

HB 1706 -- DISCOVERY IN CRIMINAL CASES

SPONSOR: Coleman (97)

This bill establishes criminal discovery statutes, replacing Missouri Supreme Court Rule 25, which currently dictates the procedure for discovery in criminal cases.

The bill provides that discovery in criminal cases must not begin earlier than the arraignment of the defendant, whereas Rule 25.02 allows for discovery to begin on filing of a felony complaint or after the filing of an indictment or information. The bill further requires the state to, upon written request of defendant's counsel, or of defendant if counsel has been waived, disclose certain documents and other items specified in the bill; however, the state may redact any personal identifying information of witnesses or other individuals named in the documents and other items and must make it clear that the information has been redacted. Rule 25.03 allows the state to redact information on a separate copy provided to the defendant and to provide an unredacted copy to defendant's counsel. This bill removes that ability. Currently, Rule 25.03 requires the state to disclose the names and last known addresses of persons the state plans to call as witnesses. This bill specifies that only the names, and not the last known addresses, of the individuals may be disclosed. Additionally, if there are no written or recorded statements or memoranda summarizing a witness's testimony, the state must provide a summary of the witness's expected testimony. The bill requires the prosecutor to use diligence and good faith to make available discoverable information that is not in the prosecutor's possession but is in the possession of other governmental personnel.

The bill allows the defense to make a written motion in the proper court requesting the state to disclose material in the prosecutor's possession or control and state with particularity the relevance and materiality of the material and information. If the court finds the request reasonable and necessary to ensure a fair trial, the court must order the state to disclose the material and information to the defendant.

The bill also requires the defendant to, upon written request by the state, disclose all or part of the material or information specified in the bill, including the names and last known addresses of people the defendant intends to call as witnesses, as well as the birth dates of witnesses by whom the defendant intends to establish an alibi. If there are no written or recorded statements or memoranda summarizing a witness's testimony, the defense must provide a summary of the expected testimony of a witness other than the defendant.

Subject to constitutional limitations, the state may make a written motion to the court requesting the defendant to disclose material and information not already covered, and the motion must specify the material or information sought. The state may also make a motion and show good cause asking the court to require the defendant to participate in various activities specified in the bill, such as appearing in a lineup or providing a handwriting sample, for example. These provisions do not apply to investigative procedures before an indictment or information is filed. The defendant has the right to have counsel present during any disclosure under these provisions.

The bill specifies material and information that is not subject to disclosure, including, among other things, attorney notes prepared for the purpose of presenting testimony of identified witnesses at trial.

The court may, at any time, on motion and for good cause shown:

- (1) Order specified disclosures be denied or restricted;
- (2) Order non-discoverable material or information contained within discoverable material be removed or redacted;
- (3) Order the recording of a private proceeding be sealed and preserved in the records of the court; and
- (4) Make various considerations, specified in the bill, when determining a motion for a protective order.

Currently, under Rule 25.12, a defendant in any criminal case, after an indictment or filing of an information, may depose any person by oral examination or written questions, and the manner or the deposition is governed by the Rules governing depositions in civil matters. This bill provides that depositions must be taken only of expert witnesses and for purposes of preserving testimony for trial. Additionally under Rule 25.12, a defendant must not be physically present at a discovery deposition unless there is good cause shown. The bill provides that the defendant must not be at a deposition except upon a showing by defendant's counsel that defendant's presence at a deposition is constitutionally required. Under Rule 25.12, the defense may discover by deposition the facts and opinions to which an expert is expected to testify. Under this bill, both parties may discover such information by deposition. The party seeking such discovery is responsible for paying the expert a reasonable hourly fee; however, in the case of an indigent defendant, the court may dispense with this requirement. The bill also provides that, at trial or upon any hearing, a deposition

obtained properly that is otherwise admissible may be used under certain circumstances specified in the bill.

A prosecuting or circuit attorney or a defense attorney may file a motion to take a deposition of a witness to preserve testimony. The motion must not seek the deposition of a defendant or the spouse of a defendant. The order must require the defendant to attend the deposition or to waive the right to be present and the right of confrontation in writing or in open court. The court must direct the deposition to be taken in the county where the offense occurred or at another location designated by the court.

The bill provides that no victim's testimony may be excluded as a discovery sanction, and no motion for sanctions or to compel discovery will be heard unless the counsel for the party that filed the motion has certified to the court that informal efforts to resolve the dispute have failed.

Finally, unless otherwise ordered by the court for good cause shown, neither counsel nor any party, or their agents or employees, may contact or communicate with identified witnesses for the opposing party, except upon advance notice to counsel for the opposing party. However, nothing will limit or prevent the state or its officers from conducting lawful investigations into any offenses or from continuing to conduct further investigation of any charged offense.