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Costs and Questions as TX Implements New Discovery Law

by [Terri Langford](#) | May 29, 2014



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photo by: Marjorie Kamys Cotera

Gov. Rick Perry ceremonially signs Senate Bill 1611, known as the Michael Morton Act, which requires prosecutors to disclose evidence in criminal cases. Morton served nearly 25 years in prison for his wife's murder before he was exonerated in 2011.

Prosecutors say the state's new Michael Morton Act, a measure designed to prevent wrongful convictions by forcing district attorneys to be more transparent in criminal cases, is driving up

evidence costs.

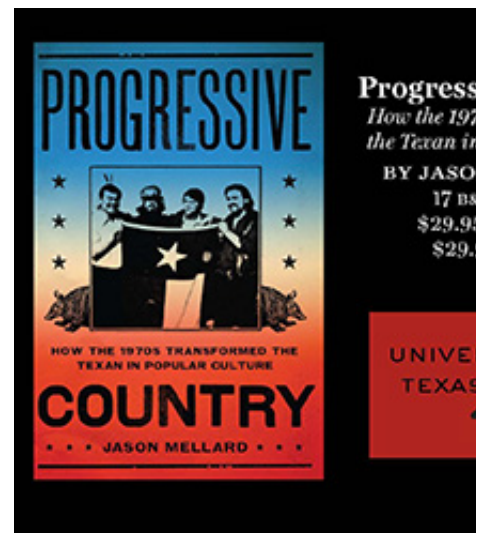
"That is an issue for a lot of folks," said Rob Kepple, executive director for the Texas District and County Attorneys Association.

Kepple says prosecutors will have to hire more people and invest in better technology to streamline the release of documents to criminal defense lawyers.

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Costs and Questions as TX Implements New Discovery Law

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Lawyers on both sides of the criminal courtroom say the Michael Morton Act — named after an Austin man who spent nearly 25 years wrongfully imprisoned for his wife's murder — has raised awareness of the importance of sharing evidence. Prosecutors, however, are concerned about the cost to taxpayers of reproducing reams of information. And defense lawyers worry that some prosecutors could use the law to keep some evidence away from them.

Kepple said that he's heard from several counties that "documentation has been a strain."

The new law requires Texas prosecutors to release all "exculpatory" evidence — information that could prove a defendant's innocence — to defense attorneys. That means a lot of copying costs and document storage and delivery concerns for Texas prosecutors and the law enforcement agencies who investigate crimes, Kepple and others said.

At the Dallas County district attorney's office, Administrative Chief Andrea Moseley said officials there are trying to reduce the amount of paper documents that they must produce to ensure that defense lawyers get all the evidence the new law requires prosecutors to share. Right now, Moseley said, the prosecutor's office is trying to find a way to securely release information through an online portal.

"I think this could become financially burdensome on smaller agencies," she said. "I would hate to see anybody shortcut investigations to defray costs."

Some district attorney offices are also developing forms for defense attorneys to sign once they have received incident reports, crime lab results and other evidence to keep track of what has and has not been released.

In 1963, the U.S. Supreme Court decided in *Brady v. Maryland* that prosecutors must produce "exculpatory" information that points to the innocence of a defendant.

But in Texas, prosecutors had been responsible for deciding which information would be considered exculpatory. A Texas Tribune investigation found that among 86 overturned convictions from 1989 to 2011, in 17 cases courts found that prosecutors failed to give defense lawyers exculpatory evidence.

"The Michael Morton Act has codified Brady," said Kathryn

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Kase, executive director of the Texas Defender Service, which represents defendants facing the death penalty.

The new law went into effect this year, nearly three years after Morton was released from prison. After Morton was freed in 2011, a court found that the prosecutor in his case intentionally withheld information that could have prevented the wrongful conviction. The law was designed to prevent such injustices.



“My sense is it’s working great,” said Rusty Hardin, who successfully prosecuted former Williamson County District Attorney Ken Anderson for withholding evidence in the Morton case.

Hardin and other defense lawyers say that in many Texas counties, prosecutors were already releasing investigative information to defense attorneys. He said that there was already an open file system in Harris County, where he worked for 15 years as a prosecutor before becoming a defense lawyer.

Defense attorney Phil Hilder, also in Houston, said the new law works as a guide for prosecutors who may not be as “well-versed” about the Brady law and its obligations.

“I do think this has been very positive legislation to even the playing field and to more readily assure that individuals get fair treatment before the courts,” said Hilder, a former federal prosecutor.

There have been some kinks to work out, though. Besides the cost, there are questions about measures in the Morton law that prevent criminal defense attorneys from disclosing some information to their clients. The law prevents lawyers from disclosing certain information, primarily to protect victims. A motion has been filed in a Lubbock case that claims the Morton Act violates a defendant's Sixth Amendment right to effective assistance of counsel because preventing full disclosure impedes a thorough investigation.

And back in Dallas County, the law has raised questions about whether prosecutors should get more access to grand jury transcripts.



Brad Lollar, a Dallas County public defender who is defending a client charged with capital murder, said the district attorney is fighting his request for a grand jury transcript.

Defense attorneys are not permitted in grand jury proceedings. But they can ask a judge for transcripts of the prosecution witnesses' testimony before the grand jury.

Defense attorneys must prove that they have a "particularized need" for the information. Lollar argues that because a transcript of any witness testifying before a grand jury could potentially help his client, the particularized need requirement has been expanded by the Morton law.

"We routinely request grand jury testimony in our pre-trial motions. That is routinely granted by the judges," Lollar said. "I think they are concerned that the Michael Morton Act will require them to turn over grand jury transcripts across the board, if [transcripts] exist. We're saying a reading of the Michael Morton Act will require that."

Kepple said his reading of the new Morton law says it does not "disturb" the protections of grand jury secrecy already in place.

"I would argue that grand jury testimony is still covered under the same rules beforehand," he said.

Grand jury testimony, though, is not specifically addressed in the Morton law, so lawmakers may re-examine questions about access to it during next legislative session.

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