

Relating to Discovery in a Criminal Case

Bill Analysis: SB 1611

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Senate Bill 1611 (SB 1611), by Senator Rodney Ellis, would amend article 39.14 of the Texas Code of Criminal Procedure to establish a uniform “open file” discovery statute.¹

An “open file” discovery system is one in which prosecutors are required to provide defense counsel with all discovery materials in their possession—with the exception of materials which the court determines are necessary to protect the safety of witnesses. Often, advocates who have urged open file policies have done so because it increases government transparency. This is true, and it is an important factor in favor of open file policies. It is also true that open file policies are likely to improve indigent defense representation.

Under current U.S. Supreme Court precedent, prosecutors are obligated to disclose all “exculpatory evidence” to defense counsel, but the process of obtaining this evidence can be cumbersome.² Defense counsel is subject to the standard discovery process with its lengthy schedules, endless motions and responses, and picayune evidentiary arguments. Moreover, because the Supreme Court precedents on these discovery matters are open to numerous interpretations, the discovery process in Texas differs from county to county. Navigating the discovery labyrinth is expensive and exhausting for defendants who have the means to pay for private defense counsel; for indigent defendants with resource constraints, it is practically impossible.

Some states, like North Carolina, have addressed this problem by instituting open file policies that make all discoverable evidence immediately available.³ No such policy exists in Texas, but it would be enormously helpful. With an open file system, counsel for indigent defendants could devote fewer resources to the discovery process and more resources to actually marshaling the arguments for a proper defense.

The majority of district attorneys’ offices in Texas have already adopted open file discovery. Moreover, one of the national models for open file discovery is located in Tarrant County, Texas.⁴ In Tarrant County, discovery files are not only open, they are accessible electronically. Governor Rick Perry’s deputy general counsel has referred to the system in Tarrant County as a “slam dunk.”⁵

SB 1611 is consistent with an emphasis on accountability and transparency, and it will likely benefit victims, innocent persons, and taxpayers by avoiding wrongful convictions that are caused by the suppression of exculpatory evidence. Ultimately, the bill is rooted in the fundamental principle that the responsibility of the prosecutor, as stated in the Texas Disciplinary Rules of Professional Conduct, is “to see that justice is done, and not simply to be an advocate.”⁶ ★

¹ SB 1611, 83rd Session (2013). Material in this bill analysis is taken substantially from Vikrant P. Reddy, “Improving Indigent Defense in Texas,” Texas Public Policy Foundation (July 2012).

² *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”)

³ Robert P. Mosteller, “Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery,” 15 *GEO. MASON L. REV.* 257, 316-18 (2008).

⁴ Alex Branch, “Tarrant County’s electronic open-file system seen as gold standard for reducing wrongful convictions,” *Fort Worth Star-Telegram* (18 Mar. 2010).

⁵ *Ibid.*

⁶ See TEXAS RULES OF PROFESSIONAL CONDUCT, Rule 3.09, Comment 1 (“A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a number of specific obligations. Among these is to see that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause.”).