

Regular Session, 2013

HOUSE BILL NO. 397

BY REPRESENTATIVE HONORE

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

CRIMINAL/PROCEDURE: Provides with respect to discovery in criminal trials

1 AN ACT

2 To amend and reenact Code of Criminal Procedure Article 723 and to enact Code of  
3 Criminal Procedure Articles 723.1, 728.1, and 729.1(C), relative to discovery by the  
4 defendant; to provide for open file and reciprocal open file discovery; to provide for  
5 definitions; to provide for the requirements of open file and reciprocal open file  
6 discovery; to provide for the procedures for open file and reciprocal open file  
7 discovery; to provide for the types of information required to be disclosed pursuant  
8 to open file and reciprocal open file discovery; to provide for court orders regarding  
9 open file and reciprocal open file discovery; to provide for the duties of the district  
10 attorney and defense counsel regarding open file and reciprocal open file discovery;  
11 to provide for exceptions; to provide for protective orders; and to provide for related  
12 matters.

13 Be it enacted by the Legislature of Louisiana:

14 Section 1. Code of Criminal Procedure Article 723 is hereby amended and reenacted  
15 and Code of Criminal Procedure Articles 723.1, 728.1, and 729.1(C) are hereby enacted to  
16 read as follows:

17 Art. 723. State reports and other matters not subject to disclosure

18 Except as provided in Articles 716, 718, 721, ~~and 722,~~ and 723.1, this  
19 Chapter does not authorize the discovery or inspection of reports, memoranda, or  
20 other internal state documents made by the district attorney or by agents of the state

1 in connection with the investigation or prosecution of the case; or of statements made  
2 by witnesses or prospective witnesses, other than the defendant, to the district  
3 attorney, or to agents of the state.

4 Art. 723.1. Open file discovery

5 A. Upon written motion of the defendant specifically requesting open file  
6 discovery pursuant to this Article, the district attorney shall indicate, in writing or  
7 otherwise upon the record, whether the state will provide the defendant with open  
8 file discovery as defined in this Article.

9 B. If the district attorney declines to provide open file discovery pursuant to  
10 this Article, neither the provisions of this Article nor the provisions of Article 728.1  
11 of this Code shall be binding upon the state or the defense, except as otherwise  
12 required by law, but discovery shall be governed by the provisions of this Chapter  
13 that are not contained within this Article. Nothing in this Article shall be construed  
14 to prohibit the district attorney or the defendant from making voluntary disclosures  
15 beyond the requirements of this Chapter and other applicable provisions of law.

16 C. If the district attorney, after the filing of a written defense motion  
17 specifically requesting open file discovery pursuant to this Article, elects to provide  
18 open file discovery pursuant to this Article, the court shall order the district attorney:

19 (1) To permit or authorize the defendant to inspect, copy, examine, test  
20 scientifically, photograph, or otherwise reproduce:

21 (a) All material that must otherwise be disclosed pursuant to this Chapter and  
22 other applicable provisions of law.

23 (b) The complete files of all law enforcement agencies, investigatory  
24 agencies, and district attorney's offices involved in the investigation of the crimes  
25 committed or the prosecution of the defendant.

26 (i) The term "file" includes the defendant's statements, the codefendants'  
27 statements, witness statements, including recorded witness statements made to a  
28 grand jury, investigating officers' notes, results of tests and examinations, or any  
29 other matter or evidence obtained during the investigation of the offenses alleged to

1 have been committed by the defendant. When any matter or evidence is submitted  
2 for testing or examination, in addition to any test or examination results, all other  
3 data, calculations, or writings of any kind shall be made available to the defendant,  
4 including but not limited to preliminary test or screening results and bench notes.

5 (ii) The term "investigatory agency" includes any public or private entity that  
6 obtains information on behalf of a law enforcement agency or prosecutor's office in  
7 connection with the investigation of the crimes committed or the prosecution of the  
8 defendant.

9 (iii) Oral statements shall be in written or recorded form, except that oral  
10 statements made by a witness to a prosecuting attorney outside the presence of a law  
11 enforcement officer or investigatorial assistant shall not be required to be in written  
12 or recorded form unless there is significantly new or different information in the oral  
13 statement from a prior statement made by the witness.

14 (2) To give notice to the defendant of any expert witnesses that the district  
15 attorney reasonably expects to call at trial. Where any such expert witness prepares  
16 a report reducing the witness' findings to writing, the district attorney shall furnish  
17 that report to the defendant. The report shall contain the expert's opinion, the  
18 underlying basis for that opinion, and any materials or facts upon which the opinion  
19 is based. Where any such expert does not prepare such a written report, the district  
20 attorney shall furnish to the defendant a written summary, including the name of the  
21 witness, the expert's opinion, the underlying basis for that opinion, and any materials  
22 or facts upon which the opinion is based. In either event, the district attorney shall  
23 furnish to the defendant the witness' qualification and curriculum vita.

24 (3) To give the defendant, at the beginning of jury selection, a written list of  
25 the names and birth dates of all other witnesses whom the district attorney  
26 reasonably expects to call during the trial. Names of witnesses shall not be subject  
27 to disclosure if the district attorney certifies in writing and under seal to the court that  
28 to do so may subject the witnesses or others to physical or substantial economic harm  
29 or coercion, or that there is other particularized, compelling need not to disclose. If

1 there are witnesses that the district attorney did not reasonably expect to call at the  
2 time of the provision of the witness list, and as a result are not listed, the court upon  
3 a good faith showing shall allow the witnesses to be called. Additionally, in the  
4 interest of justice, the court may in its discretion permit any undisclosed witness to  
5 testify.

6 D. Notwithstanding the provisions of this Article or any other provision of  
7 law to the contrary, even when the district attorney elects to provide open file  
8 discovery pursuant to this Article, the district attorney is not required to disclose,  
9 except as required by state and federal constitutional requirements, any of the  
10 following:

11 (1) Written materials drafted by the district attorney or the district attorney's  
12 legal staff for their own use at trial, including witness examinations, voir dire  
13 questions, opening statements, and closing arguments. Disclosure is also not  
14 required of legal research or of records, correspondence, reports, memoranda, or trial  
15 preparation interview notes prepared by the district attorney or by members of the  
16 district attorney's legal staff to the extent they contain the opinions, theories,  
17 strategies, or conclusions of the district attorney or the district attorney's legal staff.

18 (2) The identity of a confidential informant unless the disclosure is otherwise  
19 required by law.

20 (3) Any personal identifying information of a witness beyond that witness's  
21 name, address, date of birth, and published phone number, unless the court  
22 determines upon motion of the defendant that such additional information is  
23 necessary to accurately identify and locate the witness.

24 (4) The identity of any individual providing information regarding a crime  
25 or criminal conduct to a Crime Stoppers organization under promise or assurance of  
26 anonymity, except as otherwise provided by law.

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1        Art. 728.1. Reciprocal open file discovery

2                A. For purposes of this Article:

3                    (1) "Statements" shall mean any audio or audio-video recording of an oral  
4                    statement or interview of a witness and any statement a witness makes, signs, or  
5                    otherwise adopts.

6                    (2) "Trial" shall mean the phase of the case at which the state attempts to  
7                    meet its burden as to guilt, and specifically does not extend to the penalty phase in  
8                    capital prosecutions.

9                    B. If the defendant moves in writing for open file discovery pursuant to  
10                   Article 723.1 of this Code, and if the district attorney elects, in writing or otherwise  
11                   upon the record, to provide the defendant with open file discovery as defined in  
12                   Article 723.1, the court shall order the defendant:

13                   (1) To permit or authorize the district attorney to inspect, copy, examine, test  
14                   scientifically, photograph, or otherwise reproduce:

15                   (a) All material that must otherwise be disclosed pursuant to this Chapter and  
16                   other statutory and constitutional rules.

17                   (b) All statements of any person other than the defendant whom the  
18                   defendant reasonable expects to call as a witness at trial.

19                   (2) To give notice to the district attorney of any expert witnesses that the  
20                   defendant reasonably expects to call at trial. Where any such expert witness prepares  
21                   a report reducing the witness' findings to writing, the defendant shall furnish that  
22                   report to the district attorney. The report shall contain the expert's opinion, the  
23                   underlying basis for that opinion, and any materials or facts upon which the opinion  
24                   is based. Where any such expert does not prepare such a written report, the  
25                   defendant shall furnish to the district attorney a written summary, including the name  
26                   of the witness, the expert's opinion, the underlying basis for that opinion, and any  
27                   materials or facts upon which the opinion is based. In either event, the defendant  
28                   shall furnish to the district attorney the witness' qualification and curriculum vita.

1           (3) To give to the district attorney, at the beginning of jury selection, a  
2           written list of the names and birthdates of all other witnesses whom the defendant  
3           reasonably expects to call during the trial. Names of witnesses shall not be subject  
4           to disclosure if the defendant certifies in writing and under seal to the court that to  
5           do so may subject the witnesses or others to physical or substantial economic harm  
6           or coercion, or that there is other particularized, compelling need not to disclose. If  
7           there are witnesses that the defendant did not reasonably expect to call at the time of  
8           the provision of the witness list, and as a result are not listed, the court upon a good  
9           faith showing shall allow the witnesses to be called. Additionally, in the interest of  
10          justice, the court may in its discretion permit any undisclosed witness to testify.

11           C. Notwithstanding the provisions of this Article or any other provision of  
12          law to the contrary, the defendant shall not be required to disclose reports,  
13          memoranda, or other internal defense documents made by the defendant or his  
14          attorneys or agents in connection with the investigation or defense of the case, or of  
15          statements made by the defendant.

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17          Art. 729.1. Court's disposition of motion for discovery; vacation or restriction of  
18                  order

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20           C.(1) Upon written motion of a party and a finding of good cause, which  
21          may include but is not limited to a finding that there is a substantial risk to any  
22          person of physical harm, intimidation, bribery, economic reprisals, or unnecessary  
23          annoyance or embarrassment, the court may at any time order that discovery or  
24          inspection be denied, restricted, or deferred, or may make other appropriate orders.  
25          A party may apply ex parte for a protective order and, if an ex parte order is granted,  
26          the opposing party shall receive notice that the order was entered, but without  
27          disclosure of the subject matter of the order.

28           (2) The court may permit a party seeking relief under Subparagraph (1) of  
29          this Paragraph to submit supporting affidavits or statements to the court for in

1           camera inspection. If thereafter the court enters an order granting relief under  
2           Subparagraph (1) of this Paragraph, the material submitted in camera must be sealed  
3           and preserved in the records of the court to be made available to the appellate court  
4           in the event of an appeal.

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## DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

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Honore

HB No. 397

**Abstract:** Provides for open file and reciprocal open file discovery.

Present law provides for discovery by the defendant in criminal cases.

Proposed law retains present law and further provides that upon written motion of the defendant specifically requesting open file discovery, the district attorney shall indicate, in writing or otherwise upon the record, whether the state will provide the defendant with open file discovery.

Proposed law provides that if the district attorney declines to provide open file discovery nothing in proposed law shall be binding upon the state or the defense, except as otherwise required by law.

Proposed law provides that if the district attorney, elects to provide open file discovery pursuant to proposed law, the court shall order the district attorney:

- (1) To permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce all otherwise disclosed material required by present law and the complete files of all law enforcement agencies, investigatory agencies, and district attorney's offices involved in the investigation of the crimes committed or the prosecution of the defendant.
- (2) To give notice to the defendant of any expert witnesses that the district attorney reasonably expects to call at trial.
- (3) To give the defendant, at the beginning of jury selection, a written list of the names and birth dates of all other witnesses whom the district attorney reasonably expects to call during the trial.

Proposed law provides that defense counsel shall provide the district attorney with the same discovery if ordered by the court.

Proposed law further provides that upon written motion of a party and a finding of good cause, which may include but is not limited to a finding that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders. A party may apply ex parte for a protective order and, if an ex parte order is granted, the opposing party shall receive notice that the order was entered, but without disclosure of the subject matter of the order.

Proposed law provides that the court may permit parties seeking protective orders to submit supporting affidavits, or statements in support of the motion for in camera inspection, if the motion is granted such documents and affidavits shall be sealed and preserved in the records of the court.

(Amends C.Cr.P. Art. 723; Adds C.Cr.P. Arts. 723.1, 728.1, and 729.1(C))