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Testimony of Jennifer Bourn, Supervisory Assistant Public Defender

Judiciary Committee – March 29, 2019

S.B. 653, An Act Concerning Open File Disclosure in Criminal Cases

The Office of Chief Public Defender **supports S.B. 653 (raised): An Act Concerning Open File Disclosure in Criminal Cases**. This bill, which codifies and clarifies existing rules relating to discovery, is important because it promotes four important objectives:

- (1) It calls for uniformity in discovery practice in the state and works to eliminate disparity in the practice from courthouse to courthouse;
- (2) It works to ensure that disclosure happens in a timely manner and that a record is made of what is disclosed and when;
- (3) It requires communication between prosecutors and law enforcement about the identification and timely disclosure of exculpatory information; and
- (4) It offers protection against wrongful conviction (and against reversal of convictions years after the fact for disclosure violations).

Robust and full discovery promotes transparency and the appearance of fairness of the system, promotes expeditious and appropriate disposition of cases, and avoids unnecessary litigation, i.e., trying a case because the defendant made an ill-informed decision to reject a plea bargain and litigating issues in the trial court or in a post-conviction case having to do with the discovery itself.

To better promote these interests, we suggest modest modifications to the proposal:

1. **Section I (b) at Line 59:** Add a provision at the end of this section , entitling the defendant to a continuance if the prosecutorial official fails to comply with the rule:

“The court shall grant the request for a continuance made by the defense if the state fails to provide discovery within 45 days of the defense request. For speedy trial purposes, this period of time resulting from the continuance granted by the court time due to the state’s failure to provide such discovery shall not be held against the defendant.”

2. **Section I (b) (6) at Line 57:** Delete the phrase “with respect to the defendant.” It is a well-established, constitutional principle that exculpatory information includes impeaching information about witnesses. The phrase “with respect to the defendant” is an unnecessary and misleading limitation on what must be disclosed.
3. **Section I (d) and (e), Lines 84 through 96:** Modified as suggested below to avoid redundancy and to ensure compliance with this section at important decision points in a case:

(d) “In the case of a defendant charged with a class A, B or C felony, before (1) the court accepts a plea of guilty or nolo contendere, (2) the court requires a defendant to accept or reject a plea agreement, the rejection of which would cause the case to go to trial, or (3) trial, ~~the defendant and the prosecutorial official shall acknowledge, in writing or otherwise on the record in open court, the disclosure of all information or material provided to the defendant under this section~~ **the court shall inquire and ensure that the defendant is satisfied with the disclosures made and with the prosecutorial official’s compliance with the provisions of this section.**

(e) The prosecutorial official shall provide to the defendant an itemized list of information or material disclosed pursuant to this section. The listing of such information or material shall be in the order in which the prosecutorial official disclosed such information or material. ~~The defendant shall acknowledge receive of any such list on the record.~~ **The defendant and the prosecutorial official shall acknowledge, in writing or otherwise on the record in open court, the disclosure of all information or material provided to the defendant under this section.**

This office strongly supports the effort to improve and streamline the discovery practice in this state because the practice varies widely depending on the jurisdiction, and discovery failures have led to

Page 3 of 3 Judiciary Committee – March 29, 2019
Testimony Jennifer Bourn, Supervisory Assistant Public Defender
S.B. 653 An Act Concerning Open File Disclosure in Criminal Cases

numerous wrongful convictions in this state. In many of those cases, where the disclosure violation was discovered decades after conviction, the prosecution was unable to re-try the defendants or build and prove a case against the real perpetrator. These discovery failures harm the integrity of and confidence we have in our system, as well as the interests of all interested parties in a case.

We thank you for your consideration and are happy to provide additional information and input on this important issue and bill.