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10-16-00371-CR
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WACO, TEXAS
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IN THE COURT OF APPEALS
FOR THE TENTH JUDICIAL DISTRICT
OF TEXAS, AT WACO

Hinojosa v. The State of Texas (10-15-00356-CR)

Horne v. The State of Texas (10-16-00371-CR)

Carrera v. The State of Texas (10-16-00372-CR)

Delafuente v. The State of Texas (10-16-00376-CR)

Watkins v. The State of Texas (10-16-00377-CR)

Majors v. The State of Texas (10-17-00041-CR)

Freeman v. The State of Texas (10-17-00242-CR)

Brief with Position Statement of the Texas Criminal Defense Lawyers Association as *Amicus Curiae*

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Identity of Parties and Counsel

Pursuant to Rule 38.1(a), Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision in the case and so that the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

Arcella Hinojosa v. The State of Texas (10-15-00356-CR)

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Jesse Galindo Delafuente v. The State of Texas
(10-16-00376-CR)

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Ralph D. Watkins v. The State of Texas (10-16-00377-CR)

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Willie D. Majors III v. The State of Texas (10-17-00041-CR)

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Trevon Freeman v. The State of Texas (10-17-00242-CR)

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Statement Pursuant to Rule 11, Tex.R.App.Pro.

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and to the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,300 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as *amicus curiae*.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which complies with all applicable provisions of the Rules of Appellate Procedure. Copies have been served on all parties listed above.

Statement of the Case

The parties have adequately stated the nature of the case.

Issues as Suggested by TCDLA

1. The Legislative History of the Michael Morton Act requires early, continuing, and timely production of discovery to defense counsel.

2. Every intentional violation of the Act should result in some sanction. The more severe the violation, the more severe the sanction.

Note Regarding Abbreviations & Hyperlinks

In this brief, Appellant refers to the Clerk's Record as "CR" followed by the appropriate page: e.g., "(CR 123)." Appellant refers to the Reporter's Record as "RR" followed by the volume, page and line numbers: e.g., "(RR Vol. 3, P. 47, L. 12-15)." Additionally, in this brief, Appellant utilizes hyperlinks to cited opinions. Where possible, the hyperlink will be to the posted opinion on the particular court's website. All other hyperlinks are to a copy of the opinion on the Google Scholar site.

IN THE COURT OF APPEALS
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Brief with Position Statement of the Texas Criminal Defense Lawyers Association as *Amicus Curiae*

TO THE HONORABLE TENTH COURT OF APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association, *Amicus Curae*, and respectfully submits this "Brief with Position Statement of the Texas Criminal Defense Lawyers Association as *Amicus Curiae*," and would urge the Court that, as it interprets the application of the Michael Morton Act ("the Act"), and the modifications to Article 39.14, C.Cr.P., to find that the Act

requires both early, continuing, and timely production of discovery to defense counsel. Moreover, every intentional violation of the Act should result in some sanction. The more severe the violation, the more severe the sanction.

Issue One Restated

The Legislative History of the Michael Morton Act Requires Early, Continuing, and Timely Production of Discovery to Defense Counsel.

Relevant Facts

The exoneration of Michael Morton changed forever the rights and privileges of the criminal accused in Texas. When the Legislature passed the 2013 amendments to Art. 39.14, it recognized a history of abuse by over zealous prosecutors, and was attempting to rectify the imprisonment of an innocent man by ensuring that every person charged with a crime would have access to all of the information available to the prosecution.

Prior to the passage of the Michael Morton Act, a trial court's acts or rulings involving discovery under Art. 39.14 were discretionary. Pretrial discovery of evidence was mandatory only as

to evidence that was exculpatory, mitigating, or privileged were mandatory. "While Article 39.14 'makes it clear that the decision on what is discoverable is committed to the discretion of the trial court,' the trial court must permit discovery if 'the evidence sought is material to the [d]efense of the accused.'" ***Ex parte Miles***, 359 S.W.3d 647, 670 (Tex.Cr.App. 2012). The ***Miles*** court quoted ***Quinones v. State***, 592 S.W.2d 933, 940-941 (Tex.Cr.App. 1980), a case which illustrates the issue that plagued our criminal justice system for decades. In ***Quinones***, the Court stated that a criminal defendant did not have a right to discover even his own inculpatory statements that the State intended to introduce into evidence.

In the days of ***Quinones***, defendants had to rely on the good graces of prosecutors for any semblance of discovery. Appellate and trial courts were forced to rely on representations by prosecutors that constitutional mandates were met. There have been many instances where prosecutors summoned defense attorneys to their office to read to them offense reports or witness statements.

TCDLA believes that the rules for discovery in Texas most be viewed in light of a prosecutor's duty to produce information based on the Supreme Court's decision in ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Additionally, TCDLA believes that the sanctions to be imposed by trial and appellate courts must be flexible, but always with the idea in mind that information in possession of the prosecution team, a concept that will be defined herein, must be produced early and often. It is understood that, only through the production of information without reservations or restrictions by the prosecution, will injustices be prevented.

Argument & Authorities

Brady and its Progeny

In ***Brady***, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an 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*** and its progeny impose on the prosecution a "duty to learn of and disclose to the defense all "favorable,"

"material" information "known to the others acting on the government's behalf in the case, which includes all police investigators or others included in the prosecution team.

Time of Disclosure

The prosecution must disclose this information "at such a time" and in such a manner "as to allow the defense to use the favorable material effectively," which, as a practical matter, means well before trial, if not at the outset of the case. Production of discovery to the defense at the earliest possible time is important because "the due process obligation under ***Brady*** to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate a case and, with the help of the defendant, craft an appropriate defense." ***Perez v. United States***, 968 A.2d 39, 66 (D.C. 2009); ***Edelen v. United States***, 627 A.2d 968, 970 (D.C. 1993).

For example, in ***Ex parte Temple***, No. WR-78,545-02 (Tex.Cr.App.; November 23, 2016)(not designated for publication), the Court of Criminal Appeals was faced with the fact where the

State did not produce the entire police investigatory reports prior to trial. The record reflected that the State disclosed during trial 300 pages of nearly a 1400 page report during the trial. The Court reversed Temple's life sentence, stating:

> We hold that the State did not properly follow the rule of Brady requiring the timely disclosure of favorable evidence. It is true that the prosecutor may not have purposely or actively hidden the existence of information uncovered by the police investigation; however, she was not forthcoming with what could be viewed as Brady evidence contained within the police reports. And, although defense counsel was able to raise at trial the defensive theory that there was an alternate perpetrator, that effort was limited and hampered by the State's failure to turn over to the defense the police offense reports containing favorable evidence that would have allowed a more effective presentation of an alternate suspect. We find that the method of "disclosure" utilized by the prosecution did not satisfy the State's duty under Brady. We hold, therefore, that Applicant is entitled to relief under Brady v. Maryland.

Temple, slip op. at 9.

Today, Article 39.14 sets out the parameters for production of information, making it clear that early, continuing, and timely production of discovery is a requirement for the administration of even handed justice and fairness. The motivating force behind the Court's decision in ***Brady*** was the belief that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any

accused is treated unfairly." ***Brady***, 373 U.S. at 87. The rule encompasses both exculpatory and impeaching information. See, e.g., ***Strickler v. Greene***, 527 U.S. 263, 281-282 (1999).

Although impeachment evidence is sometimes referred to as "***Giglio***" evidence[1] in the trial courts, advocates should remember that ***Giglio*** information, as the term is used in this manner, is merely one subset of important ***Brady*** information. Delay in disclosure cannot be justified by calling ***Brady*** information by another name or because the prosecutor did not believe the truthfulness of the evidence.

In ***Temple***, *supra*. the Court stated that:

> The prosecutor believed, as evidenced by her testimony at the writ hearing, that she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible. She testified that she did not have an obligation to turn over evidence that was, based on her assessment, "ridiculous." She claimed that, when it came to what constituted Brady evidence, her opinion is what mattered. The prosecutor stated, when asked, that if information does not amount to anything, the defense is not entitled to it. However, although the prosecutor does have the initial responsibility to assess whether evidence may be favorable to the defense, the prosecutor is not the final arbiter of what constitutes Brady evidence."

Temple, slip op at 6.

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[1] See ***Giglio v. United States***, 405 U.S. 150 (1972)

Although ***Brady*** itself uses the term "evidence," the ***Brady*** doctrine encompasses any information, directly admissible or not, that would be favorable to the accused in preparing her defense, including information useful to preparation or investigation that may lead to admissible evidence or have some meaningful impact on defense strategy. See ***Wood v. Bartholomew***, 516 U.S. 1 (1995) (polygraph results showing possible deception not ***Brady*** because they would not have affected defense counsel's strategy or preparation).

Federal cases explicitly acknowledge that ***Brady*** information need not be admissible to trigger the prosecution's disclosure obligation. See, e.g., ***Ellsworth v. Warden***, 333 F.3d 1 (1st Cir. 2003) (prosecution withheld double-hearsay note that complainant had made false allegations in the past and, even though inadmissible, it might have led to admissible evidence); ***United States v. Gil***, 297 F.3d 93, 104 (2d Cir. 2002) (***Brady*** information includes competent evidence, material that could lead to competent evidence, or any information that "would be an effective tool during

cross-examination by refreshment of recollection or otherwise"); ***United States v. Bowie***, 198 F.3d 905, 909 (D.C. Cir. 1999) ("[T]o refute Bowie's contention that the undisclosed information was 'material' in the ***Brady*** sense, it is not enough to show that the [suppressed information] would be inadmissible"); see also ***Coleman v. Calderon***, 150 F.3d 1105, 1116-1117 (9th Cir. 1998); ***Wright v. Hopper***, 169 F.3d 695, 703 (11th Cir. 1999); ***Felder v. Johnson***, 180 F.3d 206, 212 (5th Cir. 1999); ***United States v. Mahaffy***, 693 F.3d 113, 131 (2d Cir. 2012); ***Johnson v. Folino***, 705 F.3d 117 (3d Cir. 2013).

Likewise, there is no limitation on the information to be produced under Article 39.14. The statute makes it clear that all information in possession of law enforcement pertinent to an investigation of the citizen accused must be produced. And the duty to produce information is not limited to the individual prosecutor handling the case or the individual investigators but all law members of law enforcement that might be included in the prosecution team.

Who is the Prosecution Team?

The Court of Criminal Appeals has long recognized that prosecutors are responsible for all of the information known to investigators. See, e.g., ***Ex parte Adams***, 768 S.W.2d 281, 292 (Tex.Cr.App. 1989). The concept of a "prosecution team" has developed in the case law to define the universe of prosecutors and investigators extending beyond the prosecutor's office whose knowledge of ***Brady*** material should be imputed to the prosecutor. See ***Kyles v. Whitley***, 514 U.S. 419, 437 (1995) (prosecutors must not only disclose information within their own personal knowledge, but "have a duty to learn of any evidence favorable to the defense that is known to others acting on the government's behalf in the case, including the police"); ***State v. Moore***, 240 S.W.3d 324, 328 (Tex.App. - Austin 2007) (distinguishing Texas Attorney General's Office from "prosecution team" of police, investigating agencies, and other agencies "closely aligned with the prosecution"). ***Ex parte Richardson***, 70 S.W.3d 865, 871-873 (Tex.Cr.App. 2002) (duty under ***Brady*** applied despite prosecutor's lack of personal

knowledge of favorable information in office files); see also ***Giglio***, 405 U.S. at 154, (recognizing that a prosecutor's office is an "entity" and that information in the possession of one attorney in the office "must be attributed" to the office as a whole) (citing Restatement (Second) of Agency § 272 (1958)). It should be noted that ***Moore***, supra, also found that the "duty to disclose under ***Brady*** arose only if the prosecutors or other members of the 'prosecuting team' knew of the investigation or had access to the information." ***Moore***, 240 S.W.3d at 328.

Thus, ***Brady***, and in turn Art. 39.14, require the prosecution to disclose all evidence in possession of the prosecution team including:

(1) Any information that tends to support an affirmative defense. ***Mahler v. Kaylo***, 537 F.3d 494, 500-501 (5th Cir. 2008) (***Brady*** violated where prosecution failed to disclose witness statements that decedent and defendant were actively fighting when gun went off);

(2) Any information that tends to support the defendant's pretrial constitutional motions or tends to show that defendant's constitutional rights were violated. ***United States v. Gamez-Orduno***, 235 F.3d 453, 461 (9th Cir. 2000) (***Brady*** violated where prosecution suppressed report that would have demonstrated that defendants had Fourth Amendment standing to challenge search);

(3) Any information that tends to diminish culpability and/or support lesser punishment. ***Cone v. Bell***, 556 US 449, 469-475 (2009) (evidence that defendant "was impaired by his use of drugs around the time his crimes were committed" constituted ***Brady*** information; remand to assess its materiality as mitigation evidence in sentencing);

(4) Inconsistent statements by government witnesses regarding the facts of the crime or the alleged conduct of the defendant. ***Kyles***, 514 U.S. at 445 (***Brady*** violated when prosecution failed to disclose multiple inconsistent statements by key witness);

(5) Statements by others that are inconsistent with statements of government witnesses regarding the facts of the crime or the alleged conduct of the defendant. ***Boyd v. United States***, 908 A.2d 39, 54-56 (D.C. 2006) (statements of witnesses who saw three rather than four persons present at the time of the abduction, contradicting government witness's account, constituted ***Brady*** information that should have been disclosed to the defense);

(6) Any information that relates to the potential mental or physical impairment of any witness. Any information relating to potential witness bias, including: Benefits received by a witness. ***Banks v. Dretke***, 540 U.S. 668, 702-703 (2004) (***Brady*** violation when government failed to disclose witness status as paid informant); ***Giglio***, at 154-155 (***Brady*** violation where government failed to disclose non-prosecution agreement with cooperating witness). Failure to disclose information that calls into question efforts to present the witness as neutral and disinterested is also a violation of ***Brady***.

It is the trial prosecutor's duty to learn of ***Brady*** information and any evidence. A prosecutor's ***Brady*** disclosure obligation is not limited to information of which a prosecutor has actual knowledge; rather, a prosecutor has a non-delegable "duty to learn of" ***Brady*** information in the case. ***Kyles***, 514 U.S. at 437. In ***Strickler***, the Supreme Court rejected the argument that defense counsel should have uncovered ***Brady*** information, stating that counsel was entitled to rely on the representations of the prosecutor and, more generally, on the prosecutor's constitutional duty of disclosure. ***Strickler***, 527 U.S. at 283-284 (FN23). Likewise, in ***Banks***, the Court declared that "[a] rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." ***Banks***, 540 U.S. at 695-698.

A prosecutor "has a duty to learn of any favorable evidence known to **the** others acting on the government's behalf in a case." ***Kyles***, 514 U.S. at 437; ***United States v. Bryant***, 439 F.2d 642, 650 (1971) ("The duty of disclosure affects not only the prosecutor,

but the Government as a whole, including its investigative agencies").

Duty of Prosecution

Article 39.14 creates a duty in the State to discover evidence that is available to the entire prosecution team. Just like the prosecutor's constitutional "duty to learn" of favorable information, their duty to discover information pertinent to a particular case extends to documents that are otherwise privileged or protected from disclosure by statute or court rules. The prosecution has a duty to review documents that are otherwise privileged or protected from disclosure by statute or court rule. ***United States v. Kohring***, 637 F.3d 895, 908 (9th Cir. 2010) ("prosecution ha[d] a duty to disclose the non-cumulative underlying exculpatory facts in the [prosecutor's] email") (internal quotations and citation omitted); ***United States v. Lloyd***, 71 F.3d 408 (D.C. Cir. 1995) (***Brady*** violation when government failed to disclose IRS filing information for people, even though protected by statute, because those people's prior false returns could have helped defendant show that the new

falsities were not his doing, but rather, a continuation of their prior improper conduct); ***Pennsylvania v. Ritchie***, 480 U.S. 39 (1987) (relying on ***Brady*** cases, Court holds defendant's due process entitlement to favorable material documents potentially extended to documents in statutorily-protected Children and Youth Services file and affirming remand for in camera review).

Conclusion - Issue Number One

The history of the discovery process in Texas, combined with the case law cited here, and the amendments to Art. 39.14, demonstrate that the intent of the Legislature is to "level the playing field" in criminal cases. The only way that goal will be accomplished is for there to be early, continuing, and timely production of discovery to defense counsel.

Issue Two Restated

Every Intentional Violation of the Act Should Result in Some Sanction. The More Severe the Violation, the More Severe the Sanction.

Relevant Facts

TCDLA relies upon the relevant facts set out in Issue One.

Argument & Authorities

Article 39.14 does not provide particular or explicit sanctions for discovery abuse. TCDLA believes that trial courts have broad discretion to create remedies for discovery abuse. Typically there are three possible remedies for discovery violations: exclusion of evidence, granting of continuances or declaring a mistrial. In a pre 39.14 case, ***State v. Sanchez***, No. 08-13-00010-CR (Tex.App. - El Paso 2014), the Court of Appeals discussed the State's refusal to comply with the trial court's discovery deadline. The Court of Appeals recognized a discovery deadline violation constituted a conscious refusal to obey a lawful order of the trial court which, as a matter of law, served as the basis for the trial court's imposition of sanctions. The Court of Appeals recognized that an appropriate

sanction was the trial court's order to prohibit the presentation or introduction of evidence in a trial of the case.

In most instances a defendant has a duty to ask for a continuance when there has been a violation of a discovery order. When evidence withheld in violation of ***Brady*** is disclosed at trial, the defendant's "failure to request a continuance might waive any ***Brady*** violation, as well as any violation of a discovery order." ***Taylor v. State***, 93 S.W.3d 487, 502 (Tex.App. - Texarkana 2002); ***Smith v. State***, 314 S.W.3d 576, 586 (Tex.App. - Texarkana 2010)(FN3); ***Jones v. State***, 234 S.W.3d 151, 158 (Tex.App. - San Antonio 2007) (holding defendant must request continuance and present ***Brady*** complaint in motion for new trial to preserve complaint for appellate review); see also ***Moulton v. State***, 360 S.W.3d 540, 566-567 (Tex. App. - Texarkana 2011).

An important consideration for the trial court to scrutinize is what a defendant would have done differently in the investigation and preparation of its case and if trial has started, what would it have done differently in the presentation of its case? For example:

(a) Have any witnesses died, gone missing or become otherwise unavailable?

(b) Has any evidence been destroyed?

(c) Has so much time passed that memories are now lost, witnesses are too difficult to locate?

(d) Has the prosecution gained some strategic advantage, and if so, how could the playing field be leveled?

Repeated ***Brady*** violations can result in the dismissal of charges. See ***Ex parte Masonheimer***, 220 S.W.3d 49 (Tex.Cr.App. 2007).

In ***Masonheimer***, the defendant was charged with murder. The State sought to try him a third time after the first two proceedings were terminated prior to final judgment at the defendant's request. The trial court granted in each instance when it was discovered, during trial, that the State suppressed exculpatory information known to the State prior to the first trial.

The Court of Criminal Appeals upheld the trial court's ruling that the prosecution constituted double jeopardy because of the prosecutor's improper suppression of evidence. See also ***Ex parte Peterson***, 117 S.W.3d 804, 826 (Tex.Cr.App. 2003)(FN7) (Hervey, J., dissenting).

TCDLA asserts that the Court of Criminal Appeals' opinion in ***Masonheimer*** supports the proposition that when a violation of the discovery rules (i.e., Art. 39.14 / the Michael Morton Act) is sufficiently severe, and the harm resulting from that intentional violation is sufficiently severe, dismissal is warranted. Citing ***Oregon v. Kennedy***, 456 U.S. 673, 678-679 (1982), the Court held that deliberate conduct, accompanied by the specific *mens rea* demonstrated in ***Masonheimer***, "bars a retrial." See ***Masonheimer***, 220 S.W.3d at 507. See also ***United States v. Dinitz***, 424 U.S. 600, 611 (1976); ***United States v. Tateo***, 377 U.S. 463, 468 (1964)(FN3).

There is also force to the argument that ***Oregon v. Kennedy*** protects a defendant from a retrial after a defense-requested

mistrial where prosecutorial misconduct [resulting in the mistrial, not a reversal on appeal] is undertaken with the intention of denying the defendant an opportunity to win an acquittal. ***United States v. Wallach***, 979 F.2d 912, 915-916 (2nd Cir. 1992). The Court of Criminal Appeals rejected the application of ***Wallach*** and a determination that re-prosecution was jeopardy barred in cases where a conviction is reversed based on prosecutorial misconduct. See ***Ex parte Davis***, 957 S.W.2d 9, 11-12 (Tex.Cr.App. 1997) and ***Ex parte Mitchell***, 977 S.W.2d 575, 578-580 (Tex.Cr.App. 1998); ***Ex parte Graves***, 271 S.W.3d 801(Tex.App. - Waco 2007).

As noted by Judge Vance, in his dissenting opinion in ***Graves***, the federal double jeopardy analyses in ***Davis*** and ***Mitchell*** have been criticized :

> The analytical double jeopardy standard adopted by the Supreme Court in Oregon v. Kennedy does not appear to include any consideration of whether the criminal defendant's ultimately successful motion for mistrial was granted during trial or on appeal. Therefore, this Court respectfully rejects that portion of the Texas Court of Criminal Appeals' analysis suggesting a constitutional distinction between cases in which a mistrial has been granted during trial and those in which a new trial is granted on appeal based on the same allegations of prosecutorial misconduct..Given the plain language of the Supreme Court's opinion in Oregon v. Kennedy, this Court concludes the distinction offered by the Texas Court of Criminal Appeals is inconsistent with clearly established federal law. Davis v. Quarterman, 2007 U.S. Dist. LEXIS 64793, at 53 n.31 (W.D. Tex. Jan. 22, 2007).

Graves, 271 S.W.3d at 817-818.

TCDLA nevertheless believes and asserts that, when a conviction is reversed based on the intentional suppression of evidence by a prosecutor retrial should be barred by the double jeopardy provision of the Fifth Amendment and Fourteenth Amendment to the United States Constitution. *See* David L. Botsford, Stanley G, Schneider,"The Law Game: Why Prosecutors Should be Prevented From a Rematch Double Jeopardy Concerns Stemming From Prosecutorial Misconduct."[2]

Andrew Lee Mitchell was wrongfully kept in custody for 14 years. Anthony Charles Graves was wrongfully kept in custody for 18 years. No legislative enactment is names after any of them.

In 2011, Ken Anderson was a highly respected jurist. He had served Williamson County as a District Judge for nearly ten years and, before that, had been the District Attorney for more than 16 years and an employee in that office for an additional 5 years. Mr. Anderson even sat as a member of this Court on about a dozen occasions.

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[2] See 47 South Texas Law Review No 4; Summer 2006.

Additionally, in 2011, Mr. Anderson had an excellent reputation among the lawyers who practiced in front of him. The State Bar of Texas Criminal Justice Section named him "Prosecutor of the Year" in 1995. He received a similar statewide honor in 2000 when he was named "Outstanding Prosecutor Upholding Victims' Rights" by the Texas Crime Victim's Clearinghouse.

In short, most people who knew Mr. Anderson, Mr. Schulman and Mr. Schneider included, believed him to be a honest and upstanding citizen. In 2011, however, it was also revealed that Mr. Anderson intentionally withheld important ***Brady*** information from the trial lawyers for Michael W. Morton, for whom "the Michael Morton Act" is named, was wrongfully kept in custody for 25 years. Mr. Anderson's misconduct caused the Legislature to re-examine the rights of the criminal defendant and mandate their right to discover all of the information available to law enforcement.

TCDLA believes and asserts that every intentional violation of the act should result in some sanction. The case of Michael W. Morton demonstrates precisely why the more severe the violation of

the act is determined to be, the more severe the sanction which is imposed should be.

While TCDLA recognizes that the overwhelming number of prosecutors approach their job in an honest and honorable fashion, we also recognizes that the pursuit of victory, to the exclusion of justice and fairness, can never be tolerated.

Conclusion - Issue Number Two

TCDLA believes that Art. 39.14 must be strictly construed against the State. A harm analysis should be applied but should also be viewed in terms of extent of the abuse and the impact that the discovery violation had on the ability of the person accused to receive a fair trial.

Fairness is the operative word. Only if the Act is strictly construed and punishment for intentionally violating it is both swift and demonstrative will justice will be served.

Prayer

WHEREFORE, PREMISES CONSIDERED, the Texas Criminal Defense Lawyers Association, *amicus curiae* in the above styled and numbered cause respectfully prays that, for the reasons set out herein, the Court will adopt TCDLA's positions in its interpretation of the requirements of the Michael Morton Act and the penalties to be imposed for violations of the Act

Respectfully submitted by:

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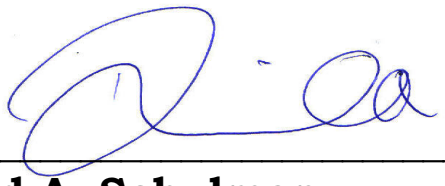

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