

FIRST REGULAR SESSION

SENATE BILL NO. 22

100TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR NASHEED.

Pre-filed December 1, 2018, and ordered printed.

ADRIANE D. CROUSE, Secretary.

0496S.011

AN ACT

To amend supreme court rules 25.02, 25.03, 25.04, 25.05, 25.10, 25.12, 25.14, 25.15, 25.16, 25.17, 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. Missouri supreme court rules 25.02, 25.03, 25.04, 25.05, 25.10, 25.12, 25.14, 25.15, 25.16, 25.17, 25.18, and 25.19, are amended to read as follows:

25.02. (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 25.03(a). The court may enlarge or shorten the time for the state to respond to the request] **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 cause shown, but no more than one extension of time shall be granted without prior notice to the opposing party.**

(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

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

19 for discovery shall be answered within fourteen days after service of the
20 request. The court may enlarge or shorten the times specified in this rule]
21 **Objections. Objections, if any, to discovery requests shall be filed and**
22 **served within the time for responding to such requests.**

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

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

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

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; **provided, that personal identifying information of any person**
42 **named in such materials, other than those obtained from the defendant,**
43 **may be redacted in the discretion of the prosecutor;**

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

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

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

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

64 [(e)] The state may elect to provide a separate copy of a redacted document
65 to defendant's counsel to be delivered to defendant and designated as
66 "Defendant's Copy." If the state provides a redacted document designated as
67 "Defendant's Copy," in addition to the information permitted to be redacted
68 pursuant to Rule 25.03(d), the state may also redact from "Defendant's Copy" of

69 the document the following information: date of birth, home address, work
70 address, and personal phone number and work phone number of a victim or
71 witness. However, the redaction must be done in a manner that makes it clear
72 the information has been redacted from the document. Defendant's counsel shall
73 be provided a separate document designated as "Lawyer Copy Only – Not for
74 Defendant" that includes the information that has been redacted from the
75 document pursuant to Rule 25.03(e). If defendant's counsel is provided with a
76 redacted document by the state designated as "Defendant's Copy," only that copy
77 shall be provided to defendant. Defendant's counsel shall not provide to defendant
78 the unredacted document or any information redacted from the document
79 pursuant to this Rule without court approval. For any document designated
80 "Defendant's Copy" or "Lawyer Copy Only – Not for Defendant," every page of the
81 respective document shall be so designated.

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

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

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

25.04. (a) The defense may make a written motion in the court having

2 jurisdiction to try said case requesting the state to disclose material and
3 information not covered by Rule 25.03 **which is in the possession or control**
4 **of the prosecutor.** Such motion shall specify the material or information
5 sought to be disclosed **and state with particularity the relevance and**
6 **materiality of such material and information.** If the court finds the request
7 to be reasonable **and necessary to ensure a fair trial,** the court shall order
8 the state to disclose to defendant that material and information requested which
9 is found by the court to be relevant and material to defendant's case.

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

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

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

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

11 (2) The names and last known addresses of persons, other than defendant,
12 whom defendant intends to call as witnesses at any hearing or trial, together with
13 their written or recorded statements, and existing memoranda reporting or
14 summarizing part or all of their oral statements; **provided, that if no written**

15 **or recorded statements or memoranda reporting or summarizing oral**
16 **statements are in existence, the defense shall provide a brief synopsis**
17 **of the expected trial testimony of such witnesses (other than the**
18 **defendant);**

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

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

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

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

25.10. The following matters shall not be subject to disclosure:

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

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

13 (c) Any material or information which involves a substantial risk of
14 prejudice to national security, where a failure to disclose will not infringe the

15 constitutional rights of the accused, and where disclosure is not essential to a fair
16 determination of the cause. Disclosure shall not be denied hereunder as to
17 material or information which is to be disclosed at a hearing or trial.

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

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

12 (c) Presence of Defendant. Defendant shall not be physically present at
13 a [discovery] deposition except by agreement of the parties or upon court order
14 for good cause shown. In addition, upon motion of the defense, the court may
15 order the physical presence of defendant upon a showing [of good cause.

16 The court should consider:

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

19 (2) The effect of defendant's presence on the witness; and

20 (3) Any available use of screening or alternative methods of taping or
21 recording that would allow defendant limited observation of the witness and the
22 ability to confer with counsel] **that the defendant's presence is
23 constitutionally required.**

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

25.14. A prosecuting attorney or defense attorney may file a motion in a
2 pending case to take the deposition of a witness to preserve testimony. The
3 motion shall not seek the deposition of defendant or the spouse of defendant.

4 (a) The court shall order the deposition if it finds, after a hearing, that

5 the deposition is necessary to preserve testimony.

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

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

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

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

18 **(f)** The reasonable personal and traveling expenses of defendant and
19 counsel shall be taxed as costs.

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

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

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

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

 [25.16.] **25.15.** At the trial or upon any hearing, any deposition obtained
2 in accordance with Rules 25.12, 25.14 or 25.15, so far as it is otherwise admissible
3 under the rules of evidence, may be used by the state if:

4 **(a)** Defendant:

5 (1) Was personally present at the deposition and had the right of

6 confrontation and cross-examination at the deposition, or

7 (2) Personally waived that right to be present and the right of
8 confrontation in writing or in open court, or

9 (3) Failed to attend the deposition after the court ordered defendant to do
10 so; and

11 (b) The witness is unavailable in that the witness:

12 (1) Is dead,

13 (2) Is unable to attend or testify because of sickness or infirmity,

14 (3) Has invoked a testimonial privilege or other refusal to testify not
15 produced by the action of the state, or

16 (4) Is otherwise unavailable and the state has made a good faith effort to
17 obtain the presence of the witness at the hearing or trial, but has been unable to
18 procure the attendance of the witness.

[25.17.] **25.16.** The deposition costs shall be certified by the person before
2 whom the deposition is taken and shall be taxed as court costs as provided by
3 law.

[25.18.] **25.17.** (a) If at any time during the course of the proceeding it
2 is brought to the attention of the court that a party has failed to comply with an
3 applicable discovery rule or an order issued regarding discovery, the court may
4 order the party to make disclosure of material and information not previously
5 disclosed, grant a continuance, exclude such evidence, or enter an order it
6 determines just under the circumstances; **provided, that a victim's testimony**
7 **shall not be excluded as a discovery sanction.**

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

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

[25.19. Except as may be provided by a protective order entered by the
2 court, counsel for the parties, including employees or agents of counsel for the
3 parties, shall not advise any individual who has relevant material or information
4 to not discuss the case with opposing counsel or their employees or agents, and
5 shall not otherwise impede opposing counsel's investigation of the case. This rule
6 does not apply to defense counsel advising defendant not to discuss the case with
7 others.]

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

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