

SECOND REGULAR SESSION

SENATE BILL NO. 881

100TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR WIELAND.

Read 1st time January 14, 2020, and ordered printed.

ADRIANE D. CROUSE, Secretary.

4392S.011

AN ACT

To amend supreme court rules 25.02, 25.03, 25.04, 25.05, 25.08, 25.10, 25.12, 25.14, 25.15, 25.18, and 25.19, relating to discovery in criminal cases.

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

Section A. Supreme court rules 25.02, 25.03, 25.04, 25.05, 25.08, 25.10, 25.12, 25.14, 25.15, 25.18, and 25.19, are amended, to read as follows:

25.02. Misdemeanors or Felonies - Time for Discovery

(a) Disclosure [on filing of felony complaint. Requests or motions for discovery of material and information as provided in Rule 25.03(a) may be made any time after defendant's initial appearance in court. The state shall, within fourteen days of service of defendant's request, provide to defendant's counsel material and information as provided in Rule 25.03(a). The court may enlarge or shorten the time for the state to respond to the request.

(b) Disclosure after indictment or filing of information. Except as provided in paragraph (a), upon the filing of an indictment or information discovery may commence. Requests or motions for discovery may be made after the filing of the indictment or information. Requests or motions for discovery shall be made not later than twenty days after arraignment. Requests or motions for discovery shall be answered within fourteen days after service of the request. The court may enlarge or shorten the times specified in this rule] **after arraignment. Discovery as provided herein 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 not less than ten days prior to trial, whichever is earlier. The time for response may be extended by the court for good**

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

20 **cause shown, but no more than one extension of time shall be granted**
21 **without prior notice to the opposing party.**

22 **(b) Objections, if any, to discovery requests shall be filed and**
23 **served within the time for responding to such requests.**

25.03. Misdemeanors or Felonies - Disclosure by State to Defendant
2 Without Court Order

3 (a) Disclosure [upon filing of felony complaint] **after arraignment.** Except
4 as otherwise provided in these Rules, the state shall, upon written request of
5 defendant's counsel, **or of defendant if counsel has been waived,** disclose to
6 [defendant's counsel] **defendant** the following material and information [in the
7 possession of the prosecutor: any arrest reports, incident reports, investigative
8 reports, written or recorded statements, documents, photographs, video, electronic
9 communications and electronic data that relate to the offense for which defendant
10 is charged.

11 (b) Disclosure after indictment or filing of information. Except as
12 otherwise provided in these Rules, the state shall, upon written request of
13 defendant's counsel, disclose to defendant's counsel the following material and
14 information] within its possession or control designated in the request:

15 (1) Any arrest reports, incident reports, investigative reports, written or
16 recorded statements, documents, photographs, video, electronic communications
17 and electronic data that relate to the offense for which defendant is charged;

18 (2) The names [and last known addresses] of persons whom the state
19 intends to call as witnesses at any hearing or at the trial, together with their
20 written or recorded statements, and existing memoranda, reporting or
21 summarizing part or all of their oral statements; **provided, that if no written**
22 **or recorded statements or memoranda reporting or summarizing oral**
23 **statements are in existence, the state shall provide a brief synopsis of**
24 **the expected trial testimony of such persons;**

25 (3) Any written or recorded statements and the substance of any oral
26 statements made by defendant, a co-defendant or a co-actor, a list of all witnesses
27 to the making of the statements and a list of all witnesses to the acknowledgment
28 of the statements [including the last known addresses of the witnesses];

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

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

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

38 (7) Any books, papers, documents, photographs, video, electronic
39 communications, electronic data, or objects that the state intends to introduce
40 into evidence at the hearing or trial or that were obtained from or belong to
41 defendant;

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

44 (9) Any photographic or electronic surveillance (including wiretapping) of
45 defendant or of conversations to which defendant was a party or of defendant's
46 premises, relating to the offense charged. This disclosure shall be in the form of
47 a written statement by counsel for the state briefly setting out the facts
48 pertaining to the time, place, and persons making the photographic or electronic
49 surveillance.

50 (c) The request provided for by this Rule shall be made by filing the
51 request in the court where the case is pending and serving a copy of the request
52 upon counsel for the state.

53 (d) The state may redact from any document it provides to defendant's
54 counsel [the following information: taxpayer identification number, the first five
55 digits of a social security number, driver's license number, financial account
56 number, personal identification code (PIN), electronic password of a victim or
57 witness, or the actual address or mailing address of a participant in an address
58 confidentiality program administered by the Missouri Secretary of State,] but
59 must do so in a manner that makes it clear that the information has been
60 redacted.

61 (e) [The state may elect to provide a separate copy of a redacted document
62 to defendant's counsel to be delivered to defendant and designated as
63 "Defendant's Copy." If the state provides a redacted document designated as
64 "Defendant's Copy," in addition to the information permitted to be redacted
65 pursuant to Rule 25.03(d), the state may also redact from "Defendant's Copy" of
66 the document the following information: date of birth, home address, work
67 address, and personal phone number and work phone number of a victim or
68 witness. However, the redaction must be done in a manner that makes it clear

69 the information has been redacted from the document. Defendant's counsel shall
70 be provided a separate document designated as "Lawyer Copy Only – Not for
71 Defendant" that includes the information that has been redacted from the
72 document pursuant to Rule 25.03(e). If defendant's counsel is provided with a
73 redacted document by the state designated as "Defendant's Copy," only that copy
74 shall be provided to defendant. Defendant's counsel shall not provide to
75 defendant the unredacted document or any information redacted from the
76 document pursuant to this Rule without court approval. For any document
77 designated "Defendant's Copy" or "Lawyer Copy Only – Not for Defendant," every
78 page of the respective document shall be so designated.

79 (f) Defendant is not entitled to the information redacted from a document
80 as provided in Rule 25.03(d) or (e) unless the court determines after a showing
81 of good cause that the disclosure of the information is necessary for the defense
82 of the case.

83 (g) The state shall, without written request, disclose to defendant any
84 material or information that tends to negate the guilt of defendant for the
85 charged offense, mitigate the degree of the offense charged, reduce the
86 punishment of the offense charged, and any additional material or information
87 that would be required to be disclosed to comply with [Brady v. Maryland, 373
88 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972) and their progeny]
89 **the requirements of due process.**

90 [(h) (f) If **otherwise discoverable** material or information [would be
91 discoverable under subsections (b) and (g) of this Rule if in the possession or
92 control of the state] **is not in the possession or control of the prosecutor,**
93 but is in possession or control of other governmental personnel, [the state shall
94 use diligence and make good faith efforts to make the material or information
95 available to defendant. If the state's efforts are unsuccessful] **the prosecutor**
96 **shall use diligence and make good faith efforts to cooperate with the**
97 **defense to make the material or information available to the defendant.**
98 **If the parties' cooperative efforts are unsuccessful,** and the material or
99 information or other governmental personnel are subject to the jurisdiction of the
100 court, the court, upon request, shall issue subpoenas or orders to cause the
101 material or information to be made available to the state for disclosure to the
102 defense.

25.04. Misdemeanors or Felonies - Disclosure by State to Defendant by
2 Court Order Requiring a Showing of Good Cause

3 (a) The defense may make a written motion in the court having
4 jurisdiction to try said case requesting the state to disclose material and
5 information not covered by Rule 25.03 **which is in the possession or control**
6 **of the prosecuting attorney**. Such motion shall specify the material or
7 information sought to be disclosed[. If the court finds the request to be
8 reasonable] **and state with particularity the relevance and materiality of**
9 **such material and information. If the court finds the request to be**
10 **reasonable and necessary to ensure a fair trial**, the court shall order the
11 state to disclose to defendant that material and information requested which is
12 found by the court to be relevant and material to defendant's case.

13 (b) The court shall specify the material and information to be disclosed
14 and the time and manner in which the state shall make disclosure under this
15 Rule.

16 (c) [If any material and information which the court orders the state to
17 disclose under this Rule is in the possession or control of other governmental
18 personnel, the state shall use diligence and make good faith efforts to cause such
19 material to be made available to the defense; and if the state's efforts are
20 unsuccessful and such material or other governmental personnel are subject to
21 the jurisdiction of the court issuing such order, said court, upon request, shall
22 issue suitable subpoenas or orders to cause such material to be made available
23 to the state for disclosure to the defense] **Nothing in this rule shall be**
24 **construed to prevent the state or defendant from securing subpoenas**
25 **duces tecum to require the attendance of witnesses and the production**
26 **of material at trial.**

25.05. Misdemeanors or Felonies - Disclosure by Defendant to State
2 Without Court Order

3 (a) Except as otherwise provided in these Rules as to protective orders,
4 and subject to constitutional limitations, on written request by the state,
5 defendant shall disclose to counsel for the state part or all of the following
6 material or information within defendant's possession or control designated in
7 such request:

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

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

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

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

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

36 (b) The request provided for by this Rule shall be made by filing the
37 request in the court where the case is pending and serving a copy of the request
38 upon defendant or defendant's attorney.

25.08. Misdemeanors or Felonies - Continuing Duty to [Disclosure]

2 **Disclose**

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

25.10. Misdemeanors of Felonies - Matters not Subject to Disclosure

2 The following matters shall not be subject to disclosure:

3 (a) Legal research, or records, correspondence, reports, or memoranda to

4 the extent that they contain the opinions, theories, or conclusions of counsel for
5 the state or members of the state's legal or investigative staff, or of defendant,
6 defense counsel, or members of defendant's legal or investigative staff, **including**
7 **attorney notes prepared for the purpose of presenting testimony of**
8 **identified witnesses at trial.**

9 (b) An informant's identity where informant's identity is a prosecution
10 secret, a failure to disclose will not infringe the constitutional rights of defendant,
11 and disclosure is not essential to a fair determination of the cause. Disclosure
12 shall not be denied hereunder as to the identity of an informant to be produced
13 at a hearing or trial.

14 (c) Any material or information which involves a substantial risk of
15 prejudice to national security, where a failure to disclose will not infringe the
16 constitutional rights of the accused, and where disclosure is not essential to a fair
17 determination of the cause. Disclosure shall not be denied hereunder as to
18 material or information which is to be disclosed at a hearing or trial.

25.12. Misdemeanors or Felonies - [Discovery Deposition by Defendant]

2 **Depositions** - When and How Taken

3 (a) In General. [A defendant in any criminal case after an indictment or
4 the filing of an information may obtain the deposition of any person on oral
5 examination or written questions. The manner of taking the deposition shall be
6 governed by the rules relating to the taking of depositions in civil actions]
7 **Depositions shall be taken only of expert witnesses and for purposes of**
8 **preserving testimony for trial.**

9 (b) Location of Deposition. Depositions of witnesses shall be taken in the
10 county where the witnesses live, or in another location agreed upon by the
11 parties, or at a location designated by the court. The deposition of any person
12 confined in prison shall be taken where the person is confined, unless otherwise
13 ordered by the court.

14 (c) Presence of Defendant. Defendant shall not be physically present at
15 a [discovery] deposition except by agreement of the parties or upon court order
16 for good cause shown. In addition, upon motion of the defense, the court may
17 order the physical presence of defendant upon a showing [of good cause] **that the**
18 **defendant's presence is constitutionally required.**

19 [The court should consider:

20 (1) The need for the physical presence of defendant to obtain effective
21 discovery;

22 (2) The effect of defendant's presence on the witness; and
23 (3) Any available use of screening or alternative methods of taping or
24 recording that would allow defendant limited observation of the witness and the
25 ability to confer with counsel.]

26 (d) Experts. The [defense] **parties** may discover by deposition the facts
27 and opinions to which an expert is expected to testify. Unless manifest injustice
28 would result, the court shall require that the party seeking discovery pay the
29 expert a reasonable hourly fee for the time the expert is deposed; **provided, that**
30 **in the case of indigency of a defendant, the court may dispense with**
31 **this requirement.**

25.14. Misdemeanors or Felonies - Depositions to Preserve Testimony -

2 When and How Taken

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

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

12 (c) The court shall direct that the deposition be taken in the county where
13 the offense occurred or at another location designated by the court.

14 (d) A deposition taken pursuant to this Rule 25.14 may be used by either
15 party at trial, subject to Rules 25.13 and 25.16.

16 (e) The officer before whom the deposition is to be taken shall have
17 authority to issue a subpoena requiring the attendance of the witness at the
18 deposition in the same manner as is provided with respect to the attendance of
19 witnesses at the trial of a criminal case.

20 (f) The reasonable personal and traveling expenses of defendant and
21 counsel shall be taxed as costs.

25.18. Misdemeanors or Felonies - Sanctions

2 (a) If at any time during the course of the proceeding it is brought to the
3 attention of the court that a party has failed to comply with an applicable
4 discovery rule or an order issued regarding discovery, the court may order the
5 party to make disclosure of material and information not previously disclosed,

6 grant a continuance, exclude such evidence, or enter an order it determines just
7 under the circumstances; **provided, that a victim's testimony shall not be**
8 **excluded as a discovery sanction.**

9 (b) Willful violation by counsel or defendant of an applicable discovery
10 rule or an order regarding discovery may subject counsel or defendant to
11 appropriate sanctions by the court.

12 (c) **No motion for sanctions or to compel discovery shall be heard**
13 **unless the counsel for the moving party has certified to the court that**
14 **informal efforts to resolve the dispute have occurred without success.**

25.19. Misdemeanors or Felonies - Investigations Not To Be Impeded

2 [Except as may be provided by a protective order entered by the court,
3 counsel for the parties, including employees or agents of counsel for the parties,
4 shall not advise any individual who has relevant material or information to not
5 discuss the case with opposing counsel or their employees or agents, and shall not
6 otherwise impede opposing counsel's investigation of the case. This rule does not
7 apply to defense counsel advising defendant not to discuss the case with others]
8 **Unless otherwise ordered by the court for good cause shown, neither**
9 **counsel nor any party, or their agents or employees, shall contact or**
10 **communicate with identified witnesses for the opposing party except**
11 **upon advance notice to counsel for the opposing party; provided, that**
12 **nothing herein shall limit or prevent the state or its officers from**
13 **conducting lawful investigations into any offenses or from continuing**
14 **to conduct further investigation of any charged offense.**

[25.15. Misdemeanors or Felonies - Discovery Depositions

2 by State - When and How Taken

3 (a) In General. A prosecuting attorney in any criminal case
4 may obtain the deposition of any person on oral examination after
5 an indictment or the filing of an information. The manner of
6 taking the deposition shall be governed by the rules relating to the
7 taking of depositions in civil actions.

8 (b) Location of Deposition. Depositions of witnesses shall
9 be taken in the county where the witnesses live, or in a location
10 that is agreed upon by the parties, or at a location designated by
11 the court. The deposition of any person confined in prison shall be
12 taken where the person is confined, unless otherwise ordered by
13 the court.

14 (c) Presence of Defendant. Defendant shall not be
15 physically present at a discovery deposition except by agreement of
16 the parties or upon court order for good cause shown.

17 (d) Experts. The prosecution may discover by deposition
18 the facts and opinions to which an expert is expected to
19 testify. Unless manifest injustice would result, the court shall
20 require that the party seeking discovery from an expert pay the
21 expert a reasonable
22 hourly fee for the time the expert is deposed.]

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