time of the alleged offense and the names of the witnesses the defendant intends to use to establish the alibi.

Sec. 3. EXCEPTIONS TO DISCLOSURE. (a) Neither the attorney

representing the state nor the defendant is required to disclose materials or information that is:

(1) recorded proceedings of a grand jury, except as required by the Texas Rules of Evidence, other law, or court order;

(2) a work product, meaning written materials drafted by an attorney or the attorney's legal staff for their own use, including witness examinations, voir dire questions, opening statements, closing arguments, legal research, or of records, correspondence, reports, memoranda, or notes prepared by the attorney or by members of the attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the attorney or the attorney's legal staff. Records, correspondence, reports, memoranda, or notes prepared by the prosecuting attorney, its agents, or by members of the prosecuting attorney's legal staff are not work product as to any portion that contains potentially favorable or exculpatory or impeaching information as to guilt or punishment or information that may mitigate punishment. Disclosure is also not required of any document of the attorney representing the defendant, or an investigator or other agent of the attorney representing the defendant that is made in connection with the investigation, prosecution, or defense of the case; or

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

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

(c) A victim impact statement shall be provided to the defendant at the beginning of jury selection if the person completing the victim impact statement is disclosed by the State as a potential witness on its witness list or there is reason to believe that the person may otherwise testify at the trial. A victim impact statement is subject to disclosure as any other evidence or information if it contains exculpatory material.

Sec. 4. CONTINUING DUTY TO DISCLOSE. If, subsequent to compliance with this article or a relevant court order, a party discovers additional material or information subject to disclosure, the party shall immediately notify the other party's counsel of the existence of the additional material or information.

Sec. 5 CERTIFICATE OF COMPLIANCE. Each time a party provides discovery, disclosure, or notice required or permitted by this article or pursuant to court order, it shall file with the court a Certificate of Compliance listing the items provided or disclosed or the notice given. Any party may request any other party to acknowledge receipt of any discovery, disclosure or notice provided for by this article or required by court order and the party receiving such discovery, disclosure, or notice shall, when requested, acknowledge in writing, or on the record in open court, the receipt of any discovery, disclosure, or notice. On request of any party, the other party shall certify either in writing or on the record in open court that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery and disclosure and has provided all required notices, and if not previously identified in a Certificate of Compliance shall identify each item of provided discovery, disclosure and notice. If further discovery is provided after the filing of a Certificate of Compliance, an additional or supplemental Certificate of Compliance shall be filed with the court, or announced on the record in open court, identifying the additional items of discovery, matters or information disclosed, or notice given.

Sec. 6. EXCISION. (a) Except as provided by Subsection (b), if a portion of material or information is subject to discovery under this article and a portion is not subject to discovery, only the portion that is subject to discovery must be disclosed. The disclosing party shall inform the other party's counsel that the portion of material or information that is not subject to discovery has been excised and withheld. On request, the court shall conduct a hearing to determine whether the reasons for excision are justifiable. Material or information excised pursuant to judicial order shall be sealed and preserved in the records of the court and shall be made available to an appellate court in the event of an appeal.

(b) Excision of a witness statement produced in accordance with the Texas Rules of Evidence is governed by that rule.

Sec. 7. PROTECTIVE ORDERS. On a showing of good cause by either party the court may at any time enter an appropriate protective order that a specified disclosure be denied, restricted, or deferred. "Good cause," for purposes of this section, includes threats, harm, intimidation, or possible danger to the safety of a victim or witness, possible loss, destruction, or fabrication of evidence, or possible compromise of other investigations by law enforcement or a defense offered by a defendant.

Sec. 8. IN CAMERA PROCEEDINGS. On request, the court may permit to be made in camera an excision hearing under Section 5(a), a showing of good cause for denial or regulation of a disclosure under Section 6, or any portion of a proceeding. A verbatim record shall be made of a proceeding in camera. If the court excises a portion of the material or information or enters an order granting relief following a showing of good cause, the entire record shall be sealed and preserved in the records of the court and shall be made available to an appellate court in the event of an appeal.

A court shall permit counsel for both parties to be present at the in-camera excision hearing, or, for portions of the in-camera excision hearing as the circumstances require, unless doing so would result in a violation of a privilege under the Rules of Evidence or if the court cannot, through a protective or confidentiality order, achieve the purposes of the in-camera hearing. The court may issue such protective and confidentiality orders as are necessary to prevent dissemination of proceedings held in-camera and as to any material excised. A court order under this section must only be as narrow as necessary to achieve the purposes of the excision.

Sec. 9. CONFERENCE. On request or motion of any party or on its own motion, the court shall hold a discovery conference to resolve any discovery, disclosure, or notice issue, to ensure that the parties are aware of their respective discovery, disclosure, and notice obligations under this article, or to verify compliance by each party with this article. Any party who has not received required or requested discovery, disclosure, or notice, shall request a discovery conference to be held not later than 20 days before the beginning of jury selection to resolve any issue with respect to the discovery, disclosure, or notice.

Sec. 10. COMPLIANCE; SANCTIONS. (a) The disclosures required under this article may be performed in any manner that is mutually agreeable to the attorney representing the state and the attorney representing the defendant or that is ordered by the court in accordance with this article. The order issued by the court may specify the time, place, and manner of making the required disclosures.

(b) If the court finds that a party has failed to comply with any of the provisions of this article, the court may order and

compel such party to provide the required discovery or disclosure, grant a continuance, issue a protective order, take other appropriate action as necessary under the circumstances to accomplish the purposes of the required discovery or disclosure, or, and only if other remedial alternatives have been exhausted, prohibit the introduction of certain evidence, the calling of certain witnesses, or other relief necessary to assure justice. The court may not dismiss a charge under this subsection unless authorized or required to do so by other law.

Sec. 11. COSTS. (a) All reasonable and necessary costs related to a disclosure required under this article, including the photocopying of materials, shall be paid by the requesting party, except that an indigent defendant shall not be required to pay costs provided for by this article. Costs under this article may not exceed those provided for by the Texas Public Information Act.

(b) The commissioners court of the county in which the indictment, information, or complaint is pending may not, as a result of any payment by the defendant of the costs required by this article, reduce the amount of money provided by the county to the office of the attorney representing the state, nor may it reduce the amount of money provided to a public defender's office as a result of costs paid to it under this article.

Sec. 12. DISCLOSURE TO THIRD PARTIES. Before the date on which the trial begins, the attorney representing the state, the attorney representing the defendant, or an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant may not disclose, without obtaining approval of the trial court, information or witness statements received from the opposing party to any third party, other than to an investigator, expert, consulting counsel, or other agent for the attorney representing the state or the attorney representing the defendant, as applicable. Information or witness statements received under this article, and not otherwise made a part of a public record as part of judicial proceedings, may not be made available to the public without a court order permitting such disclosure.

Sec. 13. DISCLOSURE OF CERTAIN CONTACT INFORMATION. (a) The attorney representing the state, without a protective court order or a hearing before the court, may excise from an offense report or other report any contact information of the alleged victim of an offense that is listed under:

- (1) Section 3g, Article 42.12; or
- (2) Article 62.001(5).

(b) On request of the defendant, and on a showing of good cause, the court shall order disclosure to the defense of the alleged victim's contact information subject to reasonable limitations on further disclosure, which may include, as the circumstances require, an order prohibiting the attorney representing the defendant from disclosing the information to the defendant or others.

Sec. 14. PRO SE DEFENDANTS. This article, including the provisions regarding the nondisclosure of a witness statement or an offense report by law enforcement personnel, applies to a defendant who has elected to proceed pro se only to the extent approved by the court.

Sec. 15. THIRD PARTY DISCOVERY. A party may obtain, other than from the office of the attorney representing the State, and other than documents or items provided by the attorney representing the state, documents from other persons, entities or third parties by serving such person or entity with a subpoena for such documents that provides a reasonable time and place for production of the

documents. A person or entity served with such a subpoena may itself or through its counsel, before the time for compliance, object to or seek protection from the request. The court may enter any order appropriate under the circumstances to assure a reasonable time, place, manner, or scope of production. Unless the court orders otherwise, costs for production shall be paid by the party requesting the production, provided that such costs shall not exceed those allowed under the Texas Public Information Act.

Sec. 16. CONFLICT OF LAW. To the extent of any conflict, this article prevails over Chapter 552, Government Code.

SECTION 2. The change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act and to any prosecution initiated after the effective date of this Act. The prosecution of an offense committed before the effective date of this Act and the prosecution of an action initiated before the effective date of this Act is covered by the law in effect when the offense was committed or the prosecution commenced, and the former law is continued in effect for this purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date and a prosecution is commenced before the effective date of this Act if a complaint, information or indictment has been filed or obtained by the attorney representing the state and the defendant has been arrested for such offense before the effective date of this Act.

SECTION 3. This Act takes effect January 1, 2014.