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The Michael Morton Act: Minimizing Prosecutorial Misconduct.

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RECENT DEVELOPMENT

THE MICHAEL MORTON ACT: MINIMIZING PROSECUTORIAL MISCONDUCT

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I. INTRODUCTION

Imagine being accused, convicted, and sentenced to life in prison for murdering your family member; a murder that you did not commit. Twenty-five years slowly pass, and the world outside changes to the point of unfamiliarity while family and friends drift away. Imagine knowing that your child is growing to adulthood while your youth is withering away.

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Such a tragedy seems unfathomable, but Michael Morton suffered it after being wrongly convicted for the murder of his wife.[1]

Morton was wrongfully convicted and imprisoned for nearly twenty-five years for the murder of his wife, Christine, because the prosecution withheld favorable evidence,[2] or *Brady* material.[3] The withheld evidence included a bandana found behind Michael's house, stained by Christine's blood with the actual killer's hair dried in it; Michael's son's eyewitness account of the murder containing a description of the murderer and a statement that Michael was not home when it happened; and neighbors' eyewitness accounts of a man carrying a wooden club casing the area behind the Morton home.[4] Worse yet, after Michael's release, police linked Christine Morton's actual killer to the murder of another wife and mother killed two years after Christine, using the same modus operandi.[5]

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1. *Know the Cases: Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Michael_Morton.php (last visited Apr. 20, 2015) (showing Michael Morton was convicted for the murder of his wife, Christine, and spent nearly twenty-five years in prison). *See generally* Pamela Colloff, *The Innocent Man* (pts. 1 & 2), TEX. MONTHLY, Nov. 2012, at 128, 128–35, 216–35, TEX. MONTHLY, Dec. 2012, at 168–75, 277–88 (providing a detailed account of the Michael Morton case).

2. *See* Colloff, *supra* note 1, Nov. 2012, at 233–34 (discussing the lead-investigator reports and notes that were withheld from Morton's defense attorneys); *id.* at 278 (uncovering the details of the lead-investigator's file, including reports of a green van behind the Mortons' home and of the van's driver walking into nearby brush around the time of the murder, memos suggesting Christine Morton's credit cards and personal checks were fraudulently used after her death, and a transcript of a phone call with Morton's mother-in-law in which she recounted a conversation with the Mortons' three-year-old son, which showed he had witnessed the murder); Josh Levs, *Innocent Man: How Inmate Michael Morton Lost 25 Years of His Life*, CNN, http://www.cnn.com/2013/12/04/justice/exonerated-prisoner-update-michael-morton/index.html (last updated Dec. 4, 2013, 2:53 PM) (reporting that prosecutors withheld evidence, including a blood-stained bandana recovered near the scene, evidence that the Mortons' son had seen the murder, and evidence of a suspicious green van and its driver near the scene at the time of the murder).

3. *Brady* material is favorable evidence, not just exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

4. *Know the Cases: Michael Morton*, INNOCENCE PROJECT, *supra* note 1; Levs, *supra* note 2; Chuck Lindell, *Mark Alan Norwood Conviction in Morton Murder Upheld*, AUSTIN AM.-STATESMAN (Aug. 15, 2014, 11:09 AM), http://www.statesman.com/news/news/mark-alan-norwood-conviction-in-morton-murder-uphe/ng3gm.

5. During Mark Alan Norwood's resulting trial for Christine Morton's murder,

> District Judge Burt Carnes allowed prosecutors to discuss [the other victim]'s murder because the patterns and characteristics "were so distinctively similar that they constituted a 'signature,'" . . . .
>
> Both victims were white, in their 30s and had long brown hair. Both were attacked while lying in bed, struck in the head six to eight times with a blunt object and were covered with pillows. The killer apparently entered through an unlocked sliding glass door after jumping a backyard fence, and in both cases a single valuable item was taken—a gun from the Morton home, a VCR from [the other victim's]—while jewelry was left in plain sight.

In response to this tragedy, the Texas legislature enacted Senate Bill 1611 (SB 1611), the Michael Morton Act,[6] which took effect on January 1, 2014 and radically changed the criminal discovery process in Texas.[7] Prior to this Act, the discovery procedures disadvantaged defendants and provided limited information.[8] Accordingly, the Act attempts to provide relevance-based discovery in a rational way.[9]

This Recent Development provides background on Michael Morton's case and describes the prosecutor's constitutional duty to disclose evidence favorable to the accused first, as set out in *Brady v. Maryland*,[10] as well as provides an in-depth discussion of article 39.14 of the Texas Code of Criminal Procedure and its implications.

II. THE MICHAEL MORTON CASE

While his wife, Christine, lay asleep, Michael left for work to confront the normal "blur of customers and demands, co-workers, corny jokes, and busywork."[11] But an eerie thought pulled at Michael when he did not hear from Christine.[12] The eerie thought turned into panic when the babysitter told him Christine never dropped off Michael's son, Eric.[13] Michael called his home, "feel[ing] sick when an unfamiliar male voice answered [his] home phone."[14] On the other end of the line was Sheriff Jim Boutwell who would only tell Michael to come home as quickly as possible.[15] Losing no time, Michael drove to his home and scrambled to

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Lindell, *supra* note 4.

6. Michael Morton Act, 83d Leg., R.S., ch. 49, 2013 Tex. Gen. Laws 106 (codified as an amendment to TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2014)).

7. H. COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013), *available at* http://www.hro.house.state.tx.us/pdf/ba83R/SB1611.PDF; Levs, *supra* note 2.

8. *See id.* (showing that even though the Supreme Court mandates the disclosure of "any *potentially* exculpatory evidence," the disadvantage still burdens the defendant).

9. *See id.* (describing how the Michael Morton Act would "require the state to permit the electronic duplication of [records] contain[ing] evidence material to any matter involved in [an] action").

10. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence was material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

11. MICHAEL MORTON, GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE 18 (2014).

12. *See id.*

13. *Id.*

14. *Id.*

15. *Id.*

his front door.[16] After Michael identified himself, Sheriff Boutwell delivered the crippling news: "Chris is dead."[17] Thus began Michael's nightmare.

Bill White and Bill Allison, Michael's lawyers, discussed the case as Christine's murder was making headlines.[18] In town to support Michael, his mother left before the next horrifying event.[19] Sheriff Boutwell knocked on Michael's door, delivering devastating words, "'Michael Morton,' he said flatly, 'I'm here to arrest you.'"[20]

After a meager two-hour deliberation, a jury wrongfully convicted Michael Morton for Christine's murder.[21] Michael spent the next twenty-five years incarcerated as his relationships, family, and life diminished.[22] Years later, after much perseverance from John Raley, Nina Morrison, and Innocence Project co-founder Barry Scheck, Morton's counsel discovered prosecutorial misconduct. Withheld evidence showed that someone else committed the crime, and new DNA evidence identified the true killer.[23] The Innocence Project reached out to the law firm of Goldstein, Goldstein, and Hilley to assist, and Gerry Goldstein and Cynthia Orr helped the team obtain Michael Morton's release on October 4, 2011.[24]

III. *BRADY V. MARYLAND* AND ITS PROGENY

The extent to which a prosecutor is constitutionally required to disclose favorable evidence to the accused is outlined in *Brady v. Maryland* and its progeny. In *Brady*, the prosecution withheld evidence that, even though Brady was guilty of murder, his co-defendant admitted to actually killing the victim during their jointly undertaken robbery.[25] On writ of certiorari,

16. *Id.* at 19.

17. *Id.*

18. *Id.* at 55.

19. *Id.* at 57.

20. *Id.*

21. *Id.* at 59.

22. Levs, *supra* note 2.

23. Agreed Proposed Findings of Fact & Conclusions of Law at 4, *Ex parte* Michael Morton, No. 86-452-K26D (26th Dist. Ct., Williamson County, Tex. Oct. 3, 2011).

24. Michael Morton has given counsel permission to write about his case for this article.

25. Brady v. Maryland, 373 U.S. 83, 84 (1963). The Court, affirming the ruling from the Maryland Court of Appeals, restated portions of the Maryland court's opinion:

> We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hand that twisted the shirt about the victim's neck. . . . [I]t would be "too dogmatic" for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady.*

the issue was whether the prosecutors' suppression of favorable evidence violated Brady's right to due process.[26] In Justice Douglas's majority opinion, the Court held "the suppression by the prosecution of *evidence favorable to an accused* upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[27] Subsequent cases refined the *Brady* rule so that the accused need not request the favorable evidence.[28]

The *Brady* line of cases not only requires favorable evidence from prosecutors but also from their agents and "others acting on the government's behalf in the case, including the police."[29] This group is labeled "the prosecution team."[30] In *United States v. Bagley*,[31] the Court confronted the standard of review of such errors on appeal.[32] *Bagley* concerned impeachment evidence over payments made to secure the cooperation of several government witnesses.[33] Regarding the standard necessary for reversal of a conviction, the Court held that if admission of withheld evidence presents a "reasonable probability" that the result might have been different, then it is sufficiently material to require a new trial.[34] The *Bagley* Court therefore made it clear that *Brady* evidence includes impeachment evidence.[35] In *Kyles v. Whitley*,[36] the Court further explained that this is not a sufficiency of the evidence test.[37] A reviewing court must consider the suppressed evidence cumulatively, and if the review undermines the court's confidence in the verdict, the conviction must be

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Id. at 88 (alteration in original) (quoting Brady v. State, 174 A.2d 167 (Md. 1961)) (finding such minimally mitigating evidence satisfied the test for favorable evidence under *Brady*).

26. *Id.* at 85.

27. *Id.* at 87.

28. *See* United States v. Agurs, 427 U.S. 97, 110 (1976) (adopting the district court's proposition that certain situations call for *Brady* evidence to be disclosed without a specific request).

29. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

30. *See, e.g.*, Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice to Dep't Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2010/01/19/dag-memo.pdf ("It is the obligation of federal prosecutors . . . to seek all exculpatory and impeachment information from all members of the prosecution team[, including] federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.").

31. United States v. Bagley, 473 U.S. 667 (1985).

32. *Id.* at 678.

33. *Id.* at 670–71.

34. *See id.* at 685 (White, J., concurring) (restating with approval the standard asserted by Justice Blackmun in Part III of the opinion).

35. *See id.* at 676 (majority opinion) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.").

36. Kyles v. Whitley, 514 U.S. 419 (1995).

37. *Id.* at 434.

overturned.[38] In *Kyles*, the suppressed Brady evidence showed that one in four eyewitnesses described the perpetrator in a manner that did not match the defendant's description, that the state's undisclosed informant had reasons to point the finger of suspicion at the defendant, and that photos of license plates outside the apartment where the crime occurred did not include the defendant's license plate.[39] Thus, *Kyles* emphasizes the broad nature of Brady evidence as being merely favorable evidence.[40]

What *Brady* does not do is impose any obligation on the prosecution to produce incriminating evidence. In this regard, the Texas Rules of Criminal Procedure govern discovery.

IV. THE REPEALED DISCOVERY RULE

Texas has traditionally recognized only limited pretrial discovery rights.[41] Before the Michael Morton Act, the state had no general duty to provide the defense pretrial access to the evidence in the prosecution team's possession or inform the defense as to the evidence available.[42]

The prior version of Texas Code of Criminal Procedure article 39.14(a) provided the defendant the ability to inspect discoverable items, if the defendant established sufficient good cause for the trial court to direct the state to produce a tangible item or to allow for inspection with the possibility of copying any discoverable records.[43] Items that previously were not discoverable included written witness statements, written

38. *See id.* at 434–35 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict.").

39. *Id.* at 425–29.

40. *See id.* at 435 (emphasizing the Court's reasoning in *Bagley* that a *Brady* violation occurred when "favorable evidence could reasonably be taken to . . . undermine confidence in the verdict").

41. *See* Mayberry v. State, No. 04-13-00382-CR, 2014 WL 4230143, at *2 (Tex. App.—San Antonio 2014, no pet.) (noting the significant changes in Texas criminal discovery law); *see also* Hackathorn v. State, 422 S.W.2d 920, 922 (Tex. Crim. App. 1964) ("It has been a consistent holding of this Court that counsel for the state is not required to furnish the accused with statements of witnesses, copies of reports, or his written statements, for the purpose of pre-trial inspection.").

42. *See* State *ex rel.* Holmes v. Lanford, 764 S.W.2d 593, 593 (Tex. App.—Houston [14th] 1989, no pet.) ("There is no general right to discovery in a criminal case." (citing *Hackathorn*, 422 S.W.2d at 922)).

43. Act of May 30, 2009, 81st Leg., R.S., ch. 276, § 2, sec. 39.14, 2009 Tex. Gen. Laws 733 (amended 2014) (current version at TEX. CODE CRIM. PROC. ANN. § 39.14(a) (West 2014)). The good-cause requirement was essentially unchanged from the original adoption of the Texas Code of Criminal Procedure in 1966. Act of May 31, 1965, 59th Leg., R.S., ch. 722, § 1.01, sec. 39.14, 1965 Tex. Gen. Laws 475 (amended 2014) (current version at TEX. CODE CRIM. PROC. ANN. § 39.14(a) (West 2014)).

communications between the State and its agents, and work product.[44] Such an onerous rule did little to stem incidents of misconduct. Data released by the Innocence Project, co-founded by Peter J. Neufeld and Barry C. Scheck in 1992,[45] showed that in ninety-one criminal cases, "courts decided that prosecutors committed misconduct, ranging from hiding evidence to making improper arguments to the jury."[46] The data only covered adjudicated exonerations, so logic dictates that the toll of wrongful convictions attributable to prosecutorial misconduct is likely much higher.[47] Michael Morton's case was one of the primary catalysts for reform in Texas discovery rules.[48]

V. THE MICHAEL MORTON ACT

The prior version of article 39.14 recognized the constitutional duty to produce favorable evidence under *Brady* despite limited criminal discovery. Also, prior to the relevance-based discovery scheme in revised article 39.14,[49] prosecutors enjoyed a great deal of discretion in determining what constituted *Brady* material.[50] Revised article 39.14 attempts to eliminate hindsight arguments over what was, or should have been, produced by the opposing party in a proceeding.[51] The changes also require the state and the defendant to document and produce records of all information provided under the new rules.[52] The change should prompt parties to memorialize essential communications, thereby protecting prosecutors

44. *See* Act of May 30, 2009, § 2 ("[E]xcept written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report . . . ."). Some examples of work product are police reports, offense reports, arrest reports, investigative reports by a police officer, and lab reports on drugs. However, if the police report contains exculpatory evidence it must be disclosed since it is *Brady* material. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression of favorable evidence by a prosecutor violates due process).

45. *About the Innocence Project*, INNOCENCE PROJECT, http://www.innocenceproject.org/about (last visited Nov. 11, 2014).

46. *See* Brandi Grissom, *Study: Prosecutors Not Disciplined for Misconduct*, TEX. TRIB. (Mar. 29, 2012), http://www.texastribune.org/2012/03/29/study-prosecutors-not-disciplined-misconduct (analyzing the growing concern over prosecutorial misconduct since cases like Michael Morton).

47. *See id.*

48. H. COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013).

49. *See* S. COMM. ON CRIMINAL JUSTICE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013). (recognizing both the fact that the Morton Act establishes a relevance based discovery scheme and the defendant's strong constitutional right to present a full defense).

50. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (construing *Brady* as "leaving the government with a degree of discretion").

51. H. COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013).

52. *Id.*

from claims of misconduct.

Under the Michael Morton Act, codified in amended article 39.14, a person charged with a crime who desires discovery must *ask for it*.[53] The state must permit the defendant access to the discovery or produce the requested information "as soon as practicable after receiving a timely request from the defendant."[54] However, for the first time, the prosecution is under a statutory duty to *continually* disclose exculpatory evidence.[55] According to the statute, this includes evidence that is exculpatory, mitigating, or of an impeaching nature.[56] This creates an open file policy, obviating the need for the defense team to continue requesting discovery.[57] The Supreme Court has made clear that where there is such an open file, the defense has the right to rely upon continuing disclosure of favorable evidence by the prosecution.[58]

The Act carves out a few exceptions to discovery.[59] Restrictions set out in section 264.408 of the Family Code and article 39.15 of the Code of Criminal Procedure concern crimes involving children.[60] Section 264.408 provides that any request from the defendant "to copy, photograph, duplicate, or otherwise reproduce a video" shall be denied by the court.[61] However, such recordings need to be readily available to the defense team (including the defendant) under article 39.15 of the Code of Criminal Procedure.[62] Article 39.15 mandates that child pornographic material

53. TEX. CODE CRIM. PROC. ANN. § 39.14 (West 2014) (emphasis added).

54. *Id.* A timely request is one made seven days before the date that a pretrial hearing is set. *See id.* § 28.01 ("When a criminal case is set for such pre-trial hearing, any such preliminary matters not raised or filed seven days before the hearing will not thereafter be allowed to be raised or filed . . . .").

55. *See* Francis v. State, 428 S.W.3d 850, 856 n.12 (Tex. Crim. App. 2014) (noting the prior version of article 39.14 was in effect at the time of trial).

56. CRIM. PROC. § 39.14(h).

57. However, counsel must still preserve the constitutional right to favorable evidence by raising its non-disclosure where such error has occurred. As mentioned above, *Brady* evidence need not be requested by the defense, and the prosecution has a continuing duty to disclose it. *Francis*, 428 S.W.3d at 856 n.12.

58. Banks v. Dretke, 540 U.S. 668, 695–96 (2004) ("A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

59. *See* CRIM. PROC. § 39.14(a) (subjecting the article to section 264.408 of the Family Code and article 39.15 of the Code of Criminal Procedure).

60. *See id.* § 39.15 (describing the discovery of evidence related to abuse and sexual conduct by children or minors); TEX. FAM. CODE ANN. § 264.408(d-1) (West 2013) (regarding discovery of a video recorded interview of a child that will be used in the prosecution of a case involving that child).

61. FAM. § 264.408(d-1).

62. *Id.*

"must remain in the care, custody, or control of the court or the state,"[63] and the defendant may examine the video at a state-controlled facility.[64] With the exception of this carve-out, the new discovery scheme is relevance-based. It requires all information from the prosecution, its agents, and contractors that is material to any matter in the case.[65]

Article 39.14 additionally contains rules for documenting and recording discovery.[66] Article 39.14(a) specifically requires that the State produce evidence "material *to any matter* involved in the action and that [is] in possession, custody, or control of the state or any person under contract with the state."[67] Even with these changes, a continuity issue exists among the 254 Texas counties regarding the procedure for implementing the Act. For example, in Harris County, Texas, defense counsel may draft a document describing what they would like to receive from the state.[68] The state can then provide copies of police reports, log entries from on the scene police reports, and witness statements. The last page of the state's file offers a fill-in-the-blank form for defense counsel to request what they want and to note the date the state discloses that information to the defense.[69] The defense also signs off on this document, initialing to affirm they have received the documents in their conference with the state. As a matter of strategy, however, there may be some discovery that counsel may want to pursue on their own volition in order to maintain the confidentiality of their work product or theory for trial. Harris County also has a pre-printed waiver form for a defendant to waive discovery.[70] However, such a waiver cannot be knowing or intelligent since what is given up is unknown and in the vast majority of circumstances advising a client to execute such a waiver may very well be ineffective. In Bexar and Tarrant County, discovery is achieved by electronic means.[71] Whatever method is employed, it varies widely from county to county and may even differ among courts.

The plain language of article 39.14(a) also imposes no requirements on

63. CRIM. PROC. § 39.15(b).
64. *Id.* § 39.14(d).
65. *Id.* § 39.14(a).
66. *Id.* § 39.14(j).
67. *Id.* § 39.14(a) (emphasis added).
68. *The Michael Morton Act*, GOLDSTEIN, GOLDSTEIN, & HILLEY, https://www.goldsteinhilley.com/presentations-lectures/the-michael-morton-act (last visited Apr. 20, 2015).
69. *Id.*
70. *Id.*
71. *Id.*

the form of the discovery to be produced.[72] Items now discoverable span from "written or recorded statements of the defendant or a witness" to "witness statements of law enforcement officers."[73] Furthermore, the statute does not specify the timing for production, only stating that it must occur "as soon as practicable" given the dynamic nature of discovery.[74] Since saying "practicable" is another way of saying "feasible,"[75] this requirement is designed to eliminate any withholding of information. As exemplified in the Michael Morton case, such information may prove to be critical to a client's rights to a fair trial and a lawyer's obligation to provide adequate representation.[76]

Article 39.14 further requires that the prosecution document the discovery supplied to the defense, and continue to offer discovery "promptly" even after initial disclosures.[77]

> (k) If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under subsection (h), the state shall *promptly* disclose the existence of the document, item, or information to the defendant or the court.[78]

Subsection (k) therefore implies that the "as soon as practicable" time frame indicates immediate production when it is feasible. The prompt disclosure provision also encompasses exculpatory, impeaching, or mitigating evidence.[79] While the Act does not define "promptly,"[80] it may be construed to mean within five days of a request.[81] The Act also

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72. CRIM. PROC. § 39.14(a).

73. *Id.*

74. *Id.*

75. *See* BLACK'S LAW DICTIONARY 584 (4th pocket ed. 2011) (meaning "reasonably capable of being accomplished" or feasible). Under Texas law, "as soon as practicable" within insurance policies is defined to require only that notice be given within a reasonable time in light of the surrounding circumstances. Blanton v. Vesta Lloyds Ins. Co., 185 S.W.3d 607, 611 (Tex. App—Dallas 2006, no pet.).

76. *See* United States v. Agurs, 427 U.S. 97, 107 (1976) ("First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel."); Bruce Green et al., *Brady Resolution*, 2011 A.B.A. SEC. CRIM. J. REP. 105D (resolving timely as disclosing exculpatory evidence, including impeachment evidence before the commencement of trial or before a guilty plea).

77. CRIM. PROC. § 39.14(k).

78. *Id.* (emphasis added).

79. *See id.* § 39.14(h) ("[T]he state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state . . . .").

80. *Id.* § 39.14.

81. *See* N.L.R.B. Procedural Rule, 29 C.F.R. § 102.96 (2014). 29 C.F.R. § 102.96 states:

> Whenever the regional attorney or other Board officer to whom the matter may be referred

requires that production be memorialized. Sections 39.14(i) and (j) provide:

> (i) The state shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article.[82]
>
> (j) Before accepting a plea of guilty or nolo contendere, or before trial, 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.[83]

The Act also limits use of discovery. Article 39.14(e) states that a representative of the defendant cannot turnover information to third parties.[84] This restriction would present a crippling barrier to effective use of the disclosed information,[85] but subsection (e) excepts investigators, experts, consulting legal counsel, or other agents of the attorney are not such third parties.[86] Therefore, once defense counsel has established an agency relationship with experts hired on the behalf of the defense, they are no longer considered third parties under article 39.14.[87] The use of *Kovel* letters is recommended to establish these relationships.[88] The

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seeks injunctive relief of a district court pursuant to section 10(l) of the Act, a complaint against the party or parties sought to be enjoined, covering the same subject matter as such application for injunctive relief, shall be issued promptly, normally within [five] days of the date upon which such injunctive relief is first sought. .

Id.

82. CRIM. PROC. § 39.14(i).

83. *Id.*

84. *See id.* § 39.14(e). Section 39.14(e) states:

> Except as provided by Subsection (f), the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant may not disclose to a third party any documents, evidence, materials, or witness statements received from the state under this article.

Id.

85. For example, video recording of a Standard Field Sobriety Test in a DWI stop and arrest would require defense counsel to obscure the license plate of any vehicles on the scene before producing a copy of the video to a consulting expert. However, this would alter the video and call into question the expert's opinion regarding that altered video.

86. *See* CRIM. PROC. § 39.14(e) (referring to subsection (f) which distinguishes investigators, consulting attorneys and experts from third parties).

87. *See id.* § 39.14(f) (allowing defense attorneys and their agents to share documentation provided by the state under article 39 with a defendant, witness, or prospective witness provided that certain information be redacted).

88. *See* Cheryl C. Magat, *How Attorney-Client Privilege and the Work Product Doctrine May Apply to Third Parties in Tax Law*, PRAC. TAX LAW., Summer 2011, at 21, 23 (2011) ("To invoke attorney-client privilege so that it extends to the [expert], the attorney should have an agreement in writing in the

prohibition on providing clients copies of discovery under subsection (f) contradicts *In re McCann*.[89] In *In re McCann*, the court held that the client, not his attorney, owns the client's files, and the client must provide consent to transfer the files to court appointed post-conviction counsel.[90]

Defense counsel have two viable solutions to rectify the conflict presented by *In re McCann* and revised article 39.14. The facts of *In re McCann* may establish good cause under article 39.14(e)(1) to get a court order to disclose it to clients.[91] Alternatively, one can make an agreement with clients so that subsequent counsel can obtain the information under *McCann*, consistent with what 39.14(f) seems to also require. At any rate, subsections (e) and (f) will often involve privileged information, which counsel are not obligated to disclose to the state.[92] Under these circumstances, one should obtain the necessary order for disclosure in camera and ex parte.[93]

Additionally, article 39.14 references the Texas Rules of Disciplinary Conduct.[94] The Disciplinary Rules expressly provide in Rule 1.03 that counsel must fully communicate with the client to allow him or her to make fully informed decisions.[95] Subsection (g) does not prevent communication with the client, it but does prevent counsel from

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form of a *Kovel* letter."). *See generally* United States v. Kovel, 296 F.2d 918, 920–23 (2d Cir. 1961) (holding the protection of attorney-client privilege attaches when an expert, such as an accountant, assists an attorney or a law firm in rendering legal services).

89. *Compare* CRIM. PROC. § 39.14(f) (explicitly prohibiting that attorneys or their agents furnish defendants, witnesses, or prospective witnesses with copies of documentation provided by the state), *with In re* McCann, 422 S.W.3d 701, 704–05 (Tex. Crim. App. 2013) (emphasizing that the attorney is an agent of the client and it is the client who owns the contents of his or her file).

90. *See In re McCann*, 422 S.W.3d at 710 ("[A] client owns his or her trial file and a former attorney is obligated to follow his or her former client's last known wishes under these circumstances . . . .").

91. *See* CRIM. PROC. § 39.14(e)(1) (authorizing a court to order disclosure of material to third parties after it considers the impact of disclosure on victims); *In re McCann*, 422 S.W.3d at 702–03 (describing the inability of post-conviction counsel to obtain a death row inmate's consent to view his file held by trial counsel).

92. CRIM. PROC. § 39.14(e)–(f); *see, e.g.*, TEX. R. CIV. P. 192.3(e) (preventing disclosure of a consulting-only expert's identity).

93. *See* Williams v. State, 958 S.W.2d 186, 193 (Tex. Crim. App. 1997) (en banc) ("In essence, if an indigent defendant is not entitled to an *ex parte* hearing on his *Ake* motion, he is forced to choose between either forgoing the appointment of an expert or disclosing to the State in some detail his defensive theories or theories about weaknesses in the State's case."). *See generally* Tex. Dep't of Corr. v. Dalehite, 623 S.W.2d 420 (Tex. Crim. App. 1981) (ordering the production of privileged records for in camera inspection by the district court judge was an act within the trial court's discretion, thus, mandamus was not issued).

94. CRIM. PROC. § 39.14(g).

95. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2014) (TEX. STATE BAR R. art. X, § 9).

essentially exposing information to the public outside of trial, except when necessary to make a good faith complaint against the victim or witness.[96]

To preserve error, however, for a writ of habeas corpus, defense attorneys still must file a *Brady* motion.[97]

The Michael Morton Act does much to remedy discovery misconduct outlined above by codifying the requirement that the prosecution must provide favorable evidence wherever it resides, going so far as to include favorable information contained in the prior statement of a witness or even in work product. In Michael Morton's case, the prosecution was able to hide the favorable eyewitness account—indicating that someone else had killed Christine Morton—by deciding not to call its case agent to the stand, in the authors' opinion,[98] to avoid its obligation to turn over *Gaskin* material.[99] It also failed to provide favorable evidence to the trial court upon direct questioning.

VI. CONCLUSION

The Michael Morton Act is a progressive discovery act designed to prevent and combat prosecutorial misconduct that took the freedom of Michael Morton and others. Michael's testimony to the Texas Senate is reflective of his understanding of the crucial importance of the Act. "There's nothing you can do that will allow me to get back my [twenty-five] years—it's gone and there's really nothing I can do about it, nothing you can do about it .... What I am seeking and what I'm asking you to help me obtain is some transparency and most of all, some accountability ...."[100] Ken Anderson was arrested after a court of inquiry made a finding that he intentionally hid evidence to secure Morton's 1987 conviction for murder.[101] He served less than ten days in jail for criminal contempt after his guilty plea.[102] Michael Morton helped accomplish

96. CRIM. PROC. § 39.14(g).

97. TEX. R. APP. P. 33.

98. Judge Anderson had co-authored a book suggesting the employment of this strategy.

99. *See* Gaskin v. State, 353 S.W.2d 467, 470 (Tex. Crim. App. 1961) (instructing the State to provide a witness's prior statement upon which their testimony is based after their testimony, or to provide it for the appellate record if it is not produced).

100. *See* Sonia Smith, *Michael Morton's Moving Senate Testimony*, TEX. MONTHLY (Mar. 12, 2013, 6:00 PM), http://www.texasmonthly.com/story/michael-morton%E2%80%99s-moving-senate-testimony (giving testimony to the state senate).

101. *See* Bennett L. Gershman, *Ken Anderson Court of Inquiry Shows Prosecutorial Misconduct at Its Worst*, HUFFINGTON POST, http://www.huffingtonpost.com/bennett-l-gershman/ken-anderson-court-of-inq_b_2664315.html (last updated Apr. 14, 2013, 5:12 AM) (detailing the arrest and testimony of Ken Anderson).

102. *See* Paul J. Weber, *Ex-Prosecutor Ken Anderson Gets Jail for Wrongful Conviction*, HUFFINGTON

much more than obtain a slight amount of personal accountability, he ignited progressive discovery reform in Texas that will affect those accused in the future.

POST, http://www.huffingtonpost.com/2013/11/08/ken-anderson_n_4242431.html (last updated Jan. 23, 2014, 10:53 AM) (describing the plea deal accepted by Ken Anderson).