

- SUBJECT:** Prohibiting retaliation for required evidence disclosure in criminal cases
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Collier, K. Bell, Cason, Cook, Crockett, Hinojosa, Murr, Vasut
0 nays
1 absent — A. Johnson
- WITNESSES:** For — Ed Heimlich, Informed Citizens; Mike Ware, Innocence Project of Texas; Robert Schmidt, Texas Employment Lawyers Association; Eric Hillman; Charlie Malouff; Michael Morton; (*Registered, but did not testify*: Lauren Johnson, ACLU of Texas; Angelica Cogliano, Austin Lawyers Guild; Shea Place, Texas Criminal Defense Lawyers Association; Maggie Luna, Texas Criminal Justice Coalition; Emily Gerrick, Texas Fair Defense Project; Cynthia Simons, Texas Women's Justice Coalition; Rebecca Bernhardt, The Innocence Project; Idona Griffith)

Against — Thomas Wilson, Smith County Criminal District Attorney's Office
- BACKGROUND:** Under Code of Criminal Procedure art. 39.14(h), the state is required to disclose to a criminal defendant any exculpatory, impeachment, or mitigating document, item, or information in the state's possession that tends to negate the guilt of the defendant or would tend to reduce the punishment for the alleged offense.

Under art. 39.14(k), if at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under this provision, the state is required to promptly disclose the existence of the document, item, or information to the defendant or the court.
- DIGEST:** CSHB 1717 would amend the Code of Criminal Procedure provisions on

the duty of the state to disclose exculpatory, impeachment, or mitigating evidence to specify that the duty of the state to disclose the evidence would apply regardless of the date the criminal offense was committed.

The bill also would prohibit prosecuting attorneys from taking certain actions against assistant prosecuting attorneys and allow legal action to be taken against prosecutors who violated those protections.

Prohibition on personnel actions. The bill would prohibit prosecuting attorneys from suspending, terminating, or taking other adverse personnel actions against an assistant prosecutor based on the assistant prosecutor:

- disclosing to the defendant evidence the state was required to disclose that was favorable to the defendant; or
- refusing to withhold the evidence or presenting evidence to the court after the prosecutor or another supervising assistant prosecutor directed the assistant prosecutor to withhold evidence from the defendant in violation of the law.

Action against prosecuting attorney. An assistant prosecutor whose employment was suspended or terminated or who was subjected to an adverse personnel action in violation of the bill could bring an action against the prosecuting attorney for:

- injunctive relief, including reinstatement to the assistant prosecutor's former position or an equivalent position;
- compensatory damages, including for wages lost while suspended or terminated;
- court costs; and
- reasonable attorney fees.

The bill would limit the amount of compensatory damages that an assistant prosecutor could recover for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. The limit would range from \$50,000 to \$250,000 depending on the number of employees of the county or

counties where the prosecuting attorney had jurisdiction

CASHB 1717 would waive and abolish sovereign and governmental immunity to suit and liability relating to the extent liability was created under the bill.

Assistant prosecutors would have the burden of proof for actions brought under the bill. The bill would create an affirmative defense to prosecution that the prosecuting attorney would have taken the adverse personnel action based solely on something unrelated to the assistant prosecutor disclosing evidence favorable to the defendant. Assistant prosecutors would have to bring an action within 90 days of the day the adverse personnel action was taken.

Court decision on required disclosure. Assistant prosecutors who were directed by the prosecuting attorney or another supervising assistant prosecutor to withhold evidence from the defendant in violation of laws requiring the disclosure of evidence favorable to the defendant, could present the evidence to the trial court for the underlying criminal case to obtain a decision on whether disclosure was required under the law. Trial courts would have to promptly issue a written decision on whether the evidence must be disclosed.

Restrictions on bringing actions. The bill would establish restrictions on when assistant prosecutors could bring an action. An action could not be brought unless the assistant prosecutor presented the evidence to the trial court for a decision on whether it must be disclosed and gave the prosecuting attorney the court's decision.

These requirements would not apply if the assistant prosecutor established:

- that there was not a reasonable opportunity to present the evidence to the court or the decision to the prosecuting attorney as required before the adverse personnel action was taken; or
- good cause for failing to present the evidence to the court or

provide the decision.

Other provisions. Civil Practice and Remedies Code ch. 102, governing tort claims paid by local governments would not apply to an action brought under the bill.

The bill would take effect September 1, 2021, and would apply only to acts that occurred on or after that date. As an exception to this, actions could be brought by assistant prosecutors for retaliation that occurred before the bill's effective date if certain conditions were met.

SUPPORTERS
SAY:

CSHB 1717 would improve transparency and integrity in Texas' criminal justice system by making it clear that discovery requirements apply to all cases and by establishing protections for assistant prosecutors from retaliation for complying with the requirements.

The bill would clear up confusion over whether the state's discovery laws that became effective January 2014 require prosecutors to make disclosures on cases that began before the bill became effective. CSHB 1717 would make it clear that all exculpatory, mitigating, and impeaching evidence in these cases should be promptly disclosed.

The bill would establish protections for assistant prosecutors who refuse to violate the state's rules on open discovery. The issue was highlighted in a lawsuit filed by an assistant prosecutor alleging he was wrongfully terminated for refusing to violate the state's law on open discovery, and he ultimately could not recover monetary damages due to governmental immunity. CSHB 1717 would close this loophole with a fair process by which an assistant prosecutor could bring a legal action if retaliation occurred related to the discovery statute. This new process is warranted because there is no adequate remedy for such retaliation under current law.

Assistant prosecutors would be given protections and a pathway to address retaliation if it occurred. Several provisions would ensure the process was fair. For example, it would allow assistant prosecutors to

recover damages but limit them to a reasonable amount. The assistant prosecutor alleging retaliation would have the burden of proof and there would be an affirmative defense for prosecutors if the action was unrelated to the open discovery laws. Prosecutors would be protected from frivolous lawsuits and individuals making unfounded claims by requiring the assistant to present the evidence to the court. The bill would not inhibit robust discussions in prosecutors' offices but rather encourage them when trying to make proper decisions.

CRITICS
SAY:

CSHB 1717 could chill open and frank discussions about evidence in prosecutors' offices. In some instances, discussions that could benefit from the input of an assistant prosecutor about whether evidence should be disclosed might not occur if it seemed that a decision not to disclose the evidence could lead to an action under the bill.

The process that would be established by the bill could be used by a disgruntled or low-performing employee to pull a prosecutor's office into litigation after a workplace disciplinary action, with any monetary punishment ultimately being borne by local taxpayers. The process could place criminal court judges in an inappropriate position in the middle of employment matters from an independently elected official's office. Other, more appropriate avenues could be used to hold a district attorney accountable for violating discovery requirements.