

SENATE BILL 1336

By Bell

AN ACT to amend Tennessee Code Annotated, Title 40, Chapter 17, relative to requiring reciprocal disclosure of witnesses prior to trial.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 40-17-106, is amended by deleting all of the language in the section and substituting instead the following:

(a) Notice of Request for Witness Names and File Disclosure. At any time following the defendant's arraignment on the indictment or presentment or no later than fifteen (15) days after a case is set for trial by the court, a defendant may elect to participate in the disclosure process provided by this section by filing with the court and providing a copy to the district attorney general, a "Notice of Witness and File Disclosure" which shall bind both the district attorney general and defendant to all reciprocal disclosure procedures contained in this section. Participation by a defendant in this disclosure process by filing the notice shall require a reciprocal defense witness list disclosure obligation as set forth in subsection (c). Such notice shall also be construed as invoking all discovery obligations mandated by the Tennessee Rules of Criminal Procedure. The requirements of this section shall not be construed as abrogating or modifying the requirements of any rule of Tennessee Criminal Procedure or other law, but shall be considered supplementary by providing additional disclosure and discovery once invoked at the election of the defendant.

(b) District Attorney General's Disclosure Obligation.

(1) Within fifteen (15) days after filing of the Notice of Witness and File Disclosure, the district attorney general shall provide the defendant with witness names which shall include a list of the names, addresses, and telephone

numbers of all persons the district attorney general expects to call as witnesses at the trial or hearing.

(2) Within thirty (30) days after filing of the Notice of Witness and File Disclosure, the district attorney general shall provide the defendant the complete file of all law enforcement agencies, investigatory agencies, and district attorney general's office(s) involved in the prosecution of the defendant as alleged in the indictment or presentment.

(3) As used in this section, unless the context otherwise requires:

(A) The term "file" includes, but is not limited to, all police, arrest, and crime or offense reports, including statements of all witnesses whether written by the witness, adopted by the witness, or summarized by others, investigating officers' notes, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

(B) The term "district attorney general's office" refers to the office of the district attorney general or State Attorney General when participating in trial level criminal prosecution.

(C) The term "investigatory agency" includes any public or private entity that obtains information on behalf of a law enforcement agency or district attorney general's office in connection with the investigation of the crimes committed or the prosecution of the defendant.

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

(c) Defendant's Obligation. Within thirty (30) days after receipt by the defendant of the State's Witness and File Disclosure furnished by the district attorney general, the

defendant shall furnish to the district attorney general a written list of the names, addresses, and telephone numbers of all witnesses (except for the defendant) whom the defendant expects to call as witnesses at the trial or hearing.

(d) Content of Disclosure

(1) If the witness is to be summoned is an expert witness, the disclosure required by subsections (b) and (c) shall also contain an indication that the particular witness is an expert witness, and stating the field of expertise in which the witness will offer the witness' opinion. If a party discloses that an expert witness may be summoned, the opposing party shall be given an opportunity by the court to seek its own expert witness in the same field of expertise.

(2) Disclosure under this section is not made by reliance on the fact that the name of a party's witness appears on the opposing party's witness list or in the opposing party's documents or records.

(3) The content of all disclosures made by this section, including witness lists, shall be to the opposing party and shall not be filed with the clerk of court or the court so as to become matters of public record, except that the court may require filing of documents under seal so as to document disclosure, resolve discovery disputes, and enter protective orders. The court shall have authority to require witness lists from both parties prior to trial to assist the court in jury selection.

(4) The fact that a witness's name is furnished or is otherwise provided under this section is not grounds for comment on a failure to call the witness.

(e) Stay of Proceedings. The filing of a motion for protective order by the district attorney general will automatically stay the times provided for in this section. If a protective order is granted, the defendant may, within two (2) days thereafter, or at any

time before the district attorney general furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of disclosure and not be required to furnish further reciprocal disclosure.

(f) Restricting Disclosure. The court on its own initiative or on motion of either party shall deny or partially restrict disclosures authorized by this section if it finds there is a significant risk to any person of physical harm, intimidation, bribery, or economic reprisals, resulting from the disclosure, that substantially outweighs any usefulness of the disclosure to either party.

(g) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorneys or members of their legal staffs.

(2) Informants. Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial as required by law or a failure to disclose the informant's identity will infringe upon the constitutional rights of the defendant.

(h) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, counsel for the parties shall not advise persons, other than the defendant, having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case. The terms "counsel" and "opposing counsel" shall include, but not be limited to, prosecution or defense personnel or their agents such as law enforcement officers or private defense investigators.

(i) Continuing Duty to Disclose. If, subsequent to compliance with this section, a party discovers additional witnesses or file information that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose the name, address or telephone number of the witness or produce the file information in the same manner as required under these rules for initial disclosure.

(j) Court May Alter Content and Times of Disclosure. On a showing of good cause, the court may at any time order that specified disclosures be restricted, altered, deferred, exempted from disclosure or modify the time for disclosure. All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it.

(k) Restriction of Proof.

(1) The trial judge shall prohibit evidence, proof, or the testimony of any witness whose name, address and telephone number was not disclosed or whose file information was not provided in compliance with this section; provided, however, if in the interest of justice, and for good cause shown, the party seeking to call the witness or introduce file evidence demonstrates reasonable grounds why the name of such witness was not disclosed or the file information was not provided, the trial judge may, in lieu of prohibiting the testimony of the witness or the introduction of related proof, grant a sufficient recess during the trial to permit the opposing party an opportunity to prepare for the testimony of the undisclosed witness in order to remedy the disadvantage. In the event that no recess during the course of the trial could properly remedy the disadvantage, but the testimony of the undisclosed witness is so material that the just resolution of the cause would be jeopardized by the prohibition of the testimony or proof, the trial judge

may declare a mistrial and reset the matter for a future trial. The decision of the trial judge in prohibiting the testimony or proof, or allowing the testimony or proof, shall not be deemed error unless the aggrieved party demonstrates that the result of the trial would have been different but for the admission or exclusion of the testimony in question.

(2) The fact that a witness is called to rebut the testimony of another witness is not, in and of itself, reasonable grounds for failing to disclose the name, address and telephone number of the witness under subsection (1). In addition to demonstrating the rebuttal nature of the testimony, the party seeking to call the rebuttal witness must prove to the satisfaction of the trial judge genuine surprise as to the testimony to which the rebuttal witness is relevant in order to establish reasonable grounds under subsection (1).

(l) Nothing in this section shall be interpreted to require the defendant to make a pretrial election of whether to testify in the defendant's own defense or invoke the privilege against self-incrimination. The defendant shall be permitted to testify regardless of whether the defendant's name has been disclosed as a possible witness by the defense to the district attorney general.

(m) Nothing in this section shall be interpreted to apply to any court that is not a court of record.

SECTION 2. This act shall take effect July 1, 2013, the public welfare requiring it.