



THE TEXAS PROSECUTOR

The Official Journal of the

Texas District & County Attorneys Association

Volume 43, Number 4 • July–August 2013

*“It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done.”
Art. 2.01, Texas Code of Criminal Procedure*

The dawn of new discovery rules

Governor Rick Perry signed into law the Michael Morton Act (SB 1611) late this spring, ushering in a new era in discovery for Texas prosecutors. Here is a general overview of this law, which is effective January 1, 2014.

Each prosecutor is charged under Texas Code of Criminal Procedure art. 2.01 “not to convict, but to see that justice is done.” What you rarely hear quoted is the next sentence: “They shall not suppress evidence or secrete witnesses capable of establishing the innocence of the accused.” This duty to seek justice rather than convictions includes setting the innocent free—and it has been this way for decades.



By Randall Sims
47th Judicial District Attorney in Potter and Armstrong Counties

Since its inception in 1965, art. 39.14 of the Code of Criminal Procedure of Texas has regulated discovery in criminal cases. Until now, the Legislature had not made major changes to criminal discovery, and in the opinion of many, including myself, it was still working very well

for all concerned. But recently, a few old cases have come to light that demonstrate that not everyone within our profession took this requirement to seek justice and hand over evidence seriously. These prominent cases from the past involve prosecutors who were not forthcoming with exculpatory evidence, and after many years, innocent defendants were freed from prison. Michael Morton is the most prominent example, and the criminal discovery reform bill, SB 1611, which amends this portion of the Code of Criminal Procedure, was named in his honor.

There were several absolutes throughout the process of amending this statute. First, art. 39.14 would be amended with or without prosecutor participation. Realizing it was better for those who know what we do daily to help make the rules than for us to allow those who have no

clue do so, prosecutors wisely chose to participate. This enabled us to keep some of the more draconian provisions out of the final bill. Second, the bill was going to include mandatory discovery of offense reports, witness statements, and all material evidence.

Here is a synopsis of the Michael Morton Act’s substantive changes under §2, listed by subsection. Please note that our efforts to prevent caselaw from becoming statutory due to the obvious problem of caselaw being more fluid than codified law (which could result in a statute not complying with current caselaw) were not successful.

Subsection (a)

Texas Family Code §264.408 and CCP art. 39.15 are specifically excluded from this act. That Family Code section includes files, records, communications, and working papers used or developed in providing services to children by Child-

Continued on page 2

Continued from the front cover

Protective Services (CPS) or Court-Appointed Special Advocates (CASA) as well as any videotaped interview of a child made at a children's advocacy center, while art. 39.15 of the CCP (regarding child pornography) provides that such evidence must remain in the care, custody, or control of the court or the State. In both statutes, the State must make the property or material reasonably available to the defendant.

Also, the State *shall* produce and permit the inspection and the electronic duplication, copying of, and photographing of listed evidence *as soon as practicable after receiving a timely request* from the defendant.

These items are discoverable:

- 1) any *offense reports*,
- 2) any documents, papers, and written or recorded *statements* of the defendant or a witness, including witness statements of law enforcement officers, and
- 3) any books, accounts, letters, photographs, 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.

The State may accomplish discovery by providing to the defendant electronic duplicates of any documents or other information described by this article.

Excluded from this discovery are written communications between the State and an agent of the State. It also does *not* authorize the removal of the documents, items, or information from the State's possession, and

any inspection shall be in the presence of a representative of the State.

Subsection (c)

(Please note that subsection (b) is not changed by the bill.) Subsection (c) allows the State to withhold discovery. When a portion of the requested document or thing is subject to discovery and a portion is not, the State must give the defense the discoverable parts and inform the defense that a portion is not discoverable. The defendant may then request a hearing for the court to determine whether the withholding is justified.

Subsection (d)

Pro se defendants may *inspect* the documents and items listed in Subsection 2(a), but they are *not* entitled to electronically duplicate those documents in any way.

Subsection (e)

This subsection prohibits disclosure of provided discovery to *any* third party. However, two exceptions allow such disclosure if: 1) a court orders the disclosure upon a showing of good cause after notice and a hearing considering the security and privacy interests of any victim or witness, or 2) the materials have already been publicly disclosed.

Subsection (f)

These are additional exceptions to the non-disclosure to any third parties provided by (e). The "entrusted circle" includes the attorney representing the defendant or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant. The "expand-

ed circle" includes the defendant, witness, or prospective witness.

A member of the entrusted circle *may* allow a member of the expanded circle to view the information provided but may not allow that person to have copies of the information, other than a copy of the witness's own statement. Before allowing that person to view a document or the witness statement of another, the person possessing the information shall redact the address, telephone number, driver's license number, Social Security number, date of birth, and any other identifying numbers contained in the document.

The defendant may not be the agent for the attorney representing the defendant. This prevents the defendant from gaining a copy of anything other than his own statement unless one of the exceptions applies from (e).

Subsection (g)

The Texas Rules of Professional Conduct apply regarding any received discovery, particularly regarding the attorney's use of identifying information in received discovery.

Subsection (h)

The state *shall* disclose to the defendant any exculpatory, impeaching, or mitigating document, item, or information in the possession, custody, or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. This portion of the statute is derived from *Brady v. Maryland*¹ and its progeny.

Continued on page 4

Continued from page 2

Subsection (i)

The State shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article. If your office is paperless, the software system should track this documentation for you. For those who are not so fortunate, I suggest preparing a checklist good for all types of cases and mark what discovery items were given, when, and to whom. Have the person providing the discovery and the defense attorney receiving it sign the list and date it. I also suggest you keep what was not disclosed separated from the discovery provided with an explanation as to why it was withheld.

All of these suggestions will come in handy 20 years from now if you ever find yourself being asked about an old case's discovery.

Subsection (j)

Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article. Use the list created under subsection (i) to orally recite into the record what was disclosed, or introduce a copy of the signed and dated list into the record.

Subsection (k)

If at any time *before, during, or after* trial, the State discovers any additional document, item, or information required to be disclosed under Subsection (h), the State shall promptly disclose the existence of

the document, item, or information to the defendant or the court.

Subsection (l)

The court may order the defendant to pay costs related to discovery.

Subsection (m)

This article prevails over Chapter 552, Government Code, the Public Information Act.

Subsection (n)

This article allows the parties to agree to discovery *equal to or greater than* those required under this article.

Working through the changes

We would be naïve to believe there will not be some problems with the new rules. After all, most anything new has a few kinks to work out. Several questions and concerns have already been raised about this new law. I will not address these concerns now, as those involved are working on compiling answers to provide a uniform implementation for prosecutors. TDCAA is hosting a meeting at its Austin headquarters at the end of June (after the deadline for this article) to discuss how the Michael Morton Act will function in practice.

A more detailed article on suggestions will be forthcoming to guide prosecutors and office staff on how to handle the new law's requirements. Additionally, be sure to attend one of the TDCAA Legislative Updates this summer to get more information on this statute.

(You can sign up online at www.tdcaa.com/training/tdcaas-2013-legislative-update-texas-tour.) Information on suggested procedures and other issues will be discussed then.

Additional information

This act becomes effective *January 1, 2014*, and will apply only to offenses taking place *on or after* that date.

All of these provisions already exist in some form in 48 other states, and they have made such laws work. We will also. I am convinced the loyal opposition will do their best to comply with the law, as will we. Remember: Doing the right thing is a moral and ethical obligation. Thus, no matter where we set the bar, those who will break the rules will, and those who will not, won't.

Also, keep in mind the Texas Legislature will open the 84th Session January 1, 2015. Each of you is more than welcome, as you were this year, to come to Austin to participate in the process that shapes what we do daily. ✨

Endnote

1 373 U.S. 83 (1963).