

SUBJECT: Requiring disclosure of certain information in a criminal case

COMMITTEE: Judiciary and Civil Jurisprudence — favorable, without amendment

VOTE: 9 ayes — Lewis, Farrar, Farney, Gooden, Hernandez Luna, Hunter, K. King, Raymond, S. Thompson

0 nays

SENATE VOTE: On final passage, April 11, 2013 — 31 - 0

WITNESSES: For — Patricia Cummings; Staley Heatly; Michael Morton; Vikrant Reddy, Texas Public Policy Foundation; (*Registered, but did not testify*: Rebecca Bernhardt, Texas Defender Service; Victor Cornell, American Civil Liberties Union of Texas; Brian Eppes, Tarrant County District Attorney’s Office; David Gonzalez, Texas Criminal Defense Lawyers Association; Susybelle Gosslee League of Women Voters TX; Annie Mahoney, Texas Conservative Coalition; Carlos Salinas, Alliance for Texas Families; Michael Vitris, Texas Appleseed; Justin Wood, Harris County District Attorney’s Office; Ana Yanez Correa, Texas Criminal Justice Coalition)

Against — Terry Breen, 24th DA Office; Robert Clopton, Fort Bend County District Attorney’s Office

On — Robert Kepple, Texas District and County Attorneys Association

BACKGROUND: Code of Criminal Procedure, sec. 39.14, requires a court to order the state to produce and permit the inspection, copying, or photographing of certain documents and information that are in the possession, custody, or control of the state or its agencies. The defendant, or an agent of the defendant, must be allowed to inspect, copy, or photograph tangible things that are not privileged and contain evidence material to any matter involved in the action, including designated documents, papers, written statement of the defendant (except written statements of witnesses and privileged work product), books, accounts, letters, photographs, or objects. There are some limitations on the disclosure of information involving children.

The court order must specify the time, place, and manner of the inspection. These rights do not extend to written communications between the state and any of its agents, representatives, or employees. Evidence cannot be removed from the state's possession, and any inspections must be in the presence of a representative of the state.

Government Code, ch. 552, subch. F, governs the charges for providing copies of public information.

DIGEST: SB 1611 would change discovery procedures and require the disclosure of certain information in a criminal case.

Discovery. SB 1611 would require the state to permit the electronic duplication of offense reports and recorded statements of witnesses, including statements by law enforcement officers, which contained evidence material to any matter involved in the action and were in the possession, custody, or control of the state or under a state contract. This requirement would exclude privileged work product. The state could provide electronic duplicates of documents or information, but it would not authorize the removal of documents, items, or information from the state's possession.

The state would have to electronically record or document any information provided to the defendant under these rules. Before accepting a guilty or nolo contendere plea, both the prosecution and the defense would have to officially acknowledge the disclosure, receipt, and list of all information provided to the defendant. If at any point the state discovered additional information, the state would have to disclose it to the defendant or the court.

The parties still could agree to discovery and documentation requirements equal to or greater than those required by the bill. Subject to some limitations, the court could order the defendant to pay costs related to discovery. The provisions in the bill would control over provisions in the Public Information Act governing charges for providing copies of public information, if they conflicted.

Non-disclosure. The state would have to produce only the portions of information subject to discovery and could redact or withhold the other parts, but would have to inform the defendant of the non-disclosure. The defendant could request a hearing to determine whether the non-disclosure

was legally justified.

Third-party disclosure. The defendant, the defendant's attorney, or an agent of the defendant or attorney, could not disclose to a third-party any documents, evidence, materials, or witness statements received from the state. This would be allowed only if the information was already publicly disclosed or after a hearing in which the court considered the security and privacy interests of victims and witnesses.

The defendant's attorney, or an agent of the attorney, could allow a defendant, witness, or prospective witness to view the information obtained through discovery. The defendant, witness, or prospective witness could not have copies of the information, unless it was of their own witness statement. The defendant's attorney or agent would have to redact any personal information before allowing another person to view the information. For the purposes of these rules, the defendant could not be considered an agent of the attorney.

These rules could not limit the communication of information allowed by the Texas Disciplinary Rules of Professional Conduct, except it could limit the communication of a witness or victim's personally identifying information. SB 1611 would not prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency when making a good faith complaint.

Other evidence. The state would have to disclose to the defendant any exculpatory, impeaching, or mitigating information within the state's control that could negate the defendant's guilt or reduce the punishment.

Pro se defendants. If a court ordered the state to produce and permit the inspection of information by a pro se defendant, the state would have to comply with the order, but would not have to allow electronic duplication.

The bill would be known as the Michael Morton Act. It would apply to the prosecution of offenses committed on or after January 1, 2014.

The bill would take effect January 1, 2014.

SUPPORTERS
SAY:

SB 1611 would modernize the state's discovery process and align it with recommendations from the American Bar Association, which ultimately could prevent the conviction of innocent individuals. Questions about

Texas' discovery process came to light with the case of Michael Morton, who was exonerated after spending nearly 25 years in prison for the murder of his wife. Although the U.S. Supreme Court has ruled that prosecutors must disclose to the defense any potentially exculpatory evidence, this still puts the defense at a disadvantage. To ensure fairness and justice, the defense should have access to all items of evidence. By requiring the disclosure of any information relevant to the case, the bill would protect due process owed to all defendants and help ensure that innocent individuals were not convicted and imprisoned.

Although most offices already follow open-file policies, a statutory mandate would codify the right to any relevant information. This would promote uniformity and give the defense a legal basis for complaints about noncompliance.

**OPPONENTS
SAY:**

SB 1611 would put significant procedural burdens on prosecutors, creating a multitude of opportunities for unintentional and innocuous rule violations. Defense attorneys could exploit these technical violations to force dismissal of a case or even the acquittal of a guilty defendant. The bill's requirements would tip the balance too far in favor of the defense.

The bill would be unnecessary because most prosecuting agencies have robust open-file policies that allow defendants and defense attorneys to have quick and easy access to information. There are more than 300 prosecuting offices Texas, and it is estimated that only two jurisdictions still maintain closed-file policies. Moreover, this bill would not protect against other instances of prosecutorial misconduct, including a bad actor who willfully decided to conceal evidence.

**OTHER
OPPONENTS
SAY:**

SB 1611 should go further to penalize prosecutors who fail to disclose evidence in accordance with the bill's requirements by establishing sanctions for violations. SB 1611 also should strengthen provisions related to victim and witness protection by allowing courts to issue protective orders to prevent defense attorneys from releasing any information obtained through discovery.

The bill should clarify provisions related to third-party disclosure. The extent to which a defense attorney can share information obtained through the discovery process with a third party, including members of the press, is ambiguous and could create considerable confusion if enacted as written.

The bill should require both the defense and the prosecution to turn over their evidence to the other party. A mandatory mutual discovery rule would be the best way to balance fairness with justice.