

National Association of Criminal Defense Lawyers State Criminal Justice Network Conference

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Michael Morton Discovery Reform Effort

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THE MICHAEL MORTON ACT



REVIEWING THE STATUTE

Invoking the Act

REQUEST DRIVEN

- “After receiving a **timely request** from the defendant”
- The State “**as soon as practicable**” shall “produce and permit”

REVIEWING THE STATUTE

Invoking the Act

WHAT IS AUTOMATICALLY PROVIDED

- “the inspection and electronic duplication, copying, and photocopying”
- “of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers”

REVIEWING THE STATUTE

Invoking the Act

WHAT IS AUTOMATICALLY PROVIDED

- “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”
- “State may provide electronic duplicates of any documents or information”

REVIEWING THE STATUTE

Invoking the Act

BUT NOT INCLUDING

- “The work product of counsel for the state... and their investigators and their notes or report”
- “Written communications between the state and an agent, representative, or employee of the state”

REVIEWING THE STATUTE

Invoking the Act

BRADY PLUS

- “State shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.”
- “Continuing duty...”

REVIEWING THE STATUTE

Jailhouse Snitches

DUTY TO DISCLOSE

The state shall disclose to the defendant any information in the possession, custody, or control of the state that is relevant to the person's credibility, including:

- the person's **complete criminal history**, including any charges that were dismissed or reduced as part of a plea bargain;
- **any grant, promises, or offer of immunity** from prosecution, reduction of sentence, or other leniency or special treatment, given by the state in exchange for the person's testimony; and
- **information concerning other criminal cases in which the person has testified, or offered to testify**, against a defendant with whom the person was imprisoned or confined, including any grant, promise, or offer given by the state in exchange for the testimony.

REVIEWING THE STATUTE

Jailhouse Snitches

TRACKING AND USE OF TESTIMONY

An attorney representing **the state shall track:**

- **the use of testimony** of a person to whom a defendant made a statement against the defendant's interest while the person was imprisoned or confined in the same correctional facility as the defendant, if known by the attorney representing the state, regardless of whether the testimony is presented at trial; and
- **any benefits offered or provided** to a person in exchange for testimony.

RESTRICTIONS

**Identifying the Recipient and
Understanding What the Defense
Attorney Can Do with Discovery
Received**

RESTRICTIONS

Reward Raised to \$70,000 In Execution-Style Slaying of Prosecutor

By LEE FERRAN, MARK SCHONE and CHRISTINA NG · Feb. 2, 2013

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RESTRICTIONS

Kaufman County District Attorney Mike McLelland, wife killed



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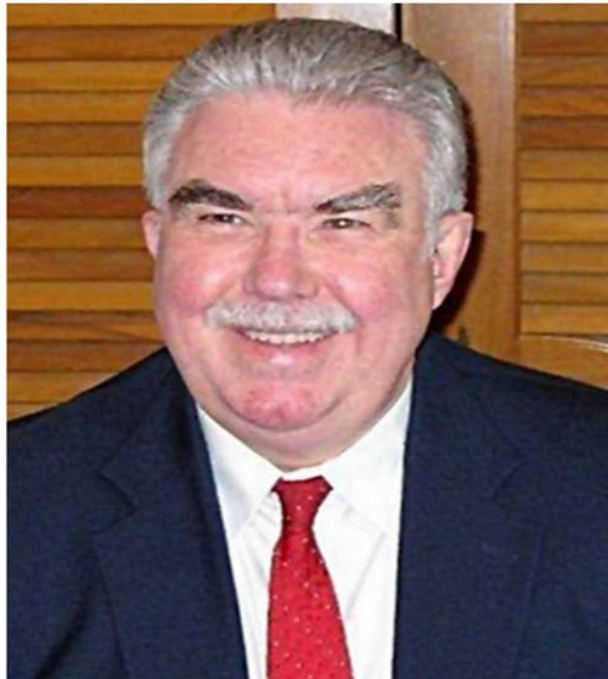
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Comments



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RESTRICTIONS

**Mike McLelland Murder Update:
Former judge Eric Williams
charged with capital murder in
Texas DA slayings**



REVIEWING THE STATUTE

Restrictions

LIMITS ON THE USE OF DISCOVERY

- NO RESTRICTIONS
 - The Inner Circle
- RESTRICTIONS
 - Defendant and Prospective Witnesses
 - Third Parties

REVIEWING THE STATUTE

Restrictions

REDACTION

Before showing the discovery, it is **THE DEFENSE ATTORNEY'S** obligation to redact:

- Address
- Telephone number
- DL number
- Social Security number
- DOB or other identifying numbers
- Bank account

REVIEWING THE STATUTE

Restrictions

DISSEMINATION

People allowed to view discovery (not allowed to have copies of the information, other than a copy of the witness's own statement):

- Defendant
- Witness
- Prospective Witness

REVIEWING THE STATUTE

Restrictions

EXCEPTIONS

- A court orders disclosure after hearing and a showing of good cause;
- Already publicly disclosed;
- TDRPC; or
- Good faith complaint

REVIEWING THE STATUTE

Creating a Record

THREE LOGS

Understanding what they are, why they exist, and when to use them

- Privilege Log
- Discovery produced
- Discovery received

CASELAW UPDATE

WHEN TRIAL COURT DOES NOT HAVE JURISDICTION OVER DISCOVERY

- After arrest before charging instrument filed (In re Lewis, WR-83,367-01, 2015 WL 4775939 (Tex. Crim.App. 2015); In re Carrillo, WR-83,345-01, 2015 WL 4776080 (Tex. Crim.App. 2015))
- Raising the issue
- Examining trials (In re State ex rel. Munk, 494 S.W.3d 370, 376 (Tex.App.—Eastland 2015, no pet.))

CASELAW UPDATE

WHEN TRIAL COURT HAS JURISDICTION

- “As soon as practicable”
- Disclosure of cell tower records 1 week before trial (Byrd v. State, 02-15-00288-CR, 2017 WL 817147 (Tex.App.—Fort Worth 2017, no pet.))

CASELAW UPDATE

WHEN INFORMATION IS MATERIAL

- Inspection of physical evidence (In re Hawk, 05-16-00462-CV, 2016 WL 3085673 (Tex.App.— 2016, no pet.))
- Disclosure of Documents (Meza v. State, 07-15-00418-CR, 2016 WL 5786949 (Tex.App.—Amarillo 2016, pet. ref'd))

CASELAW UPDATE

PROVIDING COPIES TO THE DEFENDANT

- Pro se exception
- No conflict between 39.14(f) and 39.14(e) (In re Mathew Powell, Lubbock County District Attorney, relator v. Honorable Mark Hocker, County Court at Law Number One of Lubbock County, respondent, WR-85,177-01, 2017 WL 1244452 (Tex. Crim.App. 2017))

CASELAW UPDATE

INTERESTING CASES

- Civil Liability in a plea case (*Alvarez v. City of Brownsville*, No. 16-40772, 2017 WL 2728387 (5th Cir. June 26, 2017))
- Prosecutor fired for disclosing exculpatory information – county immune from lawsuit (*Hillman v. Nueces County*, No. 13-16-00012-CV, 2017 WL 2492611 (Tex.App.—Corpus Christi June 8, 2017, no. pet.) (mem. op., not designated for publication))

THE FORECAST

“The Michael Morton Act has restored many Texans’ faith in their criminal justice system. I’m proud to report that the overwhelming majority of Texas prosecutors (a large and diverse group) have embraced these discovery reforms, regardless of political affiliation. **Occasionally a young colleague will ask, “why would a prosecutor ever withhold any discovery from the defense?” I don’t really have a good answer to their question. I just tell them that cases like Michael Morton—and people like him—showed us there was a better way.”**

- Bill Wirskye, the First Assistant D.A for the Collin County District Attorney’s Office, part of the Dallas-Fort Worth area, 02/18/2019.

THE FORECAST

“Texas police and prosecutors are doing the necessary work to provide copies of reports and burning computer disks to provide to the defense, especially with the rise of police body cameras. **However, there is hope in sight on this front as we are now actively leveraging technological solutions to efficiently move large amounts of information and digital media evidence to defense lawyers.**”

- *Bill Wirskye, the First Assistant D.A for the Collin County District Attorney's Office, part of the Dallas-Fort Worth area, 02/18/2019.*