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No. PD-1015-18

In the Court of Criminal Appeals of Texas

Ralph Watkins,
Appellant,

v.

The State of Texas,
Appellee.

Brief of Amicus Curiae Texas Criminal Defense Lawyer's Association In Support of Petitioner

Mark S. Snodgrass
President, TCDLA
Mark Snodgrass Law Office
1011 13th Street
Lubbock, Texas 79401
P: (806) 762-0267 | F: (806) 762-0277
MarkSnodgrass@sbcglobal.net SBN 00795085

Allison Clayton
Chair, TCDLA Amicus Committee
The Law Office of Allison Clayton
P.O. Box 64752
Lubbock, Texas 79464
P: (806) 773-6889 | F: (806) 329-3361
Allison@AllisonClaytonLaw.com
SBN 24059587

Lane A. Haygood
Member, TCDLA Amicus Committee
Haygood Law Firm
522 North Grant Avenue
Odessa, Texas 79763
P: (432) 337-8514 | F: (432) 225-1062
Lane@HaygoodLawFirm.com
SBN 24066670

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INTEREST OF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of those individual right 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 3,400 and offers a statewide forum for criminal defense counsel. It provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases. TCDLA also seeks to assist the courts by acting as *amicus curiae* in appropriate cases.

Neither TCDLA nor any attorney representing TCDLA have received any fee or other compensation for preparing this brief. This brief complies with all applicable provisions of the Rules of Appellate Procedure. Copies have been served on all parties to the case.

No. PD-1015-18

In the Court of Criminal Appeals of Texas

RALPH WATKINS,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

BRIEF OF AMICUS CURIAE TEXAS CRIMINAL DEFENSE LAWYER'S ASSOCIATION IN SUPPORT OF PETITIONER

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association, *Amicus Curiae*, and respectfully submits this Amicus Curiae Brief in Support of Petitioner.

Amicus avers the Texas Legislature intentionally and fundamentally changed the landscape of Texas discovery by passing the Michael Morton Act. As a result, past cases interpreting terms in the Texas criminal discovery statute are of limited utility. While the court below reluctantly felt it necessary to follow pre-Michael Morton Act caselaw, now is the time for the Court to recognize those cases are no longer applicable.

INTRODUCTION

When the Texas Legislature passed the Michael Morton Act (MMA) in 2013, Governor Perry hailed it as "a major victory for integrity and fairness in our judicial system." Brandi Grissom, *Perry Signs Michael Morton Act*, TEXAS TRIBUNE , May 16, 2013. The Governor added that with Texas's "law and order" tradition "comes a very powerful responsibility to make sure that our judicial process is as transparent and open as humanly possible." *Id.* This was an understanding universally held at the time—Texas needed sweeping changes to its criminal discovery procedures, and the MMA was the legislation by which those changes were to be accomplished.

In dealing with this sweeping reform, courts have struggled to balance the obvious intent of the Legislature with the laws of old interpreting the now-rejected statute. This is the problem in the instant case. The court below clearly, and reluctantly, felt compelled to follow the old-law interpretation of the word "material" in the criminal discovery statute. It needs this Court to confirm what everyone has known since "[t]he dawn of new discovery rules" in 2013. Randall Sims, *The Dawn of New Discovery Rules*, THE PROSECUTOR, Vol. 43, No. 4 (July – Aug. 2013). The Michael Morton Act creates a *statutory* right to discovery fundamentally different than that conceived prior to 2013, which necessarily alters how courts apply old-law cases.

SUMMARY OF THE ARGUMENT

The term "material," as construed by the Tenth Court of Appeals, in Article 39.14 of the Texas Code of Criminal Procedure should not be interpreted consistently with caselaw arising before the Michael Morton Act. The Act itself is more than an amendment to Texas criminal discovery practices—it is a wide-ranging reshaping of them. Due to this, the cases from before the Act interpret materiality in a different context: that of constitutional harm, rather than statutory rights.

Because the Michael Morton Act confers statutory rights upon defendants that defendants did not have prior to its enactment, reviewing courts should not be bound by prior decisions interpreting the terms of the statute. Instead, the common and ordinary canons of statutory construction should be applied, and in doing so, courts should give effect to the plain and ordinary meaning of the terms in the statute. If they do so, they will read the statute in such a way as to give effect to the understanding of the terms as would have existed in the minds of the legislators who voted on the new law.

ARGUMENT

THE COURT OF APPEALS IMPROPERLY CONSTRUED THE TERM "MATERIAL" IN THE STATUTE

The court of appeals erred in finding that it was not "writing on a clean slate" when considering the interpretation of materiality relevant to Texas Code of Criminal Procedure Article 39.14(a). *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App.—Waco 2018, pet. granted). If such were the case, the court below wrote, then it would be inclined to construe the phrase "at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of trial." *Id.* Because this novel interpretation is the correct interpretation that should apply to Article 39.14 as amended by the Michael Morton Act (MMA), the decision of the court below is incorrect and must be corrected.

Both the pre-amendment and post-amendment versions of Article 39.14 contain the phrase "that constitute or contain evidence material to any matter involved in the action." In both versions of the statute, this phrase follows a laundry list of the types of evidence that may be discovered. Although the wording is the same, however, the context and nature of the statutes at issue is wildly divergent; thus, decisions interpreting the original statute will have little bearing on how a similar phrase in the amended statute should be interpreted.

Prior to the adoption of the MMA, Texas statutory discovery for criminal defendants permitted different types of discovery policies for Texas prosecutors. Some prosecutors adopted an "open-file" policy, permitting defense counsel access to all non-privileged material in the State's file. Other offices utilized various species of "closed-file" policies, providing the defense only with what was constitutionally required or as directed by the Court. The original Article 39.14, for example, codified a "closed-file" policy, whereby the defense was entitled only to those matters which Supreme Court caselaw requires to be divulged (*id est*, the material described by *Brady* and its progeny) and those matters which were proven to be discoverable by "good cause."

In the original Article 39.14, the only means by which defense counsel could compel a closed-file prosecutor to reveal evidence for which disclosure was not constitutionally required was by (i) showing "good cause"; (ii) demonstrating the state possessed the evidence; and (iii) proving materiality, where "materiality" was defined by federal and state case law relating to the level of harm required to secure reversal if the challenged evidence were not disclosed. *Hoffman v. State*, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974); *In re Watkins*, 369 S.W.3d 702, 707 (Tex. App.—Dallas 2012, no pet.); Act of May 30, 2009, 81st Leg., R.S., ch. 276, § 2 (amended 2013) (current version at TEX. CODE CRIM. PROC. ANN. art. 39.14).

The question for this Court, as the Amicus Curiae observe the matter, is whether the MMA itself changed the judicial landscape surrounding "materiality" as it applies to criminal discovery. The MMA represents a watershed moment for Texans in the law of criminal discovery. The abuses of overzealous agents of the government had become destructive to the unalienable rights of humankind—life, liberty, and the pursuit of happiness—and we were compelled to "alter or abolish it," and create new laws better suited to the safety and happiness of our citizens. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

A. THE MICHAEL MORTON ACT CHANGED THE ESSENTIAL NATURE OF CRIMINAL DISCOVERY IN TEXAS

The first issue confronting the Court is whether the MMA itself reshaped the Texas criminal discovery landscape to the point where prior cases of statutory interpretation became of limited value.

The author of the bill, Senator Rodney Ellis, provided initial guidance on this issue when, in his analysis of the bill, he stated, "*Brady* is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas. That is why a uniform discovery statute is needed." Senate Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. S.B. 1611, 81st Leg., R.S. (2013). Senator Ellis continued, "[e]very defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it." *Id.*

The purpose of the Act, as per its drafter, was to mandate the use of open-file discovery. *Id.* The Act does not codify extant constitutional requirements for criminal discovery; it in effect sets an open-file policy for the State of Texas. In doing so, then, the *context* of the phrase "that constitute or contain evidence material to any matter involved in the action" changes radically, because what is "material" under an open-file policy (everything) and what is material under the old, closed-filed scheme (things that would affect the outcome of the case) vary so widely.

The effect of the Michael Morton Act was to broaden and deepen the nature of criminal discovery in Texas, to prevent the abuses of the past, and to provide for a uniform system of discovery across the 254 counties of the State of Texas. Prior to the adoption of the Act, Texas discovery was bound by certain rules, among them the "good cause" standard for obtaining discovery. *See Whitchurch v. State*, 650 S.W.2d 422, 425 (Tex. Crim. App. 1983) (finding there was no general right to criminal discovery in Texas, thus requiring a show of "good cause," materiality, and possession of the discoverable item by the state); *Hoffman*, 514 S.W.2d at 252.

The Act removed the "good cause" standard altogether. The Legislature incorporated the "possession" clause into subsections (a) and (h) (" . . . in the possession, custody, or control of the State"). The question then becomes one of tracing—whence came the requirement of "materiality," and does it still apply?

The definition of "materiality" at issue arises from forty-year-old case of *Stone v. State*, 583 S.W.2d 410 (Tex. Crim. App. 1979). There, this Court considered "materiality" not in the context of whether the evidence was material enough to be disclosed in discovery, but what standard of harm to require in order to reverse a decision on appeal. *Stone*, 583 S.W.2d at 414-15. This Court imported the rule from *United States v. Agurs*, where the United States Supreme Court held that " . . . unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." *United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976), *modified, United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Even the State admits that the Act is not a mere codification of a constitutional duty; the Michael Morton Act is its own shibboleth, conferring upon Texas criminal defendants certain rights in excess of the extant constitutional duty of prosecutors to comply with *Brady* and its progeny. If that is so, then the "materiality" standard of *Agurs*, imported into this state's jurisprudence in *Stone*, is simply inapplicable. That standard of materiality is a harm standard applicable to constitutional right claims, and the question before this Court is one of statutory, rather than constitutional, rights.

The requirement that evidence be "material" to be discoverable under Article 39.14(a) must be interpreted not in the light of prior cases of constitutional harm appropriate to appellate review, but forward-looking in order to give guidance to prosecutors as to what disclosures are required.

B. A STATUTORY OPEN-FILE DISCOVERY SCHEME BENEFITS THE ENTIRE CRIMINAL JUSTICE SYSTEM

Prior to the passage of the MMA, Article 39.14 provided ample opportunity for prosecutors to attempt to "game" the discovery system. *See State ex rel. Simmons v. Peca*, 799 S.W.2d 426, 429-30 (Tex. App.—El Paso 1990). The burden fell on defense counsel to demonstrate why it needed specific information from the State's file and then obtain an order for that information. Even when defense counsel had the opportunity to view the file, obtaining copies and being able to adequately and constitutionally prepare a defense at times turned less on the sympathies of the prosecution on more on those of the appellate courts to enforce discovery orders. *Id.*

Nevertheless, this Court, historically, considered an open file policy itself sufficient to demonstrate defense counsel's access to the file for purposes of trial preparation. *Roberson v. State*, 852 S.W.2d 508, 511 (Tex. Crim. App. 1993). This Court has long recognized the benefits an open file policy confers *on defense counsel*. *See Espinosa v. State*, 853 S.W.2d 36, 37 (Tex. Crim. App. 1993).

Texas may also draw lessons from the experience of other states which have adopted open-file discovery regulations. North Carolina, for example, underwent extensive discovery reforms a little more than a decade ago. *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, 272-276 (2008). The effect of North Carolina's adoption of a full open-file discovery scheme added "specificity to the disclosure requirements" of the disciplinary rules, providing a much clearer standard for determining whether disciplinary action should be maintained for discovery matters. *Id*.

Likewise, this Court has noted open-file discovery policies, such as those discussed in *Roberson* and *Espinosa*, benefit defense counsel by clarifying the requirements for effective representation of clients. If defense counsel has access to the full file, then there is much less counsel can claim to be surprised by at trial.

Other commentators writing on the disastrous nature of *Brady*-sanctioned closed file discovery have noted that open-file discovery itself is not a radical departure. Indeed, open-file discovery would not be looked at askance by federal civil practitioners, whose discovery rules are so liberal as to essentially be "open-file." *See* Brian Gregory, Brady *is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819, 846-47 (2012).

The author notes that the "baseline rule" in open-discovery schemes does not turn on materiality or any other inquiry. *Id.* The foundation of such schemes is that "all non-privileged evidence and information related to a criminal case" must be turned over, plain and simple. *Id.* at 847; *see* FED. R. CIV. P. 26(b)(1) (requiring parties to turn over in discovery "any non-privileged matter that is relevant to any party's claim or defense"); TEX. R. CIV. P. 192.3(a). Additional considerations do not have a place in the analysis.

The efficacy of a straightforward open-file policy has played out for this Court more than once in post-conviction litigation. This Court well knows the case upon which the Legislature based the Michael Morton Act and the prosecutorial misconduct that upset Texans so much the Legislature passed the MMA. *Ex Parte Morton*, AP-76,663, 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011).

More recently, this Court's grant of post-conviction relief in *Temple* demonstrates a case in which open-file discovery would have saved both the prosecution and defense countless hours of work, disagreement, and appeals. *See Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758 (Tex. Crim. App. Nov. 23, 2016) (not designated for publication). Most importantly, it would have spared a man from unjust incarceration. If this is the benefit to be gained, then it must certainly be balanced against the cost.

But what cost is there to the State in a mandated open-file scheme? Certainly, there will be some increased overhead in the form of having to make facilities for the review of files available, or to permit photocopying, or in the maintenance of computer or electronic systems to disclose the material. But weighed against the benefits to the accused, the additional clarity in the duty of attorneys on both sides of the bar, and the easing of the burden on the courts to referee costly and pointless discovery battles, an open-file scheme confers an overwhelming benefit upon Texas's criminal jurisprudence.

Given the wisdom and motivations behind the adoption of the MMA, then, all Texas attorneys must be mindful of what a significant change it is and how that links into the Court's prior decisions regarding discovery. Since all cases prior to the effective date of the Act dealt with a close-filed discovery scheme, those cases are of little benefit to answering the questions posed to the Court in this case.

C. PRIOR INTERPRETATIONS OF THE TERM "MATERIAL" SHOULD NOT APPLY TO A WHOLLY NEW STATUTORY SCHEME

If the prior cases interpreting "materiality" do not apply, then the court of appeals should have approached the question as one of a clean slate. This Court reviews the construction of statutes *de novo*. *Prichard v. State*, 533 S.W.3d 315, 319 (Tex. Crim. App. 2017). This Court seeks to effectuate the collective intent or purpose of the legislators who enacted the legislation. *Id.*, citing *Boykin v. State*, 818

S.W.2d 782, 785 (Tex. Crim. App. 1991). The Court focuses its analysis "on the literal text of the statute" and attempts to "discern the fair, objective meaning of that text at the time of its enactment." *Id.* This Court ordinarily gives effect to the plain meaning of the statute if that meaning, "when read using the established canons of construction relating to such text" was "plain to the legislators who voted on it." *Id.*; TEX. GOV'T CODE ANN. §§ 311.011, 311.023.

In determining the plain meaning, this Court reads the words and phrases in context and construes them according to the rules of grammar and common usage. *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014).

Nothing suggests that "material" as used in Article 39.14 is in want of a non-plain meaning. In order to give effect to the collective intent and purpose of the legislators who voted on the Act, this Court must read Article 39.14 as a statewide statutory requirement of an open-file discovery scheme, which is a total repudiation of the closed-file discovery scheme ensured by the prior version of the Article. As such, importing the pre-Act definition of "material" ignores the context and legislative intent behind the changes to Article 39.14. In interpreting the provision going forward, courts should instead assign "material" its plain meaning.

D. The plain meaning of "material" is consistent with the Legislature's intent

The definition of "material" is ambiguous. A reasonable person could read a term as having more than one understanding. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013). Because the court below is comprised of reasonable jurists, then, at a minimum, one must say there is an ambiguity over the meaning of the term material.

However, as the preceding discussion has shown, when read in context according to this Court's own canons of statutory construction, the ambiguity resolves itself. Because the Michael Morton Act swept away the old discovery schema in Texas, the ground beneath is new and ripe for fresh tilling.

The only error, as the Amicus Curiae view the issue, on the part of the court below was in believing the MMA "related back" to the old discovery scheme in Texas and prior discovery cases bore on the meaning of terms in the new statute.

But by viewing the Act not as an amendment to the Texas discovery process, but as a wholly new process of discovery, an imposition of a state-wide open-file policy, the court of appeals can free itself from its self-imposed fidelity to cases made inapplicable by legislative change. This Court may direct the Tenth Court of Appeals to do what it otherwise would have done, freed from the now-inapplicable caselaw interpreting "material" from the old Texas criminal discovery statute.

E. A BROAD DEFINITION OF "MATERIALITY" IS CONSISTENT WITH THE LEGISLATURE'S INTENT AND SOUND POLICY

The Justice Project's "Model Bill for Expanded Discovery in Criminal Cases" clearly elucidates the meaning of "materiality" in the context of open-file discovery. The Justice Project, Expanded Discovery in Criminal Cases: A Policy Review 21-25 (2007), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf (Policy in Appendix A). The model policy emphasizes the prosecutor should disclose "any material or information within the prosecutor's possession or control that *could be*, *should be*, *or is known to negate the guilt of the defendant* as to the offense charge." *Id.* at 21 (emphasis in original).

The model policy further dictates the prosecution should make its file, and files of law enforcement agencies, open to inspection "regardless of whether the prosecution determines material be relevant, irrelevant, inculpatory, or exculpatory." *Id.* at 21. Simply put, the Model Bill does not permit caveats to open-file discovery. Tolerating exceptions to open-file discovery misses the point entirely.

The Court below would have read material to mean "any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial." *Watkins*, 554 S.W.3d at 821. It is difficult to imagine any space between the model policy and the words of the Tenth Court of Appeals.

As discussed above, open-file discovery is meant to simplify the discovery process; clarify burdens on both the prosecution and the defense; and ease the burden on the courts. True open-file discovery elevates the entire criminal justice process.

If the new discovery rule is read consistent with the federal civil discovery rules, policy proposals from interested groups, and the intuitions of learned jurists like those in the court below, then this Court may simply continue along that line of thought to arrive at the correct conclusion: materiality must be given a broad reading in order to achieve the goals, stated and unstated, of open-file discovery so that Texas may claim for itself the benefits of such a scheme.

Permitting prosecutors to again parse through what to hand over according to their own judgments is offensive to the MMA's intent and plain meaning. This Court may direct the Tenth Court of Appeals to do what it otherwise would have done, freed from the prior litigation on the meaning of the term "material" within the Texas criminal discovery statute, and that is the result that should be reached in this case.

CONCLUSION AND PRAYER

Based on the reasons stated, the Amicus Curiae, the Texas Criminal Defense Lawyers Association, respectfully prays this Court reverse the decision of the Tenth Court of Appeals and remands the case to the Tenth Court of Appeals for further consideration of the meaning of "material" within the context of Article 39.14 of the Texas Code of Criminal Procedure.

Respectfully submitted,

/s/ Lane Haygood
Lane A. Haygood
Texas Bar No. 24066670
Haygood Law Firm
522 North Grant Ave.
Odessa, Texas 79761
P: 432.337.8514 | F: 432.225.1062
Lane@HaygoodLawFirm.com

/s/ Mark Snodgrass
Mark S. Snodgrass
Texas Bar No. 00795085
Mark Snodgrass Law Office
1011 13th Street
Lubbock, Texas 79401
P: (806) 762-0267 | F: (806) 762-0277
MarkSnodgrass@sbcglobal.net

/s/ Allison Clayton
Allison Clayton
Texas Bar No. 24059587
The Law Office of Allison Clayton
P.O. Box 64752
Lubbock, Texas 79464
P: (806) 773-6889 | F: (806) 329-3361
Allison@AllisonClaytonLaw.com

COUNSEL FOR AMICUS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was served on all counsel of record through electronic service on the same date as the original was electronically filed with the Clerk of this Court.

/s/ Allison Clayton
Allison Clayton

CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Texas Rule of Appellate Procedure 9.4(i)(2)(D). The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 3,570 words long. I have relied upon the word court function of Microsoft Word, which is the computer program used to prepare this document, in making this representation. This document was prepared using M. Butterick's Typography for Lawyers font pack, which includes the sans serif font Concourse in 14-point for section headings, 12-point for headers and footers and the serif font Equity Text in 14-point for the body.

/s/ Allison Clayton
Allison Clayton

APPENDIX A

THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES:
A POLICY REVIEW
(2007)

excerpt
Model Bill for Expanded Discovery in Criminal Cases

A MODEL POLICY

MODEL BILL FOR EXPANDED DISCOVERY IN CRIMINAL CASES[84]

Section I. Purpose.
Pretrial discovery procedures should, consistent with the constitutional rights of the defendant, promote the ascertainment of the truth in trials and resolutions by facilitating the full and free exchange of information such that prosecution and defense can be fully prepared for trial, provide the defendant with sufficient information to make an informed plea decision, and promote efficient resolution of the charges by reducing interruptions and complications during trial and avoiding unnecessary and repetitious trials.

Section II. Scope.
These standards should be applied in all criminal cases. Discovery procedures may be more limited than those described in these standards in cases involving minor offenses, provided the procedures are sufficient to permit the party to adequately investigate and prepare the case.

Section III. Definitions.

A. When used in this act, a "written statement"" of a person shall include:
   1. Any statement in writing that is made, signed, or adopted by that person; and
   2. The substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.

B. When used in this act, an "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

Section IV. Discovery Obligations of the Prosecution.

A. Independent of motion or request, the prosecution must disclose any material or information within the prosecutor's possession or control that *could be*, *should be*, *or is known to negate the guilt of the defendant* as to the offense charged or that would tend to reduce the punishment of the defendant.

B. Independent of motion or request, and regardless of whether the prosecution determines material to be relevant, irrelevant, inculpatory, or exculpatory, the prosecution shall disclose the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes, but is not limited to:
   1. All written and all oral statements made by the defendant or any co-defendant, and the names and addresses of any witnesses to such statements. This shall be disclosed regardless of when the statement was made, and any oral statement must be memorialized in writing.
   2. The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person. The prosecution shall also identify the persons it intends to call as witnesses at trial, even if the prosecution intends to call the witness as a rebuttal or character witness.
   3. All written and all oral statements made by witnesses;
   4. The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding, or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness. In addition, the prosecution should disclose the identity of any jailhouse informants, and any background information concerning such informants.
   5. The investigating officer's or officer notes;

6. Results of tests and examinations, or any other matter of evidence obtained during the investigation of the offense alleged to have been committed by the defendant, including, but not limited to:
    a. Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and without regard to whether the prosecution intends to call parties conducting the reports, tests, examinations, experiments, comparisons, or statements to testify. Tests, reports, and case notes prepared by state agencies or laboratories qualify as reports or written statements of experts under this section. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.
    b. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that pertain to the case or that were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.
    c. Any materials, documents, or statements relating to any searches or seizures conducted in connection with the investigation of the offense charged or relating to any material discoverable under this act.
    d. Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial. While the prosecution is under no duty to conduct background checks of all witnesses, if the prosecution runs a general criminal records search for defense witnesses, the prosecution must make the same search with respect to prosecution witnesses and must disclose the results to the defense.
    e. Any materials, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case, and the identity of any witnesses to such lineup, showup, and picture or voice identifications.

C. If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

D. If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

E. The prosecution shall disclose any and all contents of the files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant file not specifically listed or named above.

F. The prosecution must certify, in writing, that it has fully complied with the disclosure obligations contained in this act and acknowledging the prosecution's continuing obligation to disclose any discoverable information to the defense. This written certification must also contain a written statement from a designated lead investigator from each law enforcement agency involved in the investigation of the offense charged that confirms that the agency has given to the prosecution all information that, if known to the prosecution, would be discoverable.
    1. Certification must be completed as early as possible, but no fewer than five standard business days, prior to the start of trial or other resolution; and
    2. Certification must be completed earlier if the court rules, upon motion by the defense, that the defense requires additional time to incorporate complex, voluminous, or time-sensitive discovery material into the defense's case.

Section V. Disclosure Obligations of the Defense.

A. The defense should, within a specified and reasonable time prior to trial or other resolution, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:
    1. The names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness.
    2. Any reports made in connection with the case by experts whom the defense intends to call at trial. For each such expert witness, the defense should also furnish to the prosecution curriculum vitae.
    3. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that the defense intends to introduce as evidence at trial.

B. If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names, home addresses, and if already required, statements of the witnesses who may be called in support of that defense.

Section VI. The Person of the Defendant.

A. After the initiation of judicial proceedings, the defendant should be required, upon the prosecution's request, to appear within a time specified for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant, or for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance should be given by the prosecuting attorney to the defendant and the defendant's counsel.

B. Upon motion by the prosecution, with reasonable notice to the defendant and defendant's counsel, the court should, upon an appropriate showing, order the defendant to appear for the following purposes:
    1. To permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails;
    2. To permit the taking of samples of other materials of the body;
    3. To submit to a reasonable physical or medical inspection of the body; or
    4. To participate in other reasonable and appropriate procedures.

C. The motion and order pursuant to paragraph (2) above should specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

D. The court should issue the order sought pursuant to paragraph (2) above if it finds that:
    1. The appearance of the defendant for the procedure specified may be material to the determination of the issues in the case; and
    2. The procedure is reasonable and will be conducted in a manner that does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and
    3. The request is reasonable.

E. Defense counsel may be present at any of the foregoing procedures unless, with respect to a psychiatric examination, it is otherwise ordered by the court.

Section VII. Timing and Manner of Disclosure.

A. Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable following the date of arraignment and is concluded and certified as early as practicable prior to resolution. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

B. The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.
C. Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information that is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.
D. Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:
    1. Notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and
    2. Make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

Section VIII. Obligation to Obtain Discoverable Material.

A. The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office and of any others who have worked on the case for the prosecution or for the defense.
B. The prosecutor should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office.
C. If the prosecution is aware that information that would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the prosecution, the prosecution should disclose the fact of the existence of such information to the defense.
D. Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.
E. Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court must order disclosure of the specified material or information.

Section IX. Restrictions and Limitations on Disclosure.

A. Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or the defense attorney, or members of the attorney's legal staff.
B. Disclosure of an informant's identity should not be required where the court determines that reasonable fear exists that disclosureure would lead to the informant being harmed and where a failure to disclose will not infringe the constitutional rights of the defendant. The court should not deny disclosure of the identities of witnesses testifying at trial.
C. Disclosure should not be required from the defense of any communications of the defendant, or of any other materials that are protected from disclosure by the state or federal constitutions, statutes or other law.
D. The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds upon motion from the prosecution that there is substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure that outweighs any usefulness of the disclosure.