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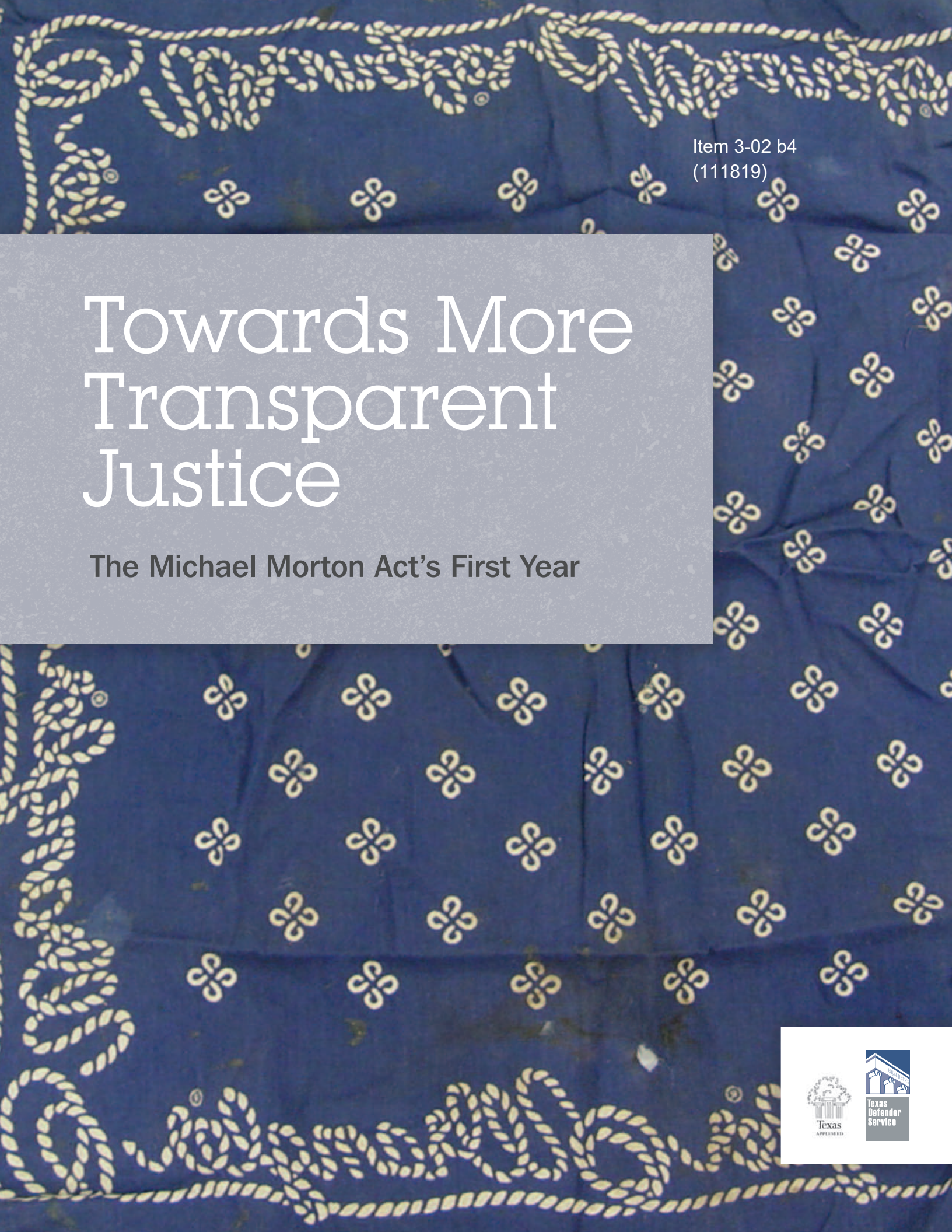
Towards More Transparent Justice

The Michael Morton Act's First Year



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The cover image depicts a blue bandanna that was recovered from the vicinity of Michael Morton's home the morning after his wife, Christine Morton, was murdered. Although no physical evidence connected Michael to the crime, Michael was charged with and eventually convicted of this offense. Throughout his case, prosecutors withheld other evidence collected during the original investigation that pointed towards Michael's innocence. Michael served twenty-five years in prison before DNA testing obtained by the Innocence Project in 2011 of this bandanna cleared his name and implicated the true perpetrator: Mark Alan Norwood, who was subsequently convicted of this crime.

In 2013, the 83rd Texas legislature passed the Michael Morton Act to prevent future wrongful convictions and reinforce public trust in the criminal justice system.

The authors would like to extend our deep thanks to the Innocence Project for the use of this image.

ACKNOWLEDGMENTS

Texas Appleseed and the Texas Defender Service would like to extend our deep gratitude to our *pro bono* partner Locke Lord LLP, for their generous support and the significant research that they undertook for purposes of this report on the Michael Morton Act's implementation. Locke Lord attorneys and staff reviewed discovery policies from district attorney offices throughout Texas and assisted with additional research and review of this report.

In the course of our research, open records requests were sent to every district and county attorney office in Texas. We are appreciative of each office's cooperation with our work.

We also extend enormous thanks to the following individuals who made this project possible: Arthur E. Anthony, Rebecca Bernhardt, Patricia Cummings, Yaman Desai, David Dyer, Deborah Fowler, Amelia Gerson, Steve Hall, Kent Hoffman, Kathryn Kase, Susan Kidwell, Marc Lipscomb, Elizabeth Mack, Amanda Marzullo, Troy McKinney, Mary Schmid Mergler, and Brooks Richmond.

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Executive Summary

On January 1, 2014, the Michael Morton Act took effect—marking the first time in Texas history that criminal defendants have a statutory right to review the State's evidence against them without a court order. This enactment instilled transparency into the criminal justice system, and ensured that the defense may acquire information necessary to: evaluate the charges against the accused, locate and preserve evidence that is favorable to the defendant, and make an informed decision about how to proceed. The following report is an evaluation of the Act's implementation during its first year. Its goal is to reveal any persistent roadblocks to a defendant's access to discovery material despite the Act's passage, and to identify best practices that may ease the transition process for district and county attorney offices. In preparing our findings, Texas Appleseed and Texas Defender Service reviewed written discovery policies established in prosecutor offices and surveyed defense attorneys throughout the State.

This systematic overview uncovered a number of issues with the Morton Act's implementation at the ground level. However, none of the concerns raised in drafting this report support the conclusion that further revision of the Texas discovery statute is necessary at this point in time. Rather, the issues discussed in this report are matters of interpretation and local procedure that should resolve themselves as prosecutors streamline their processes for reviewing and trying cases and as defendants litigate their access to specific materials.

The Michael Morton Act and Its Passage

Outraged over a series of high profile exonerations, the 83rd Texas Legislature passed the Michael Morton Act (S.B. 1611) in 2013, which mandates open file discovery processes in criminal proceedings throughout the state. This legislation received bipartisan support in both chambers and was drafted in consultation with stakeholders who work in nearly every division of the criminal justice system. Its design is to prevent future wrongful convictions by ensuring that the defense has access to all relevant materials and favorable information necessary to investigate and prepare its case. A report published by Texas Appleseed and Texas Defender Service in 2013, *Improving Discovery in Criminal Cases in Texas: How Best Practices Contribute to Greater Justice,* revealed that the Texas criminal discovery statute was out of step with best practices promulgated by the American Bar Association and adopted in a majority of other states. At the time, the defense had no statutory right to discovery—the exchange of relevant materials and information between parties to a legal proceeding—without a court order. And when issuing discovery directives, trial courts were limited in the types of disclosures they could mandate. Relevant materials, including offense reports, were not included in the statute's list of documents and other tangible things that could be turned over in discovery. While many district and county attorneys went beyond the state law requirements to provide some form of open file discovery to defendants, other prosecutors provided none without a court order, and still others required that defendants waive other rights in order to receive discovery.

The Morton Act leveled the playing field between the prosecution and the defense by implementing many of the 2013 report's recommendations. It pro-

vides that almost all relevant, non-privileged material must be provided to the defense "as soon as practicable" after the prosecution receives a request. The law also contains provisions that protect confidential information. Further, the law requires that the State disclose any information that is favorable to the defense, whether that information is exculpatory (tending to negate the defendant's guilt), impeaching (grounds for challenging a witness's testimony or credibility) or mitigating (supporting a lesser punishment). This obligation to produce such favorable information extends beyond a final conviction.

Background

At the time of the Act's consideration, several high profile exonerations shook the public's trust in the Texas criminal justice system. A study of wrongful conviction cases in Texas found that nearly a quarter were due to some form of prosecutorial misconduct. Many of these cases were resolved only after the defendant spent years, if not decades, in state custody before their innocence was brought to light. For example, Anthony Graves was convicted and held on death row for 12 years due in large part to the testimony of a witness who repeatedly recanted his statements against Graves to the prosecutor and whose statements were not disclosed to the defense. Michael Morton, for whom the Act is named, was exonerated in December 2011 after spending nearly 25 years in prison for the murder of his wife. Morton, who had no criminal or violent history, steadfastly maintained his innocence from the beginning of the police investigation. After a series of applications to Texas courts, all of which were fervently opposed by the prosecution, DNA testing on a bandanna found near the crime scene exonerated Morton and implicated another individual who is also under indictment for a subsequent murder in Travis County. The case was particularly distressing because the prosecutor who sent Morton to prison had knowingly hidden from the defense evidence that pointed to Morton's innocence.

At the time of the Act's consideration, several high profile exonerations shook the public's trust in the Texas criminal justice system. A study of wrongful conviction cases in Texas found that nearly a quarter were due to some form of prosecutorial misconduct.

Redaction & Withholding Policies

Despite the Act's clear mandate that prosecutors disclose all relevant material that is requested by the defense, several district and county attorney offices withhold broad categories of documents—*e.g.*, medical records—from their disclosures to the defense or require the issuance of a protective order before they are released. These policies often are based upon arguments of confidentiality, such the physician-patient privilege, which are inapplicable in a criminal proceeding or are rendered without legal force by the means in which the records were obtained. The Morton Act's disclosure requirements, codified in Article 39.14(a), are subject only to the exceptions contained in the language of the statute itself—*i.e.*, exceptions for work product, written communications between prosecutors and other agents of the state. Policies that direct line prosecutors to uniformly withhold additional material are overly broad and hinder the defense function. While there may be instances when materials must be withheld to ensure an individual's safety, these occurrences are few and far between. Any subsequent withholding should be exercised with judicial oversight.

In a similar vein, many offices also indicated that they uniformly redact information from discovery materials in a manner that contradicts the Morton Act. The redaction procedure established under Article 39.14(c) specifically provides that any redactions must be limited to information that is not subject to discovery. Additional redactions for information such as the witness's address and date of birth are explicitly prohibited. The Act protects sensitive information by restricting the defense's ability to circulate confidential information provided in discovery and requiring the redaction of specific information before showing the material to anyone outside the defense team (including the defendant).

Moreover, any exceptions to disclosure in the Act do not apply to information that is favorable to the defendant pursuant to Article 39.14(h), or the constitutional requirements set out in *Brady v. Maryland* and its progeny. Favorable information, whether contained in a document or tangible material, or constituting a mere verbal statement not written or recorded by law enforcement, must be provided to the defense at all times. Broad policies for withholding or redacting information must be revised so that information that is subject to disclosure under the Act is consistently provided.

Law Enforcement Practices

Coordination between the prosecution and investigating agencies is crucial to the full realization of the Morton Act's mandate. The Act not only applies to information that is in the hands of prosecutors but to any information that is in the custody of the State or its agents. Yet, many jurisdictions are experiencing issues in the transmission of information between law enforcement agencies and line prosecutors.

Our review revealed that prosecutors' instructions to law enforcement agencies, or a lack thereof, may create confusion about law enforcement responsibilities under the Morton Act. Many prosecutors produced no evidence that they had trained or informed local law enforcement agencies about the Act, or implemented practices to ensure that law enforcement officers knew what must be disclosed in each and every case.

Among the jurisdictions that had created memoranda, training materials or new forms and processes, many included information that misstated or diminished the agencies' obligations. Often these forms emphasized law enforcement's constitutional obligations under *Brady v. Maryland*, but ignored the broader requirements of the Act. Other materials developed by prosecutors mischaracterized the obligations to disclose information under the law. These materials include forms stating that law enforcement's obligation to disclose information in a case ends with a final conviction, which explicitly contradicts the Act's directive to disclose any favorable evidence before, during or *after* a case's resolution.

In certain jurisdictions, law enforcement officers may be engaging in practices that prevent the prosecution's full compliance with the Act. Reports from defense attorneys also revealed that in a handful of jurisdictions prosecutors may be disclosing everything in their own files, but not actively encouraging and requiring law enforcement to make sure all relevant information was included in those files.

Prosecutors in each jurisdiction must take affirmative steps to educate and communicate with law enforcement and other investigating agencies to ensure that they understand and comply with the Morton Act. Law enforcement agencies and prosecutors should implement practices that require law enforcement to provide to the prosecutor every single piece of information collected in a case, leaving it to the prosecutor to decide whether that information should be disclosed to the defense.

Timing of Discovery

The Morton Act is clear in its mandate that prosecutors produce discovery to the defense "as soon as practicable" after a request is received. This language does not contain any additional condition necessary to trigger the discovery process. Yet, several district and county attorney offices in Texas have established policies that are inconsistent with this directive. Most of these policies are problematic in that they postpone discovery productions until a formal charging instrument—*i.e.,* an indictment or information— is filed. Others deny access to certain materials until the eve of trial in contradiction of the plain language of the statute. Under both types of conditions, weeks, if not months, may transpire before a defendant is able to review key materials regarding his or her case. Such policies hobble the defense function and create inefficiencies in the criminal justice system. Prosecutors should make materials available to the defense as they become available to the State, regardless of a case's procedural posture.

Discovery-Related Waivers

The Morton Act's express language provides defendants with an unqualified right to discovery. Yet, many prosecutor offices have established policies that limit circumstances in which this right may

be exercised—either by requiring that defendants waive the right to discovery in exchange for a favorable plea, or that defendants forfeit other rights in exchange for accessing discovery. Both of these requirements are contrary to the Act, and are unlikely to continue as defendants litigate their rights in the proceedings against them.

The new discovery rules apply with the same force in cases that do and do not proceed to trial. Moreover, their application to plea bargained cases is essential for full operation of the Act and the efficient resolution of cases. The overwhelming majority—upwards of 95 percent—of felony and misdemeanor cases in Texas are resolved through pleas of guilty or *nolo contendere* (no contest). Yet, research has conclusively established that innocent people plead guilty with alarming frequency. For this reason, it is particularly troubling that prosecutor offices are asking defendants to waive their discovery rights in exchange for favorable treatment. Given that prosecution in and of itself is a form of punishment, the temptation to plea, coupled with inadequate information regarding one's case, may lead a number of defendants to enter a guilty plea, despite significant weaknesses in the prosecution's case.

Moreover, depending upon their scope, many of these waivers of discovery violate a prosecutor's ethical obligations to produce all information favorable to the defense under the Texas Disciplinary Rules of Professional Conduct. Regardless of whether a waiver would be upheld in court, the waivers should not be used. If the intent of a "waiver" is only to acknowledge that discovery has concluded and that the prosecutor will not produce any additional information that is not exculpatory, impeaching or mitigating, then documents should state as much without asking the defendant to "waive" any discovery rights.

A corollary to the requirement by some offices that defendants waive their rights to discovery in order to plead guilty are requirements by some offices that defendants waive other rights in order to receive any discovery at all. For example, one office reported conditioning the right to receive discovery on defense counsel's agreement not to file any discovery-related motions and to forego disclosure of certain categories of evidence, like 404(b) character evidence. Other counties ask defendants to waive the right to file discovery motions until a discovery request has been informally made and denied, or to waive the right to certain types of evidentiary objections as a condition of reviewing the information in the state's file.

The passage of further amendments to Article 39.14 during the 84th legislative session, would likely cause more confusion and stymy existing efforts to appropriately implement and comply with the 2013 law.

These waivers place improper conditions on the defense's ability to exercise a statutory right. Indeed, the State Bar of Texas recently issued an ethics opinion holding that prosecutors violate the Texas Rules of Professional Conduct if they require such waivers. In light of this opinion, the practice of imposing conditions on discovery productions should disappear.

Disclosure Format, Documentation & Costs

The Morton Act does not specify a particular format or method of production. Article 39.14(a) provides that discovery may be turned over by furnishing paper or electronic copies, or by permitting the inspection of the requested material. This flexibility was written into the law in order to accommodate the differing types of cases and the needs and capabilities of different offices across the State. Unsurprisingly, prosecutor offices have employed a variety of different disclosure methods during the last year alone, including: (1) cloud-based repositories, (2) email, (3) regular mail or carrier services, (4) in-person only pick-up, or (5) inspection procedures that allow defense teams to review files and make their own copies of the material within. Among these delivery mechanisms, the exclusive use of the last two will violate the Act by delaying discovery productions or failing to produce material altogether.

The Morton Act also codifies the well-established principle that parties to a legal proceeding should record and document their disclosures. Articles 39.14(i) and (j) provide that the prosecutors must document the materials that they produce to the defense, and that both certify a list of disclosed material to the court before a plea is accepted or the case proceeds to trial. Anecdotal reports indicate that this aspect of the law is particularly burdensome for prosecutor offices. However, this requirement protects the prosecutors from future allegations of misconduct and forecloses disputes about what was produced in post-conviction proceedings which often occur years, if not decades, after a case's disposition. In addition, there are a number of means of streamlining the documentation process.

For example, electronic discovery systems can be programmed to inventory each case and notify the defense as new materials are added. Other simple techniques for counties not prepared to implement an electronic discovery system—such as a case index at the beginning of each file, or the Bates numbering of all discoverable documents—can make the documentation process more efficient.

Relatedly, several reports have surfaced about the cost of implementing the Morton Act. While an assessment of the expenses associated with the new law is beyond the scope of this report, many of the costs associated with the Act that have been reported are either one-time initial costs—*e.g.,* purchase of discovery management software—or costs that should decrease as more efficient processes are developed.

Conclusion

Texas was in dire need of an overhaul of its criminal discovery statute when the legislature passed the Morton Act in 2013. The new law entitles defendants to receive a vast amount of material in the State's possession, while protecting information that is confidential, privileged or could endanger public safety. Still, a law that changes processes in every single criminal case across the state should be expected to have a steep learning curve. The fact that the Morton Act has caused some confusion and struggles among those responsible for its implementation should come as no surprise.

The major issues highlighted in this Report—*e.g.*, failure to disclose certain categories of information, misunderstandings among law enforcement about what they are required to provide to prosecutors, delays in the provision discovery, and the requirement by some offices that defendants' waive certain discovery-related rights in the plea process—are vitally important to the full implementation of the law as well as the fair administration of justice. Yet they are not necessarily problems with the language of the statute itself, but rather with interpretations of that language, or the necessary work and expense related to the initial development of an efficient process to implement the new requirements. None of these are issues that require an immediate legislative fix. They will likely be resolved in the coming months and years through (i) outreach by prosecutors, law enforcement, defense attorneys and other parties about the best practices to ensure defendants have access to relevant information in each case; (ii) education efforts on the part of state associations and agencies, as well as individual prosecutor offices, about what the law requires; and (iii) litigation of issues that continue to go unresolved.

The passage of any new legislation during the 84th legislative session that would further amend Article 39.14 would likely cause more confusion and stymy the existing efforts to appropriately implement and comply with the 2013 law. Instead, policymakers should provide practitioners with additional time to develop best practices around the new legal requirements to more fully adhere to both the letter and spirit of the Morton Act.

Introduction

[T]here is nothing more vital [to] the reliability and quality of our justice system in Texas than bringing all of the relevant facts to light to ensure we're protecting the innocent, convicting only the guilty, and providing justice . . . that we can trust.[1]

Inspired by the injustice of Michael Morton's wrongful conviction due to prosecutors' failure to disclose exculpatory information, the 83rd Texas Legislature passed S.B. 1611, known as The Michael Morton Act ("Morton Act"), which was signed into law on May 16, 2013. Designed to instill transparency in the Texas criminal justice system, the bill overhauled the state's criminal discovery law. Its changes to Article 39.14 of the Texas Code of Criminal Procedure were the first modifications to this statute since 1965, and by any benchmark, they were long overdue.

Before the Morton Act's effective date on January 1, 2014, the defense had no automatic right to review and investigate the prosecution's evidence against the accused. Discovery—*i.e.* the exchange of relevant information between parties to a legal proceeding—could be obtained only by filing a successful motion "showing good cause" with the presiding court. Even when the motion was granted by the court, defendants and their attorneys gained access to just a portion of the evidence at issue.[2]

Key materials, including witness statements, expert reports, and the criminal records of the defendant and any co-defendant(s) and witnesses, were excluded from production. Consequently, the defense had no procedural mechanism to acquire information essential to guard against overcharging, to conduct an independent investigation, and to evaluate evidence likely to be presented to the grand jury or admitted at trial.

Notwithstanding the prosecution's obligation to produce favorable information to the defense,[3] the sole avenue for obtaining additional insight into the facts surrounding an alleged offense was to appeal to the prosecution to voluntarily supplement its disclosures beyond the requirements of Texas law. Recognizing that a transparent discovery process ensures the integrity of case outcomes, some prosecutor offices implemented varying degrees of "open file" policies that granted the defense broad access to the prosecution's files.[4] Yet, the differences between, and sometimes within, district attorney offices created an environment in which the level of information provided to the accused depended in large part on where the charges were brought and the whim of individual prosecutors.[5]

The reliance on the State to disclose materials on its own accord created additional challenges. Although the prosecution has a duty to ensure that justice is served, this duty often is in tension with its obligation to seek convictions in an adversarial system. Hence, crucial information can be withheld from

1. Debate on Tex. S.B. 1611 on the Floor of the Senate, S.J. of Tex., 83rd Leg., R.S. 852-53 (Apr. 11, 2013) (statement of the Bill Author, Senator Rodney Ellis) [hereinafter Senate Debate].
2. Tex. Code Crim. Proc. art. 39.14(a) (West 2012), amended by The Michael Morton Act, Tex. Code Crim. Proc. art. 39.14(a) (West 2013).
3. Prosecutors have an affirmative duty to produce to the defense evidence that is exculpatory, mitigating or impeaches a witness pursuant to the Fourteenth and Sixth Amendments of the U.S. Constitution as well as the Texas Disciplinary Rules of Professional Conduct. However, as explained in later sections, these requirements in and of themselves are insufficient to ensure the fairness of the proceedings.
4. Texas Appleseed & Texas Defender Service, Improving Discovery in Criminal Cases in Texas: How Best Practices Contribute to Greater Justice 21 (2013) (describing open file policies established by the Galveston and El Paso district attorney's offices) [hereinafter 2013 Discovery Report].
5. *Id.* at 5.

the defense even when the prosecution proceeds in good faith. Factors such as cognitive bias[6] in favor of the prosecution's own theory of the case and heavy workloads, affect prosecutors' decision making. In some cases, prosecutors may even intentionally withhold information that the law would require to be disclosed to the defense. These nondisclosures often remain unknown to the defense; Michael Morton's case and other exonerations demonstrate that it frequently takes years, if not decades, after a conviction before suppressed exculpatory evidence comes to light.[7]

Recognizing the necessity of limiting prosecutorial discretion to withhold information from the defense, the Morton Act establishes statewide rules regarding what is and is not subject to discovery in a criminal proceeding. The defense no longer must seek a court order to access information in the prosecution's possession. Rather, the Act requires that the prosecution produce a broad range of information upon the defense's request, and codifies the State's obligation to produce any favorable information regardless of the defense's request. It also balances the defense's increased access to case information with the safety and privacy interests of witnesses and victims by specifying discovery exemptions, redaction requirements and restrictions regarding the use of produced materials. This framework is a radical advance in the fairness and accuracy of the Texas criminal justice system.

However, change takes time. Issues with implementation inevitably occur when the legislature enacts laws that greatly modify the processes of another branch of government. This report reviews the Act's implementation during its first year in effect. Its goal is to uncover any pervasive problems in local discovery procedures in light of the Act, as well as to identify best practices that may ease the transition process for district and county attorney offices. A review of discovery policies and practices across the state reveals a handful of issues that have repeatedly emerged across jurisdictions. Much of this report is dedicated to discussing the more problematic issues that we uncovered: the wrongful withholding of discovery materials, problematic law enforcement practices, the timing of disclosures and the means by which discovery is provided to the defense.

None of these implementation issues support the conclusion that amendment of the Texas discovery statute is necessary or appropriate at this time. Rather, the implementation issues are generally matters of interpretation of the current law or concern initial process development or expense, and are likely to resolve themselves as defendants litigate access to discoverable materials, and prosecutors streamline procedures for reviewing and producing case documents. Additional legislation at this juncture would create further problems with implementation at the county level. The best course of action for the legislature would be to avoid tinkering with the text of the statute, thus allowing prosecutors, as well as law enforcement, defense attorneys, and the judiciary to continue to improve their practices in order to comply with the letter and spirit of the law as currently written.

Methodology

Beginning in February 2014, Texas Appleseed and Texas Defender Service submitted Public Information Act (PIA) requests for documents concerning new discovery policies to every district and county attorney office in the state. We received responses from 144 district attorneys and 79 county attorneys. After reviewing these responses, we interviewed defense attorneys in nine of the 10 largest jurisdictions in the state, as well as staff members of public

6. Texas District and County Attorneys Association, Setting the Record Straight on Prosecutorial Misconduct 16-17 *(2012)* [hereinafter TDCAA Report]; *see also United States v. Agurs, 427 U.S. 97, 117* (Marshall, J., dissenting) (arguing that prosecutors naturally tend 'to overlook evidence favorable to the defense, and [have] an incentive . . . to resolve close questions of disclosure in favor of concealment); and Stephanos Bibas, *The Story of Brady v. Maryland: from Adversarial Gamesmanship Toward the Search for Innocence*, in Criminal Procedure Stories 10 (Carol Steiker, ed. 2005) (citing psychological studies that indicate that "that people tend to interpret new evidence so as to confirm their initial judgments.")

7. Senate Debate, *supra* note 1.

WHY IS DISCOVERY IMPORTANT?

A robust and uniform open file discovery process is critical for several reasons. First, discovery promotes the efficient resolution of criminal cases by informing the defense of the strength of the evidence against the defendant. For example, in a driving while intoxicated case, the prosecution might disclose to the defendant results of a blood test with alcohol levels well above the legal limit, a police officer's report indicating that the defendant badly slurred his speech, and the witness statement of a passenger who saw the defendant drinking all evening. Faced with these facts, the defendant is likely to accept a plea bargain rather than demand a lengthy and expensive trial.

Second, a uniform process creates additional efficiencies by reducing the need for discovery motions and by eliminating disagreements about the information and materials subject to disclosure. This process also reduces county indigent defense expenditures by limiting the time that appointed counsel—who represent defendants in roughly 70 percent of all felony cases and 40 percent of all misdemeanor cases—spend preparing and filing motions for discovery.

Finally, and most importantly, a truly open file policy reduces the likelihood of wrongful convictions. Innocent defendants are more likely to avoid wrongful conviction when they possess all available information about the state's case and sufficient time and opportunity to test the allegations against them.

2013 Discovery Report, *supra* note 4 at 1-2.

defender offices across Texas. We also sought information regarding local discovery practices through a survey that was circulated to defense lawyers by the Texas Criminal Defense Lawyers Association.

Accordingly, this study captures the state of the Morton Act's implementation during its first months of effect. Our discussions with defense lawyers revealed that implementation has been an ongoing effort, as expected. In the months following our PIA requests, several prosecutor offices reportedly changed their discovery practices and procedures, and are likely to continue to do so as defense counsel raise issues regarding access to discovery and best practices are circulated. The individual policies and documents cited here may have changed since the date they were provided to Texas Appleseed and Texas Defender Service. Still, implementation issues remain a persistent challenge in the prosecution of criminal cases across Texas, regardless of any modifications made by individual prosecutor offices.

Background

A CRIMINAL JUSTICE SYSTEM IN WHICH THE DEfense has limited access to information in the prosecution's possession cannot function effectively. Granting the defense broad, uniform and early access to information in the State's possession reduces the risk of wrongful convictions, and promotes the efficient resolution of criminal cases. Yet, before the passage of the Morton Act, the Texas law governing criminal discovery in Texas was seriously deficient. In particular, Texas discovery rules fell well below the production standards promulgated by the American Bar Association[8] and the Timothy Cole Advisory Panel on Wrongful Convictions.[9] The Timothy Cole Advisory Panel noted in 2010 that "Texas is in the distinct minority when it comes to limiting discovery in criminal cases . . . without access to offense and expert reports until the time of trial, the ability for defense counsel to provide a meaningful defense is diminished."[10]

At the time, Texas criminal defendants did not "have a general right to discovery of [material] in the possession of the State."[11] In order to gain access to any specific item, the defense had to show "good cause" for its disclosure, that it was material to the defense, and that it was in the possession of the

8. AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3rd ed. 1996).
9. The 81st Legislature established the Timothy Cole Advisory Panel on Wrongful Convictions to advise the Task Force on Indigent Defense (now the Texas Indigent Defense Commission) in the preparation of a study on the causes of wrongful convictions and to make recommendations to prevent future wrongful convictions in Texas.
10. TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TASK FORCE ON INDIGENT DEFENSE 23 (2010) *available at* http://tidc.texas.gov/media/25663/FINALTCAPreport.pdf [hereinafter TIMOTHY COLE REPORT].
11. *Scaggs v. State*, 18 S.W.3d 277, 294-95 (Tex. App.—Austin 2000, pet. ref'd).

State.[12] Even if this threshold was met, defendants did not gain access to the full breadth of information at issue in their cases. The scope of discovery that would be produced was limited to items specifically listed in Article 39.14(a). Crucial documents, such as police reports and witness statements, were specifically excluded from this list.[13]

The prosecution's only affirmative obligations to produce materials stemmed from the U.S. Constitution and the Texas Disciplinary Rules of Professional Conduct. *Brady v. Maryland*[14] and its progeny hold that a prosecutor must disclose all exculpatory, mitigating or impeachment evidence that is material to the accused's purported guilt or punishment.[15] The Texas Disciplinary Rules of Professional Conduct supplement *Brady*'s constitutional requirements with the mandate that a prosecutor shall:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged information known to the prosecutor.[16]

In theory, *Brady* and Rule 3.9(d) required prosecutors to produce favorable information to the defense. In practice, they accorded few protections to the accused. The withholding of evidence amounts to a constitutional violation only when the defense can demonstrate "in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure."[17] This procedural hurdle—the so-called materiality requirement—is so high that many legal commentators have argued that the *Brady* rule is "best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's right to withhold evidence from the defense."[18] More practically, the materiality requirement poses difficulties at the trial level, requiring judges to predict how a particular piece of information will impact the overall case before understanding the prosecutor's and defense's theories and how they relate to facts underpinning the alleged offense. A recent study of federal district court rulings highlighted this difficulty, finding that judges overwhelmingly favored the prosecution's position that information was not subject to *Brady* disclosure.[19] Additionally, the study found that two courts considering the same evidence and fact patterns reached different conclusions regarding the evidence's materiality.[20]

The Disciplinary Rules of Professional Conduct broaden the *Brady* obligation by directing prosecutors to disclose any favorable evidence—concerning the defendant's guilt or punishment—without consideration for its materiality.[21] However, the State Bar of Texas' disciplinary system "suffers from a lack of transparency and accessibility"[22] that has left prosecutors without guidance regarding their ethical responsibilities. Prosecutors frequently elect to proceed with their cases confidentially, which causes disciplinary proceedings to be closed to the public and prevents the State Grievance Committees from disclosing evidence of misconduct. The high evidentiary standard for disciplinary action also limits the State Bar's ability to enforce broader disclosure obligations for prosecutors. Before the State Bar can discipline a prosecutor for withholding evidence under Rule 3.09(d), it

12. *See, e.g., Hoffman v. State,* 514 S.W.2d 248, 252 (Tex. Crim. App. 1974) ("The discovery statute, Article 39.14, Vernon's Ann. C.C.P., is itself a limited one and this court has repeatedly held that it is necessary for the defendant when making a motion for discovery to show the statutory requisites of good cause, materiality, and possession by the State.").
13. *Mendez v. State*, 03-03-00571-CR, 2004 WL 2900500, at *4 (Tex. App.-Austin Dec. 16, 2004) ("The statute excludes witness statements from production and trial courts have limited authority to order discovery of anything outside the purview of the statute.").
14. 373 U.S. 83 (1963).
15. *Agurs*, 427 U.S. at 106 (holding that the duty to disclose exculpatory evidence arises "even if no request" to produce such materials is made); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (holding that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").
16. Tex. Disciplinary R. Prof'l Conduct 3.9(d).
17. *Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011) (citing *Hampton v. State,* 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) *and United States v. Bagley*, 473 U.S. 667, 682 (1985)).
18. Alafair S. Burke, *Revisiting Prosecutorial Disclosure,* 84 Ind. L.J. 481, 483 (2009); *see also* Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process,* 94 KY. L.J. 211, 213-14 (2005) (noting that the Brady doctrine imposes a review standard higher than harmless error because a prosecutor's failure to disclose exculpatory evidence "becomes error only when a reviewing court concludes that the nondisclosure of its own accord has produced a wrongful conviction at trial").
19. National Association of Criminal Defense Lawyers, Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases 15-20 (2014), *available at* https://www.nacdl.org/discoveryreform/materialindifference/.
20. *Id.*
21. *See* ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 454 (2009) (stating that Model R. Prof'l Conduct 3.08(d) on which the Texas rule is based, requires that prosecutors turn over favorable evidence regardless of any calculus regarding its materiality); *Cone v. Bell*, 556 U.S. 449, 470 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady,* only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."); *Kyles*, 514 U.S. at 437 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3–3.11(a) (3d ed.1993)").
22. TDCAA Report, *supra* note 6 at 17.

must establish that he or she possessed exculpatory or mitigating evidence, knew that the material was favorable to the defense, and still failed to produce it. This *mens rea* requirement is difficult to meet, particularly when the suppression of evidence is discovered years after the fact. As a result, the State Bar rarely disciplines prosecutors for violating Rule 3.9(d), even where there is substantial evidence of misconduct.[23]

The law governing criminal discovery before the passage of the Morton Act did not promote fairness and justice. There was no statutory right to access information in the prosecutor's possession, and neither the constitutional right to access certain favorable information nor the Disciplinary Rules of Professional Conduct effectively compensated for gaps in the law.

Impact on the Criminal Justice System

THIS ONE-SIDED ACCESS TO INFORMATION UNDERmined the integrity of the Texas criminal justice system. As several recent wrongful convictions illustrate, the state's previous discovery laws provided the defense with insufficient information to examine and confront the prosecution's evidence. A study of 86 high-profile exoneration cases that occurred in Texas between 1989 and 2011[24] found that nearly a quarter (21) of these wrongful convictions were due to some form of prosecutorial misconduct, and in 17 of the 21, prosecutors withheld exculpatory evidence from the defense. In reviewing a narrower subset of wrongful conviction cases that were adjudicated between 2004 and 2008, a subcommittee of the Texas District and County Attorneys Association identified at least four murder cases where "a *Brady* violation could have been avoided if the prosecutor's office had an open-file policy and gave the defense access to witness statements and offense/expert reports before trial."[25] It is undeniable that many of these wrongful convictions were due at least in part to the restrictive discovery practices before January 1, 2014. The following are but a few examples of defendants who were wrongfully convicted or incarcerated based on prosecutors' failure to provide broad access to the defense under the old discovery law.

Michael Morton

MICHAEL MORTON'S WRONGFUL CONVICTION IS A prime example of the errors that a transparent criminal justice system can prevent. Morton served 25 years in prison for his wife's murder before DNA testing of crime scene evidence cleared his name and implicated the true perpetrator. During this time, his life was thoroughly uprooted. His conviction led to his isolation from his friends and family as he mourned his young wife's death, and he was estranged from his son, Eric, who was 3 ½-years-old when he lost his mother.[26] Morton's exoneration gave rise to a public outcry for reform, not only due to the extreme injustice that he and his family suffered, but also because his conviction would never have occurred had the prosecution disclosed favorable information suggesting Morton had not killed his wife.

Christine Morton was bludgeoned to death on August 13, 1986, in their family home in Northwest Austin. Though he was at work at the time of the murder, Morton was the prime suspect from the beginning. Moments after he was informed of his wife's death, Morton was introduced by Williamson County Sheriff Jim Boutwell to Sgt. Don Wood, the lead investigator, for questioning. Morton cooperated at every point. He repeatedly answered investigative questions without benefit of counsel, consented to a search of his pickup truck, underwent two lie detector tests and volunteered samples of his hair, blood and saliva. Although no evidence linked Morton to the crime, he was charged with Christine's murder a month later. In February 1987, he was convicted and sentenced to life in prison.

The prosecution's theory at trial was that Morton—a devoted father and husband with no history of violent or criminal conduct—beat and killed his wife "simply because [she] was too tired to have

23. Bennett L. Gershman, *Reflections on Brady v. Maryland*, *47* S. TEX. L. REV. *685, 723 (2006).*
24. Brandi Grissom, *Courts Found DA Error in Nearly 25% of Reversed Cases*, TEX. TRIB., July 5, 2012, *available at* http://www.texastribune.org/library/multimedia/errors-in-judgment/ (analyzing a list of wrongful conviction cases compiled by the National Registry of Exonerations).
25. TDCAA REPORT, *supra* note 6 at 14.
26. Pamela Colloff, *The Innocent Man: Part One*, TEX. MONTHLY, Nov. 2012 (describing Michael Morton's custody battle with his wife's family following his conviction and his pleas to see his son), *available at* http://www.texasmonthly.com/story/innocent-man-part-one.

sexual relations with him after they returned from celebrating his 32nd birthday at a restaurant the previous evening."[27] In preparing the case, Williamson County District Attorney Kenneth Anderson became aware of substantial evidence of Morton's innocence, but refused to produce it to the defense.[28] In fact, he vigorously contested the defense's access to *any* evidence in the case, refusing to produce notes concerning Morton's own statements to law enforcement. Anderson further told the trial judge that the prosecution possessed no evidence favorable to the defense.[29]

Decades later, the Innocence Project obtained copies of the investigation file via a Public Information Act request. The file revealed that, early in the investigation, law enforcement possessed significant evidence of Morton's innocence, including:

- A taped interview of Christine's mother, who reported to police that Morton's son, Eric, was present at the time of the murder, accurately described the crime scene and stated clearly that "Daddy" was not there; and

- Statements from neighbors that they saw a man park a green van in a vacant lot by the Morton home on several occasions, and that one neighbor observed the man approach the house on the morning of the murder. Crime scene photos revealed that a fresh footprint was recovered from the area where the man was observed.

This information was not only favorable to the defense, but provided context for other evidence that established Morton's innocence. The morning after the murder, Christine's brother, John Kirkpatrick, recovered a blue bandanna with blood on it from a construction site behind the couple's house. DNA testing revealed that it contained Christine's blood and DNA from Mark Alan Norwood, who has since been convicted of Christine's murder and was under indictment for a subsequent murder in Travis County at the time of this report's publication.[30]

Anthony Graves

ANTHONY GRAVES WAS SENTENCED TO DEATH FOR six murders because the prosecution withheld compelling information that the star witness against him had lied and that Graves was innocent. By the time of his release in 2010, Graves had endured 18 years of incarceration, 12 of which were spent largely in solitary confinement while on death row,[31] and two execution dates.[32] Yet, Graves' suffering and that of his family could have been avoided had the prosecution produced the exculpatory information in its possession to his defense lawyers.

On August 12, 1992, 45-year-old Bobbie Davis was murdered in her home along with her teenage daughter—Nicole—and four grandchildren—Denitra, Brittany, Lea'Erin and Jason. Crime scene analysis would reveal that a hammer, gun, and knife were used to inflict a range of injuries on the victims and stab them collectively 66 times.[33] After appearing at the victims' funeral with extensive burn wounds, 26-year-old Robert Earl Carter, Jason's father (and against whom Jason's mother recently had initiated paternity proceedings) became a suspect in the case. Skeptical that one individual could have acted alone in committing the crime, Texas Rangers pressed Carter for information regarding co-perpetrators. Carter eventually succumbed to their questioning and implicated Graves.

Before Graves' trial, Carter told District Attorney Charles Sebesta that Carter had "acted alone." When pressed about the presence of accomplices, Carter stated that his wife, Cookie, "had the hammer." Neither of these statements, which clearly drew Graves'

27. Defendant's Motion to Recuse, *State v. Morton*, Cause No. 86-452-K26, at 25 (26th Dist. Ct., Williamson County, Tex. Aug. 17, 2011), *available at* http://www.innocenceproject.org/docs/2011/Morton_Motion_to_Recuse.pdf.
28. Findings of Fact and Conclusions of Law, *In re Hon. Kenneth Anderson*, Cause No. 12-0420-K26 (26th Dist. Ct., Williamson County, Tex. Apr. 19, 2013), *available at* http://www.innocenceproject.org/docs/andersonfindings.pdf.
29. *Id.* at 6.
30. Claire Osborne and Jazmin Ulloza, *Mark Norwood, Sentenced to Life for the Morton Murder, Pleads Not Guilty in Second Case*, AUSTIN-AM. STATESMAN, Jan. 9, 2014, *available at* http://www.statesman.com/news/news/local/mark-norwood-sentenced-to-life-for-morton-murder-p/nchx2/.
31. Anthony Graves, *When I Was on Death Row, I Saw a Bunch of Dead Men Walking. Solitary Confinement Killed Everything Inside Them*, ACLU, Jul. 23, 2013, https://www.aclu.org/blog/prisoners-rights-capital-punishment/when-i-was-death-row-i-saw-bunch-dead-men-walking-solitary.
32. Molly Henessey-Fiske, *Eight men tell stories of innocence and fights for compensation*, *Los Angeles Times*, Dec. 20, 2014, *available at* http://graphics.latimes.com/towergraphic-stories-innocence/.
33. Pamela Colloff, *Innocence Lost*, TEX. MONTHLY, *Oct. 2010*, *available at* http://www.texasmonthly.com/story/innocence-lost.

guilt into question, were disclosed to the defense.

At trial, the prosecution's case hinged almost entirely on the credibility of Carter's account that he and Graves had committed the murders in tandem. To bolster this testimony, Sebesta argued that Carter was consistent in implicating Graves and presented what the United States Court of Appeals for the Fifth Circuit subsequently found to be "false [and] misleading testimony at trial that was inconsistent with the suppressed facts."[34]

The prosecution's failure to produce Carter's inconsistent statements played a pivotal role in securing Graves' conviction and death sentence. Had the defense had access to those statements, Graves' lawyers could have effectively cross-examined Carter and focused the jury's attention to the compelling evidence of Graves' innocence: his alibi, which was verified by his brother, sister and girlfriend; his lack of motive; and the complete lack of direct evidence connecting him to the crime.

The Salvador Crime Lab Scandal

ANOTHER COMPELLING ILLUSTRATION OF THE NEED for a robust discovery law are the disparate reactions that Texas prosecutors had to a crime lab scandal that undermined the credibility of lab results in 4,900 drug cases from 29 counties.[35] In 2012, the Texas Department of Public Safety (DPS) discovered that lab technician Jonathan Salvador had falsified test results by using the analytical results from select cases to support his conclusions in other cases.[36] DPS notified the affected prosecutors' offices of these falsifications and identified the cases that were implicated. In four of the five counties most affected (*i.e.*, in which Salvador tested 250 or more cases)—Fort Bend, Galveston, Harris, Montgomery—prosecutors interpreted their responsibilities in radically different ways.[37] The district attorney offices in Galveston, Harris and Montgomery counties requested re-testing in all affected cases and promptly sent letters that informed affected defendants and their attorneys of the newly discovered information. The Galveston County District Attorney further asked district judges to appoint lawyers to represent defendants in post-conviction proceedings, and "adopted a general policy to dismiss charges in cases where no evidence [was] left to test or where evidence was ever left in Salvador's custody."[38]

Yet, not until a full year after news of the scandal broke did Fort Bend County District Attorney John Healey notify affected defendants of Salvador's actions.[39] In early 2014, Texas Defender Service submitted a Public Information Act request to Healey's office that sought, among other things, copies of all letters notifying defendants and/or their attorneys of the Salvador matter.[40] The letters, which Healey's office provided in batches through January 2015, indicate that the Fort Bend County District Attorney's Office did not notify defendants of the falsified lab results until March 2013.[41] This failure to promptly disclose defects in criminal convictions makes plain the need for clear rules—such as those imposed by the Morton Act—regarding a prosecutor's obligation to promptly disclose exculpatory, mitigating and impeaching information, even when that information arises after conviction.

34. *Graves v. Dretke*, 442 F.3d 334, 344 (5th Cir.), *cert. denied, sub nom.*, *Quarterman v. Graves*, 549 U.S. 943 (2006).

35. James Pinkerton and Brian Rogers, *Crime Lab Analyst Kept on Job despite Shoddy Work*, HOUS. CHRON. Apr. 5, 2013, *available at* http://www.houstonchronicle.com/news/houston-texas/houston/article/Crime-lab-analyst-kept-on-job-despite-shoddy-work-4413046.php.

36. TEXAS FORENSIC SCIENCE COMMISSION, TEXAS DEPARTMENT OF PUBLIC SAFETY HOUSTON REGIONAL CRIME LABORATORY SELF-DISCLOSURE 6-9 (2013) [hereinafter TFSC REPORT].

37. The fifth county is Liberty County. In researching responses to this incident, we were unable to uncover information regarding the local district attorney's reaction.

38. TFSC REPORT, *supra* note 36 at 12.

39. Lisa Falkenberg, *Area prosecutors interpret duties to justice differently*, HOUS. CHRON., Mar. 18, 2013, *available at* http://www.houstonchronicle.com/news/falkenberg/article/Area-prosecutors-interpret-duties-to-justice-4365066.php (reporting that a week before the story's publication that Fort Bend District Attorney John Healey told reporters that "lawyers in a few cases were notified verbally, but that he had planned to wait until retesting from DPS before sending a broad alert to those convicted and their lawyers").

40. Letter from Rebecca Bernhardt, Policy Director, Texas Defender Service to John Healy, Fort Bend County District Attorney (Apr. 24, 2014) (copy on file with Texas Defender Service). Further references to Rebecca Bernhardt will be cited hereinafter as Bernhardt.

41. Letter from Mark La Forge, ADA Fort Bend County to Bernhardt, (Aug.13, 2014) (on file with Texas Defender Service) (enclosing documents responsive to a Public Information Act request); Emails from Mark La Forge, ADA Fort Bend County to Amanda Marzullo, Policy Director, Texas Defender Service (Jan. 13, 15 & 19, 2015) (on file with Texas Defender Service). Further references to Amanda Marzullo will be cited hereinafter as Marzullo.

The Michael Morton Act

The Michael Morton Act codified a comprehensive discovery framework that balances the defense's right to information with the privacy and safety interests of victims and witnesses. It provides the defense with the right to receive "relevant [material and information] that may be helpful"[42] in the preparation of its case, directs prosecutors to produce any favorable information to the defense, and requires that the parties certify the materials produced in discovery in the court record. It further carves out exceptions from disclosure for attorney work product and communications with government employees, directs defense attorneys to redact certain information before showing materials to the defendant and prospective witnesses, and limits the circulation of information received in discovery.

Article 39.14(a) – The Defense's Right to Discovery

The Act's first section governs the parameters of the defense's right to discovery in all criminal proceedings. It establishes the materials that may be requested, when they must be produced, the manner in which they are to be made available, and the statutory exceptions to these rules. Previously, this provision of the Texas Code of Criminal Procedure required that defendants file a motion demonstrating "good cause" for the production of specific materials before the presiding court could order its disclosure. The Morton Act eliminates this application process and directs the prosecution to produce discovery "*as soon as practicable* after receiving a timely request from the defense." (emphasis added).

The law also expands the statute's definition of discoverable material to include nearly any information that is relevant, in the State's custody or control (including materials held by law enforcement and state contractors) and not privileged. Specifically, it provides that the defense may request access to any of the following materials that meet these baseline criteria:

1. *any* offense reports,
2. *any* designated documents, papers, and
3. written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers,
4. *any* books, accounts, letters, photographs, objects, or other tangible things.[43]

The first item on this list, offense reports, is fairly self-explanatory. The prosecution must turn over *any* police report that pertains to the alleged offense, regardless of when it is generated.

The second item, "designated documents, papers," are to be identified by the defense and requires that counsel tailor discovery requests to the case.[44] Nearly any item that contains information relevant to the case will warrant production under this provision because the two words—document and paper—must be interpreted in a manner that accords them separate meanings.[45] Further, the term "document" has been accorded an expansive definition in the civil context that includes electronic means of record-

42. Bill Analysis, Tex. S.B. 1611, 82nd Leg., R.S. (2013) (enrolled version) [hereinafter Enrolled Bill Analysis].

43. Tex. Code Crim. Proc. art. 39.14(a) (emphasis added).

44. Troy McKinney, *Criminal Discovery in Texas—2014: The Beginning of a Brave New World of Fairness*, 42 Voice Def. 16, 18 (Nov./Dec. 2013) [hereinafter McKinney].

45. *E.g.*, *Muniz v. State*, 851 S.W.2d 238, 264 (Tex. Crim. App. 1993) (courts must presume that the legislature intended an entire statute to have effect).

ing information.[46] Accordingly, defense attorneys should take care in specifying relevant materials, such as dispatch tapes, dashboard camera recordings, training records, and disciplinary files.[47]

The third item, the "written or recorded statements of the defendant or a witness, including witness statements of law enforcement," is another broad category that will include any description of the facts relating to a criminal investigation.

The final category "any designated books, accounts, letters, photographs, or objects or other tangible things," is another catchall provision that should be employed by defense counsel at their discretion. In drafting their request for discovery, attorneys for the accused should consider any available evidence that might be at-issue in the case, including electronically stored information and physical evidence that will need to be inspected or tested.

Article 39.14(c) – Redaction Procedure

In addition to subsection (a)'s exception for privileged material, the Act allows prosecutors to redact or withhold any portion of a document that they believe is privileged or not discoverable. In these instances, the prosecution must notify the defense of the redaction or withholding. The defense is entitled to *in camera* review and hearing on the propriety of these actions. This procedure creates important mechanisms for protecting attorney work-product and confidential informant information while ensuring that discoverable material is provided to the defense.

Articles 39.14(a), (d), (e), (g) & (m) – Confidentiality of Discovery

The Morton Act contains three levels of protection for materials that are provided to the defense. These safeguards were established to balance the defense's right to discover relevant information with the privacy and safety interests of victims and witnesses.[48]

First, Article 39.14(a) explicitly states that the prosecution's production requirement is subject to the restrictions in "Section 264.408, Family Code and Article 39.15 [of the Texas Code of Criminal Procedure]", which limit the circulation/duplication of certain child statement, abuse and/or pornography materials. Thus prosecutors may refuse to provide the defense with copies of CPS records or alleged child pornography, and make these materials available for inspection only.[49]

Second, the Act places limits on defense disclosure of the information obtained in discovery to parties who are not members of the defense team. Disclosure is permitted: (i) to consulting legal counsel,[50] (ii) when the information already has been publicly disclosed or (iii) when a court, after a showing of good cause and consideration of the security and privacy interests of victims or witnesses, issues an order allowing disclosure.[51] Additionally, subsection (g) allows attorneys to make communications that are consistent with the Texas Disciplinary Rules of Professional Conduct. This subsection states that attorneys may make public statements about a case when necessary to respond to public allegations and preserve a defendant's right to a fair trial. The provision also allows defense counsel to file complaints

46. "Document," Black's Law Dictionary (9th ed. 2009) ("Under the best-evidence rule, a physical embodiment of information or ideas, such as a letter, contract, receipt, account book, blueprint, or X-ray plate; esp., the original of such an embodiment.").
47. McKinney, *supra* note 44 at 18.

48. *See* Senate Debate, *supra* note 1 (comments of Senator Joan Huffman) (offering an amendment designed "to balance the need to get the information that a defendant needs to adequately prepare defense and balance that with just the duties that we have as a state, as the prosecutors have, the duties they have to protect the vulnerability of witnesses and victims who find themselves in the criminal justice system, many times, of course, through no fault of their own. And so, I worked with the prosecutors and with the other stakeholders to kind of come up with some language that would, hopefully we could all agree on, and after a little head butting, but some good substantive discussion, we were able to do that.").
49. Several prosecution offices reported that they give the defense access to these records. A policy of uniformly withholding access to these records may be of limited utility in protecting the privacy interests of complainants and witnesses given that attorneys may take notes on the content of witness statements. If the materials in question concern an interview, it may be appropriate to seek an order from the court to permit its transcription for the parties' use during the proceedings.
50. The "consulting legal counsel" exception was intended by the legislature to allow defense attorneys to consult with more experienced lawyers and obtain advice about case handling:
Senator West: Senator Huffman, I got about three questions I want to ask you. *Will your amendment permit a defense attorney to confer with a more experienced defense attorney who is not a part of the defense team on the case about issues raised by discovery received from the state?*
Senator Huffman: *Yes, the amendment specifically refers to consulting legal counsel, and I believe that what you're asking would certainly be under the definition of a consulting legal counsel. So, that would be within that inner circle because that's a person that would be under the same ethical rules of professional responsibility*, so certainly be willing to respect the parameters of the bill in keeping the confidentiality that is required under the bill.
Senate Debate, *supra* note 1 at 858 (emphasis added).
51. Tex. Code Crim. Proc. art. 39.14(e).

with licensing bodies.[52] However, neither the public statement nor the complaint exceptions allow counsel to disclose identifying information regarding a witness or victim that is not already public.[53]

Third, subsection (f) clarifies that the defense may show the materials to the defendant, witnesses or prospective witnesses. However, before doing so, the defense must redact all sensitive information—*e.g.*, bank account numbers, addresses, social security numbers—and may not give the defendant, witnesses or prospective witnesses copies of the material, "other than a copy of the witness' own statement."[54]

Articles 39.14(h) & (k) – The Duty to Disclosing Favorable Evidence

THE MORTON ACT CODIFIED THE PROSECUTION'S affirmative duty to disclose favorable and mitigating information. Subsection (h) provides that the prosecution must "disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." This obligation to produce information overrides any claim of privilege or confidentiality. If a document, item or piece of data falls within the purview of this subsection, it must be produced. This interpretation is reflected in the statute's text, which states that it applies "[n]otwithstanding any other provision of this Article" including the provisions pertaining to the State's right under Articles 39.14(a) and (c) to withhold attorney work product. It also is consistent with the Court of Criminal Appeals' rulings on the interaction between the *Brady* rule and the work-product doctrine.[55] Thus, if grand jury materials, communications with law enforcement, or prosecutor notes, or memoranda, contain information that is favorable to the defense that is not otherwise memorialized, they must be disclosed. Further, this duty extends to *information* in addition to documents and tangible materials. Verbal statements fall within this category even if they are not written or recorded by law enforcement. For example, in *Graves*, the Fifth Circuit held that the prosecutor's failure to disclose a conversation that he had had with a witness constituted the failure to produce favorable and impeaching evidence.[56] Notably, this was not a failure to produce a document memorializing the favorable and impeaching statements because no such document existed.

Subsection (k) states that exculpatory, mitigating and impeaching information must be disclosed promptly after it is obtained by the prosecution, whether "before, during or after" a case's disposition or trial. Unlike the obligation under subsection (a) to produce any relevant information only after the defense's request, the prosecutor's obligation to produce information pursuant to subsections (h) and (k) exists independently of any request by the defense. In addition, this obligation is intentionally broader than the requirements imposed on prosecutors by *Brady v. Maryland*[57]—and likely co-extensive with the Texas Disciplinary Rules of Professional Conduct[58]—because it mandates disclosure of favorable information without regard to whether the information would materially affect the outcome of the case.[59]

52. Texas Senate discussions of this provision make clear that the statute is not intended to violate *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), or ethical rules allowing defense counsel to make public statements in response to the public statements of police and prosecutors:
Senator West: And last question, *will your amendment allow defense attorneys to comply with their professional responsibilities pursuant to Rule 3.07 as trial publicity of the Texas Disciplinary Rules of Professional Conduct and the Supreme Court decision in Gentile v. State Bar of Nevada and respond publicly the statements made by law enforcements or the state characterizing the strength of the case, or the evidence to the press?*
Senator Huffman: *Yes,* and that again is covered in Subsection (g), and as discussed, the Texas Rules of Professional Responsibility lay out the obligations and ethical duties of a lawyer and the parameters that they can follow when they're just publicly discussing a pending criminal case, or a pending case.
Senate Debate, *supra* note 1 at 858 (emphasis added).
53. *Id.*
54. TEX. CODE CRIM. PROC. art. 39.14(f).
55. *See Ex Parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012) ("The privilege derived from the work-product doctrine is not absolute, and the duty to reveal material exculpatory evidence as dictated by *Brady* overrides the work-product privilege."); *see also Jordan v. State*, 897 S.W.2d 909, 915 (Tex. App.—Fort Worth 1995, no pet.) ("Accordingly… the State has no right to use the work-product doctrine as a shield against disclosure of anything exculpatory in nature or mitigating in favor of the defendant"); *see also Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (prosecutor had duty to disclose police report containing exculpatory material); *cf. Crawford v. State*, 892 S.W.2d 1, 3 (Tex. Crim. App. 1994) (defendant's due process right overrides confidentiality of documents); *Thomas v. State*, 837 S.W.2d 106, 113-14 (Tex. Crim. App. 1992) (same).
56. *Graves*, 442 F.3d at 341-44.
57. 373 U.S. 83 (1963).
58. Although Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct does not specifically state that prosecutors must turn over impeachment evidence, this category of information likely is included in the requirement to disclose favorable information.
59. By contrast, *Brady* requires disclosure of favorable information only when that information is legally material. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (*Brady* information is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

Article 39.14(i) & (j) – Documenting Discovery Productions

The Morton Act further instills transparency in the discovery process by requiring that the State document the materials and information produced to the defense, and that the parties acknowledge these disclosures, either at time of disposition or before trial (whichever comes first). Together, these provisions are intended to minimize litigation around discovery disputes over what was produced—often occurring years or decades later—and assist post-conviction assessments of defense and prosecution performance.

Article 39.14(l) – Costs

The Act recognizes that prosecutors may pass some expenses of production onto the defense. However, costs levied under this subsection must be related to the labor, materials and overhead that the prosecution incurs, and may not be used as a mechanism for generating revenue. Any fees ordered pursuant to this article should be waived for indigent defendants. Failure to do so, may give rise to constitutional challenges to any subsequent conviction.

Article 39.14(n) – Discovery Agreements

Parties may enter discovery agreements that alter their obligations under the Morton Act, but the terms must create "discovery and documentation requirements [that are] equal to or greater than those" provided under the statute.

Article 39.14(d) – Pro Se Defendants

The Morton Act limits the access of pro se defendants to discoverable materials. Instead of a bright-line right to disclosure under the Act, pro se defendants may access the prosecution's case file only via a court order pursuant to subsection (d). Further, where an order is issued, the prosecution need not provide copies, and may limit the defendant's access to the review and inspection of the materials.

Article 39.14(m) – Interaction with the Public Information Act

Finally, prosecutors may not decline to produce relevant information on the ground that it is protected from disclosure under the Public Information Act (PIA).[60] An exception within the PIA allows state agencies to withhold information—including certain internal records—related to the investigation and prosecution of criminal cases.[61] The statute clarifies that the Morton Act always trumps the PIA.

60. Tex. Gov't Code § 522.001, *et seq*.
61. Tex. Gov't Code § 552.108.

Emerging Issues in the Morton Act's Implementation

In their responses to our PIA requests, district and county attorneys reported a wide range of experiences in implementing the Morton Act. Some reported negative experiences, including one district attorney who wrote that implementation has been a "nightmare."[62] Others indicated that the Act had little or no impact on their discovery policies or that implementation had gone smoothly, like the district attorney who said that "[w]hile implementing these new policies has been a challenge, it has been a positive experience."[63] This variation is to be expected given the differences in local discovery practices before January 1, 2014.

Throughout the past year, several offices changed their initial implementation policies in response to feedback from the defense bar and their experiences via trial and error. Individual offices are likely to continue to change their practices over the next few years as defendants litigate their access to specific information, and best practices are discovered and circulated. In the following sections we outline some of the pervasive issues with the Morton Act's implementation as well as some best practices that have been established.

62. Letter from Scott A. Say, Lamb County District Attorney to Bernhardt (Mar. 11, 2014) (copy on file with Texas Defender Service).
63. Letter from Courtney J. Tracy, Newton County District Attorney to Bernhardt (Mar. 5, 2014) (copy on file with Texas Defender Service).

Redaction and Withholding Policies

One of the Morton Act's key advancements over the pre-existing discovery law is its expansion of the scope of materials subject to disclosure. Defense representation is mere guesswork without accurate information regarding the State's case. Without access to individual case files, it is impossible to evaluate a prosecution office's compliance with the Morton Act's disclosure requirements. However, a review of policies alone reveals that a number of district and county attorneys have established office-wide redaction and withholding policies that are overbroad and inappropriate given the Act's extensive disclosure requirements and its corresponding protection for sensitive and confidential information. For example, some offices do not disclose or restrict categories of material such as medical records, grand jury transcripts, criminal histories, or education records.[64] Other offices only release such records to the defense after they have obtained a protective order from the presiding courts[65] or withhold material at the request of a complainant or witness.[66] In extreme cases, these policies are without any legal basis and are designed to prevent the defense from accessing relevant information. These concerns may resolve themselves as defendants litigate the right to access relevant records and prosecutors develop internal procedures for handling confidential materials. In the Act's first year of effect, some prosecutor offices dramatically changed their production policies in response to feedback from the defense bar.

Morton Act Withholding and Redaction Provisions

The disclosure requirements under Article 39.14(a) are subject to two important exceptions: (1) the "work product of counsel for the state and their investigators" and (2) written communications between the prosecutor and an agent, representative, or employee of the state. The first exception, which is an explicit reservation of the prosecution's rights under the attorney work-product doctrine, is limited in scope. The work-product doctrine protects an attorney's analysis of the facts and circumstances of a case so that an opponent does not gain insight or benefit from her thought process and trial strategy.[67] Documents, reports or memoranda prepared by the prosecution and communications with law enforcement agents are privileged only to the extent that they reflect analysis. Protection does not apply to the "underlying factual information" that may be contained in these documents.[68] Thus, neutral accounts of the facts concerning the case, including "descriptions of potential witnesses and statements that would reveal whether the party had spoken to potential witnesses," are not work product and are discoverable.[69]

The mere involvement of a prosecutor in investi-

64. District attorney offices of Austin, Chambers, Comal, Fayette, Lee, Liberty, Navarro counties, and the 29th (Palo Pinto County) Judicial District.
65. District attorney offices of Brazoria, El Paso, and Harris counties.
66. Letter from Christina Alvarado, Assistant District Attorney, Dallas County District Attorney's Office to Bernhardt (Mar. 5, 2014) (on file with Texas Defender Service) [hereinafter Dallas County DA PIA Response].

67. *Carmona v. State*, 941 S.W.2d 949, 953 (Tex. Crim. App. 1997) ("The work-product doctrine is designed for the benefit of the lawyer by protecting the lawyer from being compelled to disclose 'the fruits of his labor to his adversary.'") (internal citations omitted); *see also Hickman v. Taylor,* 329 U.S. 495, 511, (1947) ("We do not mean to say that all written materials obtained or prepared by an adversary's counsel are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.").
68. *Pope v. State*, 207 S.W.3d 352, 357-58 (Tex. Crim. App. 2006).
69. *Id.*; *see also Leed Oil & Gas Inc. v. McCorkle,* 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, no writ (declining mandamus relief where the trial court ordered disclosure of portions of counsel notes that merely recited neutral facts, and contained no commentary).

gating and interviewing witnesses does not exempt materials and information from disclosure pursuant to the work-product doctrine. This issue recently arose in Nueces County, where a line prosecutor has asserted in a civil lawsuit that he found an exculpatory witness who was not identified in police reports regarding the underlying incident.[70] The prosecutor asserts that his supervisor directed him to withhold the witness' identity from the defense because "it was part of his own investigation."[71] In fact, nearly every applicable discovery rule regarding the production of favorable evidence (including Articles 39.14(a) & (h), *Brady v. Maryland* and its progeny) and the Texas Disciplinary Rules of Professional Conduct required disclosure of the substance of the witness' statement and her identity. Because the line prosecutor has been fired, his actions are now the subject of a wrongful termination lawsuit. Other lawyers have since come forward to complain that the Nueces County District Attorney's Office is improperly withholding favorable information or disclosing it late in the proceedings against the accused.[72] To avoid both unnecessary litigation and fulfill the Morton Act's mandate of minimizing wrongful convictions, prosecutors should err on the side of disclosing exculpatory, impeaching, and mitigating information as soon as they become aware of it. Doing otherwise subjects prosecutors to claims of gamesmanship.

The second discovery exemption, communications between a prosecutor and an agent of the State, is a broader provision that excludes communications to the extent that they are not mitigating, impeaching, or exculpatory. However, it should be noted that this does not categorically exclude from discovery internal correspondence between law enforcement officers, which may qualify as a statement regarding the facts of a case. This exemption should not be used to withhold information that is otherwise discoverable under Article 39.14(a). The mere fact that a document was emailed or exchanged between a state agent and a prosecutor (presumably for the action in question) does not in and of itself warrant exclusion from discovery. The State's continuing obligation to produce favorable information to the defense trumps statutory provisions that might otherwise be used to withhold the information.

The portion of any material that is not subject to disclosure—*e.g.*, the prosecutor's legal opinions and impressions that may be recorded in a memorandum—may be redacted. However, the defense is entitled to *in camera* review of any redactions under Article 39.14(c) and prosecutors should be careful not to withhold information necessary to understand the significance of the material. For example, the question to which a witness responds in making an exculpatory statement may be necessary to understand the witness' meaning and should be considered part of the statement itself.

Problematic Practices

Several district and county attorneys report that they treat certain records and information differently, depending upon its classification. Below we address some of the major categories of materials and information that are frequently withheld from the defense.

Victim and Witness Information

Responses to our PIA requests revealed a wide range of policies regarding the treatment of information concerning complainants and other witnesses. These ranged from the uniform redaction of specific information—*e.g.*, addresses, bank account numbers—to withholding entire records at the victim's or another witness' request. A draft of the Harris County District Attorney Office's redaction policy, which was not adopted but was in its final phases at the time of disclosure, directs prosecutors to notify interested third parties before disclosing certain materials because "[t]his gives them an opportunity to intervene and seek an appropriate protective order."[73]

70. Plaintiff's First Amended Petition at ¶15, *Hillman v. Nueces County,* No. 2014DC6279-D (105th Dist. Ct., Nueces County, Tex. Dec. 23, 2014).
71. *Id.* at ¶16.
72. Krista M. Torralva, *Defense attorneys accuse DA's office of pattern of withholding evidence*, Corpus Christi Caller Times, Jan. 7, 2015, *available at* http://www.caller.com/news/local-news/crime/judge-hears-requests-for-new-trial-in-2012-killing-case_91986886 (last visited Jan. 26, 2015).
73. Email from Scott Durfee, Assistant General Counsel, Harris County District Attorney's Office to Marzullo (Oct. 27, 2014) (attaching draft redaction and withholding instructions) (on file with Texas Defender Service) [hereinafter Harris County DA Draft Redaction & Withholding Instructions].

Yet, the redaction requirements in Articles 39.14(c) and (e) anticipate that the prosecutors will only redact information that is not subject to disclosure—*i.e.*, privileged information. The defense team—including counsel, investigators and any experts—is responsible for redacting additional information before showing materials to the defendant, a witness, or a prospective witness. This policy balances the defense's right "to . . . information that [is necessary] to adequately prepare" its case with the prosecution's duties "to protect the vulnerability of witnesses and victims who find themselves in the criminal justice system, many times, of course, through no fault of their own."[74] Redacting such information before disclosing materials to defense counsel short-circuits this process intended by the Act.

There may be situations where redactions regarding a complainant or witness are necessary. However, such circumstances are rare and should occur with court oversight, and not imposed uniformly across all cases. If a prosecutor believes that producing certain evidence will subject a crime victim to "harm, [or] threats of harm arising from cooperation with prosecution efforts,"[75] the prosecutor should notify the defense of any redaction or withholding and apply to the presiding court for a protective order.

Moreover, inviting third party intervention—particularly that of a complainant—is inappropriate and contrary to Texas law. Complainants do "not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge."[76] Any privacy interest that a complainant may have in discoverable material is protected by the Morton Act's safeguards and cannot trump the rights of the defendant to a fair trial. If the prosecutor possesses information relevant to a criminal proceeding that a complainant does not want disclosed, the proper inquiry is whether further prosecution is in the interest of justice; the inquiry should not be directed towards determining how that information can be shielded from counsel for the defendant who is facing the full weight of the criminal justice system.

74. Senate Debate, *supra* note 1 at 857 (Statement of Senator Joan Huffman).
75. Tex. Code Crim. Proc. art. 56.02(a)(1).
76. Tex. Const. art. I, § 30(e),; *see also State ex rel. Hilbig v. McDonald*, 839 S.W.2d 854, 858-59 (Tex. App.—San Antonio 1992, no writ) ("The Legislature intended to do away with the problems associated with victims who have been ignored, shunted aside, and kept in the dark by the criminal justice system. This is what is meant by 'fairness.' The Legislature intended to give victims access to the prosecutor—not to the prosecutor's file.").

Witness Statements

Several office policies demonstrate a narrow interpretation of the term "witness statement" that is not supported by the statute. For example, many district attorneys withhold *all* sections of a grand jury transcript absent a court order, without regard to the testimonies of individual witnesses that may be relevant to the case.[77] Although no court as yet has assigned a meaning to the term "witness statement" under Article 39.14(a), Texas canons of statutory interpretation direct courts to accord words and phrases their plain meaning unless they have acquired a particularized meaning under the law.[78] Given the Morton Act's clear statutory intent to provide the defense with a broad right to discovery,[79] the wide ranging definitions that different provisions of Texas law assign to the word "statement" [80] and its general usage as a "declaration of matters of fact,"[81] courts should interpret this phrase as encompassing any written or otherwise recorded account of the alleged offense or matters relating to it by the witness. At minimum, production should include any contemporaneous entry of a witness' personal knowledge of the crime, including handwritten notes of their observations, surveillance logs, formal reports, email correspondence, 911 calls, and testimony before the grand jury. This interpretation is

77. District attorney offices for Brazoria, Cass, Chambers, Comal, El Paso (only furnishes grand jury transcripts pursuant to *Tex. R. Evid*. 615(f)), Fayette, Harris, Hidalgo, Jackson (withholds "grand jury information,"), Lee, Liberty, Navarro, and Travis counties, and the 29th (Palo Pinto County) Judicial District.
78. Tex. Code Crim. Proc. art 3.01 ("All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specifically defined."); Tex. Gov't Code § 311.011 ((a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. (b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").
79. Senate Debate, *supra* note 1 (Statement of Bill Author Sen. Ellis).
80. *Compare* Tex. Penal Code § 37.01(3) ("'Statement' means any representation of fact."); Tex. Code Crim. Proc. art. 38.22 § (1) ("In this article, a written statement of an accused means: (1) a statement made by the accused in his own handwriting; or (2) a statement made in a language the accused can read or understand that: (A) is signed by the accused; or (B) bears the mark of the accused, if the accused is unable to write and the mark is witnessed by a person other than a peace officer.") *with* Tex. R. Evid. 615(f)("[A] statement of a witness means: (1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness; (2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or (3) a statement, however, taken or recoded, or a transcription thereof, made by the witness to a grand jury.") *and* Tex. R. Evid. 801(a) ("A 'statement' is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.").
81. "Statement," Webster's Third New International Dictionary, *Unabridged* (2014).

consistent with definitions under the Texas Penal Code and the Texas Rules of Evidence,[82] and further suggests that law enforcement officers who destroy these materials with the knowledge that they must be produced in the course of a criminal proceeding "commit transgressions that [could] serve as the basis for litigation, not to mention comment at trial."[83]

Public policy considerations also support a broad interpretation of "witness statement." Information contained in unofficial witness reports to law enforcement can have a tremendous impact on case outcomes. For example, the prosecution's failure to turn over two informal witness accounts led the Texas Court of Criminal Appeals to overturn the murder conviction of Richard Miles.[84] One of the suppressed statements was an anonymous tip from a woman who possessed significant information about the case, who reported that her ex-boyfriend had confessed to committing the crime and that he still had the gun used to carry it out. The second statement was a secondhand report that a man named "Deuce" was responsible for the murder. Because both statements implicated men other than Miles, disclosure of the statements before trial would have permitted his lawyers to develop an alternative theory of the crime[85] and to have averted Miles' wrongful conviction.

Grand Jury Transcripts and Information Regarding Their Proceedings

GENERALLY, THE WITHHOLDING OF ALL TRANscripts of grand jury deliberations, absent a court order, is in keeping with the mandate under Article 20.02(a) of the Code of Criminal Procedure.[86] However, some prosecution offices take the sweeping position that information presented to a grand jury and/or uncovered during a grand jury investigation is not subject to disclosure under Article 39.14(a). For example, the Harris County District Attorney's draft redaction policy instructs prosecutors that "[i]f an offense report references information obtained by grand jury subpoena, that portion of the offense report must be redacted as well."[87] The scope of these redactions exceeds the scope of secrecy required by Article 20.02(a). Information is not rendered confidential by virtue of its presentation to a grand jury or by being obtained by a grand jury subpoena.

Article 20.02(a) concerns the release of grand jury information to the *public* and prohibits the circulation of information regarding the grand jury's proceedings—*i.e.,* what was presented, discussed and deliberated. It does not prohibit the disclosure of otherwise relevant information in a criminal prosecution to the defense simply because it was presented to the grand jury for consideration. Such a rule would have the effect of exempting from discovery potentially any information pertaining to the criminal defense. For example, if a prosecutor provides the addresses of certain public monuments to a grand jury, the location of these monuments does not become confidential. Rather, it is the fact that the monument addresses were told to the grand jury that is confidential. Similarly, where an offense report references information that was obtained by grand jury subpoena, only the reference to the subpoena should be redacted and the underlying information should be produced under Article 39.14(a).

Medical Records

THE MAJORITY OF DISTRICT AND COUNTY ATTORney offices with written policies regarding the treatment of confidential information at the time of our requests reported that they withhold medical records unless the presiding court order enters an order directing their release. For example, the Brazoria County District Attorney submits draft orders to the presiding court that direct the prosecution to disclose specific medical records or lab test results and states that the defense will not disclose informa-

82. *See* TEX. R. EVID. 615(f) (this rule explicitly calls for the production of witness statements that are formally recorded, including grand jury testimony).
83. McKinney, *supra* note 44 at 18.
84. *Ex Parte Miles,* 359 S.W.3d 647 (Tex. Crim. App. 2012).
85. *Id.* at 666.
86. "The proceedings of the grand jury shall be secret." *See also* TEX. CODE CRIM. PROC. art. 20.02(d) ("The defendant may petition a court to order the disclosure of information otherwise made secret by this article or the disclosure of a recording or typewritten transcription under Article 20.012 as a matter preliminary to or in connection with a judicial proceeding. The court may order disclosure of the information, recording, or transcription on a showing by the defendant of a particularized need.").
87. Harris County DA Draft Redaction & Withholding Instructions, *supra* note 73. Most grand jury subpoenas are issued by a prosecutor as a means of gathering documents for use at trial. The materials that are produced pursuant to these subpoenas are often never presented to a grand jury.

tion to third parties.[88] This order is unnecessary for several reasons.

First, medical records are not privileged within the context of a state prosecution. The Texas Rules of Evidence specifically provide that the physician-patient privilege does not apply in a criminal proceeding.[89] This prohibition also is codified under the Texas Occupations Code, which provides that this privilege does not apply in any instance where the records are relevant to a criminal matter.[90]

Further, the means of obtaining medical records also vitiates their confidentiality. There are two ways to obtain medical records under the law. The first is by way of a waiver of federal and state privacy protections that is signed by the patient. In these instances, the patient abdicates his or her privacy protections with respect to these records. The State cannot resurrect these protections at its convenience. The second means is through a court order or a grand jury subpoena, both of which extinguish federal and state privacy protections for purposes of the underlying proceeding.[91]

Criminal History Reports

SEVERAL OFFICES REPORTED THAT THEY DO NOT provide the defense with copies of any individual's criminal history record.[92] These policies are predicated on state and federal laws that prohibit the circulation of criminal history reports that are generated by the National Crime Information Center (NCIC)[93] and the Texas Crime Information Center (TCIC).[94] While prosecutors may decline to provide defense counsel with copies of these reports pursuant to these limitations, both NCIC and TCIC reports should be made available to the defense for inspection in each and every case. Only the reports themselves are restricted from circulation; the underlying information remains subject to disclosure under the Morton Act. Moreover, disclosure of these reports is required under Article 39.14(h) and *Brady* when a witness or complainant has a criminal history that may be used for impeachment.

Prior Violation of Article 39.14

A FEW DISTRICT ATTORNEY OFFICES DISCLOSED that they restrict defense access to information when a defense attorney has violated Article 39.14.[95] For example, the Dallas County District Attorney's Office submitted forms indicating that discovery may be withheld due to the defense attorney's prior violations of the Morton Act. Other district attorneys reported that they do not provide copies of materials wherever "violations" have occurred. Such unilateral sanctions against defense counsel are improper. The Act does not provide prosecutors with the authority to restrict a defendant's right of discovery any more than it provides the defense with the authority to prohibit a district attorney whose redactions were found to be improper from making future redactions. Moreover, such policies are rife with the potential for abuse. If a prosecutor believes that a defense lawyer has violated the Morton Act, the proper recourse is to draw this violation to the presiding court's attention, and in egregious circumstances, report the conduct to the State Bar.

Best Practices

SEVERAL COUNTIES HAVE IMPLEMENTED BROAD discovery policies. For example, the Eastland County District Attorney's Office provides lawyers with online access to all records in its case file, regardless of any statutory provision regarding their confidential-

88. Letter from Jeri Yenne, Brazoria County District Attorney to Bernhardt (Jan. 28, 2014) (responding to a Public Information Act request) (on file with Texas Defender Service).
89. TEX. R. EVID. 509 (b) ("Limited Privilege in Criminal Proceedings. There is no physician-patient privilege in criminal proceedings. However, a communication to any person involved in the treatment or examination of alcohol or drug abuse by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse is not admissible in a criminal proceeding.").
90. TEX. OCC. CODE § 159.002(a) ("A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient is confidential and privileged and may not be disclosed *except as provided by this chapter*.") (emphasis added); TEX. OCC. CODE § 159.003 (a)(10) ("An exception to the privilege of confidentiality in a court or administrative proceeding exists . . . in a criminal prosecution in which the patient is a victim, witness, or defendant[.]").
91. 45 C.F.R. § 164.512(f) ("Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable. . . . (ii) In compliance with and as limited by the relevant requirements of: (A) A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer; [or] (B) A grand jury subpoena[.]").
92. District attorney offices for Chambers, Comal, Fayette, Jackson, Lee, Navarro, and Travis counties, and the 29th Judicial District.
93. 28 C.F.R. § 20.33.
94. TEX. GOV'T CODE § 411.083.
95. District attorney offices for Bell, Dallas, Erath, and Hood counties, and the 43rd (Parker County), and 220th (Bosque, Comanche & Hamilton counties) Judicial Districts. Materials provided by the district attorney offices in Bell and Erath counties appeared to predate the Morton Act, but were furnished in response to our Public Information Act requests.

ity. The Liberty County District Attorney's Office goes further and grants defense counsel access to materials that may otherwise be deemed "work product" such as attorney notes.[96] These policies ensure the transparency of the discovery process. In Liberty County, the office-wide policy of providing access to attorney interview notes ensures that favorable information is not inadvertently withheld from the defense.

Where information is redacted or withheld, prosecutors should establish systems for providing the defense with notice of these actions. For example, the Dallas County District Attorney Office has developed disclosure transmittal sheets that give the defense notice of the specific information that has been redacted—*e.g.,* a complainant's address—and the reasons for the redaction.[97] With respect to entire records, other jurisdictions, such as the online systems in Tarrant and El Paso counties, specify when records have been obtained by the prosecution, but are not available to the defense. The benefits of these policies are twofold. First, they give the defense necessary information to seek access to needed documents through the courts. Second, they minimize unnecessary litigation by allowing the defense to limit applications for court intervention. Blanket withholding policies provide the defense with no notice regarding the issues that should be raised, which results in "kitchen sink" motions that seek any and all applicable relief and that waste the litigants' and the judge's time.

96. Letter from Kim Meadows, Office Supervisor, Liberty County District Attorney's Office to Bernhardt (Mar. 21, 2014) (on file with Texas Defender Service).
97. Dallas County DA PIA Response, *supra* note 66.

Law Enforcement Practices

One of the Morton Act's inadvertent consequences is its effect on investigative agencies and their relationship with local prosecutors. Although the Act is silent on law enforcement practices, its disclosure requirements extend beyond the materials and information in prosecutor files to include evidence—both admissible and inadmissible—that is in the "possession, custody or control of the state or anyone under contract with the state."[98] This expansive application indirectly requires increased coordination between prosecution and law enforcement agencies, as well as specialized training for investigating and technical agencies to ensure their employees properly preserve evidence and information. If law enforcement officers, including lab technicians, were to misunderstand their obligations to provide information to the prosecution, or worse, attempt to conceal information, the prosecution and the defense would go forward with an incomplete understanding of the case and at heightened risk of a wrongful conviction. As the Texas Commission on Law Enforcement stated in its online training materials:

> *Complete police files will be essential for prosecutors to comply with all of these new mandates!* Continued communications to make sure the prosecutor has absolutely everything the police have in the file will be of paramount importance. . . . In the end, it is imperative that local law enforcement agencies spend time with their prosecutors to determine what the best course of action is to ensure compliance with this new discovery process.[99]

A complete assessment of law enforcement procedures to preserve and transmit information and evidence pursuant to the Morton Act is beyond the scope of this report. However, many prosecutors produced written instructions and memoranda to local law enforcement agencies in response to our Public Information Act requests. Our review of these documents and our interviews with and survey responses from defense attorneys reveals that there is a general need for law enforcement agencies to be fully informed of the Morton Act's requirements to produce both discovery and favorable information, and how the two requirements differ. Prosecutors and law enforcement should maintain close communications about practices for preserving and producing evidence so that information is not withheld from defense counsel. While many prosecutor offices and law enforcement officials have made a valiant effort to inform law enforcement officers of the Act's new requirements, many offices have not issued written directives for law enforcement, and many defense attorneys report the materials provided to them in discovery are incomplete.

Statutory Requirements

The Morton Act's disclosure requirements extend to material and information that are in the "possession, custody, or control of the state or anyone under contract with the state."[100] This means that the prosecutor's duty to produce information to the defense is not limited to the information in the prosecutor's actual possession. Rather, the prosecutor must produce discoverable information possessed by anyone on the investigative or prosecution

98. Tex. Code Crim. Proc. art. 39.14(a).

99. Tex. Comm. on Law Enforcement, 2013–2015 State and Federal Law Update: 83rd Legislature 18-19 (2014) (emphasis in original) [hereinafter TCOLE 2013-15 Update].

100. Tex. Code Crim. Proc. art. 39.14(a) & (h).

teams, including other prosecuting attorneys, law enforcement officers or forensic scientists.

In addition, the Morton Act expanded the scope of favorable evidence that must be disclosed to the defense. As discussed in other sections, the Act directs prosecutors to turn over "any exculpatory, impeachment, or mitigating document, item or information" that is in the government's possession. This requirement trumps other claims of confidentiality or exception to disclosure—*e.g.,* prosecutors must turn over their correspondence with law enforcement if it contains favorable information. It also explicitly excludes the "materiality" requirement set out under *Brady v. Maryland* and its progeny. Under the Act, information must be disclosed without any materiality analysis or anticipation of its impact on the case's outcome. Such determinations are difficult to make in pretrial proceedings and the legislature wanted to ensure that all information that could be favorable lands in the hands of defense attorneys.

Problematic Practices

Prosecutor Instructions to Law Enforcement

Although statewide training resources are available,[101] effective implementation of the Morton Act will require close communication between prosecutors and law enforcement officers to determine how they will preserve and share information efficiently. Yet, based on the information provided, it is not clear that this collaboration is occurring evenly across the state. The majority of district attorney offices—70 percent—produced no formal memoranda or instructions to law enforcement, and provided no training, about the obligation to produce material and information to the defense.

Among those that did, 11 provided a similar or identical "*Brady* Compliance Form"[102] that focuses entirely on the duty to disclose exculpatory, mitigating and impeachment evidence under *Brady v. Maryland* and its progeny and fails to reflect the new requirements established under the Morton Act. To the extent that this outdated form is still in use, it misrepresents the prosecution's duty to disclose favorable evidence to the defense and mischaracterizes the types of information that may be mitigating, impeachment or exculpatory evidence, in four important ways.

First, it includes a particular piece of evidence's "materiality" to the defendant's "guilt or punishment" among the criteria for disclosure.[103] Elsewhere, the form urges agents to relay all information in their possession, but its use of the term "materiality" to describe witnesses and their role in the case, give the overall impression that law enforcement should make determinations regarding the significance of statements and other information before disclosing them to the prosecutor. This directive will lead to violations of the Morton Act's disclosure requirements. As discussed in previous sections,[104] the Act creates an affirmative obligation for prosecutors to produce *any* material or information that is favorable, regardless of its anticipated impact on the proceedings,[105] "before during and after" the case's disposition or trial.[106]

Second, this form provides a list of potential "impeachment or exculpatory" information that fails to properly represent the full breadth of material and evidence that fall within these two categories. The four items listed are as follows:

- Statements made by the defendant or potential defense witnesses which contradict statements made by a material law enforcement employee or witness;

101. TCOLE 2013-15 Update, *supra* note 99.

102. Very similar forms were produced by district attorney offices for Colorado, Coryell, Deaf Smith, Floyd, Freestone, Hale, Navarro, Newton, and Walker counties, and the 18th (Johnson & Somervell counties), 49th (Webb & Zapata counties) Judicial Districts. A few of these offices updated the form to include Article 39.14(h) information as well—*e.g.,* 69th (Dallam, Hartley, Moore & Sherman counties) Judicial District—but the language was basically the same and the focus was entirely on exculpatory information.

103. The first paragraph of the Form submitted by Colorado County District Attorney reads:
Brady v. Maryland requires Prosecutors and other Law Enforcement personnel to disclose any and all evidence favorable to a defendant that is either exculpatory or impeaching, and is material to either guilt or punishment. Evidence is considered to be exculpatory is that evidence which will clear the defendant from fault or guilt or lead to mitigating evidence. Evidence is considered to be mitigating is evidence that might reduce a defendant's culpability or limit his/her punishment. ***Whether evidence is considered mitigating will be determined by a court during trial or upon appellate review. The wrong decision will be held to be an intentional Brady violation and may lead to civil liability and/or the inability to re-try the defendant. Err on the side of caution.***
Letter from Jay E. Johannes, District & County Attorney, Colorado County, to Bernhardt (Feb. 25, 2014) (responding to a Public Information Act request) (emphasis in the original enclosed document). A copy of this compliance form is included in this report as Appendix A.

104. *See supra* Article 39.14(h) & (k) –The Duty to Disclose Favorable Evidence.

105. Tex. Code Crim. Proc. art. 39.14(h).

106. *Id.* at 39.14(k).

- Statements made by the defendant or potential defense witness that an enforcement employee or witness used excessive force;
- Statements made by the defendant or potential defense witness that allege racial or religious bias; and
- Biased statements by a law enforcement officer.

With the exception of the last item on this list, all of the examples pertain to statements made by the defendant or a defense witness. However, exculpatory or impeachment evidence can include nearly any piece of information that undermines the State's case or can be used to discredit one of its witnesses. Common examples include prior inconsistent statements by prosecution witnesses,[107] differing accounts rendered by various individuals, information indicating that the defendant did not act with the requisite intent,[108] and even information regarding a witness's (including a law enforcement officer's) past conduct and criminal history.[109]

Third, the form states that the mitigation[110] value of information is determined "at trial," giving the false impression that such evidence has no function in pretrial proceedings. However, mitigating information often can and should be identified prior to trial. For example, law enforcement officers frequently uncover information establishing that the defendant's criminal liability is less severe than the allegations pending against him—*e.g.*, that stolen materials are less valuable than originally contended. Such information must be disclosed to the defense in order to guard against overcharging.

Finally, the form improperly indicates that "Brady disclosure requirements continue[ ] until final disposition of each and every criminal case." This statement directly conflicts with Article 39.14(k)'s mandate to disclose *any* favorable information to the defense, whether it is discovered "before, during or after the trial" or disposition of the case.

Failure to Disclose Relevant Information

In their written responses to our Public Information Act requests, a small minority of prosecutors indicated concern regarding the completeness of law enforcement's disclosures to their offices. One district attorney even criticized the Morton Act for "plac[ing] the burden of providing the information on the prosecutor and none by the law on the agency submitting the case" and recommended amending the statute to "require a law enforcement agency to turn over all discovery materials to the State who can then provide [them] to the defense."[111] Other prosecutors provided documents seeking to shift liability for any nondisclosure, either through an explicit statement that prosecutors will not be held accountable for any information that is not provided to them,[112] or requiring that an investigating officer sign a statement indicating that his enclosures are complete.[113] Without access to investigational files, it is impossible to determine whether these concerns are founded. However, the prosecution's concerns were echoed by defense attorneys who reported that law enforcement officers inadequately documented witness statements or that information provided to them in discovery was otherwise incomplete, and that they had to subpoena investigating agencies for specific materials to ensure the thoroughness of their investigation.[114]

In Nueces County in particular, a number of defense attorneys have reported that they are not receiving key information in a timely manner. During Rudy Rubio's prosecution for kidnapping and sexual assault, the prosecution originally informed his defense team

107. *Kyles,* 514 U.S. at 445 (1999) (*Brady* violated when prosecution failed to disclose multiple inconsistent statements by key witness.).
108. *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (indicating that the prosecution violated *Brady* in failing to disclose information that although the defendant committed the alleged conduct, he was innocent of a crime because he "believed his acts were immediately necessary to avoid imminent harm" to third parties).
109. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (holding that the trial court violated the defendant's rights under the Sixth Amendment when it did not allow him to cross-examine a witness with his probation statues).
110. *See Cone v. Bell*, 556 U.S. 449, 469-75 (2009) (Brady and its progeny require the disclosure of information that would support lesser punishment.).
111. Letter from R. Scott McKee, Henderson County District Attorney, to Bernhardt (Mar. 6, 2014) (on file with Texas Defender Service).
112. Letter from Scott A. Say, County & District County Attorney, Lamb County, to Bernhardt (Mar. 11, 2014) (on file with Texas Defender Service) (enclosing *inter alia* document entitled "39.14 Compliance Policy," which states "Prosecutors will not be held responsible for the failure of law enforcement or other representatives or agents of the State to provide [exculpatory, impeachment, or mitigating] evidence or information").
113. District attorney offices for Colorado, Comal, Coryell, Deaf Smith, Floyd, Freestone, Hale, Navarro, Newton, Walker, and Terry counties and the 18th (Johnson and Somervell counties), 49th (Webb and Zapata counties) Judicial Districts. The Medina County Attorney also indicated in her forms that she requires a certification regarding the completeness of an investigating officer's file in at least some instances.
114. Based on survey responses from 170 defense attorneys across the state and interviews with defense attorneys who practice in Fort Bend, Nueces and Bexar counties.

that there was no recording of the complaining witness's 911 call.[115] However, during trial, "police testified that there actually was a 911 call, but somehow, it didn't get transferred to the prosecution."[116] Similarly, in the case of Ryan Sanders and his wife, who were charged with child abuse when they had begun living in their car, their lawyers were not provided with exculpatory and mitigating evidence that was recovered from their vehicle.[117] In this case, the defense was proceeding on a theory that any neglect or malnutrition of the children was inadvertent; the family had fallen on hard times. Yet, "a hard drive containing happy family photos"—evidence that contradicted the prosecution's theory of extreme neglect—had been reviewed, "analyzed, and accidentally destroyed by police."[118]

Production of such materials is not only the law, but also is necessary to ensure that the State does not prosecute and condemn an innocent person. A number of Texas' exonerations have involved favorable witness statements or other evidence that were not preserved or relayed to prosecutors—even when the declarant was the defendant. In 2011, the Texas courts vacated Jose Luis Pena's conviction for felony possession of marijuana due to the State's withholding of his statements to the arresting officer, who recovered several purported hemp plants from Pena's truck in the course of a routine traffic stop.[119] In this case, the officer did not disclose the audio portion of his dashboard camera footage, which recorded Pena's explanations that the plants in question were legal hemp that only resembled marijuana and demands that the plants be tested to confirm his contention.[120] It was not until 13 years later that the Texas Court of Criminal Appeals reversed his conviction, determining that the outcome of the proceedings would have been substantially different if both parties had possessed the dashboard camera audio file.[121]

115. Andrew Ellison, *6 Investigates: Local Defense Attorneys Say They're Not Getting Key Evidence on Time,* 6 KRISTV, Feb. 23. 2015, *available at* http://www.kristv.com/story/28176945/6-investigates-local-defense-attorneys-say-theyre-not-getting-key-evidence-on-time/ (The underlying offenses in the cases mentioned in this newscast occurred before the Morton Act took effect. However, prosecutors in these cases were under a pre-existing duty to disclose the material that was not relayed to the defense attorneys under *Brady v. Maryland* and its progeny as well as the Texas Disciplinary Rules of Professional Conduct).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011).
120. *Id.* at 804 & 813-14.
121. *Id.* at 813-15.

Best Practices

Successful implementation of the Morton Act will require full cooperation from all law enforcement agencies and an ongoing effort to document and preserve evidence. At the time of our Public Information Act requests, some district and county attorney offices had opened a dialogue with local law enforcement regarding the Act and its requirements. These efforts included written instructions, training sessions, and new requirements that officers index their case file and sign a statement of completeness. The communications that most succinctly accomplish this goal: (1) explain the new Act and its purpose, (2) urge law enforcement officers to maintain thorough and accurate files, and (3) encourage the disclosure of new findings after a case is submitted for prosecution.

For example, the Travis County District Attorney issued a letter to the Austin Police Department's Chief of Police last April. The letter explains that the Morton Act requires that prosecutors:

> produce to defense counsel . . . all evidence, potential evidence and information related to the case . . . [and] disclose . . . 'any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.[122]

To fulfill this mandate, the letter states that law enforcement officers must "make sure that [they have] submitted [to the District Attorney's Office] . . . each and every piece of evidence or information connected with a case in [their] possession," or in the possession of other state employees. The letter then asks that police officers provide this "evidence and information *without regard to whether or not it appears to you to be relevant or material to the case*."[123] The letter then provides a comprehensive, but not exhaustive, list of the types of material that should be provided in all instances (which includes

122. Letter from Rosemary Lehmberg, Travis County District Attorney, to Art Acevedo, Chief of Police, Austin Police Department (Apr.8, 2014), *available at* https://lintvkxan.files.wordpress.com/2014/07/lehmberg-memo-to-law-enforcment.pdf. A copy of this letter is included in this report as Appendix B.
123. *Id.* (emphasis in original).

the officers' handwritten notes and *any* communication with witnesses), and urges police officers to disclose material even if they believe it should be redacted or withheld.

The letter concludes with a statement that the State's obligation to produce material under the Morton Act does not end upon referral, filing or even disposition of the case and asks "henceforth, [that the police] provide [prosecutors] with any additional information or evidence . . . you may receive in connection with a case."[124] This letter is particularly effective because it provides law enforcement with sufficient information to understand the Morton Act, its framework, and the responsibilities of law enforcement, as well as specific guidance regarding the types of records law enforcement should maintain.

Similarly the Hunt County District Attorney's Office provided a training session for law enforcement in its district.[125] This presentation urged law enforcement officers to turn over *everything* to their office's possession: "Complete police files will be essential for prosecutors to comply with all of these new mandates! EVERYTHING! Any redaction or withholding decisions will be made by the prosecution."[126] This presentation also made practical recommendations, such as writing an offense report as soon as possible after the incident, and recording interviews on patrol car video and audio systems. If implemented these recommendations would not only facilitate compliance with the Morton Act, but also constitute good policing that would protect arresting officers from any future allegations of misconduct.

Other offices, including the district attorney offices in Coleman and Comal counties have established Article 39.14 Compliance forms, which are to be completed by law enforcement officers when they submit cases for review and filing.[127] Coleman County's form specifically directs law enforcement officers to list the material contained in their files at the time of submission. This requirement eliminates confusion regarding the information relayed to the prosecution and serves as an important organizational guide as materials are passed between agencies and individual employees.

The Coleman County form also contains an acknowledgment of the ongoing obligation to turn over favorable evidence that investigating officers must sign when they submit their cases to the district attorney office. This provision reads:

> And further, outside of this material provided, I have no knowledge or belief of any exculpatory, impeachment, or mitigating document, item or information in the possession, custody or control of this law enforcement agency that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. I further acknowledge my continuing obligation to supplement all documents, items and information which meet this description and comes to me knowledge or into my possession subsequent to the date of this acknowledgment.[128]

This statement provides law enforcement with an important reminder that their obligation to apprise prosecutors of discovered information does not end after a case is submitted. It is a perpetual duty by both law enforcement and the prosecution.

Finally, prosecutors and law enforcement must work together to develop best practices for collecting and maintaining information. This challenge will require an ongoing effort to ensure that files contain all relevant facts and data—*e.g.,* that all witness statements are complete and accurately memorialized—and that they maintain their integrity as a case progresses through the criminal justice system. While beyond the scope of this report, a more thorough review of the law enforcement practices is warranted and would provide valuable insights into whether defendants are receiving the discovery to which they are entitled.

124. *Id.*
125. Letter from Noble D. Walker, Hunt County District Attorney, to Bernhardt (Apr. 1, 2014) (copy on file with Texas Defender Service).
126. *Id.* (emphasis in original).
127. Letter from Jennifer Tharp, Comal County Criminal District Attorney to Rebecca Bernhardt, Texas Defender Service (Feb. 28, 2014) (copy on file with Texas Defender Service); Letter from Heath Hemphill, Coleman County District Attorney to Bernhardt (Feb. 24, 2014) (copy on file with Texas Defender Service) [hereinafter Coleman County DA PIA Response].
128. Coleman County PIA Response, *supra* note 127 (enclosing a form entitled "Filing Acknowledgement") (emphasis in the original). A copy of this form is included in this report as Appendix C.

Timing of Discovery

THE PROVISION OF DISCOVERY AT AN EARLY POINT IN CRIMINAL PROCEEDINGS IS ESSENTIAL to the operation of a fair, efficient, and accurate justice system. Too often, defense attorneys are unable to provide meaningful legal advice due to a lack of knowledge about the prosecution's case. Competent representation requires analysis of the charges against the accused,[129] as well as an independent investigation[130] and evaluation of the evidence likely to be provided to the grand jury and/or admitted at trial.[131] Access to key information—*e.g.,* offense reports, witness names and witness statements—allows defense lawyers to evaluate the strength of the prosecution's case, locate and preserve evidence that is helpful to their clients' defense,[132] and assist an accused in making an informed decision about how to proceed.

For example, in an assault case, it is impossible for defense counsel to assess the degree of a defendant's criminal liability without studying eyewitness accounts and the complainant's medical records. There may be evidence that the accused acted in self-defense or the complainant may have made exculpatory statements to medical professionals—none of which can be uncovered unless the offense report, and the names of bystanders and the complainant are produced by prosecutors to defense counsel. In reviewing these materials, defense counsel can evaluate the charges filed against the defendant, enter meaningful plea negotiations and conserve precious criminal justice resources by seeking reduced charges or a no-bill at the grand jury stage of the case.

An even playing field during the initial phases of a case also increases the accuracy of plea dispositions. Prosecutors frequently incentivize guilty pleas during the initial phases of a criminal proceeding by offering some concessions—typically a reduction in the charges in exchange for bringing the case to a swift resolution. In theory, this bargaining process is conducive to a streamlined criminal justice system. Yet, when coupled with unequal access to information, such promises of favorable treatment substantially increase the risk that an innocent defendant will admit guilt for a crime he did not commit.[133] Prompt access to the state's evidence allows the defense to enter informed decisions regarding how to proceed and minimizes this "innocence problem."[134]

Wrongful pleas are a particular concern in Texas,[135] where the overwhelming majority of criminal cases are brought to a swift resolution. During the 2013 fiscal year, 96 percent of all district court (felony) convictions were obtained via a plea of guilty or *nolo con-*

129. *State Bar of Texas, Performance Guidelines for Non-Capital Criminal Defense Representation* Guideline 2.2(B)(1) (2011), *reprinted in* 74 TEX. BAR J. 616, 621 (July 2011) (stating counsel must "[b]e familiar with the elements of the offense and the potential punishment range").

130. *Id.* at 4.1-3.

131. *Id.* at 6.1(a) ("Under no circumstances should counsel recommend to the client acceptance of a plea agreement unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.").

132. JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 5-6 (2007), *available at* http://www.prearesourcecenter.org/sites/default/files/library/expandeddiscoveryincriminalcasesapolicyreview.pdf [hereinafter JUST. PROJ. REPORT].

133. Although no study has been able to fully evaluate the frequency of "wrongful pleas" in the U.S. criminal justice system, it is well-documented that individuals frequently plead guilty to offenses that they did not commit. *E.g.,* John H. Blume and Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, (2014) Cornell Law Faculty Working Papers, Paper 113 at 22 [hereinafter Blume & Helm] (detailing that indigent defendants accused of misdemeanor crimes frequently plead guilty to crimes they did not perpetrate in order to cut their losses); Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem, 103 J.* CRIM. L. & CRIMINOLOGY *1, 34* (2013) (finding in a clinical study that 56.4% of "innocent" participants accepted a plea offer).

134. *See* Eric Dexheimer, *Delays create Texas' unknown exonerees,* AUSTIN-AM. STATESMAN, Apr. 19, 2014 (identifying twenty instances where defendants pled guilty to drug-related offenses and were subsequently exonerated by DPS lab results).

135. Texas has had several high-profile cases involving wrongful guilty pleas. Christopher Ochoa falsely pleaded guilty to raping and murdering Nancy DePriest in order to avoid a death sentence, and later testified against Richard Danziger. Both men were exonerated 12 years later after DNA testing confirmed that another man committed the crime. *See State v. Oakley*, 227 S.W.3d 58, 59 (Tex. 2007); *see also Ex parte Ochoa,* No. AP-74,246 (Tex. Crim. App. Dec. 19, 2001) (unpublished per curiam opinion); *Ex parte Danziger,* No. AP-74,244 (Tex. Crim. App. Dec. 19, 2001) (unpublished per curiam opinion). In Dallas, innocent defendants pleaded guilty and were deported or sent to prison for possessing a controlled substance that, when finally analyzed, turned out to be powdered gypsum. Samuel Gross, et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY. 523, 535 (2005).

tendere (no contest),[136] and nearly half of all disposed cases—45 percent—were left pending for 90 days or less.[137] Misdemeanor cases are handled with similar alacrity.[138] Realization of the Morton Act's mandate requires the prompt disclosure of discovery so that relevant discoverable information can be put to use in all cases, not merely the ones that are brought to trial. This intent is reflected in the bill language, which makes clear that the Act applies to cases resolved through plea bargaining and suggests that the discovery requirements are not waiveable.[139] Yet, our research reveals that delays in the provision of discovery remain a pervasive issue in Texas and that a number of prosecutor offices ask defendants to waive their rights to discovery as a condition of a plea bargain.

In response to our Public Information Act requests, the vast majority of prosecutor offices reported no written policy regarding when they will accept and/or respond to a defendant's request for discovery. Among those that sent written statements of their policies only 20[140] set out standards that comported with the statutory directive to furnish discovery "as soon as practicable" after a request is received.[141] The remainder provide discovery only at a specific point in the proceedings—*e.g.*, upon the filing of a formal charging instrument—or place contingencies on the production of discovery that are without any legal basis. As a result, many defendants are not receiving the discovery to which they are entitled under the Morton Act.

136. Office of Court Administration, Annual Statistical Report for the Texas Judiciary: Fiscal Year 2013 40 (2014), *available at* http://www.txcourts.gov/media/467863/2013-Annual-Report9_26_14.pdf [hereinafter OCA FY 2013].
137. Disposition data regarding criminal cases in Texas is published on the Office of Court Administration's website at http://card.txcourts.gov/ReportSelection.aspx (select "District Court Data Reports" and "Age of Cases Disposed" from the drop down menus and click "Continue," on the following screen select the time period for September 2012 through August 2013) (last visited Dec. 15, 2014). The Texas government's fiscal year runs from September 1 of the previous year through August 31.
138. *OCA FY 2013, supra* note 135 at 53, 66 (stating that 97.3 percent of all cases disposed in statutory county courts were resolved with a plea of guilty/nolo contendere, and 95.9 percent of all cases disposed in constitutional county courts were resolved with a guilty/nolo plea).
139. *See* Tex. Code Crim. Proc. art. 39.14 (parties cannot agree to lesser discovery requirements than the law mandates).
140. District attorney offices in Calhoun, Harris, Eastland, Kleberg, Leon, Lubbock, Midland, Milam, Moore, Newton, Tarrant, and Taylor counties and the 69th (Dallam, Hartley, Moore & Sherman counties) Judicial District had written policies that were consistent with their obligations under the Morton Act. County attorney offices in Blanco, Cooke, Franklin, Hartley, Kennedy, Montgomery and Williamson counties also had policies that conformed to the statute's requirements. Dallas County defense lawyers reported that discovery materials are made available upon request, regardless of when the request is entered. Travis and Navarro counties do not accept discovery requests until specified periods of time have elapsed (5 or 10 days, depending on the underlying charge), which is an improper restriction on the defense's ability to request and access discoverable information.
141. In addition to these 20 jurisdictions, the Wood County District Attorney's Office provides discovery at or before the defendant's arraignment. Depending on how this policy is implemented—*i.e.*, if discovery is provided in an expeditious manner in all cases without regard to when the arraignment occurs it may be consistent with the statute.

Statutory Requirements

> Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this Code, *as soon as practicable* after receiving a *timely request* from the defendant the state shall produce and permit the inspection and electronic duplication, copying, and photographing, by or on behalf of the defendant[.][142]

On its face, this text requires that prosecutors produce information to the defense at an early point in the criminal proceedings against an accused. Contrary to the office policies of many elected district and county attorneys, the Act contains only one condition for triggering the right to this production: the receipt of "a timely request from the defendant." There is no reference to a case's procedural posture or reservation of the State's right to deny access to specified materials under certain circumstances. A request for discovery may be submitted at any point in the proceedings against the accused, and once it is received, the prosecution must respond "as soon as practicable." This plain reading also is reflected in the Act's legislative history. The original bill required discoverable information to be disclosed "no later than 30 days after the defendant's initial appearance."[143] However, this clause was struck from the Senate Committee Report and replaced by the current statutory language,[144] signifying that the Legislature considered and rejected the proposal to require discovery at a specific point in a case's life cycle.

The term "as soon as practicable" requires that prosecutors provide discoverable information to the defense as soon as reasonably possible in light of the circumstances at hand—*e.g.,* the amount of information, its format, and resources available for processing. Although no appellate court has interpreted the phrase in the context of Article 39.14, civil courts have read "as soon as practicable" as requiring that a party undertake a particular course of action with-

142. Tex. Code Crim. Proc. art. 39.14(a) (emphasis added).
143. S.B. 1611, 83rd Leg., R. Sess. (Tex. 2013) (originally filed version).
144. *Id.* (Senate Committee Report).

out any unnecessary delay while also allowing some tractability in specific circumstances.[145]

At least one trial-level court has interpreted the Morton Act as mandating the production of discovery without undue delay once the defense enters a request for documents, regardless of a case's procedural posture. Several months after the Act took effect, counsel for Bexar County defendant Jonathan Campos requested access to discovery before an indictment had been handed up.[146] The District Attorney responded that the request was premature because office policy was to provide electronic access to discoverable information only after issuance of a misdemeanor information or felony indictment.[147] In a subsequent proceeding on the matter, the district judge emphasized to the prosecution that the defense was entitled to the requested materials—in this instance it was a video recording—within a "reasonable timeframe" of the request.[148] The prosecution then consented on the record to producing the video within a specified period.

Problematic Policies

Of the prosecutor offices that produced written statements regarding when and how they respond to discovery requests, 18 had policies that were inconsistent with the Morton Act's requirement that discovery be provided as soon as practicable. The two most pervasive problems included withholding discovery until after a formal charging instrument—*i.e.,* an indictment or misdemeanor information—is filed;[149] and denying defense access to certain materials until the eve of trial.[150] Both of these policies contradict the Act on its face and heighten the risk that the innocent will be convicted, the less-culpable overcharged, and scarce criminal justice resources squandered.

Postponing Discovery

Half of all written policies stated that discovery will not be made available to the defense until the assigned prosecutor has reviewed the case and formal charges have been filed. While such a policy may not cause unreasonable delay in some circumstances—*e.g.,* where a charging decision is entered within hours of the arrest—its uniform application will lead to prolonged delays, particularly in felony cases. Several weeks, if not months, may elapse between a defendant's arrest and the presentment of formal charges in the proceedings against him or her. Under current law, an indictment must—absent a showing of good cause—be filed within approximately six months of an arrest if the defendant is in-custody or released on bail.[151] If a defendant is released without having to post bail, the prosecution may file formal charges any time before the expiration of the crime's statute of limitations, which is up to two years for misdemeanors[152] and three to seven years for most nonviolent felonies.[153]

Several defense attorneys have reported that prosecutors postpone the production of discovery until they have received all relevant information/materials from law enforcement. One defense attorney from Lubbock reported in our survey that, while she is typically appointed for several months before her client is arraigned on an indictment, she receives access to discovery during this period in fewer than 5 percent of her cases. Depending on the type of case and the forensic analysis required, such policies

145. *See e.g.*, *Blanton v. Vesta Lloyds Ins. Co.*, 185 S.W.3d 607, 611 (Tex. App. Dallas 2006, no pet.) ("'As soon as practicable' means as soon as notice would have been given by an ordinary prudent person in the exercise of ordinary care in the same or similar circumstances."); *Insurance Co. of North America v. Asarco, Inc.*, 562 S.W.2d 557, 661 (Tex. Civ. App.—Corpus Christi 1978, writ refused n.r.e.) (Notification "as soon as practicable" requires insured to notify insurer within a reasonable amount of time, which is determined by circumstances at hand); *see also* Family Medical Leave Act, 29 C.F.R. 825.302(b) ("*As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.") (emphasis in original).

146. Transcript of Record at 4, *State v. Campos*, No. 233477 (437th Dist. Ct., Bexar County, Tex. Aug. 13, 2014)

147. *Id.* at 6.

148. Transcript of Record, *State v. Campos*, No. 233477 (437th Dist. Ct., Bexar County, Tex. Aug. 27, 2014).

149. These jurisdictions include the district attorney offices for Bexar, Calhoun, Cameron, Cass, Chambers, Cherokee, Comal, Ector, El Paso, Erath, Fort Bend, Gregg, Lee, and Upshur counties, and the 18th (Johnson & Somervell counties), 36th (Aransas & San Patricio counties), 97th (Archer, Clay & Montague counties), and 220th (Bosque, Comanche & Hamilton counties) Judicial Districts. The Chambers County Attorney only provides discovery to the defense after a case has been pending on the criminal docket for five days. Email from Scott R. Peal, Chambers County Attorney to Amelia Gerson (Feb. 14 2014) (on file with Texas Defender Service) (attaching the Chambers County Attorney Discovery Policy).

150. Email Carl L. Dorrough, Criminal District Attorney, Gregg County, to Amelia Gerson (Apr. 17, 2014) (on file with Texas Defender Service) (responding to a Public Information Act request) [hereinafter Gregg County DA PIA Response]. A standing order attached to this PIA response, indicated that the standing order that instituted late phase discovery was signed March 2, 2011. It is possible that the county updated its standing order before the publication of this report.

151. Tex. Code Crim. Proc. art 32.01 (providing that "[w]hen a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation, . . . shall be dismissed and bail discharged, if [an] indictment or information be not presented against such defendant on or before the last day of the next term which is held after his commitment or admission to hail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.")

152. Tex. Code Crim. Proc. art 12.02.

153. Tex. Code Crim. Proc. art. 12.01 (specifying that the statute of limitations for felony offenses ranges from three years to an indefinite time period).

postpone production until late in the proceedings against the accused. For example, a murder case may require several types of testing (including DNA, toxicological, and fiber analysis) that can take months for state forensic labs to complete.[154] Throughout Texas, thousands of cases are resolved during this phase in the proceedings. In Harris County alone, defendants pleaded guilty in 8,000 felony drug cases between January 2013 and November 2014. Roughly half of these pleas were entered before an indictment was returned.[155] Cutting off the defense's access to information undermines the integrity of any plea and the overarching purpose of the Act. Moreover, no language in Article 39.14 supports withholding discoverable information until prosecutors have received all relevant material from law enforcement.

Withholding Certain Evidence

Still other prosecutor offices follow a piecemeal disclosure timeline, in which certain categories of evidence are provided to the defense at different points in a case's life cycle. For example, Gregg County's Standing Order on Pretrial Discovery in Felony Cases specifies that all written or recorded statements of the defendant and co-defendants must be produced as soon as possible after arraignment, but allows withholding of third-party witness statements until an unspecified time "before jury selection."[156] This policy is inconsistent with Article 39.14's mandate that all enumerated materials—including witness accounts—be produced as soon as practicable. Jurisdictions that set a later deadline for disclosure, particularly one that is on the eve of trial, expressly violate the Act and deprive the defense of meaningful access to discoverable information.

Best Practices

As a best practice, offense reports, witness statements and other evidence should be made available to the defense as the prosecutor receives them. Tarrant County offers a lesson on how other counties might implement the Morton Act. Its District Attorney's Office uses an electronic system that uploads offense reports, lab results and audio/video recordings as they are received by the District Attorney, and makes them available to the defense. Each electronic case file also signals when a document exists but has been withheld on confidentiality grounds.

Further, Tarrant County's discovery practices are mindful of defendants who are jailed pretrial and, consequently, are under substantial pressure to enter a plea bargain. Defense attorneys report that the District Attorney's office has a policy of ensuring that all materials in its possession are made available to the defense at least three days before court dates for jailed defendants. This permits defense attorneys to provide meaningful advice and representation to their clients.

Other counties that do not have electronic filing systems report that they automatically generate discovery packets as cases are processed. These packets contain all information in the prosecutor's possession at the time of its assembly and are provided to defense counsel once he or she appointed or retained.[157] Additional materials are produced to defense counsel on a rolling basis as they arrive.

154. Standard drug tests can take up to 10 months to process. Eric Dexheimer, *Lab Delays Create Texas' Unknown Exonorees*, Austin-Am. Statesman, Apr. 19, 2014, *available at* http://www.mystatesman.com/news/news/state-regional/lab-delays-create-texas-unknown-exonerees/nfdTW/.

155. Mike Tolson and Anita Hassan, *Local Exonerations fuel U.S. Record: Wrongful Conviction in low-level Harris County Cases Account for About a Quarter of Total in National Report*, Hous. Chron., Jan. 27, 2015, at B1 & B3.

156. Gregg County PIA Response, *supra* note 150.

157. District attorney offices in Kleberg, Leon, and Moore counties.

Discovery Conditions & Waivers

Several written policies indicate that discovery and the defense's access to information continues to be used as a bargaining chip during plea negotiations and other pretrial proceedings. For example, a number of district and county attorney offices indicated that they condition the receipt of discovery upon representations by counsel or waivers of the defendants' rights within a criminal proceeding.[158] Others require that defendants forego access to part, or in some cases all, of the information that would be discoverable pursuant to the Morton Act in order to receive the benefit of a plea bargain.[159] All of these policies are contrary to the Act's mandate and at times run afoul of specific provisions in the law.

Statutory Requirements

The Morton Act instructs prosecutors to produce discovery under both subsection (a) (the general right to discovery materials upon request) and subsections (h) and (k), (affirmative duty on the part of the State to provide favorable evidence to the defense "before, during and after" the case's disposition). These rights apply with full force, regardless of whether the defendant intends to accept a plea bargain or proceed to trial. The Act's requirement that parties acknowledge an itemized list of the materials disclosed to the defense before a plea is accepted or the case proceeds to trial, clearly anticipates that the defense will have reviewed discovery materials in both contexts.[160]

Moreover, the Act envisions that this access to materials and information will be a floor, not a ceiling. By stating that the law "does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required under this article[,]"[161] the Act signals that prosecutors can agree to provide more information than required by law, but that agreements for less disclosure than what the law requires are unacceptable.

Problematic Policies

Conditions on Discovery

Prosecutors in jurisdictions across the state condition the timely disclosure of discovery materials upon terms that compromise defense counsels' ability to zealously advocate for their clients. For example, prosecution offices in Lee,[162] Cherokee[163] and Ector[164] counties allow defense lawyers to review their files before indictment. However, copies of the case file are provided at the prosecutors' discretion, depending on whether the defense plans to plea-bargain the case.[165] This requirement is thoroughly improper.

Not only is such a policy without a statutory or legal basis, a responsible defense attorney cannot advise

158. District attorney offices in Bell, Cherokee, Ector, Erath, Lee, and Victoria counties, and the 220th (Bosque, Comanche & Hamilton counties) Judicial District; county attorney offices for Erath, Lee and Young counties.
159. *See* Waivers of Discovery *infra*.
160. Tex. Code Crim. Proc. art 39.14(j).
161. Tex. Code Crim. Proc. art 39.14(n).
162. Letter from Martin Placke, District & County Attorney, Lee County, to Bernhardt (Mar. 7, 2014) (enclosing *inter alia* Lee County's Discovery Policies).
163. Letter from Rachel Patton, District Attorney, Cherokee County to Bernhardt (Mar. 4, 2014) (enclosing a document titled "New Discovery Policy") (on file with Texas Defender Service).
164. Letter from R.N. Bland, District Attorney, Ector County District Attorney to Bernhardt (Feb. 26, 2104) (enclosing information regarding the office's new discovery procedures) [hereinafter Ector County DA PIA Response].
165. Bell County requires that defense counsel open a dialogue with the assigned prosecutor before discovery is furnished. Letter from Henry Garza, District Attorney, Bell County, to Bernhardt (Jan. 27, 2104) (on file with Texas Defender Service) (enclosing *inter alia* a document entitled "Discovery Policy Change"). While this policy does not require a specific representation from defense counsel, it creates a barrier to disclosure that is without a statutory basis.

his or her client about plea bargaining before having determined the strength of the State's case. No less an authority than the State Bar of Texas holds that counsel should not make recommendations regarding the acceptance of a plea agreement without having conducted "appropriate investigation and study" of the case.[166] Discovery review is part of the appropriate investigation in which a defense lawyer must engage.[167] Prosecutors should not create discovery policies that encourage defense counsel to make plea recommendations to an accused in an informational vacuum.

Still other jurisdictions have maintained discovery agreements that require defense attorneys to waive objections to evidence in exchange for access to particular materials. For example, at the time of our PIA requests, the Young County Attorney[168] required defense counsel to waive the right to compel disclosure of discovery and forego disclosure of what are known as "404(b) and 613 materials"[169] under most circumstances[170] in return for access to "the police offense report, witness statements, and the video, if any"[171] and continual review of the county attorney's file.

Finally, some district attorneys ask defense attorneys to waive the right to make certain applications to the presiding court as a condition of receiving discovery. In Polk County, defense attorneys are asked to waive the right to file discovery motions, at least until a discovery request has been informally made and denied.[172] The Anderson County District Attorney produced a form asking defense attorneys to agree not to file certain challenges with the prosecution's evidence—*e.g.*, an objection to authentication of forensic drug or alcohol lab results by certificate of analysis and chain of custody *per* 38.41 and 38.42—as a condition of viewing and copying the prosecution's file.[173] Surveyed defense attorneys indicated that the practice of requiring waiver of a right to file discovery or other motions was occurring in other jurisdictions as well.

To the extent that they are in use, these discovery contracts are not only problematic, they also are illegal and unethical. The Morton Act creates a statutory right to discovery that is unqualified. Prosecutors have no basis for conditioning defense access to discoverable information on the waiver of other rights to disclosure provided by the Texas Rules of Evidence. Indeed the State Bar of Texas recently determined that prosecutors violate Texas Disciplinary Rule of Professional Conduct 8.04(a) (12) "if they attempt . . . to impose conditions not found in article 39.14 before making the required disclosures."[174] Such agreements are proper only when they give defendants access to information beyond the scope of materials itemized under the Act.[175] Second, the Young County contract wrongly places the duty of seeking out new discovery (by reviewing the prosecution's file) on defense counsel.[176] Article 39.14(a) places an affirmative duty on the prosecution to produce or furnish evidence, including newly available evidence, to the defense. Requiring the defense to routinely check the case file creates opportunities for gamesmanship by enabling prosecutors to "publish" new information to the file immediately after defense counsel's review.

Waivers of Discovery

One important aim of the Morton Act was to eliminate the criminal justice system's one-sided investigation process, where prosecutors alone have access to offense reports and other key evi-

166. *State Bar of Texas*, *Performance Guidelines for Non-Capital Criminal Defense Representation* Guideline 6.1(A) (2011), *reprinted in* 74 Tex. Bar J. 616, 626 (July 2011).
167. *Id.* (defense investigation includes analysis of the evidence the state will use at trial).
168. Letter from Lois Dayne Miller, Young County Attorney to Bernhardt (Aug. 5, 2014) (on file with Texas Defender) [hereinafter Young County CA PIA Response]. The district attorneys for the Eastland and Erath counties and the 220th (Bosque, Comanche & Hamilton counties) included similar contracts in their PIA responses in which the defense "agrees not to file motions for discovery or omnibus pretrial motions unless defense counsel has made a written request for specific discovery and the State refused to provide such information." Eastland's discovery agreement also reserves the right to discontinue a defense attorney's access to discovery via its online system if he or she violates its agreement. The Victoria County District Attorney's Office has a comprehensive discovery agreement in which defense counsel waives their clients' rights to an examining trial in exchange for immediate access to materials that are discoverable under the Morton Act. Email from Brendan Guy. Assistant Criminal District Attorney, Victoria County Criminal District Attorney's Office to Bernhardt (Mar. 31, 2014) [hereinafter Victoria County DA PIA Response].
169. Texas Rule of Evidence 404(b) concerns prosecutorial use of evidence concerning other wrongs, crimes or acts by the defendant to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ordinarily, the prosecutor must provide "reasonable notice" of the intent to use such evidence once the defense has made a "timely request." Meanwhile, Texas Rule of Evidence 613 concerns prior inconsistent statements by a witness or information showing the witness' bias or interest in a matter.
170. Defense counsel who accept the Young County Attorney's policy can move to compel discovery and Rules 404(b) and 613 materials only if the prosecution refuses a prior demand.
171. Young County CA PIA Response, *supra* note 168.
172. Letter from Sonny Eckhardt, Assistant Criminal District Attorney, Polk County District Attorney's Office to Bernhardt (Mar. 3, 2014) (on file with Texas Defender Service) [hereinafter Polk County DA PIA Response].
173. Email from Erica Morgan, Assistant District Attorney, Anderson County District Attorney's Office to Bernhardt (Mar. 7, 2014) (on file with Texas Defender Service).
174. Prof'l Ethics Comm. of the State Bar of Texas Op. 646 (2014), *available at* http://www.legalethicstexas.com/getattachment/3e3d21df-f51a-4771-acb9-8b520f9a55a9/Opinion-646.aspx.
175. *Id.*
176. Young County Attorney PIA Response, *supra* note 168.

dence during the early phases of a criminal justice proceeding.[177] The resulting transparency allows for an even playing field between the parties and meaningful plea negotiations, during which the defense can evaluate the fairness of any plea offer and make counter arguments for leniency. Yet, since the Act went into effect on January 1, 2014, many prosecutor offices have implemented policies designed to minimize the State's production burden in plea bargained cases.[178] These offices ask defendants to waive their rights to discovery pursuant to the Act as a condition to a plea agreement, and in many cases, the required waivers are so broad as to undermine the Act's purposes.

These policies often are premised on a false assumption that discovery and its attendant protections for the accused are unnecessary during plea negotiations because innocent defendants do not plead guilty. For example, in a letter to defense attorneys, the Wichita County District Attorney argues that waivers are not problematic: "The purpose of the Michael Morton Act is to prevent innocent people like Michael Morton from being convicted. Therefore, defendants should not be accepting plea-bargains unless they are guilty."[179] The letter states that defendants who wish to plead guilty must certify that they are satisfied with discovery, that any future speculative discovery would be inconsequential, and that they are waiving any rights they have under Article 39.14, since they are in fact guilty.[180]

Such statements misapprehend the intense pressures that criminal defendants experience. Even misdemeanor charges may have a profound effect on a defendant's life—*e.g.,* the loss of driving privileges, pretrial incarceration, loss of employment or loss of a student loan. In many instances, taking a case to trial presents financial and emotional hardships that are difficult for individuals to endure. These pressures, combined with the promise of a more certain outcome and a lenient sentence, make plea bargains attractive to some defendants, regardless of guilt. In fact, the notion that only the guilty plead guilty has been conclusively disproved. Innumerable surveys of the plea-bargaining process have concluded that many, if not the majority, of innocent defendants enter guilty pleas in order to minimize the collateral consequences of a prosecution.[181] Thirty-one of the 321 individuals who have been exonerated by DNA evidence nationwide—that is, almost 10 percent—pleaded guilty to the serious crimes with which they were charged.[182] A larger national database of exonerations has documented 151 of 1428 total exonerations—again, a little more than 10 percent—in which a defendant who was later exonerated pleaded guilty at the trial level.[183]

The Morton Act was intended to reduce the risk that an innocent person would plead guilty by providing defendants with broad access to the information from the initiation of the proceedings when a plea is anticipated, and not merely in those cases that proceed to trial. In fact, the Act's mandate that the prosecution provide discovery "after receiving a timely request from the defense," clearly embodies this intent.

The most commonly used waiver language that the defense is asked to sign as a condition of a guilty plea is as follows:

> Comes now the defendant and hereby waives *any additional right* to inspection or copying of discoverable items in the State's possession as permitted by Texas Code of Criminal Procedure article 39.14, *other than to the State's continuing duty under article 39.14(k), as well as under the United States and Texas Constitutions, to provide exculpatory, impeachment, or mitigation evidence tending to negate the defendant's guilt or tending to reduce his/her punishment for the charged offense*. My attorney has fully and completely explained to me my right to further discovery pursuant to article 39.14, and I understand that right. I am freely, knowingly, and voluntarily waiving that right

177. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 Am. U. Int'l L. Rev. 1241 (2002) (arguing that the criminal investigation framework in the U.S. and England gives rise to a high wrongful conviction rate due to a lack of oversight from the defense).
178. Responses from district attorney offices in at least 50 jurisdictions across the state produced a form that a defendant would sign waiving at least some discovery rights.
179. Letter from Meredith L. Kennedy, Civil Chief, Wichita County District Attorney's Office to Bernhardt (May 27, 2014) (on file with Texas Defender Service) (enclosing a letter from Maureen Shelton, First Assistant District Attorney, Wichita County District Attorney's Office to local defense attorneys (no date)).
180. *Id.*
181. *See e.g.,* Blume & Helm, *supra* note 132.
182. Innocence Project, Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Dec. 26, 2014).
183. Hon. Jed S. Rakoff, *Why Innocent People Plead Guilty,* N.Y. Rev. Books, Nov. 14, 2014, http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/.

> after my attorney has fully informed me of the consequences of this wavier. I agree to the State's recommendation on punishment because I believe it is in my best interests and I do so with the full advance of counsel and explanation of my rights.[184]

This waiver language forfeits a defendant's right to receive future or "additional" discovery post-plea bargain, but makes an important exception for any information that would qualify as discoverable under 39.14(k) or *Brady* and its progeny.

Yet, many prosecutors produced form waivers that go far beyond this commonly used language. At least 10 offices produced form waivers that make no exception for the right to disclosure of favorable information pursuant to Article 39.14(k) or the United States or Texas Constitutions.[185] For example, the Fort Bend County District Attorney's Office produced a form titled "Texas Code of Criminal Procedure Article 39.14 Disclosure." This document states that the defense attorney has reviewed the prosecution's file and explained the defendant's right to further discovery pursuant to Article 39.14. It further states, "I believe my choice to forego further discovery is in my best interest. I therefore knowingly, intelligently and voluntarily withdraw any pending discovery requests made pursuant to Article 39.14 and forego further discovery in this case." No exception is made for exculpatory, impeachment or mitigation information required by Article 39.14(k) or for *Brady* material. Grayson County has a similarly broad waiver. After stating that a defendant typically has a right to receive discovery pursuant to Article 39.14, the "Acknowledgment and Waiver of Rights" that defendant is asked to sign states, "I do not want to delay [pleading guilty] while the above described procedure is completed. I hereby waive the requirements of Art. 39.14 of the Tx Code of Criminal Procedure and those requirements set out above."[186]

Several counties go a step further with forms requiring defendants to explicitly waive the right to discovery of any exculpatory information. For example, the Marion County District Attorney produced a "Felony Admonishment, Waivers, Guilty Plea and Certification re: Appeal," in which all the rights that a defendant waives in order to plead guilty are outlined, including the right to "the discovery of exculpatory evidence, if any exists."[187] The District Attorney for the 69th Judicial District's "Plea of Guilty, Waiver, Stipulation and Judicial Confession," states that the defendant "waives the right to the discovery of inculpatory and exculpatory evidence beyond that already provided, if any exists."[188] Such waivers violate the Act.

Furthermore, prosecutors in a handful of counties are requiring the defense to state they are satisfied with the prosecution's compliance with the Act. For example, the Morris County District Attorney produced a form that requires the defendant to sign below a statement that includes this language: "I am satisfied that the State has disclosed to me and my attorney the material evidence in this case[.]"[189] Similarly, the Cass County District Attorney's form titled "Texas Code of Criminal Procedure Article 39.14 List of Released Discovery" states "defense counsel do hereby acknowledge that . . . the State has complied with its duty to release all discoverable evidence in its possession as of the date of the entry of the plea or commencement of trial as required by that provision."[190] In fact, and as Michael Morton's case demonstrates, neither the defendant nor a defense attorney can know whether the prosecutor has fully complied with its discovery obligations. Accordingly, neither defense lawyers nor defendants should be required to agree to what they cannot know in order to receive the benefits of a plea bargain.

Finally, a number of other district attorneys re-

184. (emphasis added). At least 25 district attorney offices produced a form containing this or substantially similar language including Anderson, Andrews, Austin, Bell, Cameron, Colorado, Comal, Denton, Ellis, Gregg, Hale, Hidalgo, Kaufman, Lampasas, Matagorda, Midland, Navarro, Newton, Ochiltree, Rains, Rockwall, San Jacinto, Upshur, and Wood counties, and the 50th (Baylor, Cottle, King & Knox counties) Judicial District.
185. District attorney offices for Cass, Eastland, Fayette, Fort Bend, Grayson, Marion, Morris, Tarrant, Taylor, 69th (Dallam, Hartley, Moore & Sherman counties) Judicial District.
186. Letter from Mark La Forge, Assistant District Attorney, Fort Bend County District Attorney's Office to Bernhardt (Feb. 5, 2014) (copy on file with Texas Defender Service) [hereinafter Fort Bend County DA PIA Response].
187. Letter from Mary Ann Mauldin, Administrative Assistant, County & District Attorney Office for the 115th & 276th Judicial Districts to Bernhardt (Mar. 5, 2014) (on file with Texas Defender Service).
188. Letter from David M. Green, District Attorney, 69th Judicial District to Bernhardt (Feb. 25, 2014) (on file with Texas Defender Service).
189. Facsimile from Steve Cowen, Morris County District Attorney Letter from Clint E. Allen, Cass County Criminal District Attorney to Bernhardt (Mar. 3, 2014) (on file with Texas Defender Service).
190. Letter from Clint E. Allen, Cass County Criminal District Attorney to Bernhardt (Mar. 25, 2014) (on file with Texas Defender Service). *See also, e.g.*, Letter from Scott K. Stevens, Assistant District Attorney, 52nd District to Bernhardt (Mar. 7, 2014) (enclosing "Acknowledgement of Discovery and Compliance stating "The undersigned parties hereby certify that the State provided discovery equal to or greater than is required by Texas Code of Criminal Procedure art. 39.14.")

quire broader waivers for misdemeanor defendants than for felony defendants. For example, the Eastland County District Attorney produced a separate "Misdemeanor Plea Memorandum" that requires the defendant in misdemeanor cases to waive "all rights to continuing additional discovery pursuant to the Texas Code of Criminal Procedure" without an exception for exculpatory information.[191] In some counties, this waiver is not specific to misdemeanor defendants, but rather to only *pro se* defendants, who are most often found in fine-only misdemeanor cases where no counsel is appointed. For example, the Nueces County District Attorney produced a form that allows *pro se* defendants to check a box by the statement "I am waiving my rights to discovery in this case."[192]

Legal & Practical Problems with Waivers

THESE WAIVERS NOT ONLY REMOVE IMPORTANT procedural and statutory protections for criminal defendants, they run counter to a prosecutor's ethical duty to disclose favorable evidence, and are of questionable legal force. A defendant's intent to enter a guilty/*nolo contendere* plea has no bearing on the scope of information to which the defendant is entitled.[193] The terms of the Morton Act make it clear that it applies to cases resolved by plea bargain as well as those that are tried. In addition, many waiver forms require the defense to indicate that it has received certain materials in discovery, and to agree that the prosecution has complied with the Morton Act. This latter requirement is improper because it requires the defense to agree to a statement that it cannot know is true. Defense attorneys, and defendants more generally, do not have access to the entirety of the State's evidence and thus do not know whether all requisite disclosures were made.

Texas ethics rules create an affirmative obligation on the part of prosecutors to provide the defense with all favorable evidence and this directive is independent of any rights or protections held by the accused. Texas Rule of Disciplinary Conduct 3.09(d) provides that a prosecutor in a criminal case must:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

This rule is roughly co-extensive with Article 39.14(h)'s provisions regarding exculpatory, impeaching and mitigating evidence because it requires disclosure of favorable information to the defense without any consideration for its materiality.[194] The rule goes further by requiring disclosure before any critical phase in the proceedings against the accused.[195] The responsibility is unqualified. It cannot be waived by a criminal defendant. In Formal Opinion 09-454, which interpreted Model Rule 3.8(d) on which the Texas Rule 3.09(d) is based,[196] the ABA Standing Committee on Ethics and Professional Responsibility determined that a defendant cannot waive a prosecutor's noncompliance with this obligation in exchange for leniency. In the words of the committee: "A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.08(d), and a prosecutor may not solicit, accept or rely on a defendant's consent."

Moreover, case law suggests that favorable evidence is located in a significant number of cases after disposition. This favorable evidence may include the discovery of new evidence, such as previously untested DNA or the confession of another person. It may also include evidence of forensic failure, such as the discovery that a lab technician perjured himself, putting all cases in which he testified in doubt, or a forensic scientist who falsified results. This latter example is taken straight from the headlines. As

191. Letter from Sarah Adams, Assistant District Attorney, 91st Judicial District to Bernhardt (Mar. 4, 2014) (on file with Texas Defender Service).
192. Facsimile from Nueces County District Attorney's Office to Texas Defender Service (Mar. 3, 2014) (on file with Texas Defender Service).
193. TEX. CODE CRIM. PROC. art 39.14(j).
194. *See* George E. West, II, *A Prosecutor's Duty to Disclose: Beyond Brady*, 73 TEX. BAR J. 546, 549 (2010) (explaining that the scope of information that must be produced under *Tex. Disciplinary R. Prof'l* Conduct 3.09(d) is substantially broader than the requirements under *Brady v. Maryland* and its progeny).
195. *Id.* at 548 (citing *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (en banc) (interpreting an identical rule of professional conduct)).
196. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 454 at 7 (2009).

discussed in the Introduction, after chemist Jonathan Salvador was found to have falsified test results in drug cases, questions were raised about convictions in thousands of cases that he had worked on throughout his tenure.[197] While district attorneys in several affected counties notified defense attorneys of the discovery soon thereafter, the Fort Bend County District Attorney waited almost a year to do so.[198] Many defendants whose convictions rested upon this chemist's fake test results languished in prison for more than a year before they were notified of this scandal. Had those defendants signed blanket waivers of the right to discovery without an exception for the production of information subject to Article 39.14(k), they might never have received word of Salvador's falsifications.

Best Practices

BEST PRACTICES DICTATE THAT ATTORNEYS FOLLOW the law as the legislature intended it to operate. Prosecutors should not craft form waivers to evade the statute's requirements, nor should defense attorneys sign or advise their clients to sign waivers of their right to discoverable information. Under no circumstances should either party waive the defense's right to future production of exculpatory, impeachment or mitigating information that would be discoverable post-conviction pursuant to Articles 39.14(h) and (k).

If these waivers are intended to acknowledge that discovery has concluded and the defendant does not expect the prosecutor to produce any additional information that is not exculpatory, impeaching or mitigating, then documents should state as much. Rather than using the word "waiver" or "waive," parties can state that defendant is "withdrawing" his request. This withdrawal should be accompanied by a statement of what has already been produced through discovery pursuant to Article 39.14(j) to document that the prosecution has turned over the information in its possession at that time. The form also must state clearly that the prosecution will continue to produce any favorable information discovered after the entry of a plea bargain. The Galveston County District Attorney in its "Acknowledgment of Compliance with Article 39.14" contains such language. The acknowledgment states that the defendant who is pleading guilty is satisfied with the discovery to date and wishes to:

> *withdraw* any unfulfilled request for discovery items under Texas Code of Criminal Produce Article 39.14, other than to the State's continuing duty under Article 39.14(k), the United States Constitution and the Texas Constitution to provide exculpatory, impeachment or mitigation evidence tending to negate the defendant's guilt or tending to reduce his punishment for the charged offense.[199]

Ultimately, for the Michael Morton Act to truly increase the accuracy of criminal convictions, defendants must have access to discoverable information before entry of a guilty plea, just as they must before trial.

197. See discussion, *supra* Introduction.

198. Leah Binkovitz, *Fort Bend DA Waited Months Before Notifying Defense Counsel of Tainted Evidence*, HOUS. CHRON., Oct. 26, 2014, *available at* http://www.houstonchronicle.com/news/houston-texas/houston/article/Fort-Bend-DA-waited-months-before-notifying-5849410.php.

199. Letter from Donna Cameron, First Assistant, Galveston County District Attorney's Office to Bernhardt (Feb. 10, 2014) (on file with Texas Defender Service).

Disclosure Format

UPON RECEIPT OF A TIMELY request from defense counsel, the Morton Act directs prosecutors to produce—*i.e.,* provide—specific material to the defense *and* make them available for inspection, duplication and testing. These separate requirements are designed to ensure that the defense has sufficient access to material in the State's possession without unduly burdening the prosecution with hard-and-fast requirements that may be inappropriate in specific instances. For example, written reports and other documents are often best disclosed *via* paper or electronic copies; in contrast, physical evidence may require inspection, testing and even photographing.

To date, many prosecutor offices have reported that they employ a number of different delivery methods for their disclosures, often in conjunction with each other, such as: (1) cloud-based repositories,[200] (2) email, (3) regular mail or carrier services, (4) making materials available for pick-up, and (5) inspection procedures that allow defense teams to review files and make their own copies of the materials within. However, the exclusive use of the last two methods—making materials available for retrieval and inspection—violate the Morton Act in that they can unreasonably delay the provision of discovery, and/or fail to "produce" material to the defense altogether. To comply with the Act, prosecutors must provide copies of discovery materials or make them available to the defense in accordance with the terms of a request, and do so in an expeditious manner.

200. Cloud-based repositories are online storage systems where information is stored electronically and may be accessed online.

Statutory Requirements

ARTICLE 39.14(A) DIRECTS PROSECUTORS TO "PRODUCE and permit the inspection and electronic duplication, copying, and photographing . . . of" certain enumerated materials and to do so "as soon as practicable." A later clause in this subsection states that "[t]he state may provide . . . electronic duplicates of any documents or other information described by this article." Prosecutors have criticized this language for mandating "three different types of disclosure—electronic duplication, copying, *and* photocopying"[201] and for contradicting itself with a statement on the one hand that the prosecution must allow the electronic duplication of materials, and, on the other, that it may provide electronic copies at its discretion. However, this text merely provides that prosecutors hold two potential obligations under the statute. Depending upon the request from the defense, they must "produce" discovery by providing copies, and/or making them available to the defense for inspection and duplication. The latter requirement may be either in addition to or in *lieu* of a discovery production. It is incumbent upon the defense to draft a discovery request that is appropriate given the facts and circumstances at hand.

The specific reference to electronic duplication is a clarifying provision that allows prosecutors to produce discovery in an electronic format at their discretion.[202] Its intent was to accommodate the differing resources available to prosecutors. Some district and county attorney offices handle a high volume of criminal cases and may realize savings through the use of electronic production systems, while others

201. DIANE BECKHAM, ANNOTATED LAWS OF TEXAS: 2013-2015 369 (2013) (published by the Texas District and County Attorney's Association) (emphasis in original).
202. For a description of the Morton Act's discovery format provision see McKinney, *supra* note 44 at 9, 16-17.

file comparatively few cases annually and cannot justify the expense of scanning equipment.

Moreover, the inspection and production of a document/item is necessary in some instances. Documents with handwritten entries inevitably contain information—*e.g.,* white out, eraser marks, ink color—which may not be memorialized if photocopied or scanned in a black-and-white format, but which are important to the case. For example, a check may have been altered to reflect a different figure after the maker signed it or a loan application may have been changed after submission to reflect a qualifying income. In such circumstances, defense attorneys should be permitted to copy, scan or photograph the item in question, as well as inspect it to capture all relevant information. As drafted, the Act grants this necessary access while allowing the prosecution to use a means of production that is within its capabilities.

Legal Issues with Production Methods

A SELECT NUMBER OF PROSECUTOR OFFICES DO NOT produce materials to the defense, and respond to discovery requests by permitting the inspection and duplication of their case files.[203] For example, the Polk County District Attorney's discovery agreement states that defense attorneys are responsible for documenting the materials that are made available and must routinely check the file for supplemental discovery.[204] Similar obligations are placed on defense attorneys practicing in Victoria County where the discovery agreement provided in response to our PIA request contains a statement that:

> The Defense realizes that as the State prepares for trial[,] documents may be added to the State's file. Knowing this, the Defense must review the State's file for this additional discovery and that the State bears no responsibility to notify the Defense of additions or their trial preparation. The sole exception is that the State will proactively notify the Defense of any notice of exculpatory or "Brady material."[205]

These systems directly conflict with the Morton Act's mandate that prosecutors "produce"—*i.e.* provide copies—of materials to the defense. They are also are rife for abuse on both sides due to the lack of specificity regarding the disclosure and receipt of specific material. Even when both parties act in good faith, the requirement that defense attorneys review active files, carries a substantial risk that privileged information will be inadvertently disclosed or that some materials will be removed and withheld without the defense's detection.

Further, these systems are inefficient in that they require defense counsel to make multiple (and, in some cases, unnecessary) trips to the prosecutor's office to inspect the file while being supervised by office personnel. These problems could be avoided if the prosecution mailed copies of new materials to the defense as they arrive or, at the very least, emailed defense counsel to advise when new materials are available for review.

In other instances, prosecutors "produce" materials to the defense in a manner that significantly postpones the discovery process and thereby violates the Morton Act's requirement that prosecutors provide discovery promptly after a request is received. For example, the Fort Bend County District Attorney's Office has established disclosure protocols that unnecessarily delay the provision of discovery given the resources available to it. Its staff uploads all lab reports and electronic evidence during intake, which occurs before documents are sent to the court secretary for filing.[206] These files could easily be made available to defense counsel via email or a cloud-based system. Either of these means of delivery would provide the defense with ready access to information while minimizing the office's administrative burden and generating an electronic record of the time, date and substance of each discovery production. However, instead of availing itself of the conveniences of technology, the Fort Bend District Attorney's Office requires that its line prosecutors conduct in-person discovery meetings with defense

203. District attorney offices for Newton and Polk counties and the 23rd Judicial District.
204. Polk County DA PIA Response, *supra* note 172.
205. Victoria County DA Response, *supra* note 168 (attached Discovery Agreement at 10).
206. Fort Bend County PIA Response *supra* note 186 (enclosing *inter alia Fort Bend County District Attorney's Office, Office Procedure under the Michael Morton Act* (revised 1/2014)).

counsel during which they review the materials at issue in each case before release. This meeting requirement often a poses a substantial barrier to the defense's access to information. Some defense attorneys report that discovery requests remain pending for months due to the pressures of their schedules and those of the line prosecutors, who often are hard to reach and must add these meetings to their pre-existing case duties.

A similar production method that can result in untimely delivery of discovery occurs in counties where defense attorneys are required to retrieve discovery from the prosecutor's office and are prohibited from delegating this task to other members of the defense team.[207] In addition to adding expense in cases where counsel is court-appointed, these policies unduly burden the defense and affect the timeliness of the production, particularly in remote pockets of the state where the attendant travel time to the prosecuting attorney's office significantly undercuts a defense lawyer's productivity.

Prosecutors justify this "appearance requirement" as a means of ensuring their compliance with the Act's documentation requirement. However, in cases where the scope of discovery is large and the method of production includes electronic information on storage devices, it may be impossible for the receiving lawyer to fully review the content of the production before acknowledging receipt. Moreover, there are several less burdensome ways to verify receipt that do not require the lawyer's appearance at the prosecutor's office. These include mail-tracking receipts, facsimiles, and email. When a prosecutor insists that a signature is required, attorneys should be able to designate an agent who can sign for and deliver the materials to them. The Act explicitly allows counsel to share discovery materials with other members of the defense team, including investigators, legal consultants and other agents.[208] The requirement that an attorney must personally appear is without any legal or practical basis.

Best Practices

WHEREVER POSSIBLE, PROSECUTORS SHOULD PRODUCE copies of discoverable items to the defense by a means that records the time and date of each delivery.[209] The reasons for this process are three-fold. First, providing copies allows the prosecution full control over the materials that are furnished to the defense. Sections of some documents may not be subject to discovery and require redaction. Providing copies allows the prosecution to withhold sections of such materials from the defense while fulfilling their disclosure obligations. Second, production eliminates the defense's review of a working file, which increases the possibility of error. Offense reports may be removed inadvertently from the file, while privileged material may be disclosed unintentionally. Additionally, the defense will waste significant time checking and rechecking a working file, rather than simply relying on the prosecutor to produce copies when they become available. Third, production minimizes disputes over the disclosure of relevant material and information, in that materials may be transmitted in a manner that documents their receipt—*e.g.,* certified mail, an electronic interface, email.[210] Particularly useful are cloud-based discovery systems, such as those in El Paso and Tarrant counties, which automatically generate a list of the documents uploaded in each case. This list is then attached to the court file to document Morton Act compliance at the time of case disposition or before trial.

207. District attorney offices for Cherokee and Denton counties and the 21st (Burleson & Washington counties) Judicial District. Survey responses from defense attorneys in Brazoria, Ellis, Hardin and Rockwall counties reported that they must retrieve discovery in person. The Kaufman County District Attorney also requires in-person pick up, but this task may be delegated to other members of the defense team.
208. TEX. CODE OF CRIM. PROC. art 39.14(e) & (f).

209. Several prosecution offices throughout the state meet these criteria including the district attorney offices for: Angelina (email), Bell, Bexar, Brazos, Cameron, Eastland, Ector, El Paso, Galveston, Hays (email), Johnson, Somerville, Lubbock, Nueces, Orange, Palo Pinto, Rusk, Tarrant and Wichita counties and the 220th (Bosque, Comanche & Hamilton counties) Judicial District.
210. Whenever photocopies are mailed via parcel post to defense counsel, it is recommended that the prosecution include a cover sheet that itemizes the enclosures and states the number of pages included in the production. At all times, the parties should use Bates numbers to document the specific pages that are exchanged in discovery.

Discovery Documentation

A CENTRAL TENET OF ANY form of litigation, whether it is criminal or civil, state or federal, is that parties should record and document their productions to their opponent.[211] Although discovery is a frequent subject of controversy, such records eliminate future evidentiary battles regarding the State's failure to disclose pertinent information and limit litigation to substantive issues of admissibility. They also shield prosecutors from allegations of having suppressed evidence and facilitate responses in post-conviction proceedings that often are filed long after discovery is tendered.[212] It is with these goals in mind that the Timothy Cole Advisory Panel on Wrongful Convictions[213] endorsed this requirement and that the Galveston District Attorney's Office instituted a policy of requiring defense attorneys to acknowledge the receipt of specific materials at the time of each production.[214]

The Morton Act codifies this principle in Articles 39.14(i) and (j), which provide that: (1) that the prosecution must "electronically record or otherwise document any document, item, or other information provided to the defendant under this article," and (2) before trial or the entry of a plea of guilty or *nolo contendere*, "each party shall acknowledge in writing or on the record in open court the disclosure, receipt and list of all documents, items and information provided to the defendant under this article." Thus, it has a two-step process. First, prosecutors must maintain their own records about their specific productions to the defense. Second, both parties must certify to the court that certain materials were provided in the case, either by filing a verified list of produced discovery in the court record, or making an affirmative statement on the record.

Despite the protection that these provisions provide for prosecutors, several offices have found these requirements to be particularly burdensome. In May 2014, Rob Kepple, Executive Director of the Texas District and County Attorney's Association, reported to the *Texas Tribune* that that he had "heard from several counties that 'documentation has been a strain.'"[215] Without knowledge of the specific counties that are having issues with documenting their productions, it is difficult to respond to their concerns. Nevertheless, our research demonstrates that prosecutors in several counties have established production procedures that facilitate this process and minimize the time associated with each disclosure.

Best Practices

AS DESCRIBED IN PREVIOUS SECTIONS, THE USE OF electronic discovery systems can greatly reduce the administrative aspects of producing materials to the defense. Many prosecutor offices throughout the state, including the district attorney offices in Bexar, Eastland, El Paso and Tarrant counties have employed cloud-based discovery systems that automatically inventory the discovery materials produced in a particular case, the date when they were made available and when they were accessed by the

211. *See, e.g.*, Memorandum from Deputy Attorney General David W. Ogden to Department of Justice Prosecutors Re: Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010) ("One of the most important steps in the discovery process is keeping good records regarding disclosures."), *available at* http://www.justice.gov/dag/memorandum-department-prosecutors.

212. *Id.*

213. TIMOTHY COLE REPORT, *supra* note 10 at 27-28; *see also* JUST. PROJ. REPORT, *supra* note 132 at 6

214. Chris Paschenko, *Two Prosecutors out at DA's Office*, *Daily News*, Oct. 3, 2012 (reporting that Galveston District Attorney Jack Roady instituted a policy that requires the documentation of what evidence is provided to defense attorneys after two line assistants failed to produce a 911 tape to defense counsel).

215. Terri Langford, *Costs and Questions as TX Implements New Discovery Law*, TEX. TRIB., May 29, 2014, http://www.texastribune.org/2014/05/29/michael-morton-act-driving-evidence-costs-das/.

defense. When materials are produced in a physical form—*i.e.* via paper copies or on a CD—Tarrant County enters the disclosure into the online system, which notifies defense counsel that he or she must pick up additional materials. The lists that these systems generate can then be verified by defense counsel and introduced into the trial record in satisfaction of Article 39.14(j).

For counties that cannot afford such systems, costs can be minimized by integrating the documentation requirement into each discovery production. A case index at the beginning of every file that itemizes the materials that have been added to the prosecution's file and when they were received by the defense—*e.g.*, *via* certified mail, email or hand delivery—can be used to generate a discovery list that can be filed with the court. These entries should be made at the time of each action. For example, if an offense report is added to the file and emailed to the defense, the line prosecutor should make a notation at the time the report is emailed. This process also provides line prosecutors with a quick reference point for all evidence at issue in a given case and is handy when more than one prosecutor or defense lawyer handles a given case.

Another technique that may eliminate confusion regarding the documentation of discovery is the use of Bates numbering. Although the statute does not require that the prosecution Bates number its productions, doing so, particularly in document-heavy cases, greatly facilitates the discovery process. Bates numbering is a page-numbering system in which every page that is provided in discovery is assigned a unique number. This numbering allows any party to respond to a claim that a document was not produced by referring to the specific page wherein it was produced. It also facilitates the documentation requirement under Article 39.14(j) by enabling the prosecution to collectively list categories of documents by referring to their Bates numbers—*e.g.,* offense reports Bates numbered 1-45. Moreover, the process of numbering individual pages can be automated for a minimal expense. Readily available software, including Adobe Professional, has Bates-numbering functions that allow parties to instantaneously number thousands of pages with a single click of a button.[216] Many of these programs allow users to sequentially number several electronic files at the same time and can be purchased for less than $200. Further, if an office does not scan its discovery, many copy machines will automatically Bates-number copies and streamline this step in the discovery process.

216. Acrobat for Legal Professionals, http://blogs.adobe.com/acrolaw/category/bates-numbering/ (last visited Jan. 27, 2015).

Discovery Costs

THROUGHOUT THE PAST YEAR, several news articles have reported on the costs associated with complying with the Morton Act. Some elected officials have gone so far as to argue that the Act constitutes an unfunded mandate to county governments, which must now absorb the expense of preparing and documenting discovery productions in their annual budgets. A detailed analysis of the expenses associated with the Morton Act is beyond the scope of this report. However, it bears noting that many of these costs are likely to decrease over time as a growing number of prosecutors adjust their case processing procedures to accommodate their new requirements. Several offices reported that they automatically produce documents to the defense, whether by making copies or scanning documents, as they review and receive materials from law enforcement. This one-step process eliminates duplication in the case-review process and minimizes staff hours. In many instances prosecutors also produce documents by electronic means—*e.g.*, cloud-based systems—that automatically generate a record of the materials that are produced that may be introduced into the trial record in satisfaction of Article 39.14(i)'s documentation requirement.

Some prosecutors have begun to charge defense attorneys fees for discovery production. The Morton Act anticipates that this may be necessary in Article 39.14(l), stating, "A court may order the defendant to pay the costs related to discovery . . . provided that costs may not exceed the charges prescribed by Subchapter F, Chapter 552, Government Code." The referenced Government Code section, which concerns Public Information Act requests, allows the government agency to charge individuals for labor, materials, and overhead costs associated with responses that are greater than 50 pages, but limits the agency to a per-page fee for responses that contain fewer than 50 pages.[217] Under this provision, a local prosecutor may seek to defray production costs by obtaining a standing order that directs payment of such fees as applicable or a specific order that requires reimbursement in an individual case.[218]

Several county prosecutors have implemented *a la carte* fee schedules.[219] The Ector County District Attorney charges defendants $0.10 per page for physical copies, $15.00 per hour for preparation time, and $1 for each CD/DVD provided in each case.[220] Other jurisdictions charge attorneys flat fees for discovery productions. The Hays County District Attorney's Office charges a $10 administrative fee in each case,[221] while other offices, including the Lubbock County District Attorney's Office, charge defense counsel annual subscription fees for use of an online e-discovery system.[222] These fees are proper to the extent that they are ordered by the court and reasonably relate to, and reimburse prosecutors for, the labor, materi-

217. Tex. Gov't Code § 552.261.

218. Although no court has ruled on the constitutionality of passing these expenses onto indigent defendants, doing so may constitute a violation of an indigent defendant's right to counsel under the Sixth and Fourteenth Amendments. *See e.g., Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[W]hile the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system. To implement this principle, we have focused on identifying the basic tools of an adequate defense or appeal, and we have required that such tools be provided to those defendants who cannot afford to pay for them.") (internal citations omitted); *and Ex parte Briggs*, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) (a defendant who exhausts her resources hiring counsel is entitled to seek court funding for auxiliary defense services).

219. District attorney offices in Angelina, Brazoria and Fort Bend counties. The district attorney offices for the 51st (Coke, Irion, Schleicher, Sterling & Tom Green counties) and 119th (Concho, Runnels & Tom Green) Judicial Districts allow their local defense attorney associations to maintain copy machines in their offices at the associations' expense.

220. Ector County DA PIA Response, *supra* note 164.

221. Email from Aaron Diaz, Legal Assistant—Civil Division, Hays County Criminal District Attorney's Office to Bernhardt (Feb. 17, 2014) (copy on file with Texas Defender Service). This requirement may be inconsistent with the Morton Act's reimbursement provision in many cases.

222. Letter from Donna L. Clarke, Assistant Criminal District Attorney, Lubbock County Criminal District Attorney's Office, to Marzullo (Oct. 31, 2014) (copy on file with Texas Defender Service) (enclosing documents that describe annual subscription fees for its e-discovery system that range $360 for solo practitioners to $6,000 for firms with 20 or more lawyers); Ector County DA PIA Response *supra* note 164 (including a discovery agreement wherein participating attorneys agree to pay a $50.00 annual fee to receive discovery via online database).

als and overhead costs associated with the production of discovery in cases where more than 50 pages of material is disclosed to the defense. However, these payments should not be a revenue-generating mechanism for local prosecutor offices. For example, if the annual subscription fee generates more revenue than necessary to defray the licensing and maintenance costs for the e-discovery system, it does not meet the intent of the Act.

Conclusion

The Michael Morton Act instilled transparency into the Texas criminal justice system when it took effect January 1, 2014. Defendants now are entitled to receive much of the information in the State's possession upon request and without a court order. Further, the State must "promptly disclose" any information that could be considered exculpatory, impeaching or mitigating, without a request from the defense, even if it is discovered after the defendant's conviction. The Morton Act also establishes discovery rules to protect information that is confidential, privileged or could endanger public safety. Yet, changing the processes in every single criminal case across the state naturally comes with a steep learning curve. Confusion and ensuing litigation regarding the Act's implementation is to be expected.

The major issues highlighted in this Report—*e.g.*, failure to disclose certain categories of information, misunderstandings among law enforcement about what they are required to provide to prosecutors, delays in the provision of discovery, and the requirement by some offices that defendants waive certain discovery-related rights in the plea process—are vitally important to the full implementation of the law as well as the fair administration of justice. It is the recommendation of the authors that prosecutors and law enforcement agencies, with the input of defense attorneys, review their current policies and practices and implement the necessary changes to ensure that they are following best practices. Specifically, the authors recommend that prosecutors:

- Ensure that the defense has access to information as soon as it is received by the prosecution, without any unnecessary delay, regardless of a case's procedural posture;
- Eliminate any policy that requires that defense counsel waive any right(s) in exchange for receiving discovery pursuant to Article 39.14 and discontinue the use of any associated form;
- Do not require defense counsel or defendants to waive any right to discovery pursuant to Article 39.14 as a condition of a guilty plea;
- Rewrite any form that asks the defendant or defense counsel to affirmatively state that the prosecution has complied with their obligations under Article 39.14;
- Reconsider blanket rules that withhold or redact entire categories or types of information to ensure that all discoverable information is being produced;
- Establish systems for providing the defense with notice of any withholding or redaction on a case-by-case basis;
- Review all materials provided to local law enforcement agencies to ensure they contain accurate information about the current state of the law and fully convey law enforcement's obligations under the Morton Act;
- Closely communicate with local law enforcement agencies and provide regu-

lar training to them to ensure all relevant information is documented and provided to the prosecution, reserving any judgments about what is discoverable to the prosecution, and continuing to disclose favorable information after a final conviction; Require written confirmation that this has been done in every case;

- Produce copies of documents to defense counsel in the most efficient method possible, and if possible, install a cloud-based discovery system that automatically tracks all documents uploaded and downloaded in a case.

Ultimately, the implementation issues identified do not require an immediate legislative fix. The passage of any new legislation during the 84th legislative session that would further amend Article 39.14 would likely cause more confusion and stymy existing efforts to appropriately implement and comply with the 2013 law. Prosecutors, as well as law enforcement and defense attorneys, still need time to understand and give full effect to the letter and spirit of the law. With the continued development and implementation of best practices, many of the issues should be resolved, and the Morton Act will improve the fairness, accuracy and efficiency of the Texas criminal justice system, as it was designed to do.

APPENDICES

COLORADO COUNTY BRADY POLICY

Brady v. Maryland requires Prosecutors and other Law Enforcement personnel to disclose any and all evidence favorable to a defendant that is either exculpatory or impeaching, and is material to either guilt or punishment. Evidence considered to be exculpatory is that evidence which will clear the defendant from fault or guilt or lead to mitigating evidence. Evidence considered to be mitigating is evidence that might reduce a defendant's culpability or limit his/her punishment. **Whether evidence is considered mitigating will be determined by a court during trial or upon appellate review. The wrong decision will be held to be an intentional Brady violation and may lead to civil liability and/or the inability to re-try the defendant. *Err on the side of caution.***

- Investigate for the existence of Brady material;
- Collect and maintain Brady material;
- Make prosecuting attorneys and attorneys for the defense aware of the existence of potential Brady material;
- Make potential Brady material available for the prosecuting attorneys and attorneys for the defense; and,
- When in doubt, consider the evidence Brady.

Potential impeachment or exculpatory material in the possession of law enforcement includes:

- Statements made by the defendant or potential defense witnesses which contradict statements made by a material law enforcement employee or witness;
- Statements made by the defendant or potential defense witness that an enforcement employee or witness used excessive force;
- Statements made by the defendant or potential defense witnesses that allege racial or religious bias; and
- Biased statements by a law enforcement officer.

Because mitigation is often determined at trial, other evidence can be considered Brady material. Therefore, include all evidence in the file submitted.

Compliance with, Brady disclosure requirements continues until final disposition of each and every criminal case. As such, any and all potential Brady material discovered after submission of the file to the County Attorney's Office will be incorporated with the criminal file, and disclosed to the County Attorney's Office by supplement. It is the joint responsibility of the supervising and investigating officer to inform the prosecution of any and all exculpatory or mitigating material discovered at any time.

By signing below I am signifying that I understand my responsibilities regarding Brady information and agree that, as it concerns investigations, I will forward all Brady or potential Brady information in the possession of my agency to the County Attorney's Office in all of my cases.

_____
Date

_____
Signature

_____
Printed Name

_____
Agency

Rosemary Lehmberg ✯ Travis County District Attorney
P.O. Box 1748 Austin, Texas 78767 • Telephone: 512-854-9400 • Fax: 512-854-9534
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April 8, 2014

Art Acevedo
Chief of Police
Austin Police Department
715 East 8th Street
Austin, Texas 78701

Dear Chief Acevedo:

The 83rd Texas Legislature recently passed SB 1611, otherwise known as *The Michael Morton Act*. This new law adds many requirements that prosecutors and law enforcement officers must follow for all criminal cases that commence after January 1st, 2014. Our office is now required to produce to defense counsel electronic duplicates of all evidence, potential evidence and information related to a case. The law requires that we must disclose to defense counsel "any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." This requirement includes evidence in the possession of *any* law enforcement agency that has investigated the case.

For this reason, before we can present a case to a grand jury, we need to make sure that your agency has submitted to us each and every piece of evidence or information connected with a case in your possession, in the possession of any other employee of your agency or in the possession of any other law enforcement agent you have worked with on the investigation. We ask that you provide this evidence and information *without regard to whether or not it appears to you to be relevant or material to the case.* In searching for this evidence and information, we ask that you check all files, computer directories and other records and inquire with all individuals who may have worked on the case, or who may have retained records associated with the case, to ensure that absolutely every item associated with a case has been provided to us.

This request for evidence and information includes, but is not limited to, ***any and all***:

- Investigative reports or offense reports and report supplements in the case
- Investigative reports or offense reports and report supplements in any related cases (e.g., codefendants)
- Names, contact information and identifiers for any and all persons interviewed in connection with the case, including any victim(s)
- Witness statements and interview notes, whether audio or videotaped, typed, handwritten, or otherwise memorialized, of any and all persons interviewed in connection with the case, including any victim(s)
- Correspondence/communications with all witnesses, victim(s), the defendant and counsel for any of these individuals, including letters, emails, text messages, voicemails, instant messages, etc.

- The defendant's and codefendants' statements and interview notes, whether audio or videotaped, typed, handwritten or otherwise memorialized
- 911 recordings with any possible connection to the case, and any transcriptions
- Photographs taken in connection with the investigation, including crime scene photos, autopsy photos, and victim injury photos
- Line-ups, show-ups and any materials compiled to prepare line-ups or show-ups in connection with the case, even if never shown to a witness/victim
- Video or audio recordings of the events at issue or the location at issue, including surveillance videos, patrol car videos and security camera footage, and any transcriptions of recordings
- Scientific reports and test results, including: autopsy reports, drug/substance analysis, ballistic reports/analysis, fingerprint analysis, DNA testing, blood or breath testing results, computer/cell phone forensic analysis, etc.
- Names, contact information and identifiers for any and all experts ever consulted in connection with the case
- Correspondence with scientific experts or other expert consulted in connection with the investigation and copies of their reports and supplements
- Written correspondence, including memoranda, emails and text messages sent or received to anyone in connection with the investigation
- Offers, suggestions, or implications of leniency made to any person or entity in connection with the case, even if not acknowledged, written or recorded
- Search warrants, search warrant affidavits and any documents or evidence used in the preparation of search warrants
- Copies of every document, correspondence, card, receipt, calendar, journal, ledger, or other writing seized or obtained from any person or entity in connection with the case
- Digital images/copies and forensic reports of all electronic data of any correspondence seized in connection with the case, including computers, USB drives, CDs, DVDs, cell phones, tablets, digital cameras and other devices capable of digital media storage
- Evidence inventories and photographs of all physical evidence seized or obtained from any location, entity or person in connection with the investigation
- Medical records obtained in connection with the investigation
- Other business records, including, but not limited to, bank records, sales records, phone records, utility records, real estate documents, postal records, government documents, etc.
- Spreadsheets, graphs, exhibits, flow charts, diagrams and any other compilations or summaries of any evidence prepared in connection with the case, including, but not limited to, business records
- Copies/images of any digital communications, images or other social media evidence obtained in connection with this investigation, including but not limited to web pages, Facebook/MySpace pages and posts, emails, text messages, instant messages and Twitter posts, the date and method of capture of the social media data and the name and contact information of the individual who captured the data
- Court records, evidence and sworn testimony from any other criminal cases, or civil or administrative proceedings related to the investigation
- Criminal history of the defendant
- Criminal histories of any and all persons interviewed in connection with the case
- Notes and memoranda created by law enforcement officers in connection with the case

If you feel that a particular item or information should be redacted or excluded from discovery, feel free to make that concern known when providing the data. However, *please do not make any redactions or exclusions from the material you provide to our office.* A prosecutor will make an assessment of what material may lawfully be redacted or excluded in compliance with Texas law before providing discovery to defense counsel.

In addition, the State's obligation to provide discovery does not end with the referral of a case for prosecution, with indictment by grand jury, or even upon conviction of the defendant under investigation. Therefore, we ask that, henceforth, you provide us with any additional information or evidence (see above list) you may receive in connection with a case.

We thank you for your hard work and your service to the public.

Sincerely,

Rosemary Lehmberg

STATE OF TEXAS vs. _____
OFFENSE(S) _____
DATE OF OFFENSE: _____

FILING ACKNOWLEDGEMENT

My name is _____ and I am the primary/responsible officer in the attached case which is being submitted to the Coleman County District Attorney's Office for prosecution. In that capacity I have forwarded the attached list of documents, items, and information for the purposes of filing a criminal case. I hereby state that to the best of my knowledge this list represents all the material documents, items, and information gathered and created by the **CPD / CCSO / SAPD / DPS /** _____ in connection with this case. And further, outside of this material provided, I have no knowledge or belief of any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of this law enforcement agency that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. I further acknowledge my continuing obligation to supplement all additional documents. items, and information which meets this description and comes to my knowledge or into my possession subsequent to the date of this acknowledgment.

List of all documents, items, and information submitted

( ) Offense Report(s)

Prepared by _____
Prepared by _____

( ) Witness Statement(s)

Made by _____ # of pages _____
Made by _____ # of pages _____
Made by _____ # of pages _____

( ) Statement of Defendant _____
( ) Audio/Video Recorded Statement # of Discs _____
( ) Videos from Law Enforcement Vehicles # of Discs _____
( ) Photos
( ) Lab reports and scientific testing referencing _____
( ) Other, to-wit _____
( ) Other, to-wit _____
( ) Other, to-wit _____

_____
Signature of Officer

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