By: _____ **H.B. No. _____**

90R _____ — DRAFT

A BILL TO BE ENTITLED

AN ACT

relating to the confidentiality and privilege of communications between a crime victim and the attorney representing the state made in the exercise of the victim's constitutional right to confer.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 56A, Code of Criminal Procedure, is amended by adding Article 56A.056 to read as follows:

Art. 56A.056. PRIVILEGE FOR CONFERRING COMMUNICATIONS

(a) Definitions. In this article:

(1) "Victim" means a person who is a victim of an offense for purposes of Section 30, Article I, Texas Constitution, and includes:

(A) a guardian of a victim; and

(B) if the victim is deceased, a close relative of the deceased victim.

(2) "Close relative of a deceased victim" has the meaning assigned by Article 56A.001 and expressly includes a stepparent who married the victim's parent while the victim was a minor.

(3) "Holder" means a victim who makes a conferring communication under this article, including a guardian or close relative of a deceased victim who makes a conferring communication. Each holder holds the privilege under this article only as to communications the holder authored.

(4) "Conferring communication" means a communication between a holder and a representative of the prosecutor's office, made in the exercise of the right to confer under Section 30(b)(3), Article I, Texas Constitution, the content of which is one or more of the following:

(A) the holder's views regarding a decision whether to file charges, a dismissal of charges, the use of a pretrial intervention program, a plea bargain agreement, or the sentence to be sought or imposed;

(B) a question directed to the attorney representing the state;

(C) analysis, research, a chronology or timeline, criticism of anticipated evidence or expert testimony, or a suggestion regarding strategy, offered for the consideration of the attorney representing the state; or

(D) information concerning the personal impact of the offense, the holder's privacy or safety, or restitution, offered in connection with a matter described by Paragraph (A).

(5) "Fact-witness communication" means a communication the content of which is a statement of fact concerning the offense or events perceived by the person making the communication, a statement of a witness for purposes of Article 39.14(a), or a statement relating to the subject matter of the testimony of a witness for purposes of Rule 615, Texas Rules of Evidence.

(6) "Exculpatory portion" means the portion of a communication that is exculpatory, impeaching of a witness for the state, or mitigating, within the meaning of Article 39.14(h) and the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

(b) Privilege. A holder has a privilege to refuse to disclose, and to prevent the attorney representing the state or any other person from disclosing, a conferring communication in any criminal, civil, administrative, or legislative proceeding, including in discovery under Article 39.14 and in production required by Rule 615, Texas Rules of Evidence. The privilege may be claimed by:

(1) the holder;

(2) the holder's attorney; or

(3) the attorney representing the state, on the holder's behalf.

(c) Classification by content. Whether a communication is a conferring communication or a fact-witness communication is determined by its content, regardless of the form, label, or stated purpose of the communication, and regardless of whether the holder also provides fact-witness material or also engages in the analysis of evidence. A holder does not, by making a

conferring communication, become an agent, representative, employee, or investigator of the state.

(d) Notwithstanding other law. Except as provided by Subsection (g), this article applies notwithstanding Article 39.14(a) or any other law authorizing or requiring the disclosure of a communication, including a motion, order, or other request for disclosure premised on a claim that the holder acted as an investigator, agent, or representative of the state, or that a conferring communication constitutes investigatory material outside the protection of Brady v. Maryland.

(e) Duties expressly preserved. Nothing in this article:

(1) limits or conditions the duty of the state under Article 39.14(h) to disclose exculpatory, impeachment, or mitigating information;

(2) limits or conditions a prosecutor's duty under Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct;

(3) applies to a fact-witness communication;

(4) limits the production of a statement of a witness under Rule 615, Texas Rules of Evidence; or

(5) limits a defendant's rights under the United States Constitution or the Texas Constitution, as applied by the court.

(f) Testifying holders. A holder who testifies as a witness retains the privilege under this article for the holder's conferring communications. The privilege is lost only as to a communication that is a fact-witness communication under Subsection (e)(3) or that contains an exculpatory portion disclosed under Subsection (g).

(g) Disclosure of an exculpatory portion. (1) A defendant who believes a conferring communication contains an exculpatory portion may file a motion, not later than the 30th day before the date trial begins, supported by an affidavit showing a good faith, specific, and reasonable basis to believe the communication contains an exculpatory portion that is not duplicative of material already disclosed. A motion concerning material that first arises after that deadline may be filed promptly after the material arises. The defendant shall serve the motion on the attorney representing the state and on the holder.

(2) On a finding by a preponderance of the evidence that the affidavit establishes the basis described by Subdivision (1), the court shall order the attorney representing the state to produce the communication to the court under seal for in camera review.

(3) After in camera review, the court shall order disclosure only of the specific exculpatory portion of the communication, and only under a protective order limiting the use of the disclosed portion to the proceeding. The remainder of the communication remains privileged.

(4) The procedure under this subsection is the exclusive procedure for obtaining disclosure of a conferring communication on the ground that it contains an exculpatory portion. This subsection does not condition, and may not be construed to condition, the state's independent and continuing duties under Subsection (e)(1) and (2), which the attorney representing the state shall perform on receipt of a conferring communication and throughout the proceeding, including during trial, without the need for a motion by the defendant.

(h) Waiver. (1) The privilege under this article belongs to the holder and may be waived only by the holder, in a writing signed by the holder, as to communications specified in the writing.

(2) Waiver of a communication requires the signed written waiver of each holder who authored the communication. A person who is merely present during, copied on, or a recipient of a communication authored by another holder does not hold the privilege as to that communication and may not waive or veto waiver of it. A statement made by a holder within a joint exchange is that holder's own communication for purposes of this subsection.

(3) The attorney representing the state may not waive the privilege on behalf of a holder.

(4) A disclosure is not a waiver if it is made to the attorney representing the state, to the holder's attorney, or within the conferring process, or if the disclosure was compelled or inadvertent.

(i) Notice and stay before disclosure. (1) A court may not order the disclosure of a communication claimed to be

privileged under this article, and a disclosure so ordered may not be carried out, until the holder has been given written notice of the motion or order and of the holder's rights under this subsection. The duty to give notice under this subsection binds the court and any person who would make the disclosure, as the court directs.

(2) A disclosure ordered under Subsection (g) or otherwise under this article may not be carried out before the 10th day after the date the holder receives notice under Subdivision (1).

(3) The holder has standing to file a motion to stay a disclosure under this article and to seek review of an order denying the stay or ordering disclosure, including by mandamus. A holder's assertion of rights under this article does not make the holder a party to the criminal proceeding.

(j) One-time advisement. Before or at the first conferring between a holder and a representative of the prosecutor's office, the attorney representing the state shall provide the holder a single written explanation of this article in plain language, stating that: conferring communications are privileged and may not be disclosed except as provided by this article; statements of fact and statements about testimony are not privileged; a portion of a communication that is exculpatory, impeaching, or mitigating may be disclosed to the defendant through the sealed in camera procedure provided by this article; and communications sent to persons other than a representative of the prosecutor's office may not be protected by this article. The explanation is given once and need not be repeated. Failure to provide the explanation does not waive the privilege and is not a ground for relief for any party.

(k) Segregation and log. The attorney representing the state shall maintain conferring communications separately from the discovery file in the case. On the request of a party, the attorney representing the state shall provide the court a log of conferring communications, under seal, stating the date, the participants, and the classification claimed for each communication, sufficient to permit in camera adjudication under this article.

(l) Other exceptions. (1) The privilege under this article

does not apply to a communication made in furtherance of a crime or fraud, or to a disclosure required by a mandatory reporting law, including Chapter 261, Family Code.

(2) If an expert witness for the state relies on a conferring communication, the facts or data relied on are governed by the Texas Rules of Evidence.

(3) A comment on, or an inference from, a claim of privilege under this article is not permitted in any proceeding.

(m) No party status. Nothing in this article makes a victim or holder a party to a criminal proceeding, or amends Section 30(e), Article I, Texas Constitution.

SECTION 2. Article 39.14(a), Code of Criminal Procedure, is amended to provide that the rights granted to a defendant under that article do not extend to a conferring communication privileged under Article 56A.056, except as provided by that article.

SECTION 3. Article 56A.051(c), Code of Criminal Procedure, is amended to include the privilege provided by Article 56A.056 among the rights to be explained to a victim on request.

SECTION 4. [Conforming amendment -- Chapter 552, Government Code: a privileged conferring communication in a prosecutor's file is excepted from required public disclosure under the Public Information Act. Placement for Legislative Council drafting, in coordination with the evidence-sharing proposal.]

SECTION 5. If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. Article 56A.056, Code of Criminal Procedure, as added by this Act, applies to a criminal proceeding that commences on or after the effective date of this Act, and to conferring communications made in such a proceeding.

SECTION 7. This Act takes effect September 1, 2027.