
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: SB 441 **Hearing Date:** March 28, 2023
Author: Bradford
Version: February 13, 2023
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Criminal procedure: discovery*

HISTORY

Source: California Attorneys for Criminal Justice

Prior Legislation: AB 419 (Davies), Ch. 91, Stats. 2021
SB 651 (Glazer), Ch. 483, Stats. 2019
AB 1516 (Lieu), Ch. 297, Stats. 2009

Support: California Public Defenders Association

Opposition: California District Attorneys Association; San Diegans Against Crime; San Diego Deputy District Attorneys Association

PURPOSE

The purpose of this bill is to require, in felony cases, the prosecuting attorney to provide discovery to the defendant, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies, before or at the preliminary hearing.

Existing law requires the prosecuting attorney to disclose to the defendant all of the following materials and information, also known as discovery, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

- The names and addresses of the persons the prosecutor intends to call at trial;
- Statements of all defendants;
- All relevant real evidence seized or obtained as a part of the investigation of the offenses charged;
- The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial;
- Any exculpatory evidence; and
- Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial. (Pen. Code, §1054.1.)

This bill requires, in a felony case, the prosecuting attorney to disclose to the defendant the above materials and witness information for persons they intend to call at the preliminary hearing, if it is in the possession of the prosecuting attorney or knows it to be in the possession of the investing agencies, before the preliminary hearing.

This bill clarifies that the bill's provisions do not reduce the obligation to produce discovery under other statutory provisions, as mandated by the U.S. Constitution, or by any other law.

Existing law states that before a party may seek court enforcement of any of the required disclosures, the party shall make an informal request of opposing counsel for desired materials and information. (Pen. Code, § 1054.5, subd. (b).)

Existing law states that if within 15 days of the informal request, opposing counsel fails to provide the materials and information requested, the party may seek a court order and upon a showing that the moving party complied with informal discovery, a court may make any order necessary to enforce compliance, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure. (Pen. Code, § 1054.5, subd. (b).)

This bill provides that in a felony case in which the defendant has not waived the right to a preliminary hearing within 10 court days, if within 3 days of the informal request opposing counsel fails to provide the materials and information requested, the party may seek a court order.

Existing law states that disclosure of the required materials and information shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure shall be denied, restricted or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (Pen. Code, § 1054.7.)

Existing law states that "good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. (Pen. Code, § 1054.7.)

This bill provides that these disclosures shall, in a felony case when the defendant has waived the right to a preliminary hearing within 10 court days, be made no later than 10 days before the date scheduled for the preliminary hearing.

This bill provides that when a defendant has not waived the right to a preliminary hearing within 10 court days, the disclosures shall be made no later than 72 hours before the preliminary hearing is scheduled to begin.

COMMENTS

1. Need for This Bill

According to the author of this bill:

SB 441 will require prosecutors in felony cases to disclose specified information to the defendant or their attorney within 72 hours of a preliminary hearing. This shall include critical information such as statements made by the defendant, witnesses, and physical evidence already collected by the prosecution or law enforcement. By promoting the full disclosure of this key information by prosecutors and law enforcement, SB 441 will ensure our criminal justice process is more efficient and effective by giving the accused access to this information early in the legal process, eliminating long and costly legal motions over the disclosure of evidence, and reducing the risk of wrongful arrests and convictions.

2. Criminal Discovery Procedures Enacted by Proposition 115

Existing law, as enacted by Proposition 115, approved by California voters on June 6, 1990, established a system of reciprocal discovery whereby both the prosecution and defense are required to turn over specified information and materials such as the names and addresses of witnesses that will be called to testify at trial. (Pen. Code, § 1054 et seq.)

Discovery is generally conducted informally between the parties by unwritten request and most courts have a standing discovery order requiring the parties to turn over standard information and materials, such as police reports, names and addresses of anticipated witnesses, experts' reports and rap sheets. In these courts, filing a formal discovery motion is usually necessary only when counsel seeks something not the standing disclosure list or when one party has failed to comply with the informal request for discovery.

Generally, discovery must be given to opposing counsel as soon as possible but no later than 15 calendar days after they are requested. (Pen. Code, § 1054.5, sub. (b).) Additionally, depending on when the discovery request is made, the law requires discovery to be given to opposing counsel at least 30 calendar days before trial, unless good cause is shown why disclosure should be denied, restricted or deferred. (Pen. Code, § 1054.7.) However, if required materials and information becomes known to, or comes into the possession of a party within 30 calendar days before trial, disclosure must be made immediately unless good cause is shown. "Good cause" is limited to threats of possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement. (*Ibid.*)

This bill requires disclosure of witness information, exculpatory evidence, felony convictions of specified material witnesses, and relevant expert witness reports to the defendant prior to the preliminary hearing. The court has specifically rejected the argument that statutory discovery is limited only to trial discovery finding that nothing in Penal Code sections 1054 to 1054.10 precludes their availability in advance of a preliminary examination. (*Magallan v. Superior Court* (2011) 192 Cal. App. 4th 1444, "Proposition 115 did not eliminate a criminal defendant's right to bring a suppression motion at the preliminary examination. Hence, the need for discovery in support of such a motion was left unchanged by Proposition 115's other changes to the nature of preliminary examinations.")

The Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, and then only upon whatever conditions the voters attached to the Legislature's amendatory powers. According to the text of Proposition 115, "The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 568-569.)

Because this bill amends the discovery statutes that were enacted by Proposition 115, the bill is keyed as requiring a 2/3 vote by the Legislature. However, since a court has already found that Proposition 115 did not eliminate a defendant's ability to get discovery prior to a preliminary examination, arguably this bill does not authorize anything that Proposition 115 prohibits and should not require a 2/3 vote. (*Id.* at pg. 1460; *Pearson, supra*, at 571 ["In deciding whether this particular provision amends Proposition 115, we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits."])

3. Preliminary Hearings

When a prosecuting attorney files a felony complaint, a defendant is entitled to a preliminary hearing to ensure that there is enough evidence to hold the defendant to answer in the trial court. (Pen. Code, § 872.) The preliminary hearing must be held within 10 court days of the date of arraignment or the date the defendant plead not guilty, whichever occurs later, unless time has been waived or good cause has been for a continuance has been found. (Pen. Code, § 859b.)

At the preliminary hearing, the prosecution must present sufficient evidence to convince the judge or magistrate that probable cause exists to believe that a crime has been committed and that the defendant committed it. (Pen. Code, § 872.) The prosecution can present live witnesses, hearsay from law enforcement witnesses, or a combination of both. The defense may call witnesses and cross-examine the prosecution's witnesses. Evidence provided at the preliminary hearing may be used to argue for dismissal of charges or reduction of a felony to a misdemeanor, or to request a particular settlement of the case.

This bill would require the disclosure of witness information, exculpatory evidence, felony convictions of specified material witnesses, and relevant expert witness reports to the defendant prior to the preliminary hearing. Because the vast majority of felony cases are settled prior to trial, the preliminary hearing may be the only opportunity for the defendant to provide evidence to the judge and cross-examine witnesses. Having more information disclosed to the defendant at this stage would provide a more complete picture of the strength of the prosecution's case thereby leading to more informed decisions on whether to plead or proceed with trial.

4. Argument in Support

According to the California Public Defenders Association:

Currently, the law does not require that the district attorney provide all information, including exculpatory information, to the defense attorney prior to the preliminary hearing. This deficit in the law puts the defense attorney at an extreme disadvantage at the preliminary hearing and allows the judge to make a ruling concerning probable cause solely on the information the district attorney chooses to disclose about the case.

This bill will provide for more fruitful and meaningful preliminary hearings where the defense attorney will be able to elicit relevant and exculpatory information for the court to consider in making the probable cause determination. It also ensures that a defense attorney will have been able to fully cross-exam a witness who testifies at the preliminary hearing, in the event that the district attorney attempts to introduce the witness' preliminary hearing testimony at trial because the witness has become unavailable.

5. Argument in Opposition

According to the California District Attorneys Association:

Senate Bill 441 may be intended to provide more information, earlier, to more defendants. In practice, however, it would immediately prove to be disastrous, drastically destabilize the criminal justice system, and cause prosecutors to be constantly at the beck and call of defense attorneys for any requested evidence. If a defense attorney requests something like “every body camera video, surveillance video, booking video, patrol camera video, and photograph taken2” on a multiple-homicide case involving several different investigating agencies and crime scenes, a prosecutor would be forced – within 3 days – to come up with everything, all at once, at risk of sanctions including, under SB 441, continuance past the statutory last day, thereby requiring dismissal. What if the request comes on Friday afternoon on a three-day weekend? Some complex cases take more than three days just to read all the reports and have a basic understanding of what occurred in an investigation.

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