APPENDIX

The Michael Morton Act

Texas Code of Criminal Procedure article 39.14

AN ACT

relating to discovery in a criminal case.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act shall be known as the Michael Morton Act.

SECTION 2. Article 39.14, Code of Criminal Procedure, is amended by amending Subsection (a) and adding Subsections (c) through (n) to read as follows:

(a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall [~~Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to~~] produce and permit the inspection and the electronic duplication, copying, and [~~or~~] photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements [~~statement~~] of the defendant or a witness, including witness statements of law enforcement officers but not including[~~, (except written statements of witnesses and except~~]

the work product of counsel for the state in the case and their investigators and their notes or report[~~)~~], or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that[~~, which~~] constitute or contain evidence material to any matter involved in the action and that [~~which~~] are in the possession, custody, or control of the state or any person under contract with the state [~~State or any of its agencies~~]. The state may provide to the defendant electronic duplicates of any documents or other information described by this article. The [~~order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the~~] rights granted to the defendant under this article do [~~herein granted shall~~] not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize [~~State or any of its agents or representatives or employees. Nothing in this Act shall authorize~~] the removal of the documents, items, or information [~~such evidence~~] from the possession of the state [~~State~~], and any inspection shall be in the presence of a representative of the state [~~State~~].

(c) If only a portion of the applicable document, item, or information is subject to discovery under this article, the

state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and may withhold or redact that portion. The state shall inform the defendant that a portion of the document, item, or information has been withheld or redacted. On request of the defendant, the court shall conduct a hearing to determine whether withholding or redaction is justified under this article or other law.

(d) In the case of a pro se defendant, if the court orders the state to produce and permit the inspection of a document, item, or information under this subsection, the state shall permit the pro se defendant to inspect and review the document, item, or information but is not required to allow electronic duplication as described by Subsection (a).

(e) Except as provided by Subsection (f), the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant may not disclose to a third party any documents, evidence, materials, or witness statements received from the state under this article unless:

(1) a court orders the disclosure upon a showing of good cause after notice and hearing after considering the security and privacy interests of any victim or witness; or

(2) the documents, evidence, materials, or witness statements have already been publicly disclosed.

(f) The attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, may allow a defendant, witness, or prospective witness to view the information provided under this article, but may not allow that person to have copies of the information provided, other than a copy of the witness's own statement. Before allowing that person to view a document or the witness statement of another under this subsection, the person possessing the information shall redact the address, telephone number, driver's license number, social security number, date of birth, and any bank account or other identifying numbers contained in the document or witness statement. For purposes of this section, the defendant may not be the agent for the attorney representing the defendant.

(g) Nothing in this section shall be interpreted to limit an attorney's ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness, including name, except as provided in Subsections (e) and (f), address, telephone number, driver's license number, social security number, date of birth, and bank account information or any information that by reference would make it possible to identify a victim or a witness. Nothing in this subsection shall prohibit the disclosure of identifying

information to an administrative, law enforcement, regulatory, or licensing agency for the purposes of making a good faith complaint.

(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

(i) The state shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article.

(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.

(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.

(l) A court may order the defendant to pay costs related to discovery under this article, provided that costs may not

exceed the charges prescribed by Subchapter F, Chapter 552, Government Code.

(m) To the extent of any conflict, this article prevails over Chapter 552, Government Code.

(n) This article does not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required under this article.

SECTION 3. The change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act. The prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

SECTION 4. **This Act takes effect January 1, 2014.**

BILL ANALYSIS

S.B. 1611
By: Ellis
Judiciary & Civil Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Criminal discovery, which involves the exchange of relevant information between prosecutors and the defense prior to trial, is considered a necessary element of a fair and just criminal justice system and is also required as part of a defendant's constitutional right to a full defense. Interested parties observe that a U.S. Supreme Court ruling requires prosecutors to turn over to the defense any evidence that is relevant to the defendant's case, but express concern that the ruling is vague and open to interpretation, resulting in different levels of discovery across different counties in Texas. The parties contend that such inconsistency demonstrates a need to change the state's criminal discovery laws to ensure uniformity throughout Texas.

Concerned parties cite several reasons why a uniform open file discovery process is important. The parties contend that it promotes efficiency in the criminal justice system and lessens the likelihood of discovery disputes, costly appeals, and wrongful convictions. Recent high profile cases in Texas suggest that open file discovery increases the likelihood that evidence relevant to a defendant's innocence will be revealed before the defendant is wrongfully convicted. Reducing the occurrence of appeals and wrongful convictions through the criminal discovery process could save the state substantial amounts of money.

S.B. 1611 amends current law relating to discovery in a criminal case in an effort to uphold a defendant's constitutional right to a defense, minimize the likelihood of wrongful convictions, save thousands in taxpayer dollars, promote an efficient justice system, and improve public safety, all while increasing the public's confidence in the criminal justice system.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

S.B. 1611, to be known as the Michael Morton Act, amends the Code of Criminal Procedure to revise provisions relating to discovery in a criminal case. The bill removes statutory language requiring a court in which a criminal action is pending, on motion of the defendant showing good cause and after notice to other parties, to order the state to produce and permit the inspection and copying or photographing, by or on behalf of the defendant, of certain documents, items, and information. The bill instead requires the state, as soon as practicable after receiving a timely request from the defendant and subject to certain restrictions, to produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, 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 but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. The bill authorizes the state to provide to the defendant electronic duplicates of any documents or other information described by the bill's provisions.

S.B. 1611 establishes that if only a portion of the applicable document, item, or information is subject to discovery, the state is not required to produce or permit the inspection of the remaining portion that is not subject to discovery and is authorized to withhold or redact that portion. The bill requires the state to inform the defendant that a portion of the document, item, or information has been withheld or redacted. The bill requires the court, on request of the defendant, to conduct a hearing to determine whether withholding or redaction is justified by law.

S.B. 1611 requires the state, if a court orders the state to produce and permit the inspection of a document, item, or information in the case of a pro se defendant, to permit the pro se defendant to inspect and review the document, item, or information, but does not require the state to allow electronic duplication of those materials in such a case.

S.B. 1611 prohibits the defendant, the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or other agent of the attorney representing the defendant, except as otherwise provided in the bill, from disclosing to a third party any documents, evidence, materials, or witness statements received from the state under the bill's provisions unless a court orders the disclosure upon a showing of good cause after notice and hearing and after considering the security and privacy interests of any victim or witness or unless the documents, evidence, materials, or witness statements have already been publicly disclosed. The bill authorizes the attorney representing the defendant, or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant, to allow a defendant, witness, or prospective witness to view the information provided under the bill's provisions, but prohibits allowing that person to have copies of the information provided, other than a copy of the witness's own statement. The bill requires the person possessing the information, before allowing such a person to view a document or the witness statement of another, to redact certain identifying personal information contained in the document or witness statement. The bill prohibits the defendant from being the agent for the attorney representing the defendant for such purposes.

S.B. 1611 prohibits its provisions from being interpreted to limit an attorney's ability to communicate regarding his or her case within the Texas Disciplinary Rules of Professional Conduct, except for the communication of information identifying any victim or witness or any information that by reference would make it possible to identify a victim or witness. That prohibition does not prohibit the disclosure of identifying information to an administrative, law enforcement, regulatory, or licensing agency for the purpose of making a good faith complaint.

S.B. 1611 requires the state to 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. The bill requires the state to electronically record or otherwise document any document, item, or other information provided to the defendant under the bill's provisions. The bill requires each party, before accepting a plea of guilty or nolo contendere or before trial, to 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 the bill's provisions. The bill requires the state, if at any time before, during, or after trial the state discovers any additional exculpatory, impeachment, or mitigating document, item, or information required to be disclosed to the defendant to promptly disclose the existence of the document, item, or information to the defendant or the court.

S.B. 1611 authorizes a court to order the defendant to pay costs related to discovery under the bill's provisions that do not exceed the charges for providing copies of public information under state public information law. The bill's provisions prevail to the extent of any conflict with state public information law. The bill's provisions do not prohibit the parties from agreeing to discovery and documentation requirements equal to or greater than those required by the bill.

EFFECTIVE DATE

January 1, 2014.

It seems that even before the exoneration of Michael Morton and the creation of the Act which bears his name, there has been a great national recognition of the need for discovery reform.

Appendix A

NACDL Proposed 18 USC § 3014, Duty to Disclose Favorable Information

18 USC § 3014. Duty to Disclose Favorable Information (New)[1]

(a) In any criminal prosecution, the attorney for the government shall provide to the defendant all information, data, documents, evidence or objects that–

(1) may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed; and

(2) are within the possession, custody or control of the United States, or the existence of which is known, or by the exercise of reasonable diligence would become known, to the attorney for the government.

(b) The attorney for the government shall disclose the information, data, documents, evidence or objects described in subsection (a) without delay after arraignment, and prior to the entry of any guilty plea pursuant to an agreement with the government, or if such information is not then known, immediately upon its existence becoming known, without regard to whether the defendant is proceeding to trial or has entered or agreed to enter a guilty plea.

(c) The obligation described in subsections (a) and (b) shall be discharged notwithstanding section 3500(a) of this title or any other provision of law (including any rule or statute), provided that where the materials to be disclosed under this section are ―classified information‖ as defined by the Classified Information Procedures Act, that Act's protective procedural provisions shall apply.

(d) Upon motion of the United States, the court may issue an order to protect against the immediate disclosure to a defendant or to a defendant and counsel for a defendant, of material otherwise required to be disclosed under subsection (a), if—

(1) the disclosure is favorable to the defendant solely because it would provide a basis to impeach the credibility of a potential witness, and

(2) the United States establishes a reasonable basis to believe that:

(i) the identity of the witness is not already known to any defendant, and

[1] Available at http://www.nacdl.org/criminaldefense.aspx?id=31326&libID=31295

(ii) disclosure of the impeaching information to a defendant or to a defendant and counsel for a defendant would reasonably present a threat to the safety of the witness or of any other person.

The court may delay disclosure under this subsection until a reasonable time before the date set for trial, but no less than 30 days, and only so long as the preconditions specified herein continue to exist. The court may permit the United States to make its application under this subsection under seal to the extent necessary to protect the identity of the witness, but any ex parte submissions shall be summarized for the defendant in sufficient detail to permit the defense a meaningful opportunity to be heard on the question, including the need for any such protective order or its scope.

(e) No provision of this section may be waived by any defendant except in open court, and upon a factually supported finding that the proposed waiver is knowingly, intelligently and voluntarily offered and that the interests of justice so require.

(f) At any time prior to entry of judgment, upon motion of a defendant or on its own motion, if there is reason to believe the attorney for the government has failed to comply with subsection (a) or (b), the court shall determine whether the United States is in compliance and if not, the extent of and reason for any non-compliance. The court shall enter its findings in the record.

(g) Remedies –

(1) If the court determines that the United States has failed to discharge its duty under subsection (a), or has failed to discharge its duty in a timely manner under subsection (b), the court shall order appropriate remedial measures. Relief may include postponement or adjournment of the proceedings, exclusion or limitation of testimony or evidence, ordering a new trial, dismissal, or other appropriate remedies. In fashioning a remedy, the court shall consider the totality of the circumstances, including the seriousness of the violation, its impact on the proceeding, whether the failure resulted from innocent error, negligence, or knowing conduct, and the effectiveness of alternative remedies to protect the defendant's and the public interest in assuring fair prosecutions.

(2) If the court grants relief under subparagraph (f)(1), on a finding that the failure was due to negligence or knowing conduct by the United States, it may order that the defendant recover from the United States the defendant's costs and expenses incurred as a result of the failure, including reasonable attorney's fees (without regard to the terms of any fee agreement between the defendant and defense counsel). For purposes of this subparagraph, ―the defendant‖ includes any federal public defender or community defender agency, and also includes the fund for providing court-appointed counsel under the Criminal Justice Act (section 3006A of this title).

(h) Harmless error. On the hearing of any appeal or writ of certiorari initiated by a criminal defendant presenting an issue of fact or law under this section, the court shall apply the harmless error rule only if persuaded beyond a reasonable doubt that the error or defect did not affect the defendant's substantial rights.

Notes on Proposed Section 3014[2]

The Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), recognized the constitutional importance of disclosure of information favorable to the accused, bearing on either guilt or punishment. "Society 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," and a prosecution in which favorable information is withheld from the accused "does not comport with standards of justice." *Id*. at 87-88. The suppression of information favorable to the accused presents an obvious risk of conviction of the innocent and of the imposition of unjust, excessive, and unduly costly sentences. Ten percent of the 225 cases to date in which individuals have been exonerated by DNA evidence, according to the Innocence Project, were cases in which the suppression of favorable information had actually been raised.[3]

Although the rule in *Brady v. Maryland* is properly understood as imposing on the prosecution an "affirmative duty to disclose evidence favorable to a defendant," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), the impact of that decision as a protection against mistakes in the criminal justice system has been dulled over decades by uncertainty as to what information was covered, when it had to be disclosed, and what remedies applied for a violation. The Department of Justice maintains that Brady does not reach information which "may not, on its own, result in an acquittal." U.S. Attorney's Manual 9-5.001.[4] Some courts agree. *See Ellsworth v. Warden*, 333 F 3d 1 (1st Cir. 2003). Following decisions of some circuits, the Department further maintains the position that information may be suppressed so long as it would not have changed the result at trial. *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001); *United States v. Causey*, 356 F. Supp. 2d 681 (S.D. Tex. 2005); *see generally* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 Hastings L.J. 1321 (2011).

These restrictions set a standard that is difficult to meet in an appellate posture, where a defendant seeks to overturn the result of a trial. However, this "materiality" standard has also been used to determine the scope of the prosecutor's obligation at the pretrial or in-trial stages as

[2] Available at http://www.nacdl.org/criminaldefense.aspx?id=31326&libID=31295
[3] Emily M. West, Innocence Project, Court Findings of Prosecutorial Misconduct Claims in Post- Conviction Appeals and Civil Suits Among the First 225 DNA Exoneration Cases 6 (August 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf.
[4] http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm

well, permitting the prosecution to withhold favorable information if it correctly estimates that the accused (1) will not learn of the suppressed evidence or (2) will be unable to prove later that it would have changed the result. Id. The consequence is that the prosecutor at trial is not called upon by these decisions to act with any greater generosity in ensuring a fair trial than would be required to avoid reversal. Because there is usually no remedy other than a new trial, if a reversal is required, there is little incentive, under the current implementation of Brady v. Maryland for a prosecutor to provide more information than is absolutely essential, or to provide it until the last possible moment.

Moreover, following a suggestion from the Supreme Court, *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam), some courts hold, as the Department of Justice maintains, that admissibility of the information is a precondition to trigger a prosecutor's disclosure obligations. *Madsen v. Dormire*, 137 F.3d 602 (8th Cir. 1998); *United States v. Derr*, 990 F. 2d 1330, 1335-36 (D.C. Cir. 1993). Thus, many prosecutors condition disclosure on whether the information is admissible evidence.

This is problematic for two reasons. First, even inadmissible information may lead to admissible evidence proving that an accused is innocent, as the Supreme Court recognized in Wood. Second, "inadmissible" information sometimes is nevertheless required to be admitted under the compulsory process clause of the Sixth Amendment, as the Supreme Court has held in such cases as *Washington v. Texas*, 388 U.S. 14 (1967), *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Green v. Georgia*, 442 U.S. 95 (1979), and, most recently, *Holmes v. South Carolina*, 547 U.S. 319 (2006). All these well-known cases involved reversal of convictions where evidence was formally inadmissible under the rules of evidence, but where its exclusion nevertheless violated the Right to Present a Defense founded in the Compulsory Process Clause. *See generally* Peter Westen, *Compulsory Process*, 73 Mich. L. Rev. 71, 120-21 (1974).

As a consequence, the promise of *Brady v. Maryland* has not been fulfilled. *See* Laural Hopper and Shelia Thorpe, Federal Judicial Center, *Brady v. Maryland* Material in the United States District Courts: Rules, Order and Policies (Mat 31, 2007) http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file /bradyma2.pdf. This 2007 Judicial Center Report surveys a few of the articles written about the failure of the government to fulfill the "special role played by the American prosecutor in the search for truth in criminal trials"—i.e. "not that it shall win a case, but that justice shall be done."

> One author investigated the ―dissonance between Brady's grand expectation to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise.‖ Further, the author proffers that the lack of specific local court rules imposing obligations on prosecutors impedes compliance. Others argue that current disciplinary mechanisms provide little remedy.

Id. at 3-4 (footnotes omitted). *See also United States v. Mannarino*, 850 F. Supp. 57, 59, 71 (D. Mass. 1994) (finding that prosecutors had consistently, for many years, shown an "obdurate indifference to… disclosure responsibilities," prompting the district to adopt an extensive discovery rule).

In addition to considerations of constitutionality and fundamental notions of justice, federal prosecutors have an ethical obligation to disclose favorable information to accused persons regardless of the potential impact of the evidence on the verdict (materiality) and prior to a guilty plea proceeding or trial. *See* ABA Formal Ethics Opinion 09-454. As the Supreme Court recognized, the "obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations than under the federal constitution." *Cone v. Bell*, 129 S Ct. 1769 (2009); *see* Model Rules of Professional Conduct R. 3.8(d) (2008); 28 U.S.C. § 530B (state rules of professional ethics made binding on federal prosecutors). The proposed ABA Standards for the Prosecution Function also reflect this view of the prosecutor's disclosure obligations.

What must be disclosed

This proposal uses the terminology of "favorable" to describe the information and other matter required to be disclosed. Favorable information "is any information in the possession of the government" broadly defined to include all Executive Branch agencies [and local agencies and other entities participating in the investigation or prosecution of the case, as well as their agents of whatever sort] – that "relates to" guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses." *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). This includes all "information," not limited to "evidence" or "potential evidence." The formulation "information, data, documents, evidence or objects" tracks the forms in Rule 16 of the Rules of Criminal Procedure and is intended to be inclusory. It does not use the term "exculpatory" or "impeaching" or refer to distinctions between these categories of information. Though commonly used in discussions of the Brady doctrine, the word "exculpatory" is nowhere found in the Supreme Court's main opinion in Brady, which twice describes as "favorable" the information to be disclosed. The use of the term ―favorable‖ is most common in local rules adopted by district courts. Hopper, *supra* at 12.

Though inspired by *Brady v. Maryland* and the precedent on which that decision relied, it is the intent of this provision to eclipse the disagreements and confusion found in post-Brady decisions not only by using the original term of "favorable" but also by specifying that the subject to which the information is relevant includes not only the guilt determination and sentencing, but also any preliminary matter, such as determination of a detention motion or a motion to suppress. Some jurisdictions have adopted this by rule, id., while some circuits have so declared. *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) (*Brady* doctrine applies in context of motion to suppress); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) (same); *see United States v. Jones*, 686 F.Supp.2d 147, 2010 WL 565478 (D. Mass. 2010); *Magallan v.*

Superior Court, 121 Cal.Rptr.3d 841 (2011); *People v. Geaslen*, 54 N.Y.2d 510 (1981). Some circuits have assumed that *Brady* applies to pretrial determinations, without deciding, *United States v. Williams*, 10 F.3d 1070, 1077 (4th Cir. 1993); *United States v. Stott*, 245 F.3d 890, 902 (7th Cir 2001); while others have resisted the idea, *United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999). This statute resolves the question in favor or requiring disclosure of information favorable to the accused in relation to any determination to be made in the context of the criminal proceeding.

Despite *Brady* being a constitutional doctrine, the government consistently argues, and many courts have ruled, that the restriction on the disclosure of "statements" found in 18 USC §3500(a) (the "*Jencks* Act") applies even to statements that are ―favorable.‖ In other words, some courts hold that the Jencks Act "trumps" *Brady*. *See, e.g., United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994). The result is that such favorable information might not be disclosed until after a witness testifies on direct examination or possibly not at all if the witness is not called to testify. This proposed statute would clarify the relationship between these directives by requiring the prompt disclosure of statements favorable to the accused notwithstanding the restriction found in § 3500.[5] Similarly, as to "favorable" information, etc., that it covers, the disclosure provisions of this statute will prevail over any other statute or rule, except as expressly provided herein with respect to classified information.

Consistent with the constitutional and ethical imperatives codified by this provision, the proposal does not require a request by the defense in order to trigger the attorney for the government's disclosure obligation.

Reasonable Diligence

The "reasonable diligence" referred to in paragraph (a)(2) will ordinarily include, at a minimum, appropriate inquiries addressed by the attorneys for the government to the agents and employees of any federal, state or local agency or other person or entity participating or cooperating in the investigation or prosecution of the case and of any related case, and to other federal agencies reasonably likely, in the circumstances of the case, to be in possession of information that would be disclosable under paragraph (a)(1).

Waivers

[5] There is a question as to the continuing effectiveness of §3500. The Criminal Rules Advisory Committee recognized in 1979, when recommending Rule 26.2 to the Judicial Conference for adoption, that §3500 is ―purely procedural‖ and is thus subject to modification or even being superseded, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b), by the Rules amendment process. Accordingly, §3500 has been supplanted by the adoption of Rule 26. 2 and the various Rules amendments extending Rule 26.2's reach to adversarial proceedings other than (and prior to) the trial, such as detention and suppression hearings at which §3500 did not authorize disclosure. Congress' later comments on this history reinforces the same notion, that §3500 is viewed as superseded and repealed by Rule 26.2. See Sen. Rep.96-553 (Jan. 17, 1980) on S. 1722, (96th Cong, 2d Sess) (recounting the history of federal criminal code reform efforts in its introductory statement). Rule 26.2 does not include the restriction on disclosure reflected in §3500(a).

Because of strong public policy in favor of disclosure of favorable information, and the imbalance in the plea negotiation process, only judicially approved waivers of the rights assured by this statute are permitted.

Timing of disclosure

Timing of disclosure has been another significant issue. Although many districts by local rule require that "*Brady*" material be disclosed promptly after arraignment, *see* Judicial Center Report, *supra*, circuit courts have permitted suppression of favorable information so long as it is disclosed – even at the last minute – in time for the defense to make some use of it. *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001).

The requirement in this proposal that the attorney for the government disclose the information "without delay" is consistent with the original purpose of the *Brady* decision and the existing practice in many districts and avoids tactical considerations from interfering with the prosecutor's ethical and constitutional obligations to the accused. The proposal is not one that leaves to the prosecutor the option of speculating that the information or evidence might later not be considered to have been "material." Experience has proven that backward-looking appellate standards are an insufficient protection for fairness prior to the trial or negotiation of cases. Rather, any evidence that is favorable to the accused should be turned over at the earliest opportunity.

Defendants deciding whether to plead guilty must also have access to favorable information. The withholding of such information is "impermissible conduct by the government depriving [the defendant] of his ability to decide intelligently whether to plead guilty." *Ferrara v. United States*, 384 F. Supp. 2d 384, 389 (D. Mass. 2005), *aff'd*, 456 F.3d 278 (1st Cir. 2006). *See* ABA Op. 09-454. Where the defendant has negotiated an agreement to plead guilty upon arraignment, the attorney for the government still must provide the disclosure unless a waiver is accepted. However, when a defendant pleads guilty with no prior agreement – more likely to be a surprise to the government — prior disclosure is not required.

Nothing in this statute suggests, or is intended to suggest, that the duty of the United States to disclose later-discovered favorable information terminates at any time. Procedures and remedies for such cases are not addressed in this statute, however.

Protective Order

In recognition of the concerns that may arise in disclosing impeachment information relating to some prosecution witnesses, express provision is made for a protective order to be entered which would allow such disclosure at a time closer to trial. Procedural protections are implemented in order to protect the due process rights of the accused to the extent that the government obtains permission to proceed, to some degree, ex parte in making its application.

See United States v. Abuhamra, 389 F.3d 309, 321 (2d Cir. 2004). Such concerns are not likely to arise in connection with disclosure of statements favorable to the accused made by witnesses.

Nevertheless, this provision mirrors current practice by indicating that the burden is on the government to justify concealing favorable information, and that the court should consider lesser remedies than preventing disclosure altogether, such as allowing disclosure to defense counsel who would be restricted, under a protective order, from disclosing the information, or certain aspects of the information, to the defendant. *See United States v. Rezaq*, 156 F.R.D. 514, 524 (D.D.C. 1994).

With respect to information that is ―classified information,‖ this provision accepts the protective provisions in the Classified Information Procedures Act, §6(c) and (e), which requires dismissal if the defense is precluded from the use of favorable classified information and permits use of summaries in lieu of the evidence if the court "finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."

Remedies

It is also important that prosecutors recognize the ramifications of failing to adhere to this constitutional norm, now protected by this statute, and judges need authority beyond their supervisory powers to enforce the requirement of discovery and protect against pretrial gamesmanship that elevates an adversarial perspective over the demands of fair procedure and the search for truth. Thus, a statute with clear mandates and provisions for non-compliance serves the judicial process with the accompanying mechanisms to assure compliance with law. *See* Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 Cardozo L. Rev. 1943 *et seq*. (2010). "Brady violations and instances of prosecutorial misconduct have to be addressed in real time. Appellate opinions that find prosecutorial misconduct years after the violation has occurred have very little, if any, deterrent effect." *Id*. at 2033. Thus, judicial oversight early in the process will not only avert any problems related to disclosure but will be helpful to prosecutors in making pretrial disclosure decisions.

Appellate review

Given the serious consequences which may flow from the failure to disclose favorable information, and the fundamental constitutional concerns which led to the *Brady* decision, this provision requires that the standard of review on appeal or certiorari approximate the scrutiny required to be given to the claimed denial of fundamental constitutional rights.

The proposed federal regulation is not nearly as expansive as Texas' Michael Morton Act which went into effect on the first of this year. We should note that while the Morton Act applies only to offenses committee after the first of this year, we are seeing jurisdictions apply it across the board to cases that are pending as of the first of this year.

Appendix A
ABA Brady Checklists

Brady Checklists

- Information that would tend directly to negate the defendant's guilt concerning any count in the indictment, information or complaint.
- Information that would cast doubt on the admissibility of evidence that the prosecution anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be immediately appealable.
- A statement whether any promise, reward, or inducement has been given to any witness whom the prosecution anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.
- A copy of any criminal record of any witness identified by name whom the prosecution anticipates calling in its case-in-chief.
- A written description of any criminal cases pending against any witness identified by name whom the prosecution anticipates calling in its case-in-chief.
- A written description of the failure of any witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.
- Any information that tends to cast doubt on the credibility or accuracy of any witness whom the prosecution anticipates calling in its case-in-chief.
- Any information that tends to cast doubt on the credibility or accuracy of any evidence that the prosecution anticipates offering in its case-in-chief.
- Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the prosecution anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
- Any statement, or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness

the prosecution anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

- Information reflecting bias or prejudice against the defendant by any witness whom the prosecution anticipates calling in its case-in-chief.
- A written description of any prosecutable criminal offense, regardless of the jurisdiction, known by the government to have been committed by any witness whom the prosecution anticipates calling in its case-in-chief.
- A written description of any conduct that may be admissible under the jurisdiction's evidence law on the issue of a witness's character for truthfulness or untruthfulness known by the government to have been committed by a witness whom the prosecution anticipates calling in its case-in-chief.
- Information known to the government of any mental or physical impairment of any witness whom the prosecution anticipates calling in its case-in-chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.
- Exculpatory information regarding any witness or evidence that the prosecution intends to offer in rebuttal.
- A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's sentence.
- All information required to be disclosed by the prosecution to the defendant in a criminal trial pursuant to the jurisdiction's ethical rule, such as Rule 3.8(d), ABA Model Rule of Professional Conduct, that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, all unprivileged mitigating information known to the prosecutor.

Second Version

1. An unabridged copy of any and all written plea agreements the government has entered into with any witness the prosecution intends to call as a witness in the case;
2. Any deal, promise, inducement, or benefit that the government has made or may make in the future to any witness the prosecution intends to call as a witness in the case;

3. Any promises which may have been discussed with any witness the prosecution intends to call in the case by a person in authority in connection with an agreement (whether written or oral) to cooperate and/or to testify (whether or not agreed to);
4. Any statement made by any witness the prosecution intends to call in the case seeking a benefit or manifesting an expectation of receiving a benefit;
5. Any request any witness the prosecution intends to call in the case has made for special treatment or special consideration (whether or not agreed to);
6. Any and all written communications from any witness the prosecution intends to call in the case or any lawyer that has or is representing any such witness to the government, including the prosecution and law enforcement agents, seeking to obtain a deal or to change the terms of the plea agreement;
7. Any and all written communications from the government to any witness the prosecution intends to call in the case or any lawyer that has or is representing such a witness seeking to obtain a deal or to change the terms of the plea agreement;
8. Any other known evidence or information that may attest to or diminish the credibility of any witness the prosecution intends to call in the case;
9. Any grants of immunity, regardless of kind, degree or scope, granted any witness the prosecution intends to call in the case, with regard to any statements either of them made to law enforcement personnel or government counsel at any time;
10. Whether at any time any witness the prosecution intends to call in the case has recanted any testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;
11. All statements, whether oral or written, that any witness the prosecution intends to call in the case; has made to any law enforcement personnel or member of a prosecutor's office or staff;
12. The identification of each and every charge by factual basis and statutory violation that the government, including prosecutors and law enforcement agents, told any witness the prosecution intends to call in the case; or their lawyer[s] that the witness potentially faced;
13. Copies of each and every offense for which any witness the prosecution intends to call in the case; was indicted or otherwise charged;

14. Copies of any and all grand jury testimony any witness the prosecution intends to call in the case has given in the investigation of the defendant and/or any other person or persons;
15. The complete criminal history of any witness the prosecution intends to call in the case;
16. Any records of investigations and sanctioning of any witness the prosecution intends to call in the case for any type of misconduct or malfeasance, including administrative actions;
17. Any benefit given to any member of either the family of any witness the prosecution intends to call in the case or any other person associated with the witness, or any benefits sought by such persons, as consideration for the witness's cooperation with the government;
18. Any medical or mental health records of any witness the prosecution intends to call in the case that include data or diagnoses that would raise questions concerning the witness's competence as a witness or would otherwise reflect on the witness's ability to remember and recall past events; and
19. Any evidence, whether admissible or not, that would raise questions concerning any witness the prosecution intends to call in the case as to competence as a witness or would otherwise reflect on his ability to remember and recall past events.
20. All evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal, as required by the controlling ethical rule governing the conduct of a prosecutor.

Appendix D

Federal Rule of Criminal Procedure, Rule 16

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows--or through due diligence could know--that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule **16**(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows--or through due diligence could know--that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows--or through due diligence could know--that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert witnesses.--At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as permitted by Rule **16**(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), **16**(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule **16**(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule **16**(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert witnesses.--The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule **16**(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

It is important to note that local rules or a general order entered by a judge may require more than stated by the Federal Rule of Criminal Procedure, so it is important to evaluate a client’s particular situation and all of the discovery requirements for a given situation.

Appendix E

IN THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CAUSE NO. 5:14-CR-00000-FB
	§	
JOHN DOE	§	

MOTION FOR DISCOVERY OF FAVORABLE EVIDENCE

TO THE HONORABLE CHIEF JUDGE FRED BIERY OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS:

John Doe asks the court to order the Assistant United States Attorney to produce all evidence favorable to the defendant pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), including but not limited to the following:

1. Any and all written or recorded statements made by any person to the police or to the government which tends to establish the defendant's innocence or to impeach or contradict the testimony of any witness whom the government will call at the trial of this cause.

2. Any law enforcement of other investigation report made to any federal department or agency which tends to establish the defendant's innocence or to impeach or contradict the testimony of any witness whom the government will call at the trial of this cause.

3. The names and addresses of witnesses who might establish the defendant's innocence or impeach the testimony of any witness whom the government will call at the trail of this cause.

4. Any information or material which would tend to establish the defendant's innocence or to impeach or contradict the testimony of any witness whom the government will call at the trial of this cause.

5. Any scientific or medical report which tends to establish the defendant's innocence or to impeach or contradict the testimony of any witness whom the government will call at the trial at this cause

6. All information relating to psychiatric or drug treatment of any government witness.

7. All prior wrongful conduct of any potential government witness which the government knows about but is to prosecuting, including a detailed description of the act, the date, the time and place of the act and the name, address and phone numbers of all persons who claimed to have witnessed the act.

8. Any statement made by potential government witnesses regarding his or her motive for making statements regarding the defendant or any of his relatives, including statements relating to revenge, jealousy, money, of hatred.

9. Any record of prior criminal convictions or other evidence which would impeach the credibility of persons whom the prosecuting attorney intends to call as witnesses at a hearing or trial, including records of the Governments informants, if any.

10. All prior wrongful conduct of any alleged co-conspirators which the government knows about but is not prosecuting which is probative of his or her character for untruthfulness, including a de tailed description of the act, the date, the time and place of the act and the name, address and phone numbers of all persons who claimed to have witnessed the act.

11. Any plea agreements made with any witness in exchange for their cooperation with the government or its agents.

12. The sum of money paid the informant or informants, if any, for services in the case.

13. The total sum of money the informant or informants, if any, have earned for services to the government.

14. The probation and prison files of any and all persons whom the government intends to call as a witness at any hearing or trial herein.

15. Any evidence deemed favorable regardless of the fact that such evidence involved is the fruition of the "work product" of the prosecutor.

16. Notice of any and all information obtained by the government about Defendant, pursuant to 50 U.S.C. § 1881a, that the government intends to use in any way, during any proceeding before this Honorable Court, as notice is required pursuant to 50 U.S.C. § 1806(c).

17. Any and all applications made by the government and orders pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d) for historical cell site data.

18. Any and all evidence obtained from orders pursuant to 18 U.S.C. § 2703(d), including historical cell site data created when the user places and terminates a call, as well as data

from phones that used a particular tower at a particular interval, data from a phone which is the recipient of a call, and data revealing location information form the duration calls or when a phone was idle.

The defendant asks the court to order the prosecutor to produce all favorable evidence which is either in the government's possession or is obtainable by the government.

Respectfully,

By:_____
Jane Q. Defense
Bar No. 12345678
300 Downtown St.
San Antonio, Texas 78205
210-555-5555 phone
210-555-5556 facsimile

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above was served *via* CM/ECF electronic filing system to John Attorney, address on this _____ day of _____, 2014.

*/s/Jane Q. Defense*_____
Jane Q. Defense

Both sides of the bar are occupied by professional lawyers trying their utmost to engage in the fair administration of justice. We all need to be studious and focused stewards on the path of competent representation.

Discovery is always a work in progress. There is always a new method of obtaining, storing, and analyzing information. There will always be new ways to use the information as evidence. We can never be satisfied, sit back and occupy a static position in regard to our obligations. Neither can we rest on the existence of an article or code provision to help us rest easy in the belief that we will be voluntarily provided favorable evidence. We must be vigilant, tenacious, creative, and unrelenting in our efforts to track down every lead to evidence and information that will assist the defense.