IN THE WAKE OF MICHAEL MORTON

BRADY V. MARYLAND & TEXAS DISCOVERY

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Brady – The Constitutional Standard

- In 1963 the United States Supreme Court decided the case of *Brady v. Maryland*, holding that: "the suppression by the prosecution of evidence favorable to the accused…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."

Brady v. Maryland, 373 US 83, 87 (1963)

What does that mean?

1. *Brady* applies to "**exculpatory," "material"** information in **possession of the government**
2. The prosecution has a **duty to find** this information
3. The prosecution has a **duty to disclose** this information to the accused

OK, but what does "exculpatory" mean?

- *Brady* material includes more than just information that would prove the defendant not guilty
- It includes **favorable** information
- "Favorable" information includes impeachment evidence that tends to bring into question the credibility or reliability of a witness for the state

How is "exculpatory" different than "favorable?"

- Exculpatory information is information of any type that tends to reduce the likelihood of guilt or bears favorably on culpability or some other component of punishment; in other words – information that tends to show the defendant didn't do it or that punishment should be mitigated

"Favorable" isn't limited to what's favorable at trial

- Favorable information may relate to both pretrial matters and trial matters
  - For example, information related to the circumstances surrounding an out-of-court identification process would be relevant to determining the admissibility of the identification testimony for trial purposes – so the information would need to be disclosed prior to the suppression hearing.

Only "material" information is covered by *Brady*

- "Evidence is 'material' … only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different."

… and it must be admissible

- Not only must the evidence be favorable to the accused and material to the case, the undisclosed evidence must also be of the type that would have been admissible at trial.

OK, I see what *Brady* material is, but what's this "duty to find?"

- Brady does not require that the favorable, material evidence be "possessed" by the prosecutor
  - Possession of this evidence by the police counts as possession for purposes of Brady, even if the police do not disclose the Brady material to the prosecutor.

It's not just what's in the files!

- Brady information is still Brady information even though the police don't write it down
  - For example, a witness tells the investigating officer she can't identify the suspect

Examples of *Brady* material that must be disclosed:

- Failure to disclose that report indicated fire was not the result of arson
- Blood or DNA results from crime scene that do not belong to defendant
- Contradictory results from a different lab regarding DNA or blood issues

… and on and on.

- Ballistic results that gun was inoperable
- Withholding medical examiner's report listing different cause of death
- Line-up shown to five witnesses; only one could ID the suspect; withhold fact that four could not ID suspect
- Witness statement that suspect was not the person talking to deceased shortly before his murder

So what's the worst that can happen?

- A conviction can be set aside on due process grounds
- Disciplinary action by the Bar
- State officials can be held liable for money damages
  - An individual state actor could be sued under 42 U.S.C. 1983 for depriving a person of a right, privilege, or immunity guaranteed by the Constitution
  - A government entity (e.g., the city) could be held liable, too, if it directs the misconduct or has a policy or custom that allowed the violation

Risk management [i.e., how to make sure you're following the law if you're "the State"]

- Train all prosecutors and law enforcement officers to recognize and disclose *Brady* material
- Develop and review policies that ensure this material is known and disclosed, then *enforce* them
- Supervise, check, double-check at all levels
- Take it seriously because it's serious

Article 39.14 of the Texas Code of Criminal Procedure

THE TEXAS RESPONSE

Article 39.14

- Art. 39.14 is the general discovery statute in Texas criminal procedure
- It applies to all courts and state agencies, including fine-only courts
- The discretionary "good-cause" standard has been replaced by SB1611 to **require disclosure** by the State of covered material and information
  - In other words: There is now a mandatory "open-file" policy for prosecutors

What does 39.14 cover?

- Any of the following that are under the control of the State or any person under contract with the State:
  - Offense reports
  - Any designated documents, papers, written or recorded statements of the defendant
  - Any written or recorded statements from witnesses
  - Any witness statements of law enforcement officers, excluding the work product of prosecutors and their investigators
  - Any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action

When must this information be disclosed?

- In the case of a defendant represented by counsel – upon a "timely" request from the defense attorney. This request goes directly to the prosecution and does not require a court order
- In the case of a pro se defendant – a request from the defendant, followed up with a court order directing the prosecution to disclose

[39.14(a), (d) CCP]

For *pro se* defendants

- Pro se defendants have access to disclosure upon a request and order from a court
- Pro se defendants may inspect the material, and probably "photocopy" it, but the court is not required to allow "electronic duplication"

[39.14(d) CCP]

The prosecutor's role:

- The prosecutor must produce the material upon a timely request and order (if an order is required)
- The prosecutor may withhold or redact information that is not subject to discovery
  - The prosecutor has to tell the defense some information has been withheld
  - Defense may request the court to conduct a hearing on the matter

[39.14(c) CCP]

The defense attorney's role:

- Submit a written request to the prosecution for disclosure
  - Request even if an "open-file" policy exists
- If prosecution decides to withhold information, request a hearing to determine existence of privilege
- Do not improperly disclose details of information received
- READ and USE what is produced

Considerations for the court

- Removes the court from the front-end of the process
- Courts may, upon receiving a request from a pro se defendant, order disclosure
- Courts may have to conduct hearings to determine the propriety of a decision by the State to withhold information
- Courts may have to conduct hearings to determine if discovered information may be disclosed to a third party
- May order defendant to pay costs of discovery, limited to ORA amounts

[39.14(d), (c), (e)(1), (k)(1) CCP]

Putting it all together

- Under *Brady* the State must disclose evidence favorable to the accused, no request is necessary
- State law requirements are initiated by a timely request
- State law expressly assigns an ongoing responsibility to the prosecutor to provide disclosure before, during and after trial [39.14(k)]
- Before accepting a plea or before trial the State and defense have to assert in open court or in writing that discovery occurred and list the items disclosed [39.14(j)]

Does disclosure of *Brady* information satisfy Art. 39.14?

- Under *Brady* – The State must disclose "favorable" evidence: exculpatory, material, admissible evidence; and the duty is applicable to both case-in-chief and impeachment
- Under state law – disclose everything except those items for which some sort of privilege applies, and even then the state has to tell the defense something was withheld

Ethical issues

- Judges:
  - Canon 2 – Avoiding Impropriety and the Appearance of Impropriety
    - Promote public confidence and impartiality
  - Canon 3 – Performing the Duties of Judicial Office Impartially and Diligently
    - B(2) faithful to the law
    - B(9) dispose of all matters promptly, efficiently and fairly
- Prosecutors
  - Required training on discovery for those who prosecute anything greater than a class C
  - Must make timely disclosure of exculpatory evidence - TDRPC 3.09(d)
  - Must make disclosure of virtually all evidence under state law – see TDRPC 3.04 (obstruction of party's access to evidence)
  - Obligation to disclose is ongoing
  - Document compliance on the record or in writing

Ethical issues

- Defense attorneys
  - Obligation to competently and diligently represent – TDRPC 1.01
  - Duty as advisor – TDRPC 2.01

A final word …

Brady and Article 39.14 aren't really discovery rules,

THEY'RE *DISCLOSURE* RULES

Used properly, they can prevent wrongful convictions … and everyone "wins"

The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not

By Gerald S. Reamey[1]

Civil litigators in Texas would be completely baffled by the "discovery" phase in a criminal case. The contrast between discovery in civil and criminal litigation, until very recently, has been extraordinary. Civil litigation practice usually involves relatively little trial work and a great deal of discovery activity.[2] Discovery is not unknown in criminal litigation, but is often defined more by investigation and the exploitation of procedures not designed for that purpose, than by the variety of effective discovery tools available in any civil case.[3] Interrogatories and requests for admissions simply don't exist in criminal cases. Depositions are available only in theory.[4] The decision whether to disclose material favorable to the defendant,

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[1] ©Gerald S. Reamey. Professor of Law and Co-Director of International Legal Programs, St. Mary's University School of Law. I am grateful for the background research assistance of Malori Carley, and I especially thank my research assistant, Sarah Bassler, for her thorough and important contributions to this project. Thanks also to my St. Mary's colleagues, Professors Michael Ariens, Vincent Johnson, John Schmolesky, and Stephanie Stevens for their helpful comments, suggestions, and insights.

[2] All civil litigation cases must be governed by a discovery control plan, which allows for a continuous flow of evidence and information regarding the trial. The openness between case materials, evidence and information allows parties to acquire full knowledge of the facts involved in the dispute, which often leads parties to find a suitable compromise without trying the lawsuit. The Texas Rules of Civil Procedure Section 9 governs the rules pertaining to discovery in all civil cases. *See* TEX. R. CIV. PRO. Art. 190 et. seq.

[3] *See* Gerald S. Reamey & Charles P. Bubany, Texas Criminal Procedure (11th ed. 2013). The disparity between criminal and civil discovery is not apparent just by reading the rules,. *Id.* Rather the disparity can be seen from the study of the cases interpreting those rules, and the realization that discovery opportunities are very limited in scope. *Id.* As a result of the limited access to discovery, criminal practitioners have been forced to find other ways to discover the prosecution's case. *Id.*

[4] In *James v. State*, the appellant sought depositions from various people involved in the case who had useful information. See James v. State, 563 S.W.2d 599, 602 (Tex. Crim. App. 1978). Appellant expressed his reasons for needing the depositions in an affidavit, which included officers' refusal to discuss any facts of the case with the appellant's court-appointed private investigator or attorney, the fact that a complainant in one of the related cases was out of state, and that two complainants, one of whom was the prosecutrix, had moved since the initial investigation and the Assistant District Attorney would not disclose their addresses. *Id.* Despite the establishment of these facts, the court denied appellant's request to take the depositions, stating that appellant did not prove he had good reason to take their depositions and, therefore, that the denial was not harmful to him. *Id.* at 602-03*; See McKinney v State*, 505 S.W.2d 536, 540 (Tex. Crim. App. 1974) (The trial court has wide discretion in either granting or denying a deposition. The fact that witnesses of whom depositions are requested are adverse witnesses is not enough, standing alone, to show an abuse of discretion in denying the motion to take a deposition. In the event

the disclosure of which is required by due process, lies with the prosecutor whose failure to comply may, but easily may not be discovered after the fact.[5] So many limitations existed on the scope and timing of required disclosures that the information released to the defense was often too little, and came too late.

"Wide-open" discovery in civil matters reflects the sensible view that resources should not be wasted on the litigation of issues about which the parties agree. As often happens, parties possessed of complete information about the merits of a case are able to arrive at a reasonable settlement, confident that no important unknown evidence would significantly change the outcome. Why, then, would criminal defendants not be entitled to the same access to information? Wouldn't that lead to more settlements, just as it does in civil cases?[6] And isn't it even more important, given the high stakes involved in a criminal prosecution, to arrive at an informed and fair resolution? Isn't that in the interest of everyone?[7]

Truth-finding is an important goal in every criminal justice system, but it is not always the highest value to be served.[8] In the United States, for example, exclusionary rules prevent

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the motion requesting depositions is denied, the party must demonstrate harm to establish an abuse of discretion by the trial court.).

[5] This difficulty in unearthing violations of the obligation to reveal exculpatory information to the defense has been noted recently by federal appellate judge Alex Kozinski:

> Prosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory, and while they are required to provide exculpatory evidence to the defense under *Brady*, *Giglio*, and *Kyles v. Whitley*, it is very difficult for the defense to find out whether the prosecution is complying with this obligation.

See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxii (2015).

[6] As the authors of discovery reform noted in their bill analysis, "(Open file discovery) promotes efficiency in the criminal justice system. A defendant who understands the extent of the evidence against him can make an informed decision to plead. It also allows for a full defense, lessening the likelihood of an overturned verdict on appeal. The state saves thousands of dollars in appeals, incarceration, and potential compensation for wrongful convictions." Bill Analysis, S.B. 1611 (Senate Research Center, July 26, 2013).

[7] R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 966 (2014) (prosecutors and defense attorneys are all officers of the court and integral parts of the judicial system who want justice).

[8] See Gerald S. Reamey, *The American Exclusionary Rule Experience*, EXCLUSION OF EVIDENCE WITHIN THE EU AND BEYOND (contributing author)(Höpfel & Huber, editors)(iuscrim - Max-Planck-Institut for Foreign and International Criminal Law 1999).

fact-finders from learning of probative, even crucial, evidence regarding guilt and innocence.[9] Simple rules of evidence impede the jury's ability to judge on all the facts, facts that might better help it ascertain the truth. Hearsay is excluded because the jury might not appreciate its unreliability; significant documents go unseen because they cannot be properly authenticated. Although these rules are intended to filter out what may be untrue, they cannot succeed without sometimes also filtering out what is true. This burden to the truth-finding function is deemed less harmful generally than the risk of admitting everything. Similarly, rules that prevent the accused from having access to all evidence collected by the prosecution may serve other values at the expense of truth-finding and justice.

The arguments against criminal defendants having the wide-open discovery available to parties in a civil suit usually boil down to two: (1) Giving a person accused of crime full information about evidence, including witnesses, that will be used against him facilitates coercion, collusion, and evidence tampering;[10] and (2) due to constitutional guarantees afforded the accused, it is impossible to have fully reciprocal discovery, giving the defendant an unfair advantage in the adversarial contest.[11]

As to the first of these, the fear of witness intimidation or worse is not borne out by the experience in other countries. In most advanced legal systems, the defense receives – often early

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[9] See id.

[10] See, e.g., R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 965 (2014). Mr. Ranc, a former prosecutor in Williamson County and now a criminal defense attorney, describes this argument:

> The district attorney would further assert the idea that if the prosecution gave the defense an open file, the information would prompt the defendant to concoct a story in defense of the accusations against him or her. I think most defense attorneys would agree that this idea is preposterous. …. Until the very end, the belief was propounded that if the state's files were completely open, then the state could never win a prosecution.

Id.

[11] See W.C. Crais III, Right Of Prosecution To Pretrial Discovery, Inspection, And Disclosure, 45 A.L.R.2d 1224, Sec. 2 (1964) (reciprocal discovery arguably violates right against self-incrimination); Charles Alan Wright, Andrew D. Leipold, Peter J. Henning, Sarah N. Welling, 2 FED. PRAC. & PROC. CRIM. Sec. 260 (4th ed.) (discussing the constitutionality of discovery by the government).

in the process and without requesting it – all of the evidence collected by the police and prosecution.[12] Some cases of collusion, evidence tampering, and threatening witnesses must exist in these systems, but do not seem to be widespread or sufficient to restrict the flow of information to the defense. And despite the limits on disclosure of prosecution evidence in the United States, such abuses have not been eliminated entirely.[13] While judges should be able to order suitable, tailored protections for witnesses and evidence in individual cases, a rule that blocks disclosure exacts a high cost from all defendants, even in the absence of cause for concern.

The reciprocity argument is one peculiar to adversarial systems. Because the trial process is viewed as a competition, each "side" will seek an advantage. An advantage to one party will often be a disadvantage to the other, making the process "unfair." In a nonadversarial system, the kind used in most developed countries, there is, in theory at least, only one "side," represented by the truth.[14] Full disclosure in these systems is seen more as a means for facilitating a just result by arriving at the truth than as an advantage or disadvantage in a contest in which truth is revealed by the combat of competing champions. In an adversarial environment, discovery rules that favor either party will be seen as unfair, and possibly thwarting

[12] See, e.g., 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, 214-15 (2005-2006) (principle of transparency in criminal justice has entered an era of disclosure in foreign and international systems of law).

[13] See, e.g., Ex parte Welch, 729 S.W.2d 306, 309 (Tex. App. – Dallas 1987, no pet.) (while on bond for aggravated assault, defendant solicited another to kill his wife to prevent her from testifying); Solomon v. State, 830 S.W.2d 636 (Tex. App. – Texarkana 1992, pet. ref'd) (defendant threatened to kill prospective witness in retaliation for her testifying).

[14] See Mirjan Damaška, Evidentiary Barriers to Convictions and Two Models of Criminal Procedure: A Comparative Study, 121 U. PA. L. REV. 506, 525 (1973) (some sources of information are rejected in American system due to fear of unreliability, while others are rejected to advance "other values"); Gordon Van Kessel, Adversary Excesses in the American Criminal Trial, 67 NOTRE DAME L. REV. 403, 416 (1992) (so-called "inquisitorial" systems rely on neutral and detached judge rather "upon presentation of evidence by interested "advocates" to an unprepared fact finder"); Gerald S. Reamey, Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?, 27 ARIZ. J. INTL. & COMP. L. 695, 699 (2010) (lawyers shape and control all aspect of trial in America, while Continental judges are the active participants).

the ends of justice. Never mind that even the most rigorously adversarial system is inherently unbalanced and therefore always "unfair" in some sense, the appearance of an "uneven playing field" smacks of poor design leading to unreliable results.

Rights guaranteed to the accused admittedly do prevent any true reciprocity of discovery in criminal cases. Taking the deposition of the accused, for example, could not meaningfully be required. The guarantee against compelled self-incrimination prevents it in a way that has no counterpart for a complaining witness. Requiring production of correspondence between a defendant and her attorney would interfere with the constitutional right to counsel, but at least in that instance similar protections safeguard correspondence between prosecutor and witness, even if they do so less robustly.

Impediments to full reciprocity of discovery do not necessarily produce a lopsided adversarial process. Laying aside the inherent advantages enjoyed by the prosecution through its unmatched access to investigative resources,[15] an approximation of reciprocity nevertheless can be achieved if discovery rules are crafted to preserve the adversarial balance to the extent constitutionally permissible while simultaneously extending the defendant's access to information.

Prior to 2014, Texas discovery law provided safeguards against improper use of evidence and against the unbalanced access to that evidence by the parties,[16] but it also inhibited the ability of the criminally accused to obtain useful material from the State in a timely fashion. Capable defense lawyers often were required to find informal means of discovery, to gather facts by requests pursuant to the Texas Open Records Act, or by filing applications for a bail reduction

[15] See note 5 *supra.*
[16] See note 5 *supra*.

or petition for habeas corpus relief in order to pry loose bits of the State's case.[17] Examining trials were used, not for their statutory purposes, but to substitute as a rough-and-ready, but very limited, kind of deposition.[18] Unimaginative, impatient, or lazy lawyers simply made no effort, and negotiated guilty pleas for their clients based on no more than a short summary of the facts provided by the prosecutor or their own, partially informed client. In some counties, prosecutors adopted an "open file" policy, but in others defendants were dependent on the trial judge to order the production of evidence.[19] Unfortunately, Texas law gave a defendant the right to no more than due process requires.

The promise of an "open file" policy, in those counties in which one existed, sometimes provided an illusory kind of disclosure. Access to a so-called open file promised nothing beyond the minimal information to which the defendant is entitled under due process, and maybe not even that. The file given to the accused was almost certainly not the entire case file. Even generous disclosures of information would not include work product. Would the file include everything else in the possession of the State? Would it include non-*Brady* materials in the hands of law enforcement or other state agencies? There simply was no way short of a court's disclosure order to ensure that "open access" was "full access."

Even if complete prosecution files were made available to the defendant, access often was so restricted as to inhibit actual use of the materials. For example, for a considerable time the Bexar County District Attorney's Office, to its credit, maintained an open-file policy. Defendants and their attorneys, however, were not allowed to photocopy, scan, or photograph

[17] See Gerald S. Reamey & Charles P. Bubany, Texas Criminal Procedure 315 (11th ed. 2013) (due to limited criminal discovery practitioners have been forced to find unconventional ways to discover the prosecution's case).
[18] See id. at 221 (suspect obtains "some discovery" in examining trial).
[19] See R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 965 (2014) (some district attorney's offices had liberal open-file policies while others were much more restrictive).

pages within the files.[20] They could inspect the file, read it, and take notes of its contents, but not reproduce it.[21] This daunting task effectively discouraged even diligent lawyers, and especially in cases with voluminous files like those often accompanying white collar crime prosecutions and major cases.[22] Copying by hand, organizing, and indexing hundreds or thousands of pages was simply impractical. Even in less challenging cases, the chore required considerable time and expense.[23] Other conditions, like restricting the hours files were available for inspection, further impeded defendants in some counties with "open" file policies.

The risk of wrongful conviction is high in an adversarial system in which defendants are systematically denied information about the State's case until it is revealed at trial. In the case of a Texas defendant named Michael Morton, this risk was realized.

Impetus for Change

Christine Morton was murdered in her home in 1986. The crime was a grisly one having only one eyewitness, her three-year-old son. Despite his insistence that his father, Michael Morton, had not committed the murder, investigators almost immediately suspected Michael of bludgeoning his wife to death. None of the evidence that was gathered substantially supported this suspicion, and some of the evidence contradicted it, but Michael Morton was arrested, tried,

[20] See Bexar DA's Open File Policy Called "Inferior" by State's Defense Lawyers, San Antonio Express-News (Sept. 30, 2007), at http://no.newsbank.com/nl-search/we/Archives. A similar policy existed in the Travis County District Attorney's Office. See R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 965 (2014). Some offices, including the Williamson County District Attorney's Office – the office that prosecuted Michael Morton – had an even more restrictive view of "open file." See id.

[21] See id.

[22] Bexar County District Attorney Susan Reed said in response to criticism of her office's "no-copy" policy, "What can I say? I don't make it as easy as everyone else." See Bexar DA's Open File Policy Called "Inferior" by State's Defense Lawyers, San Antonio Express-News (Sept. 30, 2007), at http://no.newsbank.com/nl-search/we/Archives.

[23] Bexar County criminal defense attorney Mark Stevens was quoted as saying about this process, "(Recently) I just spent an hour and a half in an office dictating a file. My secretary is probably going to have to spend seven or eight hours on that transcript." See Bexar DA's Open File Policy Called "Inferior" by State's Defense Lawyers, San Antonio Express-News (Sept. 30, 2007), at http://no.newsbank.com/nl-search/we/Archives.

and convicted of the crime. Without belaboring the facts of this case, which have been extensively chronicled elsewhere,[24] suffice it to say that potentially exculpatory evidence that came to light during the investigation allegedly was ignored or deliberately withheld by the prosecuting district attorney. After serving almost twenty-five years of a life sentence, Michael Morton was released from prison and exonerated once the undisclosed evidence came to light. Subsequently, the former district attorney, Ken Anderson, by then a sitting Texas District Court judge, was removed from the bench, surrendered his law license, and was sentenced to serve ten days in jail as part of a settlement in a civil misconduct suit and contempt proceeding against him.[25]

The timing of Morton's release in October of 2011 could not have been better for the purpose of provoking law reform. Publicity surrounding the case became unavoidable when *Texas Monthly* magazine ran a lengthy two-part article by Pamela Coloff in November and December of 2012 describing in great detail the failures of investigation and disclosure that led to Morton's wrongful conviction. This was followed in March by a *60 Minutes* interview on CBS that focused on prosecutorial misconduct and the devastating effect of the conviction on Michael Morton's life. Efforts to amend Texas's general criminal discovery statute were fed by increasing interest in the compelling story of a man who suffered immeasurable loss by the murder of his wife, the alienation of his young son, and decades spent in a Texas prison,[26] all due to apparent failures to recognize and disclose exonerating or mitigating evidence. By the time

[24] See Pamela Colloff, *The Innocent Man, Part One*, Tex. Monthly, (Nov. 2012), http://www.texasmonthly.com/politics/the-innocent-man-part-one; Pamela Colloff, *The Innocent Man Part Two,* Tex. Monthly, (Dec. 2012), http://www.texasmonthly.com/articles/the-innocent-man-part-two.
[25] Chuck Lindell, *Ken Anderson to Serve 10 Days in Jail*, American-Statesman (Nov. 8, 2013), http://www.statesman.com/news/news/ken-anderson-to-serve-10-days-in-jail/nbmsH.
[26] Mr. Morton's release was delayed further by the refusal of Williamson County District Attorney John Bradley to agree to DNA testing. See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxxi (2015) (innocent defendants spend years fighting for evidence that would exonerate them, including Michael Morton who spent six additional years in prison because Bradley worked to block Morton's request for DNA testing).

the Texas Legislature convened in the spring of 2013, calls for reform were impossible to ignore. Adding to the momentum was Michael Morton's demeanor. Quiet, respectful, forgiving and never vindictive, he simply and persistently called for reforms that would prevent others from suffering his fate.[27] The conviction in March of 2013 of Mark Allan Norwood for murdering Christine Morton[28] set the stage for legislative action. DNA evidence linking Norwood to another woman's murder *after* Michael Morton's wrongful conviction made that action irresistible.

The Focus of Reform

The Morton case highlighted a systemic failure, but what would fix it? An obvious answer seemed to be to give defendants more access to evidence gathered by the State. If Michael Morton's trial lawyer had known that a suspicious green van had been seen parked behind the house when the crime occurred, or that a blood-stained bandana had been found where the van was parked, or that Morton's son had described a "monster" – not his father – being in the house when his mother was killed, the result might have been different.[29] Prosecutors had a duty to disclose exculpatory material and impeachment evidence, but much of the information in the State's possession that would be useful to the defense, but not exculpatory, or *potentially* exculpatory, or exculpatory but not "material" to the issue of guilt, could be withheld. Even if evidence is clearly exculpatory and material, its disclosure may be delayed

[27] "'My life is great. I have been blessed in a million ways, more then I can count,' Michael Morton told the American-Statesman reporter." *Morton Case Calls for System Reforms*, American-Statesman (Mar. 30, 2012), http://www.statesman.com/news/news/opinion/morton-case-calls-for-system-reforms/nRmbm. Since Michael Morton's release, Morton has been on a mission to change the law, hold prosecutors accountable for their misconduct, and keep innocent people from suffering the same fate that he faced. *See* Brandi Grissom, *Senate Unanimously Approves Michael Morton Act*, Texas Tribune (Apr. 11, 2013).

[28] Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder,* Tex. Monthly (Mar. 27, 2013), http://www.texasmonthly.com/articles/mark-alan-norwood-found-guilty-of-christine-mortons-murder.

[29] Cf. Bill Analysis, S.B. 1611 (Senate Research Center, July 26, 2013) ("Recent high profile cases in Texas show that with open file discovery, the likelihood that evidence relevant to the defendant's innocence would have been revealed is increased.")

until the trial is actually underway.[30] Clearly, disclosure satisfying the minimal due process standard does not guarantee that defendants have everything necessary to mount an effective defense to the State's case, or that they will receive information in time to make best use of it.[31]

To supplement the disclosure requirement of *Brady v. Maryland*,[32] Texas criminal procedure law includes a general discovery provision.[33] Until 2005, that provision, Article 39.14, permitted, but did not require, a trial judge to order the State to produce certain items in its possession.[34] The discretionary nature of Article 39.14 assured that application of the law was uneven.[35] Some trial judges ordered extensive disclosure of prosecution materials while others might routinely deny requests for production of anything beyond the constitutionally mandated minimum. In response to calls from the Texas defense bar for strengthened discovery options, the Texas Legislature amended Article 39.14 in 2005 to include mandatory language:

> Upon motion of the defendant showing good cause therefor and upon notice to the other parties, … the court in which an action is pending *shall order* the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or

[30] See Losoya v. State, 636 S.W.2d 566, 571 (Tex. App. – San Antonio 1982, no pet.), *citing*, Juarez v. State, 439 S.W.2d 346 (Tex. Crim. App. 1969).
[31] Cf. Bill Analysis, S.B. 1611 (Senate Research Center, July 26, 2013) (*Brady* is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas).
[32] 373 U.S. 83 (1963).
[33] See TEX. CRIM. PROC. CODE ANN. Art. 39.14.
[34] See Kinnamon v. State, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds*, Cook v. State, 884 S.W.2d 485 (Tex. Crim. App. 1994).
[35] See Bill Analysis, S.B. 1611 (Senate Research Center, July 26, 2013) ("A defendant's chances to a fair trial often vary according to jurisdiction, because of the lack of a uniform discovery law.").

> tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies.[36] [emphasis added]

As well-intentioned as this amendment may have been, it remained easy to circumvent. Couched in terms reminiscent of *Brady*, the "mandate" applied to production in a "pending" action *or* "on trial." The trial judge could comply with Article 39.14 by allowing the State to defer production until the trial was actually in progress. Making best use of exculpatory material or valuable impeachment facts is difficult, and often impossible, in the midst of trial, and a request for trial delay in order to develop newly discovered evidence or prepare effective cross-examination rarely is met with enthusiasm and generosity by the trial court. Further, the statute was limited to "material" evidence that was in possession of the State or its agencies. Often, facts that arguably may not by themselves be "material" will nevertheless be important to the defense. In this sense, Article 39.14 never functioned as a true "discovery" statute, but only as a kind of "safety net" to prevent the worst kinds of unfairness to the accused.

The most significant deficiency of the 2005 version of Article 39.14, however, was the preliminary requirement of a showing of "good cause" by the defendant. This placed the burden of requesting production squarely on the defense, along with a burden of showing good cause, a term undefined by the statute. Trial judges who were reluctant to order disclosure of the State's case could rely on an abuse of discretion standard to protect denial of a production order based on the defendant's failure to show "good cause."[37] To make matters worse, if the trial judge granted the defense request, the State's failure to comply with a production order also was

[36] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2005).
[37] See id.

reviewed for abuse of discretion.[38] In short, it was entirely possible following the 2005 amendment of Article 39.14 for a criminal defendant to receive no more than the minimum disclosures required by *Brady v. Maryland*. Even if this iteration of the statute had been in effect when Michael Morton was prosecuted, he might have been no better off.

The Fix: A New and Improved Discovery Statute

If "the truth shall set you free," or better, if the truth has the power to prevent the accused from being wrongfully imprisoned, then more disclosure of information in the possession of the state better serves the interest of justice than less disclosure. In essence, this simple argument motivates the 2013 amendment to Article 39.14 known as the "Michael Morton Act"[39] ["the Act"]. Responding to claims, apparently well-founded claims, that vital information was withheld from Michael Morton, the 83rd Texas Legislature approved a broad mandate requiring the production by the state of material in its possession upon request of a defendant.[40]

Items Subject to the Act

The kinds of items and information to be produced under the Act are varied, far more so than the disclosure required by *Brady*. Without regard for whether this material exculpates or casts doubt on other anticipated trial evidence, amended Article 39.14 includes offense reports, designated documents, papers, written or recorded statements of the defendant or a witness, books, accounts, letters, photographs, and objects or other tangible things that are not privileged,

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[38] See Walker v. State, 321 S.W.3d 18, 22 (Tex. App. – Houston [1st Dist.] 2009, pet. dism'd).

[39] Michael Morton prefers that the amendments to Article 39.14 of the Texas Code of Criminal Procedure embodied in Texas Senate Bill 1611 of the 83rd Texas Legislature be referred to as "SB 1611" rather than "the Michael Morton Act." Conversation between Gerald S. Reamey and Michael Morton, May 14, 2015. The bill, however, specifies that the provision be known as the Michael Morton Act, so that is the way in which it is referred to in this article. See Act of May 16, 2013, 83rd Leg., R.S., ch. 49, § 1, 2013 Tex. Gen. Laws 106-108 (codified at TEX. CRIM. PROC. CODE ANN. Art 39.14).

[40] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).

as long as these items are "in the possession, custody, or control of the state or any person under contract with the state."[41]

As extensive as this list is, it failed to include the names of any expert witnesses either side "may use" at trial.[42] Provision for those disclosures was made in the next regular session of the Texas Legislature following the enactment of the Michael Morton Act.[43] Effective September 1, 2015, upon request of a party made not later than "the 30th day before the date that jury selection in the trial is scheduled to begin or, in a trial without a jury, the presentation of evidence is scheduled to begin," the party to whom the request is made must disclose the name(s) of any expert witness that may be used at trial.[44]

Not included in the Act's original laundry-list is "work product of counsel for the state *in the case* and their investigators and their notes or report."[45] More broadly than for work-product, the Act excepts "written communications between the state and an agent, representative, or employee of the state."[46] Notwithstanding these limitations, the sweep of the disclosure requirement is breathtaking in comparison with what previously existed.[47]

To be fair, it must be remembered that prior to passage of the Act some prosecuting offices, particularly but not exclusively in larger cities, maintained an "open file" policy that

[41] See id. Note that the reach of the requirement extends to agents of the state, and not only to persons working full-time as employees of the state.
[42] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(b) (Vernon Supp. 2015).
[43] See id.
[44] See id.
[45] See id. It may be significant that the exception extends only to state's counsel involved "in the case." A reasonable implication is that the work product of counsel for the state may be subject to production if that lawyer is not involved in the defendant's case. A related question concerns whether the requirement of amended Article 39.14 trumps any general work-product privilege, a point discussed *infra*.
[46] See id.
[47] It must be noted that under the prior version of Article 39.14, a trial judge could exercise discretion in favor of disclosure and order the same kinds of materials covered by the amendment. While this may have been done by some judges in some cases, the author is unaware of any evidence that this practice was prevalent.

simultaneously provided extensive discovery opportunities for defendants and protection from *Brady* violation claims for those offices.[48] Recall that, because open file policies were largely gratuitous, their scope and the operational procedures by which they were implemented varied greatly.[49] Even for those defendants fortunate enough to be prosecuted in a county with such a policy, there was no guarantee that everything in the file would be made available, or that the defense would know what had been withheld. Since no right existed to see material not covered by *Brady*, an open file policy was only as useful as the willingness of the prosecution to make full disclosure.[50]

The Act goes beyond creation of a mandatory open file policy for prosecutors. It redistributes the burden of discovery. While the state's attorneys long have had a duty to produce *Brady* material, discovery of other information in the possession of the state or its agents required the defendant to request its production, and then to show good cause for the trial court to order its release. A simple request from the defendant for material covered by Article 39.14 now activates the prosecutor's duty to produce the requested items, assuming of course that those items are ones for which production is required.

The Request

Unlike the procedure previously in place, the current statute creates a virtually automatic disclosure duty. The defense need not show cause for production because, for the most part, the

[48] See, e.g., Brian R. Means, Suppression of Evidence – *Brady* Claims, POSTCONVICTION REMEDIES Sec. 36:15 (2015) (discussing the impact of open-file policies on claimed *Brady* violations).
[49] For example, the Bexar County District Attorney's Office maintained for a considerable period of time an open-file policy, but would not allow defense counsel to photocopy or photograph any materials in the often-voluminous files.
[50] No doubt, in some cases an open file policy allowed a defendant access to more than she was entitled to receive under *Brady* or than a trial judge could order under the existing statute.

trial judge has no decision to make once disclosure is requested.[51] Article 39.14 does not specify whether the defense request be written, but only that it be "timely."[52] Presumably, a request is timely if it is made before trial and sufficiently before trial to allow the prosecutor to respond. Failure to expressly request material under Article 39.14 amounts to relying on *Brady* and its due process minimum disclosures, and may be seen as a tacit waiver of the right to production of non-*Brady* material.

Depending on an "open-file" policy in lieu of making a 39.14 request also may be ineffective, and even dangerous, for the defense. An open-file policy is, by its nature, a voluntary and discretionary policy in which no one is accountable for incomplete disclosure. The Michael Morton Act has been characterized as creating "mandatory open-file discovery."[53] That characterization, however, is misleading. The Act specifies the objects and materials that *must* be disclosed upon request by the defense, while the traditional open-file policy maintained by many prosecutors' offices prior to passage of the Act was as broad or narrow, as inclusive or exclusive, as the office wished it to be within the confines of due process. The mandate of Article 39.14 is not merely a command to "open the prosecutor's 'file';"[54] it is a structured command to be applied in a uniform manner, requiring disclosure of many items while protecting the confidentiality of others. In this way disclosure is not dependent on a local

[51] See Randall Sims & R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 965 (2014).
[52] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[53] See Randall Sims & R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964 (2014); see also TEX. ETHICS OP. 646 (November 2014) ("article 39.14 requires an 'open file' policy by prosecutors").
[54] One of the shortcomings of an open-file policy is that the lawyer making the materials available is able to determine, without any more guidance than conscience and a due process "floor," what is included within the "file." A prosecutor could, for example, maintain a separate "file" of witness statements or forensic reports, which would not be available to defendants, despite the availability of an apparently complete "file" containing offense reports and other materials. This disclosure of the State's "file" would not necessarily be incomplete in any obvious way, but it would not include items any criminal defense attorney would think important in the trial of the case. Selection of items to omit might also be entirely *ad hoc*, further masking the incompleteness of the file that was "open" to the defense. Few prosecutors acting in good faith would fail to disclose these limitations to defendants viewing the file except in cases of innocent mistake or inadvertence, but in the absence of a more stringent guiding principle than generosity, no consequences or remedies exist for such a failure.

prosecutor's policy concerning the contents or definition of "the file," it is access that is statutorily required and clearly defined.[55]

A request might be made by the defense in a variety of ways.[56] It could be delivered orally – say by phone call or a passing comment in a courthouse hallway – but doing so is fraught with the usual possibilities that drive lawyers to memorialize in writing virtually everything. Making the request in a letter avoids a good many misunderstandings and miscommunications, but a careful lawyer might choose instead to continue the practice that existed before the Michael Morton Act existed by filing a motion for production.

Although filing a motion seemingly defeats the goal of extricating the trial judge from routine discovery requests, it is unlikely to increase the court's burden. In addition to requesting material available under Article 39.14, the production motion undoubtedly will request the court to order the State to disclose anything material to the case that is exculpatory – that is, information to which the defendant is entitled under *Brady v. Maryland*. While *Brady* material need not be requested specifically, careful defense lawyers always do this.[57]

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[55] Compliance with the defense request cannot ethically be conditioned by the prosecution on agreement by the criminal defense attorney that information produced will not be disclosed to the defendant, or that a blanket waiver be made of court-ordered discovery in any of their client's cases. See Ethics Opinion No. 646 (Nov. 2014), 78 TEX. B.J. 78 (2015). Prosecutors are required to comply with the Michael Morton Act. See id.

[56] In this context, "the defense" actually refers to the attorney representing the accused. *Pro se* defendants are subject to somewhat different rules and limitations, discussed *infra* in the subsection of this article devoted to that subject.

[57] In the past, defense lawyers developed the habit of requesting *Brady* material in order to fall under the "request" standard, which resulted in a somewhat more lenient review in cases of alleged failure to disclose than the "non-request" standard. See *United States v. Agurs*, 427 U.S. 97, 112 (1976); *United States v. Bagley*, 473 U.S. 667 at 680 (1985). When the distinction ended, lawyers may have continued the practice of requesting *Brady* material from force of habit, unawareness that the standard had changed, or simply a desire to have the trial court rule favorably on at least one part of the motion for production.

In addition to the constitutional requirement, the defendant is entitled to *Brady* material under Section (h) of Article 39.14:

> Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or

In addition to asking for *Brady* material and information discoverable under Article 39.14, the motion often is used to request production of evidence in the State's possession for inspection that is not obviously exculpatory or obviously included within the scope of 39.14. For example, certain tangible objects like drugs or pieces of physical evidence may be subject to inspection under the long-standing rule of *Detmering v. State*.[58] Some of those items might be within the language of Article 39.14 relating to "any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state."[59] Until it is clear that "material to any matter involved in the action" will be construed to include evidence subject to *Detmering*, prudence dictates making a specific request.

Finally, a motion filed in the trial court usually will be the best evidence that a request actually was made by the defense. It is unclear from the Act whether the defendant may waive production, or, if so, whether that waiver must be explicit, or the form the waiver should take.[60] Lest a claim that no request was made by the defense result in a later allegation of ineffective assistance of counsel, the prudent defense attorney will hesitate to rely on less definitive methods of communicating a request. For the prosecution, too, an explicit written request – as by motion for production - eliminates ambiguity and clearly defines its obligations.[61]

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control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

TEX. CRIM. PROC. CODE ANN. Art. 39.14(h) (Vernon Supp. 2013).

[58] TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).

[59] See id.

[60] See, e.g., Randall Sims & R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 966 (2014). If waivers are permitted, as seems likely, they cannot be compelled by the State in exchange for the prosecution's compliance with the disclosure mandate of the Michael Morton Act. See Ethics Opinion No. 646 (Nov. 2014), 78 TEX. B.J. 78 (2015).

[61] See id.

In most cases, trial judges are unlikely to labor over routine 39.14 requests. Their decision making burden usually will be eliminated by the mandatory nature of the Act. No determination of "good cause" is required; the order of production should become routine in the ordinary case.

Production

Once a request is made by any means, it is incumbent on the prosecutor to produce the requested materials "as soon as practicable."[62] In a simpler case, compliance might be possible in a very short period of time, but in other cases the prosecution will require an extended period in which to gather and transmit the information. The Act provides no further guidance on the timing of the request or the time within which the state must respond. Nor does it require the trial court to allow the defendant any particular amount of time or even a "reasonable" amount of time prior to trial to read, consider, and react to what she has learned.

For a prosecutor receiving a request under 39.14, compliance can be challenging and time-consuming. One prosecutor described the situation this way:

> … [A]lready overloaded prosecutors' offices must put together discovery on each case, provide it to the defense, and document which items were provided and when – all with the same number of employees. Many offices are also filing with the district clerk a 39.14 Notice of Discovery, which enumerates the items given to the defense, as well as keeping a copy for their case file and providing a copy to the defense attorney at the same time they convey the discovery it documents.

[62] See id.

> Making this trickier, a few offices are paperless, so discovery (both in the state providing it and in the defense receiving it) occurs electronically. But the vast majority of prosecutors' offices still use paper, at least to some extent, and the task of duplicating case files, video recordings, audio clips, and other evidence has burdened stretched-thin staff, budgets, and equipment. Such paper-pushing offices have a couple of choices. The first is to make paper copies of everything for the clerk and defense counsel. The second is to go electronic by scanning the discovery items and report and then providing an electronic copy to the defense by email, cloud storage, thumb drives, or something similar while retaining the electronic file. The majority of district clerks in Texas are already mandated to be fully paperless on civil matters, and it is coming soon for criminal cases. Perhaps prosecutors should start moving that way with discovery.[63]

The absence of language in the Act requiring response to a request for production within a certain time creates the possibility that a prosecutor, perhaps for understandable reasons, will delay production of the material for an unreasonably long period. Agreeing to a continuance or resetting of the case, however, does not cure the harm done to the defendant in this circumstance. While many criminal defendants are in no rush to resolve the charges against them, many others are sitting in jail cells, unable to make bail and unwilling to plead guilty or demand trial without having had access to the state's evidence against them. The hydraulic pressures of this situation all work against the very goals of a more expansive discovery regime. Without invoking the intervention of the trial court – the very thing the Act was intended to reduce or eliminate – the defendant is left to wheedle, beg, and threaten in order to obtain what the Act ostensibly

[63] See Randall Sims & R. Marc Ranc, *Two Views of Morton*, 77 TEX. B.J. 964, 965-66 (2014).

guarantees. Delay in the production of information also necessarily delays the preparation of the defense case for trial. Minimally, the statute should require, as do other similar provisions,[64] that the defendant have a reasonable period in which to digest the material, and sanctions should be available for flagrant abuses of the production requirement.[65]

Even after the State discloses everything in its possession that must be disclosed, its duty is not satisfied. The Act creates a continuing duty of disclosure that requires the prosecution to "promptly disclose the existence of the documents, items, or information" to the court or defendant if any of these is discovered at "any time before, during, or after trial."[66] Materials "discovered" even years after the conclusion of a trial must be disclosed, something that potentially will facilitate the discovery and advancement of both claims of actual innocence and those of *Brady*/39.14 violations.

But what of the witness statement that is unknown to the prosecutor, a discoverable document found languishing in the file cabinet of a suburban police department because it was overlooked, or because an investigator decided without consultation that it was unimportant to the case? The answer to this question is clear under *Brady v. Maryland*.[67] Material that is favorable to the defendant, and that is in possession of the government or those acting on its behalf, must be disclosed.[68] In essence, this rule creates a prosecutorial duty to find and disclose such information. Texas law now appears to impose the same duty on prosecutors respecting Article 39.14 materials.

[64] See TEX. R. EVID. CODE ANN. Rule 615(d) (Vernon Supp. 2015).
[65] See TEX. R. EVID. CODE ANN. Rule 615(e) (Vernon Supp. 2015).
[66] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(k) (Vernon Supp. 2013).
[67] 373 U.S. 83 (1963).
[68] See Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Subsection (a) of Article 39.14, which creates the request and disclosure doctrine, extends to documents, papers, statements, and objects "that are in the possession, custody, or control of the state or any person under contract with the state."[69] Given that "the state" is not defined within the Act, and that prior versions of Article 39.14 did not overlap with *Brady v. Maryland*, the reach of the prosecutorial duty to find and disclose for at least non-*Brady* material remains somewhat unclear, but the requirement of disclosure of *Brady* material in subsection (h) certainly suggests that adherence to the constitutional understanding of "possession" should control in some cases. Consistency in this regard would create a better integrated scheme of duty to disclose, and, in a practical sense the prosecutor always will be burdened with ensuring that items in the "possession, custody, or control of the state *or any person under contract with the state*" are made available to the defendant.

Some material in the possession of the State need not be produced in response to an Article 39.14 request. For example, inspection and copying of designated documents, papers, written or recorded statements of the defendant or a witness is permitted,[70] but that right does not extend to "the work product of counsel for the state in the case and their investigators and their notes or report."[71] In another provision, the statute provides that, "The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative or employee of the state."[72] The latter exclusion of written communications is quite broad, but presumably does not extend to, for example, offense reports, which are specifically listed among those items to be available to the defense.[73] To exclude offense reports or witness statements of law enforcement officers – also expressly discoverable – would defeat

[69] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(k) (Vernon Supp. 2013).
[70] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[71] TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[72] TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[73] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).

much of the purpose of the Act and would violate the general principle of statutory construction regarding the primacy of the specific provision over the general.

Not surprisingly, if a prosecutor decides that information may be withheld, that decision must be revealed to the defense.[74] The State "shall inform the defendant" if some portion of an item has been withheld or redacted, giving the defense an opportunity to challenge the omission.[75] That challenge is initiated by a defense request which, in turn, requires the trial court to conduct a hearing to determine whether the failure to disclose was justified.[76] The language of the Act is mandatory in this regard, specifying that "the court *shall conduct* a hearing"[77] on the issue once it is raised, but it does not indicate how quickly the hearing must be held.

Requiring the prosecution to reveal incomplete disclosures serves the interest of the state in protecting privileged or otherwise protected information, while giving the defense notice that something is missing. Rather than burdening the state and courts with the filing of a request for a protective order in advance of any disclosure, the procedure permits the defense access to material that clearly must be disclosed, leaving the validity of a claimed exception to disclosure for a later hearing. The disadvantage of this procedure from the defendant's point of view is that, in the absence of a request for a hearing to review the prosecution's decision to withhold, the justification for the omission or deletion is tacitly conceded. It is incumbent on defense attorneys, therefore, either to obtain a satisfactory explanation for non-disclosure from the state's attorney or to test the action by requesting review in the trial court.

When Counsel's Access Exceeds A Defendant's – The *Pro Se* Dichotomy

[74] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(c) (Vernon Supp. 2013).
[75] See id.
[76] See id.
[77] See id. (emphasis added)

One of the peculiarities of the amended language of Article 39.14 is that the word "defendant" apparently means "defendant's lawyer" rather than the actual accused person. Subsection (a) requires the state to produce documents, papers, statements, or objects upon "request from *the defendant*" (emphasis added).[78] Ordinarily, a reference to "the defendant" includes both the accused and his or her attorney, and in the case of Subsection (a) it does appear that either may request disclosure.[79] Indeed, the statute provides that, "after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying and photographing, *by or on behalf of the defendant*, of [discoverable materials].[80] Although Subsection (a) does not differentiate between lawyer and client, other portions of the Act clearly do, often in a manner seemingly at odds with the initial command.[81]

The thrust of these distinctions is to give the defendant's attorney access to all of the material proffered by the state, but to deny the actual defendant the same access. Nothing in Subsection (a) suggests that "the defendant" should not receive materials upon request without the involvement of the court.[82] Indeed, the plain words of that provision clearly name "the defendant" as the requesting party, and require the state to produce reports, documents, papers, and statements, and "permit the inspection … *by … the defendant.*"[83]

In Subsection (d), however, the following appears:

> In the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection,

[78] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[79] See id. No distinction is drawn in Subsection (a) between the accused and defense counsel, and there is no hint in the general command of that provision that access differs according to the status of the person requesting it, as long as that person is legally identified with "the defendant."
[80] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[81] See "The Duty Not to Disclose" *infra*.
[82] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).
[83] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(a) (Vernon Supp. 2013).

> the state shall permit the pro se defendant to inspect and review the document, item, or information but is not required to allow electronic duplication as described by Subsection (a).[84]

Without prior mention or explanation, the quoted language raises two inferences: (1) A *pro se* defendant, unlike one represented by counsel, must move for production of Article 39.14 materials; and (2) production, inspection, or review is required *only if* it is ordered by the trial court. Nothing is said about the standard by which the court will decide a production motion filed by a *pro se* defendant, and nothing seems to prevent the state from allowing that defendant access to an "open file" containing the same materials even without a court order.

In the absence of statutory guidance, is production for a *pro se* defendant left entirely to the whim of the court? Is the decision subject to review for abuse of discretion? How would that discretion be limited? How should the trial judge decide a motion? Drawing a distinction between *pro se* defendants and defense counsel is an obvious attempt to address the concern that has so constricted the flow of information in the past: fear that someone accused of crime will misuse it. This conclusion is supported by the creation within the Act of a duty of confidentiality for defense lawyers.[85] The tension between this fear and the desire to put useful information in the hands of the defendant's representative creates in the new version of Article 39.14 an uneasy balance that disadvantages the accused who wishes to act *pro se*.

Also puzzling is the limitation in Subsection (d) on allowing a *pro se* defendant to electronically duplicate produced materials.[86] Does the possible ban on "electronic duplication"

[84] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(d) (Vernon Supp. 2013).
[85] See, e.g., TEX. CRIM. PROC. CODE ANN. Art. 39.14(e), (f) (Vernon Supp. 2013).
[86] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(d) (Vernon Supp. 2013).

effectively reduce the unrepresented to looking and writing notes?[87] If so, it must be because a greater potential for misuse was imagined when materials were electronically duplicated, but the distinction is unexplained and the term "electronic duplication" is undefined.[88] Since the language is only permissive, allowing, but not requiring the prosecution to deny electronic duplication, that potential for misuse must not have been thought to be especially strong.

The division between defendants and their lawyers also is reflected in Subsection (f) of Article 39.14.[89] An attorney representing the accused is permitted to view, copy, store, and otherwise use materials produced by the state, but the defendant and witnesses may only see the information, but not have copies of anything other than his or her own statement.[90] Information relating to the address, telephone number, driver's license number, social security number, date of birth, bank account number, or other identifying numbers must be redacted before a defendant or witness is allowed to view a document or item.[91]

It is the duty of the person who allows the defendant to see the produced material to redact the prescribed information.[92] That person may be the defendant's lawyer, an investigator, expert, consulting legal counsel, or agent for the defendant's lawyer.[93] Interestingly, any of these persons, and not only the defense counsel, apparently may see the information that the defendant

[87] Photocopying, scanning, and photographing almost universally involve electronic duplication in the sense that the images are captured and stored electronically (digitally). Could a *pro se* defendant use a film camera to record images of the produced materials as a matter of statutory right if the court ordered production?
[88] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(d) (Vernon Supp. 2013).
[89] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(f) (Vernon Supp. 2013).
[90] See id.
[91] See id.
[92] See id.
[93] See id.

cannot. If they do so, however, they and the defendant cannot share what they learn outside this defense inner circle.[94]

The Duty Not to Disclose

Generally, material produced for defense use under the Act cannot be disclosed by the recipients to a third party.[95] This prohibition applies to "the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant."[96] The ban is not absolute; a court may conduct a hearing and order disclosure if "good cause" is shown, and "the security and privacy interests of any victim or witness" have been considered.[97] Again, fear of coercion, intimidation, or worse, is the concern driving this policy. Revealing materials to third parties also is permitted in cases in which those materials previously have been disclosed to the public.[98]

Beneath this precautionary policy lurks a more problematic reality for defense lawyers and their clients. In an effort to protect victims and witnesses, the Act creates not only a duty of nondisclosure for criminal law practitioners, but also a duty of security and confidentiality. To be sure, lawyers are accustomed to dealing with confidential materials and information, and in many respects, the duty created by the Act imposes no additional burden on the attorney already required to keep the secrets of clients. It does create, though, the potential for this duty – which is shared with the client – to become a source of conflict in the attorney-client relationship.

[94] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(e) (Vernon Supp. 2013).
[95] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(e) (Vernon Supp. 2013).
[96] See id.
[97] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(e)(1) (Vernon Supp. 2013).
[98] See TEX. CRIM. PROC. CODE ANN. Art. 39.14(e)(2) (Vernon Supp. 2013).

For example, if a violation of the nondisclosure rule were to be claimed by the State, the court surely would consider whether the breach occurred by the actions of the accused or by the defendant's attorney or an agent of the attorney. For the lawyer to dispute or defend against a claimed violation presents the real possibility that he or she will be forced to point an accusing finger at the lawyer's own client. The lawyer's defense might require disclosure of otherwise privileged attorney-client communications[99] and, even if it did not, vigorously defending against an allegation of wrongful disclosure would likely put the attorney's interests in conflict with those of the client.

Adding to the dilemma for the attorney is the uncertain consequence of a violation. No crime was created by the Act to complement the nondisclosure requirement and the violation of the statutory duty might not even constitute a disciplinary infraction by the lawyer. Contempt would not be available to punish the errant defense lawyer unless a nondisclosure order had been entered, and it is hard to see how the court's inherent supervisory powers could be used to address the breach in a way that is appropriate. Perhaps a trial court could bar the attorney from appearing before that court in the future, or, in a case in which wrongful disclosure harmed some third party, the lawyer could be subject to tort liability. Ironically, the defense lawyer who violates the nondisclosure provisions of Article 39.14 might be better off offering no defense to a claim by the State than risking discipline by disclosing privileged information.

[99]If the defendant told her attorney after the fact that she had mentioned information obtained through discovery to a friend or family member, and asked whether that revelation was improper, it seems the *fact* that the disclosure had been made would be privileged because it constitutes an admission of legal wrongdoing made to the attorney in order to obtain legal advice or counsel. See TEX. R. CRIM. EVID. 503 (Vernon 2015). Similarly, if defense counsel asks the client, "Now, you didn't tell anyone any of those things we got from the prosecution, did you?" and the client responds, "Well, I showed that witness statement to my brother so he could see what X was saying about me," isn't that statement by the defendant privileged? Or may the defense attorney reveal the statement in order to establish that she did not disclose the witness statement, but rather that her client did? And if she does disclose what she's been told, perhaps because any privilege has been waived, isn't she still in a conflict with her own client?

The client, on the other hand, would face possible contempt proceedings for the same violation if a nondisclosure order had been issued, but probably not prosecution unless actual witness tampering occurs. Should the attorney who is falsely accused of disclosing privileged information gained through discovery be precluded from revealing that her or his own client is the real culprit? Or should the lawyer risk a disciplinary action or being held in contempt by defending herself without regard for the consequences to the client?

The Texas Disciplinary Rules of Professional Conduct define "confidential information" to include both privileged and unprivileged information,[100] so the consideration is not simply one of determining whether the client's statement is privileged as an evidentiary matter.[101] Information "acquired by the lawyer during the course of or by reason of the representation of the client"[102] may not be revealed or used to the disadvantage of the client unless the client consents.[103] Nor may the lawyer reveal confidential information "for the advantage of the lawyer" without a client's consent.[104]

This general prohibition is tempered by permission to reveal confidential information "to the extent reasonably necessary to … establish a defense on behalf of the lawyer in a controversy between the lawyer and the client,"[105] or "to establish a defense to a … disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client."[106] Unprivileged information may be revealed "when the lawyer has reason to believe it is necessary to do so in order to … defend the lawyer or the lawyer's

[100] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(a).
[101] See TEX. R. CRIM. EVID. 503 (Vernon 2015).
[102] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(a).
[103] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(b)(1), (2).
[104] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(b), (4).
[105] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(c)(5).
[106] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(c)(6).

employees or associates against a claim of wrongful conduct"[107] or to "respond to allegations in any proceeding concerning the lawyer's representation of the client."[108] These exceptions to the general prohibition on revelation of confidential information may provide a partial answer to lawyer's dilemma where the client has wrongfully disclosed materials produced by the State, but the Preamble to the Texas disciplinary rules includes a reminder that the lawyer's duty of confidentiality is not lightly abandoned:

> [T]hese rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.[109]

Under the confidentiality rules, even if defense counsel may reveal that his or her client violated the provisions of Article 39.14 by disclosing produced materials, doing so places the lawyer in the uncomfortable, and perhaps prohibited, position of becoming the accuser of, and chief witness against, her own client. As the commentary to the Texas disciplinary rule regarding conflicts of interests reminds members of the bar, "Loyalty is an essential element in the lawyer's relationship to a client."[110] The commentary also admonishes lawyers that the lawyer's own interests "should not be permitted to have adverse effect on representation of a client,"[111] and that a conflict exists "when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests."[112] Obviously, a lawyer who asserts that own client has violated the nondisclosure rule of Article

[107] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(d)(2)(ii).
[108] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.05(d)(2)(iii).
[109] See Preamble, TEX. DISC. R. PROF. CONDUCT (16).
[110] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.06, Comment 1.
[111] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.06, Comment 5.
[112] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 1.06, Comment 4.

39.14 in order to save herself from disciplinary action or sanction by the trial court, places her own interests above those of her client.

Curiously, the Act fails to create a crime or other sanction for violation of its nondisclosure requirement. The absence of a prescribed enforcement mechanism presents a challenge for the trial judge. If an attorney before the court misbehaves by improperly disclosing information obtained from the state, the court might refer the matter for possible attorney discipline[113] or hold the lawyer in contempt if the court's order was violated. Presumably, a sanction might issue using the court's general supervisory powers. Unfortunately, violation of a statutory duty in the course of legal representation is not *per se* a disciplinary violation And as previously noted, the Act – by design – eliminates the need for a production order, thereby reducing the opportunities to employ contempt as a sanction.

Enforcement Options: When Good Prosecutors Go Bad

a. Professional Discipline

Just as the Act is silent regarding remedies for violation of the nondisclosure requirement by a defendant or his attorney, there is no remedy provision in cases of prosecutorial misconduct. Moreover, while Article 39.14(g) refers to the Texas Disciplinary Rules of Professional Conduct in a manner implying those rules apply to lawyers employing the Act, that subsection is clearly addressed to attorneys for criminal defendants, and not to prosecutors.[114] Subsection (h),

[113] See TEX. CRIM. PROC. CODE. ANN. Art. 39.14(g) (Vernon Supp. 2013).

[114] See TEX. CRIM. PROC. CODE. ANN. Art. 39.14(g) (Vernon Supp. 2013). Subsection (g) begins by stating that, "[n]othing in this section shall be interpreted to limit an attorney's ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, … address, telephone number, driver's license number, social security number, date of birth, and bank account information or any information that by reference would make it possible to identify a victim or a witness." See id. This language reminds the reader that the Disciplinary Rules apply, and implies that communication of specified information would violate those rules.

elaborated in subsection (k) of Article 39.14, codifies the requirement that prosecutors comply with *Brady v. Maryland*, but even those provisions include no mention of an enforcement mechanism to use in the event of a violation.[115]

Despite the absence of enforcement language within the Act, remedies for misconduct exist. Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct contains several applicable provisions:

1. A lawyer shall not violate the Disciplinary Rules;[116]
2. A lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"[117] and
3. A lawyer shall not "engage in conduct constituting obstruction of justice."[118]

A prosecutor who violates a requirement of Article 39.14 by, for example, failing to comply with an order of a court to produce certain evidence or failing to meet his or her statutory obligation to produce items discoverable under the Act when a timely defense request has been made, has obstructed justice. That violation of Rule 8.04(a)(4) simultaneously violates the prohibition on violation of the disciplinary rules.[119]

Lawyers also are not allowed to engage in "conduct involving dishonesty, fraud, deceit or misrepresentation"[120] While a prosecutor's straightforward failure to comply with the

[115] See TEX. CRIM. PROC. CODE. ANN. Art. 39.14(h) (Vernon Supp. 2013). See also See TEX. CRIM. PROC. CODE. ANN. Art. 39.14(k) (Vernon Supp. 2013)(State has a duty to supplement disclosure of *Brady* material "at any time before, during, or after trial"). Article 39.14 does not directly provide for violations of *Brady*, but Rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct does. See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 3.09(d).
[116] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(1).
[117] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(3).
[118] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(4).
[119] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(1).
[120] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(3).

requirements of Article 39.14 is only arguably dishonest and fraudulent because the conduct implies that no discoverable material is in the possession of the state, an outright misrepresentation of the existence of such material clearly violates Rule 8.04(a)(3).[121] And it obstructs justice[122] by denying the defendant and the court access to evidence that may bear on the guilt or innocence of the accused or impair the fairness of the proceedings.

Although the preamble to the Texas Disciplinary Rules of Professional Conduct is hortatory, and not mandatory, section 4 admonishes lawyers that:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.[123]

Failure to comply with a legally established duty of production obviously constitutes a failure to conform to the requirements of the law. If done in order to "harass or intimidate" a defendant, the prosecutor acts contrary to the legislative intent, spirit, and letter of Article 39.14.

All prosecuting attorneys, are required, and not merely exhorted, to observe their "primary duty": "[N]ot to convict, but to see that justice is done."[124] This universally recognized duty may obligate a public prosecutor in some cases to exceed the disclosure mandates of *Brady* and Article 39.14, but it leaves no room for falling short. Yet, in many cases that have come to

[121] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(3).
[122] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, R. 8.04(a)(4).
[123] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, Preamble, sec. 4.
[124] See TEX. CRIM. PROC. CODE. ANN. Art. 2.01 (Vernon Supp. 2013); see also Berger v. United States, 295 U.S. 78, 88 (1935) (United States Attorney is representative of a sovereignty whose interest is not in winning a case, but in seeing that justice is done).

light, and others that continue to plague the fair administration of justice in the United States,[125] prosecutors have been found to have failed to comply with even the minimal due process requirements of *Brady*.[126] These failings have led to wrongful convictions in some cases,[127] but in all cases have deprived the defendants of the fair process to which every accused person is entitled.

Professional discipline has occasionally been imposed on errant prosecutors,[128] but so sporadically and unevenly that the possibility of sanction is unlikely to effectively deter this type of misconduct.[129] If not discipline, then what? Accustomed as American lawyer are to

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[125] Consider U.S. Circuit Court Judge Alex Kozinski's observation that, "there are disturbing indications that a non-trivial number of prosecutors – and sometimes entire prosecutorial offices – engage in misconduct that seriously undermines the fairness of criminal trials." See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxii (2015).

[126] Judge Alex Kozinski has described these failings as an "epidemic of *Brady* violations abroad in the land." See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC viii (2015). See also United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc). In the recent Texas prosecution of David Temple for killing his wife, a state district judge hearing the defendant's habeas petition based on undisclosed exculpatory evidence, found that the results would have been different had the State observed its obligation to reveal to the defense favorable evidence. See Brian Rogers, Judge Cites Prosecutorial Misconduct in Temple Case, http://www.expressnews.com/news/local/article/Judge-cites-prosecutorial-misconduct-in-Temple-6374157.php (July 8, 2015). In an article reporting on that finding, Joanne Musick, president of the Harris County Criminal Lawyers Association was quoted as saying, "Whether it's Morton or Graves or whoever, we see prosecutors who want to win, so they don't want to disclose everything. If they're hiding things or playing games, that's not upholding their duty to do justice. That's trying to win." See id.

[127] The prosecution, conviction, and incarceration of Michael Morton is but one example of this kind of misconduct resulting in wrongful conviction. Unfortunately, there are many others. See Peter A. Joy, The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 WIS. L.REV. 399 (2006).

[128] See *Woman on Death Row to be Resentenced; Life Term Expected,* http://latimesblogs.latimes.com/nationnow/2011/11/woman-on-texas-death-row-granted-new-hearing.html (prosecutor testified that he had been privately reprimanded for withholding evidence in the death penalty case of Michael Roy Toney); In the Matter of: Kevin Caroll Kakac, Respondent-Appellee, No. 6211262, IL Disp. Op. 07 SH 86 (Ill.Atty.Reg.Disp.Com), 2010 WL 5624454 (prosecutor received 30-day suspension for improperly withholding evidence); The Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001) (prosecutor suspended for one year for withholding name of informant); *Prosecutor in Anthony Graves Case Disbarred*, http://www.chron.com/news/houston-texas/houston/article/Prosecutor-in-Anthony-Graves-case-disbarred-6323681.php (disbarment of prosecutor for failure to disclose exculpatory evidence).

[129] In part, this failure to discipline is due to the difficulty inherent in discovering the violation for reasons described in the following passage:

> Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? Or if a prosecutor delays disclosure of evidence helpful to the defense until the defendant has accepted an unfavorable plea bargain, no one will be the wiser. Or if prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will

considering money damages an effective deterrent and enforcement tool, civil liability for disclosure violations naturally come to mind. The availability of this remedy, however, is more limited than might be expected.

b. Civil Liability

The Preamble to the Texas Disciplinary Rules of Professional Conduct makes clear that a violation of the Rules is not necessarily grounds for liability:[130]

> These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.[131]

If violation of a disciplinary rule does not constitute a basis for civil liability, by itself, a wrongfully convicted defendant conceivably may have no recourse to damages from the attorney who contributed to, or caused that miscarriage of justice, but may seek reparations from the State of Texas instead.[132] As helpful as such an award could be to the wrongfully convicted, it has no punitive effect – and therefore is unlikely to have much deterrent value – with respect to the individual most likely to have caused the harm.

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take an extraordinary degree of luck and persistence to discover it – and in most cases it will never be discovered.

See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxiii (2015). See also Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3441-42 (1999) (professional discipline, as applied, is insufficient to compensate for broad grant of immunity from civil rights actions). If discipline is rarely imposed on *known* instances of prosecutorial misconduct, imagine the larger number of unknown cases that go unpunished. It is small wonder that close adherence to discovery obligations may not be seen as a high priority by some prosecutors. Those who do take great pains to follow the law of disclosure do so primarily for the right reasons, and contribute to the fair administration of justice in a way that may never be fully appreciated.

[130] See TEX. GOV'T CODE ANN. Art. X, Sec. 9, Preamble, sec. 15.

[131] See id.

[132] See TEX. CIV. PRAC. & REM. CODE ANN., Tit. 5, Ch. 103 (Vernon 2006).

Ordinarily, damages could be pursued against someone who, acting under color of state law,[133] deprives another of a right, privilege, or immunity guaranteed by the constitution or laws of the United States.[134] When a prosecutor denies a criminal defendant due process by withholding mitigating or potentially exculpatory evidence, he or she deprives that defendant of such a right, but the remedies usually available under 42 U.S.C. Sec. 1983 offer no relief.

Prosecutors enjoy absolute immunity for activities "intimately associated with the judicial phase of the criminal process."[135] Qualified immunity, a powerful defense in its own right, initially was recognized for conduct by prosecutors acting in an administrative or investigative capacity.[136] In its opinion in *Imbler v. Pachtman*, the Supreme Court of the United States explained that:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.[137]

The Court continued to explain why qualified immunity ordinarily would be insufficient to protect the public prosecutor from fear of frivolous and vexatious litigation, and impede the pursuit of criminal justice.[138] Subsequently, in *Van de Kamp v. Goldstein*,[139] the Court extended

[133] See West v. Atkins, 487 U.S. 42, 49-50 (1988).
[134] See 42 U.S.C.A. Sec. 1983 (1996).
[135] See Imbler v. Pachtman, 424 U.S. 409, 430 (1976); see also Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3452-53 (1999).
[136] See 424 U.S. at 430-431; see also Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3454 (1999).
[137] See Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976).
[138] See Imbler v. Pachtman, 424 U.S. 409, 424-27 (1976). This holding had had its detractors. Among them is Judge Alex Kozinski, who observed that the ruling was neither a constitutional ruling nor one "compelled by the language of the statute." It was, Judge Kozinski wrote, "a pure policy judgment." See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxxix (2015). See also Lesley E. Williams, The Civil

absolute immunity to a district attorney and his chief deputy for clearly administrative duties: the failure to establish an information-sharing system on jailhouse informants within their office, and the failure to train prosecutors properly regarding their disclosure obligations under *Giglio v. United States*.[140]

Absolute immunity from Section 1983 liability strips the criminally accused, as well as the wrongfully convicted, of the only remedy that is likely to be effective,[141] a point the *Imbler* court acknowledged:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.[142]

This observation, whatever its merits, focused on acts and omissions respecting an attorney's conduct in a particular prosecution. The question left unanswered was whether a district attorney and his or her employing governmental entity might be liable for Section 1983 damages due to failure to train prosecutors about their duty to disclose. That issue came to the fore in *Connick v.*

Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3479-80 (1999) (arguing that qualified immunity is sufficient to protect prosecutors and that absolute immunity should be abolished).

[139] 555 U.S. 335 (2009).

[140] 92 U.S. 763 (1972).

[141] See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441 (1999) (professional discipline does not adequately compensate for broad prosecutorial immunity); see also George A. Weiss, Prosecutorial Accountability after *Connick v. Thompson*, 60 DRAKE L.REV. 199, 231 (2011) (absolute immunity, which almost always applies, is the "main reason" the threat of civil liability "is not an adequate deterrent to prosecutorial misconduct").

[142] See Imbler v. Pachtman, 424 U.S. 409, 4427-28 (1976). This last observation regarding possible "skewing" of post-conviction decisions suggests, with surprising candor, that appellate judges might ignore or undervalue meritorious claims of prosecutorial misconduct resulting in denial of due process because the reviewing judges would wish to spare the trial prosecutor the burden of liability for damages.

Thompson.[143] Notwithstanding a record of providing prosecutors within his office inadequate, and sometimes incorrect, information about the requirements of *Brady*, and the absence of a single case in his office in which a prosecutor was disciplined for a violation,[144] the Supreme Court refused to find sufficient evidence that the District Attorney was "deliberately indifferent" to the rights of the defendant.[145] In the absence of a pattern of indifference to the due process rights *Brady* sought to guarantee, as opposed to a single instance of violation, the case for Section 1983 liability is not established,[146] barring a wrongfully convicted plaintiff from recovering damages even from the governmental entity in which the violation occurred.

The limitations on civil liability, particularly a prosecutor's immunity, effectively remove damages as an enforcement tool for violations,[147] a point not lost on the Supreme Court. Writing for the majority in *Imbler*, Justice Powell noted that alternatives to the civil remedy exist: criminal prosecution and professional discipline.[148] The latter option, professional discipline, was accompanied by the following observation from the *Imbler* majority:

> [A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks (criminal prosecution and professional discipline) undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.[149]

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[143] See Connick v. Thompson, 131 S.Ct. 1350 (2011).
[144] See Connick v. Thompson, 131 S.Ct. 1350, 1381-82 (2011) (Ginsburg, J., dissenting). The record in *Connick* established an appalling and dangerous misunderstanding and neglect of the prosecutor's ethical obligation to produce exculpatory and mitigating evidence. Justice Ginsburg's dissenting opinion describes in detail the environment leading to the wrongful conviction in this case. See Connick v. Thompson, 131 S.Ct. 1350, 1370-87 (2011) (Ginsburg, J., dissenting).
[145] See Connick v. Thompson, 131 S.Ct. 1350, 1366 (2011).
[146]See Connick v. Thompson, 131 S.Ct. 1350, 1359-66 (2011).
[147] See generally Martin A. Schwartz, The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for *Brady* Violations, 37-MAY CHAMPION 58 (2013) (discussing how the *Imbler*, *Goldstein*, *Connick* immunity grants effectively eliminate consequences for prosecutorial misconduct).
[148]See Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976).
[149]See Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

The optimism of this passage has been questioned, and with good reason.[150] In an empirical study conducted by Professor Fred Zacharias, the evidence suggested that prosecutors not only were less likely to be disciplined that attorneys handling civil matters, but that even when they are disciplined, it is rarely for conduct resulting from excessive zeal.[151] A survey of cases reported in news accounts and in opinions by courts and disciplinary entities reveals that even in cases including wrongful conviction, prosecutors rarely suffer professional discipline.[152]

In his review of enforcement alternatives for prosecutorial misconduct, George Weiss summarized the effectiveness of professional discipline as a curb on rule violations by noting that, "[w]hether on the logical or empirical side, it seems bar sanctions are unlikely to restrain misconduct due to their low probability of occurring and because lighter sanctions are often imposed when they do occur.[153] Other enforcement mechanisms seem not to fare any better.

c. Criminal Prosecution

The federal criminal analog to Section 1983 is 18 U.S.C. Section 142.[154] Like its civil counterpart, Section 142 provides a criminal sanction for persons acting under color of law who

[150]See George A. Weiss, Prosecutorial Accountability after *Connick v. Thompson*, 60 DRAKE L.REV. 199, 223-25 (2011)(attorney-discipline authorities are less likely to bring charges or successfully inflict sanctions against prosecutors for prosecutorial misconduct). Judge Alex Kozinski characterized the argument as "dubious in 1976" and "absurd" today. See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxxix (2015).

[151]See Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C.L. Rev. 721, 754-57 (2001); George A. Weiss, Prosecutorial Accountability after *Connick v. Thompson*, 60 DRAKE L.REV. 199, 223-25 (2011).

[152]In reported claims of prosecutorial misconduct by 60 prosecutors in wrongful conviction cases reviewed by myself and my research assistant, Sarah Bassler, only 8 resulted in disciplinary action. This low discipline rate is despite the fact that in virtually every instance, exculpatory or mitigating evidence was found to have been withheld by the prosecution. An investigation was still pending in only one of these cases. It is noteworthy that 33 of the claims were from Texas, and only 3 of those resulted in discipline.

[153] See George A. Weiss, Prosecutorial Accountability after *Connick v. Thompson*, 60 DRAKE L.REV. 199, 225 (2011); see also Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441 (1999) (case law after *Imbler* suggests professional discipline does not sufficiently compensate for immunity from civil rights actions); Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3441-42 (1999) (experience post-*Imbler* suggests that disciplinary bodies do not compensate for the lack of civil liability).

[154]See 18 U.S.C.A. Sec. 142 (2006).

deprive another of a right, privilege, or immunity guaranteed by the constitution or laws.[155] Similarly, Texas criminal law punishes public servants and others for various kinds of conduct that may be involved in hiding or failing to divulge to a defendant information to which the accused is entitled.[156]

One need not be cynical to believe that criminal prosecution is unlikely to be an effective deterrent to *Brady* or Morton Act violations. George Weiss asserted in his 2011 article on enforcement mechanism that only one conviction of a prosecutor for violating Section 242 has been secured since the enactment of the statute.[157] In that case, *Brophy v. Commission on Professional Standards*, the sentence was a $500 fine with no jail time and the errant prosecutor received only a censure from New York Bar's disciplinary authority.[158]

The reticence to prosecute, whether in federal or state court,[159] is perhaps understandable given that the authorities who exercise prosecutorial discretion would be similarly jeopardized by widespread use of the sanction. It also has been suggested that prosecution of a public servant might be "overkill" if the defendant who was denied access to materials to which she was entitled was subsequently convicted in a new trial.[160] But this argument misses the point that the intentional withholding of *Brady* material or information covered by Article 39.14 harms the accused in a very real way, and that harm is unlikely to be undone merely because the injured

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[155] See id.
[156] See, e.g., TEX. PENAL CODE ANN. Sec. 39.03(a)(2) (2009) (abuse of official capacity); TEX. PENAL CODE ANN. Sec. 39.04(a)(1) (2009) (violations of the civil rights of person in custody); TEX. PENAL CODE ANN. Sec. 37.09 (2011) (tampering with or fabricating physical evidence); TEX. PENAL CODE ANN. Sec. 37.10 (2013) (tampering with governmental record).
[157] See George A. Weiss, Prosecutorial Accountability after *Connick v. Thompson*, 60 DRAKE L.REV. 199, 220 (2011).
[158] See Brophy v. Comm. On Prof'l Standards, 442 N.Y.S.2d 818, 819 (App. Div. 1981) (censure was deemed adequate in light of "unblemished record" and stigma of criminal conviction).
[159] No instance of criminal conviction for prosecutorial misconduct has been found in Texas.
[160]See George A. Weiss, Prosecutorial Accountability after *Connick v. Thompson*, 60 DRAKE L.REV. 199, 220 (2011).

party eventually obtains what she was entitled to receive in the first place. Refusal to prosecute also removes, even in egregious cases, the deterrent value that might otherwise exist.

d. Other Means of Enforcement

If criminal prosecution is essentially nonexistent, why did prosecutor Michael Nifong[161] serve one day in jail, and Williamson County, Texas, former District Attorney Ken Anderson serve five days' jail time?[162] In both cases, the short jail stay was for criminal contempt, and not as a punishment following conviction of a crime.[163] Although contempt seems scarcely more available than prosecution for violations of disclosure requirements, it may take on some life in the age of mandatory disclosure ushered in by the Michael Morton Act.

If contempt is to gain relevance in the post-Morton world, it will be because defendants seek, and obtain from trial courts, orders to produce evidence, and because judges enforce those orders. Although, as previously described, Section 39.14 is designed to avoid the involvement of the trial judge in the initial discovery process, routine motions and orders to produce discoverable materials may facilitate enforcement against willful breaches of the statutory duty. This point is reflected in a passage by United States Circuit Judge Alex Kozinski regarding *Brady* violations in the case against former Alaska U.S. Senator Ted Stevens:

> … *Brady* is not self-enforcing; failure to comply with *Brady* does not expose the prosecutor to any personal risk. When Judge Sullivan discovered that the prosecutors in the [*United States v.*] *Stevens* case had obtained their conviction after failing to disclose exculpatory evidence, he appointed a special counsel, DC attorney Henry Schuelke III, to independently investigate the prosecutors' conduct. Schuelke determined that the lawyers had committed willful *Brady* violations but that the court lacked the power to

[161] Michael Nifong was the prosecutor in the notorious "Duke University Lacrosse" case in which players were falsely accused of rape. Mr. Nifong, disbarred for his misconduct, was found to have withheld potentially exculpatory DNA evidence. The publicity this case received, not unlike that of the Michael Morton case, resulted in adoption by North Carolina of a mandatory open-file policy. See Robert P. Mosteller, Exculpatory Evidence, Ethics, And The Road To The Disbarment Of Mike Nifong: The Critical Importance Of Full Open-File Discovery, 15 GEO. MASON L. REV. 257 (2008).
[162] See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxxix-xl, n. 210 (2015).
[163] See id.

> sanction the wrongdoers because they had not violated any court-imposed obligations. The solution to this problem is for judges to routinely enter *Brady* compliance orders, and many judges do so already.[164]

Courts also are free to promulgate local rules under their supervisory powers. Violations of these rules may be punished in a variety of ways[165] and, although they lack the uniformity of state or federal rules, they are potentially useful in addressing or deterring prosecutorial misconduct.[166]

Other disincentives to violate Section 39.14 are somewhat less formal, but could be equally effective, if applied consistently and appropriately. These include the prospect of public disclosure of the violation, especially in instances of wrongful conviction, internal disciplinary measures within the prosecuting office or by county, state, or municipal officials,[167] and loss of reputation within the legal community.

Without effective enforcement measures for violations of *Brady* and Article 39.14, compliance will be a low priority for some prosecutors, and an invitation to cheat for others. As Judge Alex Kozinski has observed, "Prosecutors need to know that someone is watching over their shoulders – someone who doesn't share their values and eat lunch in the same cafeteria."[168] If the actions of criminal defense lawyers are sometimes viewed by prosecutors, judges, and the public with too much suspicion, those of prosecutors may have been viewed with too little. No

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[164] See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxxiii (2015).
[165] Sanctions might include dismissal of a prosecution or the exclusion of evidence. See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3446 (1999). See also State v. Sanchez, 2014 WL 2090546 (Tex. App. – El Paso 2014, pet. ref'd) (not designated for publication) (trial court ordered suppression of evidence for failure of prosecution to disclose *Brady* material; appellate court reversed on finding that failure to comply with court's discovery order was not willful).
[166] See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3444 (1999) (rules adopted under the supervisory power of courts have sometimes been promulgated in response to violations by prosecutors).
[167] See, e.g., Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3445 (1999) (federal prosecutors subject to internal regulations and ethical standards). But Mr. Williams also notes that prosecutors "may be inherently too biased to ensure fair disciplinary review." See id. at 3477-78.
[168] See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxxii (2015).

profession fares well on naked assumptions of competence and good faith, and no rule has life and vitality without enforcement.

Realizing the Promise

The 2013 amendments to Article 39.14 significantly and substantially changed both the law and practice of criminal discovery in Texas. Like all reform efforts, however, work remains to be done if the Act is to fulfill its promise to Michael Morton and the citizens of Texas. The legislature should, for example, carefully reconsider the disparate ways in which represented defendants, *pro se* defendants, and lawyers for defendants are treated. The statute must more clearly delineate when the discovery right of a "defendant" differs from that of a defendant's lawyer.

The restrictive approach taken in the statute toward *pro se* defendants must be clarified. If the ban on "electronic duplication" is maintained, the scope of that limitation must be defined.

Requiring production not less than ten days before the beginning of the trial would ensure that defendants at least have time to see and use the information that is provided. And perhaps defendants, and their lawyers, should be obliged to expressly waive discovery in writing if no request has been made because production is not being sought.

What Judge Kozinski has said of *Brady* applies with equal force to the reforms undertaken in the Michael Morton Act:

> [T]hree ingredients must be present before we can be sure that the prosecution has met its *Brady* obligations under the law applicable in most jurisdictions. First, you must have a highly committed defense lawyer with significant resources at his disposal. Second, you must have a judge who cares and who has the gumption to hold the prosecutor's feet to the fire when a credible claim of misconduct has been presented. And, third, you need a great deal of luck, or the truth may never come out.[169]

[169] See Alex Kozinski, Criminal Law 2.0, Preface, 44 GEO. L.J. ANN. REV. CRIM. PROC xxvi (2015).

The same may be said of the obligations of confidentiality imposed by Article 39.14 on defendants and their attorneys. As is true generally in the criminal justice system, if - and only if – all of the principals in the administration of justice perform in ways consistent with the letter and spirit of this reform measure, Texas will enjoy a more open, transparent, and fair process. Wrongful convictions will not be eliminated merely by valuing truth-finding more highly than it has been in the past. There are many other ways in which we arrive at unjust prosecutions, convictions, and punishments. But we must not sacrifice the good because we are unable to achieve the perfect.

Even highly committed defense lawyers without significant resources can better protect their clients and create a remedial opportunity for the trial judge by filing a motion for production under Article 39.14 and *Brady*. Trial judges are free, of course, to routinely order such disclosure in cases before them. Specifying what must be disclosed simultaneously documents the "request" and affords the court the option to punish noncompliance by contempt. Alternatively, Article 39.14 could be amended to provide that failure to comply with its provisions subjects the violator to contempt. Defense lawyers and defendant would thereby also be held accountable for violation of the nondisclosure duty created by the Act.

The tools currently available to enforce compliance with Article 39.14 must be used more vigorously, if not expanded. Professional discipline holds potential as an effective deterrent, but only if it is applied uniformly, certainly, and swiftly. It has been suggested that existing disciplinary rules are inadequate to address prosecutorial misconduct, both because they fail to directly address the kinds of misconduct that may lead to wrongful convictions, [170] and because

[170] See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3464-67 (1999) (describing the variety of prosecutorial misconduct that is subject to neither professional discipline nor criminal prosecution).

they usually are not applied to prosecutors.[171] Rules designed specifically to address violations of *Brady* and Article 39.14 disclosure obligations could significantly increase the likelihood that professional discipline will be imposed, especially if those rules are accompanied by a reporting requirement imposed on trial and appellate courts encountering such a breach.[172]

It also is time to rethink immunity from civil liability for blatant misconduct. Whether qualifying immunity for prosecutors instead of maintaining an absolute shield,[173] or modulating the degree of immunity depending on the bad faith and culpability of the errant official, the potential and actual harm that results from conviction at any price is simply too great to disallow accountability. If the Supreme Court of the United States is not yet satisfied that *Imbler* created too strong a defense for ethical lapses, the State of Texas could, and should, consider whether reparations paid by the state government to the wrongfully convicted would be more fairly imposed on the offices and individuals who ignore the legal duties that have been created by the state legislature, the Constitution, and notions of fundamental fairness.

Even criminal prosecution should be available for egregious violations.[174] If other public officials are sometimes prosecuted for breaches of duty and ethical failings with far less serious consequences, prosecution for violations of the very laws prosecutors are sworn to uphold – violations for which they prosecute others every day – must also be an option in practice, and not only in theory.

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[171] See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3468-76 (1999) (explaining how and why ethics violations are not enforced against prosecutors).

[172] For an excellent discussion of the reluctance of professional bodies to discipline prosecutors for unethical conduct, and for recommendations, including specific rules and mandatory reporting, to counter violations of *Brady* and other kinds of misconduct, see Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3477-80 (1999).

[173] See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3479-80 (1999) (arguing that only qualified immunity should be available for prosecutorial misconduct).

[174] See Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3476 (1999) ("Even when a prosecutor's misconduct is arguably a criminal act such as suborning perjury or obstructing justice, enforcement against prosecutors is rare.").

In criminal cases, it is time to temper adversarial habits with the recognition on both sides that nothing is of more importance to the credibility of the American criminal justice system than rigorously hewing to the rule of law – not even doing justice in the individual case. Every wrongful conviction, every subversion of the search for truth, undermines society's confidence that criminal justice in Texas is not just a rigged lottery in which the stakes are incredibly high. The Michael Morton Act is not a panacea for these ills, but it has the potential to instill a heightened reliability into a system damaged by its revealed flaws.