

SECOND REGULAR SESSION

# HOUSE BILL NO. 1706

## 100TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE COLEMAN (97).

4361H.011

DANA RADEMAN MILLER, Chief Clerk

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### AN ACT

To repeal section 545.415, RSMo, and to enact in lieu thereof twenty new sections relating to discovery in criminal cases.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Section 545.415, RSMo, is repealed and twenty new sections enacted in lieu thereof, to be known as sections 545.415, 545.1100, 545.1103, 545.1106, 545.1109, 545.1112, 545.1115, 545.1118, 545.1121, 545.1124, 545.1127, 545.1130, 545.1133, 545.1136, 545.1139, 545.1142, 545.1145, 545.1148, 545.1151, and 545.1154, to read as follows:

545.415. Beginning July 1, 1995, a prosecuting or circuit attorney in any criminal case pending in any court may obtain the deposition of any person on oral examination. The manner of taking such depositions shall be governed by the rules relating to the taking of depositions in civil actions. ~~[The depositions of any person confined in prison shall be taken where such person is confined.]~~

**545.1100. Sections 545.1100 to 545.1154 shall apply to all criminal cases.**

**545.1103. 1. Discovery as provided in sections 545.1100 to 545.1154 shall not commence earlier than arraignment of the defendant. Unless otherwise provided, responses to discovery requests shall be made within fifteen days of the service of the request or no less than ten days prior to trial, whichever is earlier. The time for response may be extended by the court for good cause shown, but no more than one extension of time shall be granted without prior notice to the opposing party.**

**2. Objections, if any, to discovery requests shall be filed and served within the time for responding to such requests.**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

545.1106. 1. Except as otherwise provided in sections 545.1100 to 545.1154, the state shall, upon written request of defendant's counsel or of the defendant if counsel has been waived, disclose to the defendant the following material and information within its possession or control designated in the request:

(1) Any arrest reports, incident reports, investigative reports, written or recorded statements, documents, photographs, video, electronic communications, and electronic data that relate to the offense for which the defendant is charged; provided that, personal identifying information of persons named in such materials may be redacted in the discretion of the prosecuting or circuit attorney;

(2) The names of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements; provided that, if no written or recorded statements or memoranda reporting or summarizing oral statements are in existence, the state shall provide a brief synopsis of the expected trial testimony of such persons;

(3) Any written or recorded statements and the substance of any oral statements made by defendant, a codefendant, or a coactor; a list of all witnesses to the making of the statements; and a list of all witnesses to the acknowledgment of the statements;

(4) Those portions of any existing transcript of grand jury proceedings that relate to the offense with which the defendant is charged, containing testimony of the defendant, and testimony of persons whom the state intends to call as witnesses at a hearing or trial;

(5) Any existing transcript of the preliminary hearing and of any prior trial held in the defendant's case if the state has the transcript in its possession;

(6) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(7) Any books, papers, documents, photographs, video, electronic communications, electronic data, or objects that the state intends to introduce into evidence at the hearing or trial or that were obtained from or belong to the defendant; provided that, personal identifying information of any person named in such materials, other than those obtained from the defendant, may be redacted in the discretion of the prosecuting or circuit attorney;

(8) Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial; and

(9) Any photographic or electronic surveillance, including wiretapping, of the defendant or of conversations to which the defendant was a party or of the defendant's

37 premises, relating to the offense charged. Such disclosure shall be in the form of a written  
38 statement by the prosecuting or circuit attorney briefly setting out the facts pertaining to  
39 the time, place, and persons making the photographic or electronic surveillance.

40 2. The request provided for by this section shall be made by filing the request in the  
41 court in which the case is pending and serving a copy of the request upon the prosecuting  
42 or circuit attorney.

43 3. The state may redact from any document it provides to the defendant's counsel  
44 any personal identifying information of witnesses or other persons named in any document  
45 but shall do so in a manner that makes it clear that the information has been redacted.

46 4. The state shall, without written request, disclose to the defendant any material  
47 or information that tends to negate the guilt of the defendant for the charged offense,  
48 mitigate the degree of the offense charged, reduce the punishment of the offense charged,  
49 and any additional material or information that would be required to be disclosed to  
50 comply with the requirements of due process.

51 5. If otherwise discoverable material or information is not in the possession or  
52 control of the prosecuting or circuit attorney but is in possession or control of other  
53 governmental personnel, the prosecuting or circuit attorney shall use diligence and make  
54 good faith efforts to cooperate with the defense to make the material or information  
55 available to the defendant. If the parties' cooperative efforts are unsuccessful and the  
56 material or information or other governmental personnel are subject to the jurisdiction of  
57 the court, the court, upon request, shall issue subpoenas or orders to cause the material or  
58 information to be made available to the state for disclosure to the defense.

545.1109. 1. The defense may make a written motion in the court having  
2 jurisdiction to try such case requesting the state to disclose material and information not  
3 covered under section 454.1106 that is in the possession or control of the prosecuting or  
4 circuit attorney. Such motion shall specify the material or information sought to be  
5 disclosed and state with particularity the relevance and materiality of such material and  
6 information. If the court finds the request to be reasonable and necessary to ensure a fair  
7 trial, the court shall order the state to disclose to the defendant such material and  
8 information requested that is found by the court to be relevant and material to the  
9 defendant's case.

10 2. The court shall specify the material and information to be disclosed and the time  
11 and manner in which the state shall make disclosure under this section.

12 3. Nothing in this section shall be construed to prevent the state or defense from  
13 securing subpoenas duces tecum to require the attendance of witnesses and the production  
14 of material at trial.

545.1112. 1. Except as otherwise provided in sections 545.1100 to 545.1154 as to protective orders, and subject to constitutional limitations, upon written request by the state, the defendant shall disclose to the prosecuting or circuit attorney part or all of the following material or information within the defendant's possession or control designated in such request:

(1) Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons that the defense intends to introduce into evidence at a hearing or trial; except that, those portions of any of the above containing statements made by defendant shall not be disclosed;

(2) The names and last known addresses of persons, other than the defendant, whom the defendant intends to call as witnesses at any hearing or trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements; provided that, if no written or recorded statements or memoranda reporting or summarizing oral statements are in existence, the defense shall provide a brief synopsis of the expected trial testimony of such witnesses, other than the defendant;

(3) Those parts of any books, papers, documents, photographs, videos, electronic communications, electronic data, or objects, except those that contain statements of the defendant, that the defendant intends to introduce in evidence at a hearing or trial;

(4) If the defendant intends to rely on the defense of mental disease or defect excluding responsibility, or to claim that the defendant has a mental disease or defect negating a culpable mental state, disclosure of such defenses shall be in the form of a written statement by counsel for the defendant; and

(5) If the defendant intends to rely on the defense of alibi and the state in its request specifies the place, date, and time of the offense charged, disclosure shall be in the form of a written statement by counsel for the defendant, announcing the defendant's intent and giving specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known, the names, addresses, and dates of birth of the witnesses by whom the defendant proposes to establish the alibi.

2. The request provided for by this section shall be made by filing the request in the court in which the case is pending and serving a copy of the request upon the defendant or defendant's attorney.

545.1115. 1. Subject to constitutional limitations, the state may make a written motion in the court having jurisdiction to try the case requesting the defendant to disclose material and information not covered under section 545.1112. Such motion shall specify

4 the material or information sought to be disclosed. If the court finds the request to be  
5 reasonable, the court shall order the defendant to disclose to the state such material and  
6 information requested that is found by the court to be relevant and material to the state's  
7 case.

8       2. Upon motion by the state, and subject to constitutional limitations and any other  
9 safeguards deemed appropriate by the court, and upon a showing of good cause, the court  
10 may order the defendant to:

11       (1) Appear in a lineup;

12       (2) Speak for identification;

13       (3) Be fingerprinted;

14       (4) Pose for photographs not involving reenactment of a scene;

15       (5) Try on articles of clothing;

16       (6) Provide a sample of the defendant's handwriting;

17       (7) Submit to the taking of specimens of material from under the defendant's  
18 fingernails;

19       (8) Submit to the taking of samples of the defendant's blood, hair, and other  
20 materials of the defendant's body that involve no unreasonable intrusion thereof; or

21       (9) Submit to a reasonable physical or medical inspection of the defendant's body.

22       3. If requested by any party, the court shall hear evidence on the necessity of  
23 discovery requested under subsection 2 of this section.

24       4. In its order directing discovery under this section, the court shall make the  
25 grounds for its decision a part of the record.

26       5. The court shall specify the material and information to be disclosed and the time  
27 and manner in which the defendant shall make disclosure under this section.

28       6. The defendant shall have the right to have counsel present during any disclosure  
29 under subsection 2 of this section.

30       7. Subsection 2 of this section shall not apply to investigative procedures before an  
31 indictment or information is filed.

      545.1118. Unless otherwise ordered by the court, disclosure under sections 545.1106  
2 to 545.1115 shall be:

3       (1) In a manner agreed to by the state and defendant;

4       (2) By the party making disclosure notifying opposing counsel that the material and  
5 information may be inspected, obtained, tested, copied, or photographed at a specified time  
6 and place; or

7           (3) By the party making disclosure providing opposing counsel a copy of the  
8 material and information and filing contemporaneously with the court a document listing  
9 what was disclosed to the other party.

**545.1121.** If, after complying with a request for disclosure or order of the court, a  
2 party discovers information or material that the party would have been required to  
3 disclose under the request or order, the party shall furnish such additional information or  
4 material to opposing counsel as soon as practicable. If the additions are discovered during  
5 trial, the court also shall be notified.

**545.1124.** Any information or materials obtained under sections 545.1100 to  
2 545.1154 shall be used only for the purpose of preparation and trial of the case and shall  
3 be subject to the terms, conditions, or restrictions that the court and statutes require. A  
4 willful violation of sections 545.1100 to 545.1154 may subject that party to sanctions and  
5 penalties by the court.

**545.1127.** The following matters shall not be subject to disclosure:

2           (1) Legal research or records, correspondence, reports, or memoranda to the extent  
3 that they contain the opinions, theories, or conclusions of counsel for the state or members  
4 of the state's legal or investigative staff, or of the defendant, defense counsel, or members  
5 of the defendant's legal or investigative staff, including attorney notes prepared for the  
6 purpose of presenting testimony of identified witnesses at trial;

7           (2) An informant's identity if the informant's identity is a prosecution secret, if a  
8 failure to disclose will not infringe the constitutional rights of the defendant, and if  
9 disclosure is not essential to a fair determination of the cause. Disclosure shall not be  
10 denied under this subdivision as to the identity of an informant to be produced at a hearing  
11 or trial;

12           (3) Any material or information that involves a substantial risk of prejudice to  
13 national security if a failure to disclose will not infringe the constitutional rights of the  
14 defendant and if disclosure is not essential to a fair determination of the cause. Disclosure  
15 shall not be denied under this subdivision as to material or information that is to be  
16 disclosed at a hearing or trial.

**545.1130. 1.** The court may at any time, on motion and for good cause shown:

2           (1) Order specified disclosures be denied or restricted, or make an order the court  
3 determines appropriate; provided that, all material that a party is entitled to receive is  
4 disclosed in time for counsel to make use of it; and

5           (2) Order nondiscoverable material or information contained within discoverable  
6 material be removed or redacted and the remaining material or information be disclosed.

7 The removed or redacted material or information shall be preserved by the party or in the  
8 records of the court and be made available to a reviewing court in the event of an appeal.

9 2. At any proceeding for showing good cause for the denial or restriction of  
10 disclosure, that is made in-camera and a record is made, the record of the in-camera  
11 proceeding shall be sealed and preserved in the records of the court, to be made available  
12 to a reviewing court in the event of an appeal.

13 3. In determining a motion for protective order, the court may consider the  
14 following:

- 15 (1) The risk of endangering the life or physical safety of an individual;
- 16 (2) The risk of intimidation of potential witnesses;
- 17 (3) The risk of flight from prosecution;
- 18 (4) The risk of destruction or tampering with evidence;
- 19 (5) The risk of economic reprisals;
- 20 (6) The risk that disclosure may seriously jeopardize a criminal investigation; or
- 21 (7) Any other relevant consideration.

545.1133. 1. Depositions shall be taken only of expert witnesses and for purposes  
2 of preserving testimony for trial.

3 2. Depositions of witnesses shall be taken in the county where the witnesses live, in  
4 another location agreed upon by the parties, or at a location designated by the court. The  
5 deposition of any person confined in prison shall be taken where the person is confined,  
6 unless otherwise ordered by the court.

7 3. The defendant shall not be physically present at a deposition except by  
8 agreement of the parties or upon court order for good cause shown. In addition, upon  
9 motion of the defense, the court may order the physical presence of defendant upon a  
10 showing that the defendant's presence is constitutionally required.

11 4. The parties may discover by deposition the facts and opinions to which an expert  
12 is expected to testify. Unless manifest injustice would result, the court shall require that  
13 the party seeking discovery pay the expert a reasonable hourly fee for the time the expert  
14 is deposed; provided that, in the case of indigency of a defendant, the court may dispense  
15 with this requirement.

545.1136. 1. At the trial or upon any hearing, any deposition obtained in  
2 accordance with sections 545.1133 and 545.1139, so far as it is otherwise admissible under  
3 the rules of evidence, may be used by the defendant if it appears that the witness:

- 4 (1) Is dead;
- 5 (2) Is out of the state, unless it appears that the absence of the witness was procured  
6 by defendant;

7           **(3) Is unable to attend or testify because of sickness or infirmity;**

8           **(4) Is a judge of a court of record or a practicing attorney or physician and engaged**  
9 **in the discharge of an official or professional duty at the time of trial;**

10           **(5) Has invoked a testimonial privilege or other refusal to testify not produced by**  
11 **the action of defendant; or**

12           **(6) Is otherwise unavailable and the defendant has made a good faith effort to**  
13 **obtain the presence of the witness at the hearing or trial, but has been unable to procure**  
14 **the attendance of the witness.**

15           **2. The facts that would authorize the use of any deposition may be established by**  
16 **the testimony of the deposing witness or by the certificate of the officer before whom the**  
17 **deposition is taken.**

**545.1139. 1. A prosecuting or circuit attorney or defense attorney may file a motion**  
2 **in a pending case to take the deposition of a witness to preserve testimony. The motion**  
3 **shall not seek the deposition of the defendant or the spouse of the defendant. The court**  
4 **shall order the deposition if it finds, after a hearing, that the deposition is necessary to**  
5 **preserve testimony.**

6           **2. The order shall require the defendant to attend the deposition or to personally**  
7 **waive the right to be present and the right of confrontation in writing or in open court.**  
8 **The order shall contain provisions necessary to fully protect the defendant's rights of**  
9 **personal confrontation and cross-examination of the witness.**

10           **3. The court shall direct that the deposition be taken in the county where the**  
11 **offense occurred or at another location designated by the court.**

12           **4. A deposition taken under this section may be used by either party at trial, subject**  
13 **to sections 545.1136 and 545.1142.**

14           **5. The officer before whom the deposition is to be taken shall have authority to**  
15 **issue a subpoena requiring the attendance of the witness at the deposition in the same**  
16 **manner as is provided with respect to the attendance of witnesses at the trial of a criminal**  
17 **case.**

18           **6. The reasonable personal and traveling expenses of the defendant and counsel**  
19 **shall be taxed as costs.**

**545.1142. At the trial or upon any hearing, any deposition obtained in accordance**  
2 **with section 545.1133 or 545.1139, so far as it is otherwise admissible under the rules of**  
3 **evidence, may be used by the state if:**

4           **(1) The defendant:**

5           **(a) Was personally present at the deposition and had the right of confrontation and**  
6 **cross-examination at the deposition;**

- 7           (b) Personally waived that right to be present and the right of confrontation in  
8 writing or in open court; or
- 9           (c) Failed to attend the deposition after the court ordered the defendant to do so;  
10 and
- 11           (2) The witness is unavailable in that the witness:
- 12           (a) Is dead;
- 13           (b) Is unable to attend or testify because of sickness or infirmity;
- 14           (c) Has invoked a testimonial privilege or other refusal to testify not produced by  
15 the action of the state; or
- 16           (d) Is otherwise unavailable and the state has made a good faith effort to obtain the  
17 presence of the witness at the hearing or trial but has been unable to procure the  
18 attendance of the witness.

          545.1145. The deposition costs shall be certified by the person before whom the  
2 deposition is taken and shall be taxed as court costs as provided by law.

          545.1148. 1. If at any time during the course of the proceeding it is brought to the  
2 attention of the court that a party has failed to comply with an applicable discovery rule  
3 or an order issued regarding discovery, the court may order the party to make disclosure  
4 of material and information not previously disclosed, grant a continuance, exclude such  
5 evidence, or enter an order the court determines just under the circumstances; provided  
6 that, a victim's testimony shall not be excluded as a discovery sanction.

7           2. Willful violation by counsel or the defendant of an applicable discovery rule or  
8 an order regarding discovery may subject counsel or the defendant to appropriate  
9 sanctions by the court.

10           3. No motion for sanctions or to compel discovery shall be heard unless the counsel  
11 for the moving party has certified to the court that informal efforts to resolve the dispute  
12 have occurred without success.

          545.1151. Unless otherwise ordered by the court for good cause shown, neither  
2 counsel nor any party, or his or her agents or employees, shall contact or communicate  
3 with identified witnesses for the opposing party except upon advance notice to counsel for  
4 the opposing party; provided that, nothing in this section shall limit or prevent the state  
5 or its officers from conducting lawful investigations into any offenses or from continuing  
6 to conduct further investigation of any charged offense.

          545.1154. The provisions of supreme court rule 25 relating to disclosure and  
2 depositions are no longer applicable in criminal cases; section 545.1100 to 545.1154 shall  
3 govern in such matters.

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