NOW WHAT?: A GUIDE TO NAVIGATING THE MICHAEL MORTON ACT'S SEEMINGLY UNCONSTITUTIONAL PRO SE PROVISION

Comment

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"The United States wins its point whenever justice is done its citizens in the courts."
–Inscription, Robert F. Kennedy Department of Justice Building, Washington, D.C.

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* J.D. Candidate, Texas Tech University School of Law, May 2016; B.S. Biology, The University of Texas–Pan American, December 2010. I dedicate this Comment to my wife and parents. Without your support, I could never strive for excellence. Second, to the wonderful folks at the McAllen Municipal Court and the McAllen City Attorney's Office: thank you for inspiring me to write about such a pressing issue. Finally, thank you to the individuals (quoted and non-quoted) who helped make this Comment a reality.

I. THE TRAGIC TALE OF DONNIE DEFENDANT

After driving twelve straight hours across long, winding roads to deliver refrigerated goods to several grocery stores, Donnie Defendant stopped at a rest area for the night. At approximately 3:00 A.M., he locked the truck doors and lay down to sleep. Two hours later, he awoke to sirens, flashing lights, and a loud knocking on the driver's side of his truck. He stepped out of the cabin to find his eighteen-wheeler surrounded by police. Before he knew it, he was handcuffed and sitting in an interrogation room at the local police station, being questioned about the shooting death of Valerie Victim. Despite Donnie adamantly denying any knowledge of the murder and providing the police with an alibi—being fast asleep in his truck—he was indicted for Valerie's murder. Without family or friends to call, without money to pay an attorney, and without trust in the system he believed accused him without sufficient evidence, Donnie had no choice but to represent himself.[1]

At trial, the prosecutor did her best to convince the jury that Donnie was a psychotic murderer who repeatedly shot Valerie out of sheer pleasure. The prosecutor presented images of Valerie's naked body, thrown behind Donnie's eighteen-wheeler, bloody, covered in grass and dirt. She focused on the fact that Donnie was the only person at the truck stop on the night of the murder, which made him the only feasible suspect. When given the chance to testify, Donnie maintained his innocence, claiming he had been asleep at the time of the murder and had not interacted with anyone at the truck stop. After deliberating for mere minutes, the jury found Donnie guilty of Valerie's murder and sentenced him to death. Donnie spent the next fifteen years on death row and consistently maintained his innocence until he was executed by lethal injection.

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1. It is crucial to remember prosecutors are "obliged to see that the defendant is accorded procedural justice, [and] that the defendant's guilt is decided upon the basis of *sufficient evidence*." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (emphasis added).

After reading Donnie's story in her local newspaper, Anna Attorney filed a public information request to learn all she could about Donnie's case.[2] She was appalled to discover that Valerie's bloody clothes, which investigators found at the scene of the crime, had not been tested for DNA. In fact, the bloody clothes were never mentioned in court—it was as if the clothes did not exist. After Anna pursued the matter for two years, a judge finally allowed the clothes to be tested.[3] DNA results did not link the blood on the clothes to Donnie but to Kim Killer, a convicted felon who had escaped from prison the night of Valerie's death. Anna was repulsed; the government likely would not have executed Donnie if an attorney had represented him. A competent attorney would have ensured compliance with discovery procedures.[4]

Sadly, while Donnie's story is fictitious, it is neither far-fetched nor wildly imaginative. Headlines within recent years have exposed the cruel realities of the American justice system, even in cases where attorneys zealously represent their clients.[5] If Donnie's story is a possibility for represented individuals, it is not unlikely to happen to individuals without legal representation—pro se defendants.[6] More specifically, Donnie's story may be a real possibility in Texas under the Michael Morton Act (the Act).[7]

The Act, implemented on January 1, 2014, overhauls the Texas criminal discovery system and impacts judges, prosecutors, defense attorneys, and defendants, including pro se defendants.[8] The Act includes one provision targeting pro se defendants.[9] More importantly, the provision fails to guarantee the same rights to self-represented defendants that it guarantees to those with representation.[10] Thus, it *appears* as though the Texas Legislature purposefully took two steps forward and one step back—at the expense of

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2. In Texas, the Public Information Act is found in Chapter 552 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 552 (West 2015).

3. TEX. CODE CRIM. PRO. ANN. art. 64.03 (West 2006 & Supp. 2014) (setting forth the statutory requirements for DNA testing (e.g., when the court should order it, where testing should be conducted, and what to do with the results)).

4. *See generally* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble (stating that an attorney is to provide zealous representation for a client).

5. *See generally* John Thompson, Opinion, *The Prosecution Rests, But I Can't*, N.Y. TIMES (Apr. 9, 2011), http://www.nytimes.com/2011/04/10/opinion/10thompson.html?_r=0 (telling the story of an exonerated inmate who spent fourteen years on death row in Louisiana after the prosecution failed to disclose blood evidence).

6. *Pro se*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011) (defining *pro se* as "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer"). *See generally* Martha Neil, *Man Exonerated by Own Research Gets $13M for Wrongful Conviction in Rabbi Slaying*, A.B.A. J. (Aug. 19, 2014, 9:25 PM), http://www.abajournal.com/mobile/article/man_gets_13m_after_serving_15_years_for_rabbi_slaying_he_didnt_commit (telling the story of a pro se litigant who, after spending sixteen years in prison for a murder he did not commit, was exonerated and subsequently awarded $13 million in damages).

7. CRIM. PRO. art. 39.14.

8. *See id.*

9. *Id.* art. 39.14(d).

10. *Id.*; *see infra* Part VII.

pro se litigants.[11] Accordingly, there is a need for Texas judges, prosecutors, and pro se defendants to understand the provision's ramifications on pretrial discovery.[12] This is particularly important because pro se defendants are an "often-overlooked facet of the justice system."[13]

The purpose of this Comment is to serve as a "how-to guide" for navigating the Act's only pro se provision.[14] Its purpose is not to recommend amendments to the provision, but to provide judges and prosecutors with practical guidance for conducting pretrial discovery in pro se cases. It is also meant to help pro se defendants understand a considerable disadvantage of criminal pro se litigation in Texas. Part II of this Comment tells the story of Michael Morton, and Part III discusses how his experiences inspired the Texas Legislature to repair the criminal discovery system.[15] Part IV addresses the constitutional "requirements" of a criminal discovery system, while Part V chronicles the evolution of criminal discovery in Texas, from inception to present.[16] Part VI introduces the reader to the concept of pro se litigation, prior to Part VII's dissection of the Act's pro se provision.[17] Part VIII discusses the legislative intent behind Texas's treatment of pro se defendants and includes practical guidance from Senator Robert Duncan, co-author of the Michael Morton Act.[18] Part IX includes policy-focused recommendations for judges and prosecutors on how to conduct discovery in cases involving pro se defendants.[19] Similarly, Part X provides pro se defendants with a how-to guide for navigating criminal discovery in Texas.[20] Finally, Part XI concludes this Comment by summarizing the realities of pro se discovery in Texas.[21]

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11. *See infra* Part V.B–C.

12. *See generally* Christian A. Fuller, Comment, *A Duty of Discretion: Looking at How Prosecutors Should Regard Detained Pro Se Defendants During Pretrial Discovery*, 35 J. LEGAL PROF. 423, 423–24 (2011) (noting the lack of discussion regarding the "seemly important nexus between the prosecutors and the detained pro se defendants during pretrial discovery"). Although Fuller's article focuses on institutionalized self-represented defendants, his statement is widely applicable to all criminal pro se defendants in Texas, especially in light of prosecutorial discretion, the newness of the Michael Morton Act, and the ambiguity of article 39.14(d) of the Texas Code of Criminal Procedure. *See infra* Part III.

13. Fuller, *supra* note 12, at 424.

14. CRIM. PRO. art. 39.14(d).

15. *See infra* Parts II–III.

16. *See infra* Parts IV–V.

17. *See infra* Parts VI–VII.

18. *See infra* Part VIII.

19. *See infra* Part IX.

20. *See infra* Part X.

21. *See infra* Part XI.

II. MICHAEL MORTON: FROM TRAGEDY TO REDEMPTION

Tuesday, August 12, 1986, was a special day for Michael and Christine Morton—it was Michael's thirty-second birthday.[22] After enjoying dinner at a local restaurant with their three-year-old son Eric, the couple returned to their home just outside of Austin.[23] In a matter of hours, Michael's life went from celebration to tragedy.[24]

The next morning, Michael awoke at 5:00 A.M., got dressed, and left for work.[25] Later that day, a friend responded to cries coming from the Morton house and entered to find Christine lying on her bed, covered with a wicker basket and a suitcase, lying on semen-stained bed sheets—bludgeoned to death.[26] Without any other suspects, the police charged Michael with his wife's murder.[27] Before trial, Michael's defense team asked prosecutor Ken Anderson to disclose all exculpatory material in the State's possession; Anderson claimed he had nothing to turn over.[28]

At trial, Anderson portrayed Michael as a depraved individual who bludgeoned his wife to death because she refused to have sex with him on his birthday.[29] Without scientific evidence, eyewitness testimony, a murder weapon, or any believable motive, the jury found Michael guilty of Christine's murder; he was sentenced to life in prison on February 17, 1987.[30]

Years later, Michael learned that several key pieces of exculpatory evidence were not presented at trial.[31] These included a bloody bandana and an investigative report detailing Eric's eyewitness account, where he told his grandmother that a "monster with red hands" had "hit mommy."[32] In 2010, a judge granted Morton's attorneys' request for DNA testing on the bloody bandana.[33] Test results indicated that DNA on the bandana matched that of Christine and another man—Mark Alan Norwood.[34] The police also linked

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22. Josh Levs, *Innocent Man: How Inmate Michael Morton Lost 25 Years of His Life*, CNN (Dec. 4, 2013, 2:53 PM), http://www.cnn.com/2013/12/04/justice/exonerated-prisoner-update-michael-morton/.

23. *Id.*

24. *Id.*

25. AN UNREAL DREAM: THE MICHAEL MORTON STORY (CNN Films 2013) [hereinafter AN UNREAL DREAM].

26. *Id.*; *Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Michael_Morton.php (last visited Nov. 6, 2015).

27. Levs, *supra* note 22; AN UNREAL DREAM, *supra* note 25; *Michael Morton*, *supra* note 26.

28. Sara Kinkaid, *The Michael Morton Act and Texas Municipal Courts*, RECORDER: J. TEX. MUN. CTS., Jan. 2014, at 1, 1, http://www.tmcec.com/files/3313/9041/0707/Recorder_Vol.23_No.2_FINAL.pdf; AN UNREAL DREAM, *supra* note 25.

29. Levs, *supra* note 22; AN UNREAL DREAM, *supra* note 25; *Michael Morton*, *supra* note 26.

30. AN UNREAL DREAM, *supra* note 25; *Michael Morton*, *supra* note 26.

31. AN UNREAL DREAM, *supra* note 25.

32. *Id.*

33. *Michael Morton*, *supra* note 26.

34. AN UNREAL DREAM, *supra* note 25.

Norwood to another murder that resembled Christine's, which occurred while Michael was in prison.[35]

After spending nearly twenty-five years in prison for a crime he did not commit, Michael Morton was released on October 4, 2011, and exonerated on December 4, 2011.[36] For his role in Michael's wrongful conviction, prosecutor Ken Anderson's penalty included a $500 fine, 500 hours of community service, loss of his law license, and a ten-day jail sentence (of which he only served five days due to good behavior).[37] Mark Alan Norwood was convicted of Christine's murder in March 2013.[38]

III. HISTORY 101: ORIGINS OF THE MICHAEL MORTON ACT

After his exoneration, Michael became a symbol of both the problems and the fairness of the judicial system.[39] He devoted himself to campaigning for legal reform, in hopes of preventing future wrongful convictions.[40] While Michael has arguably become the face of legal reform, it is his lobbying efforts that have truly made a difference.[41] As Texas Senator Rodney Ellis,

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35. Levs, *supra* note 22; AN UNREAL DREAM, *supra* note 25. DNA from a pubic hair linked Mark Alan Norwood to the January 13, 1988, bludgeoning death of Debra Baker. Brandi Grissom, *An Exoneration After Decades, and a Conviction*, N.Y. TIMES (Apr. 6, 2013), http://www.nytimes.com/2013/04/07/us/austin-man-found-guilty-in-killing-of-exonerated-mans-wife.html. Baker's murder was relevant to the Morton case because of the glaring similarities between the two crimes: both victims were in their thirties, had long brown hair, and were mothers to three-year-old children; both victims were bludgeoned to death with a similar number of blows to the head; both victims had been robbed; and both victims had wounds on the left arm, consistent with attempting to fend off an attacker. Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder*, TEX. MONTHLY (Mar. 27, 2013), http://www.texasmonthly.com/story/mark-alan-norwood-found-guilty-christine-mortons-murder.

36. *Michael Morton*, *supra* note 26. According to the University of Michigan Law School's National Registry of Exonerations, Texas is the state with the second highest number of exonerations in the nation. Lindsay Stafford Mader, *Exonerations*, 77 TEX. B.J. 967, 967 (2014). New York is the country's leader in exonerations, with 181 since January 1989; Texas has had 151 exonerations since 1989. *Id.*

37. Claire Osborn, *How Ken Anderson Was Released After Only Five Days in Jail*, STATESMAN (Nov. 15, 2013, 3:47 PM), http://m.statesman.com/news/news/local/ken-anderson-released-from-williamson-county-jail/nbtKN/; Paul J. Weber, *Ex-Prosecutor Ken Anderson Gets Jail for Wrongful Conviction*, HUFFINGTON POST (Nov. 8, 2014, 4:30 PM), http://www.huffingtonpost.com/2013/11/08/kenanderson_n_4242431.html. Anderson faced "criminal contempt and tampering charges for failing to turn over evidence pointing to" Michael Morton's innocence. *Michael Morton Prosecutor Will Face Criminal Charges for Withholding Evidence*, INNOCENCE PROJECT (Apr. 19, 2013, 12:00 AM), http://www.innocenceproject.org/news-events-exonerations/press-releases/michael-morton-prosecutor-will-face-criminal-charges-for-withholding-evidence.

38. AN UNREAL DREAM, *supra* note 25. After deliberating fewer than four hours, a jury found Norwood guilty of Christine Morton's murder. Colloff, *supra* note 35. Because the judge honored Christine's family's request to remove the death penalty as an option, Norwood received an automatic life sentence. *Id.* The Austin Court of Appeals affirmed the trial court's ruling, and the Texas Court of Criminal Appeals refused Norwood's petition for discretionary review. Norwood v. State, No. 03-13-00230-CR, 2014 WL 4058820, at *1 (Tex. App.—Austin Aug. 15, 2014, pet. ref'd) (mem. op.).

39. AN UNREAL DREAM, *supra* note 25.

40. *Id.*; Levs, *supra* note 22.

41. *See* Brandi Grissom, *Perry Signs Michael Morton Act*, TEX. TRIB. (May 16, 2013), http://www.texastribune.org/2013/05/16/gov-rick-perry-signs-michael-morton-act/.

co-author of the Michael Morton Act stated, "Michael's tragic case brought to the forefront something we already knew. . . . Our criminal discovery process in Texas need[ed] serious reform."[42]

While Texas has exonerated dozens of individuals and paid over $60 million in related damages within the past twenty-five years, Michael's case made reform a reality by brewing the perfect storm of both public and legislative interest.[43] First, the timing of Michael's release allowed his story to gain momentum in the press.[44] There was enough time for public outcry to build, calling for legislative reform to rectify the system that failed Michael Morton.[45] Second, the media attention surrounding Ken Anderson's disciplinary case amplified discussion and disgust in the public and legislative communities.[46] Third, Mark Alan Norwood's arrest, criminal proceedings, and subsequent conviction ensured that Michael's story remained relevant.[47]

Michael capitalized on the attention.[48] With the goal of passing a bill imposing fines and possibly revoking the law license of prosecutors who engage in misconduct, Michael hired a Republican lobbyist to assist him in his efforts.[49] He also met with legislators, prosecutorial and defense attorneys, and representatives from the Office of the Governor to raise awareness for his cause—prosecutorial accountability.[50] Michael's efforts came to fruition as a result of strong legislative support from sponsors who rallied around the cause.[51]

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42. Brandi Grissom, *Senate Unanimously Approves Michael Morton Act*, TEX. TRIB. (Apr. 11, 2013), http://www.texastribune.org/2013/04/11/senate-approves-michael-morton-act/.

43. Scott Ehlers, *State Criminal Justice Network Legislative Update: Lessons Learned from Legislative Victories in the Lone Star State*, CHAMPION, May 2014, at 47, 47–48.

44. *Id.* Michael was released approximately four months after the 2011 Legislative Session ended, which was approximately fifteen months before the next legislative session began. *Id.*

45. *See id.* at 48.

46. *See id.*; Brandi Grissom, *State Bar Seeks Disciplinary Action Against Anderson*, TEX. TRIB. (Oct. 19, 2012), http://www.texastribune.org/2012/10/19/state-bar-seeks-disciplinary-action-against-anders/. On the final day of the Court of Inquiry into Ken Anderson's alleged prosecutorial misconduct case, Anderson "cast himself as the victim of a 'media frenzy,'" spoke in a sarcastic tone, and offered Michael Morton a seemingly half-hearted apology for the fact that "the system screwed up." Pamela Colloff, *Another Chapter Closes in the Michael Morton Case*, TEX. MONTHLY (Feb. 8, 2013), http://www.texasmonthly.com/articles/another-chapter-closes-michael-morton-case/.

47. Ehlers, *supra* note 43, at 48; *see* Colloff, *supra* note 35.

48. *See* Ehlers, *supra* note 43, at 48–49.

49. *Id.* at 48.

50. *See id.* at 48–49. Michael also raised awareness by launching a website (www.michael-morton.com), which allows users to contact their state legislators to "urge them to support laws that make prosecutors more accountable for their mistakes." Brandi Grissom, *Michael Morton: A Year of Freedom*, TEX. TRIB. (Oct. 4, 2012), http://www.texastribune.org/2012/10/04/michael-morton-year-freedom/.

51. *See* Ehlers, *supra* note 43, at 47–49.

During the 83rd Legislature, Senators Robert Duncan and Rodney Ellis joined efforts to co-author Senate Bill 1611.[52] They introduced it to the senate on March 20, 2013.[53] The senators intended to lay aside party politics and work toward a common policy goal: creating a desperately needed, uniform, statutory "open file" policy for the Texas criminal discovery system.[54] Senators Duncan and Ellis based their bill on *Brady v. Maryland*, a 1962 United States Supreme Court case that requires prosecutors to disclose materially exculpatory information to the defense.[55] The senators agreed that *Brady*'s vagueness had resulted in the disparate interpretation of Texas's criminal discovery laws, intensifying the need for uniform legislation.[56] In developing the bill, Senators Duncan and Ellis worked with Michael Morton, the Office of the Governor, and various advocacy groups to create necessary and powerful change.[57] Motivating factors included promoting efficiency and fiscal responsibility, ensuring the right to defense, maintaining public safety, and preventing wrongful convictions.[58] The senators were able to not only navigate the historic legislation, but also manage competing and contentious interests.[59]

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52. *See* Grissom, *supra* note 42. Rodney Ellis (Democrat) has served in the Texas Senate since 1990 and has passed over 600 bills. *Senator Rodney Ellis: District 13*, TEX. SENATE, http://www.ellis.senate.state.tx.us/ (last visited Nov. 7, 2015). During the 83rd Legislative Session, Senator Ellis served as Chairman for the Senate Committee on Open Government, which works to improve the transparency of the Texas government, and he currently serves as Chairman on the Board of Directors for the Innocence Project. *Id.* Before becoming a state senator in 1996, Robert Duncan (Republican) served in the Texas House of Representatives from 1992 to 1996. *Senator Robert Duncan Meets with Cosntituents* [sic], MASON COUNTY NEWS (Sept. 19, 2013), http://www.masoncountynews.com/news/ 112297/. He served on the Senate Finance Committee during every legislative session since 1999 and "as president pro tempore of the . . . Senate during the 81st Legislative Session." *Id.* In 2014, Duncan left the Texas Senate to become Chancellor of the Texas Tech University System. *Robert L. Duncan*, TEX. TECH U. SYS., http://www.texas tech.edu/chancellor/robert-l-duncan.php (last visited Nov. 7, 2015).

53. *History*, TEX. LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1611 (last visited Nov. 7, 2015).

54. *See* Grissom, *supra* note 42; Michele Nellenbach, *State Senators Ellis and Duncan Working Together to Reform the Texas Criminal Justice System*, BIPARTISAN POL'Y CTR. (June 3, 2013), http://bipartisanpolicy.org/blog/state-senators-ellis-and-duncan-working-together-reform-texas-criminal-justice-system.

55. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1964); TEX. S. RESEARCH CTR., BILL ANALYSIS, Tex. S.B. 1611, 83d Leg., R.S. (2013). The *Brady* rule mandates that prosecutors disclose any "materially exculpatory evidence . . . in the government's possession to the defense"; this includes information that favors the defendant or potentially negates the defendant's guilt. *Brady Rule*, LEGAL INFO. INST.–CORNELL U., http://www.law.cornell.edu/wex/brady_rule (last visited Nov. 7, 2015) (citation omitted).

56. TEX. S. RESEARCH CTR., supra note 55, at 1 ("*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.").

57. Ehlers, *supra* note 43, at 48–49 (listing the Texas District and County Attorneys Association, the Texas Criminal Defense Lawyers Association, Texas Appleseed, and the Texas Defender Service as advocacy groups that helped the Michael Morton Act come to fruition); *see* Nellenbach, *supra* note 54.

58. TEX. S. RESEARCH CTR., *supra* note 55, at 1.

59. Ehlers, *supra* note 43, at 48.

Among the strongest points of contention was the bill's initial inclusion of provisions requiring reciprocal disclosure by defense attorneys.[60] This was problematic because Texas law did not mandate such disclosures at the time.[61] The proposed provisions required defense attorneys to disclose written or recorded statements of related witnesses and contact information of lay witnesses reasonably expected to testify at trial.[62] The proposed provisions also required defense attorneys to disclose affirmative defenses, alibi information, and physical or documentary evidence intended for use at trial.[63] The drafters eventually removed the reciprocal provisions and did not include them in the final version of the bill.[64] Less than two months after it was introduced as a bill, Governor Perry signed the Michael Morton Act on May 16, 2013.[65] The end result effectuated the most significant change to the Texas criminal discovery process in nearly fifty years.[66]

IV. UNDER CONSTRUCTION: A CONSTITUTIONALLY SOUND CRIMINAL DISCOVERY SYSTEM

Discovery—the pretrial process by which the prosecution and defense exchange relevant information pertaining to a criminal case—is vital to ensuring the criminal justice system operates in a way that is fair and just.[67] Undoubtedly, criminal discovery is important in Texas. There is also no question that the same can be said about the federal government.[68] Still, criminal discovery does not rise to the level of constitutional mandate.[69] The U.S. Supreme Court held in *Weatherford v. Bursey* that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[70] In practice, however, criminal discovery does have constitutional implications, specifically with regard to due process.[71]

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; *see* TEX. CODE CRIM. PRO. ANN. art. 39.14 (West 2005 & Supp. 2014).

65. Nellenbach, *supra* note 54; *see supra* note 53 and accompanying text.

66. CRIM. PRO. art. 39.14; Ehlers, *supra* note 43, at 47.

67. TEX. DEF. SERV. & TEX. APPLESEED, IMPROVING DISCOVERY IN CRIMINAL CASES IN TEXAS: HOW BEST PRACTICES CONTRIBUTE TO GREATER JUSTICE 1 (2013), http://texasdefender.org/wp-content/uploads/tds_report.pdf.

68. *See infra* Part V.C.

69. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

70. *Id.* In *Bursey*, the Court held that the *Brady* rule did not necessarily require disclosure of the names of all State witnesses whose testimony would disfavor the defendant. *Id.* The Court stated, "*Brady* is not implicated here where the only claim is that the State should have revealed that a government informer would present the eyewitness testimony of a particular agent against the defendant at trial." *Id.* at 559–60; *see also infra* Part V.C. (explaining *Brady*'s relevance to the discovery process and the Michael Morton Act).

71. *See* Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the *balance of forces* between the accused and his accuser." (emphasis added) (citation omitted)).

While criminal discovery is not a constitutional mandate, due process does require that a discovery system be operated as a "two-way street."[72] That is, the system should operate fairly—in such a manner that the defense is not required to divulge specific information while the State silently maintains its poker face.[73] Although the Due Process Clause does not lay ground rules for creating perfect discovery procedures, it does leave room for a system "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."[74] In fact, the U.S. Supreme Court has not only lauded liberal discovery systems as fairness-enhancers of the justice system but also encouraged states to experiment with them.[75]

The U.S. Supreme Court laid out procedural due process requirements in the 1976 landmark case *Mathews v. Eldridge*.[76] In *Mathews*, the Court declared that due process is not a rigid, mechanical system but is instead flexible and adaptable to the particulars of each situation.[77] In other words, due process can be determined on a case-by-case basis.[78] To ensure flexibility, the Court established a balancing test that considers three factors

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72. *Id.* at 475. The prosecutorial duty to disclose "generally stems from the Sixth Amendment." *See* Fuller, *supra* note 12, at 428.

73. *Wardius*, 412 U.S. at 475–76. "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise . . . ." *Id.* (footnote omitted).

74. *Id.* at 474 (quoting Williams v. Florida, 399 U.S. 78, 82 (1970)); *see supra* note 70 and accompanying text.

75. *Wardius*, 412 U.S. at 473–74. For example, the Court lauded the use of notice-of-alibi rules because they are "based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases." *Id.* at 473. The Court went on to say that "[t]he growth of such discovery devices is a salutary development [that] . . . enhances the fairness of the adversary system." *Id.* at 474.

76. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Eldridge sued Mathews, the Secretary of Health, Education, and Welfare, after his Social Security benefits were terminated. *Id.* at 324–25. Eldridge, who had previously received Social Security benefits for approximately four years, contested the constitutional validity of the Agency's administrative termination procedures, claiming that the Agency's actions did not comport with procedural due process requirements. *Id.* Prior to terminating Eldridge's benefits, the Agency obtained reports from Eldridge's physicians, consulted with a psychiatrist, and used information in Eldridge's file, as well as information from a questionnaire Eldridge submitted, in deciding to terminate benefits. *Id.* at 323–25. The Court held that the Agency's procedures satisfied due process, particularly because the administrative procedures entitled Eldridge to "an effective process for asserting his claim prior to any administrative action, but also assure[d] [him] a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim bec[ame] final." *Id.* at 349 (citation omitted).

77. *Id.* at 334. The Court quoted two of its previous decisions: "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (second alteration in original) (quoting Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961), and Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

78. *See id.*

in its determination of whether due process has been satisfied in a particular matter.[79]

The first factor is "the private interest that will be affected by the official action."[80] Not only is this the defendant's "why," but it is also his or her need to be heard and have his or her proverbial day in court.[81] The second is the risk of erroneous deprivation of the private interest by the official action and "the probable value, if any, of additional or substitute procedural safeguards."[82] Thus, prosecutors should consider the consequences their actions will have on a defendant's interests and whether any procedures should be implemented to protect those interests.[83] The final factor considers government interests, including fiscal and administrative burdens.[84]

V. CHANGE IS ~~COMING~~ HERE

A. Texas Discovery Pre-Michael Morton Act

Robust and uniform criminal discovery laws not only further objectivity and access to justice but also benefit the state fiscally by "limiting discovery disputes, promot[ing] efficient case resolution, and reduc[ing] the likelihood of wrongful convictions."[85] In drafting the Michael Morton Act, the authors sought to unify the Texas criminal discovery system because prior to the Act, procedures were disorganized, at best.[86]

The original article 39.14 of the Texas Code of Criminal Procedure, enacted in 1966, was one section long and left discovery completely at the court's discretion.[87] The statute remained unmodified for approximately thirty-three years until 1999, when lawmakers added a second section allowing for the reciprocal discovery of expert witnesses.[88] Despite the addition, the statute was effectively unchanged, as the decision whether to allow discovery remained with the court.[89] In 2005, the Texas Legislature once again amended the statute, this time requiring courts to order discovery

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79. *Id.* at 335.

80. *Id.*

81. *See generally* Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 680 (1988) (discussing a pro se civil litigant's interest in being heard).

82. *Mathews*, 424 U.S. at 335.

83. *See id.* (citing Goldberg v. Kelly, 397 U.S. 254 (1970)) (drawing support from *Goldberg*'s indication that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process").

84. *Id.*

85. TEX. DEF. SERV. & TEX. APPLESEED, *supra* note 67.

86. *See id.* at 1–8.

87. Jessica A. Caird, *Significant Changes to the Texas Criminal Discovery Statute*, HOUS. LAW. Jan.–Feb. 2014, at 10.

88. *Id.*

89. *Id.*

upon a defendant's showing of "good cause."[90] Still, the amendment left the courts some discretion to decide whether to permit discovery.[91] While discovery was broader than before (courts "*shall order*" discovery upon a showing of "good cause"), it was restricted to "designated documents, papers, written or recorded statements of the defendant[,] . . . books, accounts, letters, photographs, [and] objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action."[92] The disclosure of written witness statements remained under prohibition.[93] The changes did, however, mandate that a trial court must specify the time, place, and conditions under which material would be inspected, copied, or photographed.[94]

Prior to passage of the Act, article 39.14 "require[d] significantly fewer disclosures by the prosecution than are recommended by the American Bar Association."[95] As a result, Texas's discovery procedures varied from county to county.[96] Some counties required prosecutors to follow the minimum statutory requirements, while others required an open file policy.[97] In general, however, district attorneys' offices supplemented the Texas rules with local policies, providing defendants with more information than required under Texas law.[98] Thus, access to true justice often depended on where the defendant was charged because discovery rules varied between counties and sometimes even within a single district attorney's office.[99] A consequence of Texas being "in the distinct minority" of states with limited criminal discovery procedures was that "the ability for defense counsel to

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90. *Id.*

91. *See generally id.* (suggesting that a defendant who did not show good cause would not be entitled to discovery).

92. Michael Morton Act, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (codified at TEX. CODE CRIM. PRO. ANN. art. 39.14(a)) (emphasis omitted); *see* Caird, *supra* note 87.

93. *See* Michael Morton Act § 2; *see* Caird, *supra* note 87.

94. Michael Morton Act § 2; *see* Caird, *supra* note 87.

95. TEX. DEF. SERV. & TEX. APPLESEED, *supra* note 67, at 3. For example, Texas courts previously required the defense to file a motion showing good cause before a trial court ordered discovery, ABA best practices recommend a system of automatic discovery. *See* Michael Morton Act § 2; TEX. DEF. SERV. & TEX. APPLESEED, *supra* note 67, at 3.

96. TEX. DEF. SERV. & TEX. APPLESEED, *supra* note 67, at 4. Prosecutors in counties such as Archer, El Paso, and Galveston disclosed more than statutorily required, including police and expert reports, witness statements, and full criminal histories. *Id.* Upon request, Brazoria County routinely provided defense counsel with recorded grand jury testimony. *Id.* at 4–5 n.14. In Victoria County, defendants had access to an open file policy if they made certain promises, agreements, and waivers, including: waiving an examining trial; waiving claims of inadequate notice and insufficient time; waiving the right to motion for the State's witness list; and providing the State with information regarding any witness for the defense. *Id.* at 27.

97. Ehlers, *supra* note 43, at 47.

98. TEX. DEF. SERV. & TEX. APPLESEED, *supra* note 67, at 3. The rule in Texas was that, while "[c]riminal defendants [did] not have a general right to discover evidence in the State's possession, . . . they [were] granted limited discovery." Scaggs v. State, 18 S.W.3d 277, 294–95 (Tex. App.—Austin 2000, pet. ref'd).

99. TEX. DEF. SERV. & TEX. APPLESEED, *supra* note 67.

provide a meaningful defense [was] diminished."[100] Naturally, limited discovery increased the possibility of wrongful convictions and *Brady* violations.[101]

B. Texas Discovery Post-Michael Morton Act

In an apparent attempt to "avoid another [Michael Morton-like] miscarriage of justice," the Texas Legislature enacted Senate Bill 1611—the Michael Morton Act—which significantly expanded article 39.14 of the Texas Code of Criminal Procedure.[102] Expansion occurred not only as a result of amending the first subsection of article 39.14 but also by adding twelve new subsections to the statute.[103] The Act's effect is to require prosecutors "to produce and permit the inspection of their files, subject only to the limitations set forth in article 39.14."[104]

Amended subsection (a) removes the need to show good cause, and instead makes discovery mandatory "as soon as practicable after receiving a timely request from the defendant."[105] It eliminates the requirement that the court specify the time, place, and manner of discovery, and expands a defendant's right to copy information to include "electronic duplication" and photocopying.[106] In addition, it requires the disclosure of witness statements (which were previously withheld) and explicitly includes "witness statements of law enforcement officers."[107] Despite major changes to subsection (a), the

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100. *See id.* at 4 (quoting TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 23 (2010), https://www.prisonlegalnews.org/media/publications/timothy_cole_advisory_panel_on_wrongful_convictions_report_to_tx_task_force_on_indigent_defense_2010.pdf). A "survey of discovery practices among the 50 states found that Texas' discovery statute [was] out of step with discovery statute provisions in a majority of other states." *Id.* at 6. For example, 84% of states did not require a court order prior to disclosure of information, and 62% required the disclosure of witness statements before trial. *Id.*

101. *Id.* at 5; *see infra* Part V.C (explaining the significance of *Brady v. Maryland*).

102. Caird, *supra* note 87.

103. *See* Michael Morton Act, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (codified at TEX. CODE CRIM. PRO. ANN. art. 39.14(a)).

104. Tex. Comm. on Prof'l Ethics, Op. 646, 78 TEX. B.J. 78, 78 (2015). One of the Act's practical impacts has been to render invalid *Professional Ethics Committee Opinion 619 (June 2012)*, which allowed prosecutors to require that defense counsel withhold copies of discovery materials from defendants. *See id.* However, such an agreement would violate the Act's implementation of a seemingly unconditional open file policy, which in turn would violate Rule 8.04(a)(12) of the Texas Disciplinary Rules of Professional Conduct by enabling a lawyer to violate a state law "relating to the professional conduct of lawyers and to the practice of law." *Id.*; TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(a)(12), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9). Thus, when prosecutors comply with article 39.14, they inherently comply with Rule 8.04(a)(12). Tex. Comm. on Prof'l Ethics, *supra*.

105. TEX. CODE CRIM. PRO. ANN. art. 39.14(a) (West 2005 & Supp. 2014); *see* Caird, *supra* note 87, at 11.

106. CRIM. PRO. art. 39.14(a); *see* Caird, *supra* note 87, at 11.

107. CRIM. PRO. art. 39.14(a); *see* Caird, *supra* note 87, at 11.

Act left subsection (b) untouched.[108] For that reason, this Comment does not discuss subsection (b).[109]

Beginning with subsection (c), the remainder of the Act adds to the previously two-paragraph-long statute.[110] Subsection (c) states that the State may not withhold information subject to discovery merely because a document contains information not subject to discovery.[111] Instead, the State should redact non-discoverable information and disclose the remaining information to the defense.[112]

The fourth subsection, subsection (d) (which is the main focus of this Comment), applies only to pro se defendants.[113] Subsection (d) states: "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)."[114]

Subsections (e)–(h) expand on subsections (a) and (c) by specifying what portions of particular documentation may or may not be disclosed. With very limited exceptions, subsection (e) requires defense counsel to keep information received from the State confidential.[115] Subsection (f) permits the defense to visually share information disclosed by the State to a defendant, witness, or prospective witness, but restricts the defense from giving a copy of the information shown unless it is "a copy of the witness's own statement."[116] Subsection (f) also requires the redaction of personal information in any copy of any document shown to a defendant, witness, or prospective witness, and prohibits a defendant from acting as defense counsel's agent.[117] Subsection (g) clarifies that the Act is not meant to inhibit an attorney's use of personal information found in the documents, so long as the use does not conflict with the Texas Disciplinary Rules of Professional Conduct.[118] Subsection (h) describes the type of information the State must

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108. *See* Michael Morton Act § 2; *see* Caird, *supra* note 87, at 11; Randall Sims, *The Dawn of New Discovery Rules*, TEX. DISTRICT & COUNTY ATT'YS ASS'N, http://www.tdcaa.com/journal/dawn-new-discovery-rules (last visited Nov. 7, 2015). Subsection (b), added in 1999, allows for reciprocal discovery of expert witnesses. *See* CRIM. PRO. art. 39.14(b).

109. On December 15, 2014, Texas House of Representatives Member Joe Moody (Democrat, District 78) filed House Bill 510, which, if passed, would amend article 39.14(b). Tex. H.B. 510, 84th Leg., R.S. (2015). As of the time this Comment was written, the act was untitled and described as " relating to disclosure of certain information about expert witnesses in a criminal case." *Id.*

110. CRIM. PRO. art. 39.14(c)–(n).

111. *See id.* art. 39.14(c).

112. *Id*.

113. *Id.* art. 39.14(d).

114. *Id.* (emphasis added).

115. *Id.* art. 39.14(e). Exceptions to the general duty of confidentiality include: (1) information that a court orders be released and (2) information previously made available to the public. *Id.*

116. *Id.* art. 39.14(f).

117. *Id.*

118. *Id.* art. 39.14(g).

disclose, which includes "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."[119] Subsection (h) is the progeny of *Brady v. Maryland*.[120]

Finally, subsections (i)–(n) serve housekeeping functions. Subsection (i) requires the State to keep electronic records of all discovery information provided to the defendant.[121] Subsection (j) requires the prosecution and defense to acknowledge either in writing or on the record that the prosecution complied with the requirements of the Act.[122] Subsection (k) imposes on the State the ongoing duty to promptly disclose any additional *Brady* material that arises before, during, or after trial.[123] Subsection (*l*) grants courts the power to charge a defendant for discovery-related costs.[124] Subsection (m) states that if any conflict arises between the Act and Texas Government Code Chapter 552 (Public Information Act), article 39.14 prevails.[125] Lastly, subsection (n) allows parties to agree to discovery procedures that exceed the Act's scope; at minimum, parties must follow the procedures set forth in the Act.[126]

C. Raising the Brady *Bar*

The Act essentially codifies the U.S. Supreme Court's holding in *Brady v. Maryland*.[127] Despite *Brady*'s command that prosecutors disclose materially exculpatory evidence, not all prosecutors abide by that duty.[128] Thus, the Texas Legislature's decision to "err on the side of disclosure" no

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119. *Id.* art. 39.14(h).

120. Sims, *supra* note 108.

121. CRIM. PRO. art. 39.14(i).

122. *Id.* art. 39.14(j). Acknowledgement is to occur before the court accepts a plea of guilty or *nolo contendere*. *Id.*

123. *Id.* art. 39.14(k); *see* Sims, *supra* note 108.

124. CRIM. PRO. art. 39.14(*l*). Court-imposed costs must be "an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead." TEX. GOV'T CODE ANN. § 552.261(a) (West 2015); CRIM. PRO. art. 39.14(*l*).

125. CRIM. PRO. art. 39.14(m). Title 5, Chapter 552 of the Texas Government Code establishes the public information procedures. GOV'T CODE § 552.001(a). The policy behind Chapter 552 is that all individuals are entitled to know the "complete information about the affairs of government and the official acts of public officials and employees." *Id.*

126. CRIM. PRO. art. 39.14(n).

127. *See supra* note 55 and accompanying text. In *Brady*, the U.S. Supreme Court held that suppression of evidence favoring the petitioner, particularly where evidence was material to guilt or punishment, violated due process, regardless of the prosecution's good or bad faith. Brady v. Maryland, 373 U.S. 83, 87 (1963).

128. *See supra* notes 31–37 and accompanying text. Despite the U.S. Supreme Court's explicit mandate in *Brady*, some prosecutors continued to conceal information, using "the courthouse to play a win-at-all-costs game." *Editorial: Benefits of the Michael Morton Act*, DALL. MORNING NEWS (Jan. 3, 2014, 10:28 PM), http://www.dallasnews.com/opinion/editorials/20140103-editorial-benefits-of-the-michael-morton-act.ece.

longer required prosecutors to "be in the position of deciding whether certain material is *potentially beneficial* to the defense."[129]

Despite *Brady*'s undoubted influence, the Act goes beyond a mere codification of U.S. Supreme Court jurisprudence. While *Brady* only requires the disclosure of information material to guilt or punishment, the Act requires the disclosure of any materials that "constitute or contain evidence material to *any matter involved* in the action."[130] Texas's expansion of due process protects not only defendants but also the criminal justice system as a whole because the system "suffers when any accused is treated unfairly."[131]

VI. ENTER: PRO SE DEFENDANT

There is a widely held misconception that pro se litigation is inherently frivolous.[132] That sentiment is utterly false and a gross misunderstanding of

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129. *Editorial*: *Benefits of the Michael Morton Act*, *supra* note 128 (emphasis added). *But see Michael Morton Act: Texas Discovery Law Raises Concerns*, O'CONNOR'S ANNOTATIONS (Aug. 7, 2014), http://annotations.jonesmcclure.com/2014/08/07/michael-morton-act-texas-discovery-law-raises-concerns/#sthash.dpbNCv4Q.dpbs (noting that prosecutors' offices have faced logistical setbacks since the Act's implementation, including lack of staff and effective technology that will allow them "to be able to comply with the increased discovery burden the law imposes"). Since the Act's implementation, "documentation has been a strain" for several Texas counties. Terri Langford, *Costs and Questions as TX Implements New Discovery Law*, TEX. TRIB. (May 29, 2014), http://www.texastribune.org/2014/05/29/michael-morton-act-driving-evidence-costs-das/. Accordingly, many prosecutors are concerned about the financial strain on taxpayers, and many defense attorneys are concerned about prosecutors using the Act to hide evidence. *Id.* Some prosecutors' offices have even begun asking defense attorneys to sign—prior to their client's entering a guilty plea—documents acknowledging the receipt of all required discovery materials and waiving the prosecutor's requirement to disclose after a defendant has entered a guilty plea. *Michael Morton Act: Texas Discovery Law Raises Concerns*, *supra*. Some critics question the Act's value because most Texas counties had adopted open file policies by the time the Act took effect on January 1, 2014. *See Editorial*: *Benefits of the Michael Morton Act*, *supra* note 128.

130. CRIM. PRO. art. 39.14(a) (emphasis added); *see Brady*, 373 U.S. at 87. Texas courts define *materiality* as follows: "[T]here is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Little v. State, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). The materiality test does not concern whether inculpatory evidence should have been excluded; rather, "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" satisfies the burden. Kyles v. Whitley, 514 U.S. 419, 435 (1995).

131. *Brady*, 373 U.S. at 87. To ensure that all defendants receive a fair trial, the *Brady* rule is grounded in the Due Process Clause of the Fourteenth Amendment. Matthew v. Johnson, 201 F.3d. 353, 360 (5th Cir. 2000). This requires that an impartial party determine a defendant's guilt "based on *all* the available evidence." *Id.* (emphasis added). The purpose of due process in criminal cases is to protect defendants from an unfair conviction. Adamson v. California, 332 U.S. 46, 57 (1947), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

132. *See* Candice K. Lee, Note, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1262 (2003). Because nearly all lawsuits filed by prisoners are filed pro se and nearly all of them are dismissed as frivolous, there is an assumption among the legal and non-legal communities that all pro se litigation is frivolous. *See* Jon O. Newman, Foreword, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996); Lee, *supra*. It is important to note, however, that the definition of *pro se* does not require a defendant to be behind bars; the term's definition never mentions incarceration. BLACK'S LAW DICTIONARY, *supra* note 6.

pro se representation.[133] "Even though the number of meritorious pro se complaints may be small, it is essential that these [meritorious] complaints be recognized."[134] Because of the complexities associated with lawsuits, pro se litigants need assistance in navigating the legal system, at least in the form of procedural protections.[135] Moreover, the dichotomy of rising numbers and poor public perception fuels the need to ensure protections for this class of defendants.[136] After all, "both the First Amendment and the Due Process Clause of the Fourteenth Amendment guarantee sufficient access to the courts."[137]

A. A History of Pro Se Litigation

The first litigants in history were pro se.[138] In fact, prior to the "invention" of lawyers, pro se litigation was the status quo.[139] While ancient civilizations had court systems and judges in place, the standard operating procedure was for litigants to represent themselves, regardless of whether the matter was civil or criminal in nature.[140] Involved parties stood before the judge and took turns presenting their case.[141] While pro se litigation was the

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133. Newman, *supra* note 132, at 520. The Honorable Jon O. Newman, former Chief Judge of the Second Circuit Court of Appeals, explains this misconception: "[U]nder the burdens of having to respond to thousands of lawsuits, most of which are frivolous, the attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous." *Id.* The media has also played a role in skewing the general public's perception of pro se litigation. *See id.* (citing a March 1995 *New York Times* article that labeled several misleading or false claims filed by pro se prisoner litigants as "typical"); Lee, *supra* note 132, at n.6. The frivolousness of pro se litigation has been greatly exaggerated. *See* Newman, *supra* note 132, at 519–20.

134. Bradlow, *supra* note 81, at 678 (citing Wayne T. Westling & Patricia Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. CHI. L.J. 273, 275, 303 (1985)).

135. *See* Lee, *supra* note 132, at 1264 (noting that a major reason pro se litigants often lose cases is because of their failure to comprehend judicial procedures).

136. In a 2009 Self-Represented Litigation Network nationwide survey, 60% of judges surveyed reported an increase in pro se litigants in their courtrooms. *Pro Se Statistics*, TEX. ACCESS TO JUST. COMMISSION 1, http://www.texasatj.org/sites/default/files/3ProSeStatisticsSummary.pdf (last visited Nov. 7, 2015).

137. Lee, *supra* note 132, at 1263. "Congress shall make no law . . . abridging the . . . right of the people peaceably to assemble, and to *petition the Government for a redress of grievances*." U.S. CONST. amend. I (emphasis added). "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* amend. XIV, § 1.

138. *See* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 36 (2002).

139. *Id.* In ancient civilizations and "happy times, there was not a single lawyer to be found on the globe." *Id.*

140. *Id.* Judges in these crude court systems adjudicated issues based on what they considered to be fair rather than on what the law stated. *See id.* This is because laws were not binding; they served as mere guidance. *See id.*

141. *Id.*

historical custom, modern-day pro se litigation occurs as a result of an individual's choice to proceed without legal counsel.[142]

Many of the individuals who proceed pro se are prisoners.[143] Because many are poor and uneducated, they are unable to afford an attorney.[144] While pro se litigation is often associated with imprisonment, the practice of navigating the judicial system without legal counsel is neither restricted to the incarcerated nor to criminal cases.[145] In fact, civil law has experienced a surge in pro se litigation within recent years.[146] There is no indication that pro se litigation will disappear—"[p]ro se litigants are a fact of life."[147]

In 1975, the U.S. Supreme Court held in *Faretta v. California* that individuals have a constitutional right to represent themselves in a criminal trial.[148] The decision was based on the Sixth Amendment right to counsel, which the Court recognized "implicitly embodies a 'correlative right to dispense with a lawyer's help.'"[149] While most defendants are better off with a lawyer, a court cannot force an attorney upon an unwilling defendant as long as an accused "knowingly and intelligently" relinquishes his or her right

142. *Id.* "What is different today from previous historical periods is that the pro se litigant is returning to court, insisting on access to justice without a lawyer." *Id.*

143. Lee, *supra* note 132, at 1264.

144. *See id.*

145. *See* Goldschmidt, *supra* note 138, at 36–37.

146. *Pro Se Statistics*, *supra* note 136, at 1–3. Between September 1, 2010, and August 31, 2011, 21.6% (57,597 cases) of all family law cases in Texas were filed pro se. *Id.* Additionally, 16,862 other civil and probate cases were filed pro se in Texas. *Id.*

147. Goldschmidt, *supra* note 138, at 36–37. "The flood of [self-represented litigants] in our courts is expected to increase even further as a by-product of enhanced means of access to justice." Jona Goldschmidt, *Strategies for Dealing with Self-Represented Litigants*, 30 N.C. CENT. L. REV. 130, 131 (2008).

148. Faretta v. California, 422 U.S. 806, 806 (1975). The background facts in *Faretta* are as follows: Anthony Faretta was charged with grand theft, and a public defender was appointed to his case. *Id.* at 807. After the attorney's appointment, however, Faretta requested permission to defend himself because he had previously represented himself in another criminal prosecution, had a high school education, and believed the public defender's office already had a heavy caseload. *Id.* at 807–08. The judge attempted to sway Faretta's opinion, but Faretta was set on representing himself. *Id.* The judge accepted his waiver of assistance of counsel but later backtracked and reassigned the public defender to Faretta's case. *Id.* at 808–11.

149. *Id.* at 814 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

to counsel.[150] In general, pro se defendants are held to the same procedural and evidentiary standards as represented defendants.[151]

B. Why Do Individuals Choose to Proceed Pro Se?

From the recent surge in pro se litigation stems a logical question: Why would an individual choose to forgo representation?[152] In addition to a lack of economic means, there are other reasons why individuals choose to be pro se.[153] Factors including increased literacy, consumerism, individualism, and anti-lawyer sentiment have all played a role.[154] Additionally, individuals now have greater access to legal material and feel more comfortable navigating the justice system without the assistance of an attorney.[155] Tactical or strategic reasons may also play a role, such as defendants who have committed heinous crimes and feel they have nothing to lose or those attempting to symbolically disrespect the court system.[156] Then there are the individuals who "are so . . . out of touch with reality that they believe they can do it all themselves."[157]

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150. *Id.* at 834–35. "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting *Adams*, 317 U.S. at 279). Although self-representation is a right, a pro se defendant may lose that right by exhibiting "serious and obstructionist" disruptive behavior during trial, which effectively constitutes a constructive waiver of the right. *Id.* at 834 n.46. Even over the pro se defendant's objection, the court always retains the right to appoint "standby counsel" at any time to assist at the pro se defendant's request or, if the court finds it necessary, to terminate self-representation. *Id.*

151. Jona Goldschmidt, *How are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 15 (1998). *But see* Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (stating that pro se defendants' pleadings are held to "less stringent" standards than those drafted by attorneys).

152. *See* Goldschmidt, *supra* note 147, at 130.

153. Goldschmidt, *supra* note 138.

154. *Id.*

155. *See* Goldschmidt, *supra* note 147, at 130–31. Within the last 10 years, the National Center for State Courts has reported an increase in information requests regarding self-representation. *Id.* at 131.

156. John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J., 483, 485–87 (1996). For example, famed criminal Charles Manson and several of his co-defendants requested to defend themselves in their murder trial. *Id.* at 486 n.4. The Seventh Circuit found Bobby Seale, member of the Black Panther Party, in contempt of court, largely related to his repeated attempts "to assert his right to self-representation," after the trial court refused to allow him to proceed pro se. *Id.* at 485–86 n.3 (quoting United States v. Seale, 461 F.2d 345, 351 (7th Cir. 1972)).

157. *Id.* at 487. During his opening statement, pro se defendant Colin Ferguson, who was found guilty on six counts of murder and sentenced to life in prison after shooting commuters on the Long Island Railroad, stated that the reason there was a 93-count indictment against him was because the crime occurred in 1993. *Id.* at 487 n.7.

C. Pro Se Defendants and the Michael Morton Act

Given the prevalence of pro se litigation, it is reasonable to understand why the Texas Legislature addressed the issue in the Michael Morton Act.[158] While the Act uses the term *defendant* throughout, subsection (d) instead uses the term *pro se defendant*.[159] Importantly, subsection (d) is the *only* subsection to use that term.[160] The oddity lies not in the fact that pro se defendants are mentioned in only one subsection, but in the unique text of that subsection, particularly when compared to the rest of the Act. Subsection (d) not only leaves discovery in pro se cases at the court's discretion but also leaves the decision of whether to allow electronic duplication of discovery documents at the State's discretion.[161]

VII. DECONSTRUCTING THE ACT'S PRO SE PROVISION: A CAREFUL LOOK AT ARTICLE 39.14(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE

To understand the meaning of subsection (d), it is important to "begin with the language of the statute."[162] First, the Act, in its application, creates a fundamental distinction between defendants and pro se defendants—it does not require prosecutors to disclose discovery material to pro se defendants.[163] Whereas prosecutors are *required* to disclose discovery materials to criminal defendants, the legislature did not create the same mandate for cases involving criminal pro se defendants.[164] Instead, legislators left that decision to the court.[165] While a represented defendant is entitled to discovery upon request, pro se defendants are neither entitled to nor guaranteed pretrial discovery, even if they request it.[166] Thus, Texas has withheld the very right the Act was meant to convey—the right to discovery—from pro se defendants.[167]

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158. *See supra* Part V.B; *see also infra* note 192 and accompanying text (quoting Senator Duncan's statement that by choosing to include a pro se provision, the Texas Legislature was "trying to be comprehensive in [its] approach").

159. *Compare* TEX. CRIM. PRO. ANN art. 39.14(a), (c), (e)–(f), (h)–(*l*) (West 2005 & Supp. 2014) (exclusively using the term *defendant*), *with id.* art. 39.14(d) (exclusively using the term *pro se defendant*).

160. *See id.* art. 39.14(d).

161. *Id.*

162. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

163. CRIM. PRO. art. 39.14(d) (allowing a pro se defendant to inspect materials subject to discovery "*if* the court orders the state to produce and permit the inspection" (emphasis added)).

164. *Compare id.* art. 39.14(a) (mandating prosecutors to disclose discovery information: "[T]he state *shall* produce" (emphasis added)), *with id.* art. 39.14(d) (failing to require mandatory disclosure: "In the case of a pro se defendant, *if* the court orders the state to produce" (emphasis added)).

165. *See id.* art. 39.14(d).

166. Troy McKinney, *Criminal Discovery in Texas—2014: The Beginning of a Brave New World of Fairness*, VOICE FOR DEF. ONLINE (Nov. 20, 2013), http://www.voiceforthedefenseonline.com/story/criminal-discovery-texas%E2%80%942014-beginning-brave-new-world-fairness; *see supra* note 164 and accompanying text.

167. *See supra* Part V.A–B.

Second, *if* the court grants a pro se defendant the opportunity "to inspect and review a document, item, or information," the State is "not required to allow electronic duplication as described by Subsection (a)."[168] Although the text of the Act is unclear as to what constitutes "electronic duplication," what is clear is that while a pro se defendant may have the opportunity to inspect and review the State's information, the individual does not have a right that subsection (a) grants represented defendants.[169] Thus, the pro se defendant is again left at the mercy of others, as electronic duplication is allowed only if prosecutors choose to grant it.[170] At best, pro se defendants *may* have access to copying and photographing discovery materials; at worst, they may not have access beyond what a visual inspection and review allows.[171]

VIII. BEHIND THE SCENES: A PEEK INSIDE THE DRAFTERS' MINDS

Certainly, pro se defendants deserve the bare essentials of due process.[172] Despite its provocative title, this Comment is not intended to suggest that the Texas Legislature proposed otherwise, implemented an Act that disposes of due process, or is purposefully injuring pro se defendants. In fact, every indication points toward a legislative desire to rehabilitate Texas's previously broken discovery system.[173] Yet, it is unrealistic to expect every piece of legislation to function perfectly.[174]

In his *Faretta* dissent, U.S. Supreme Court Justice Blackmun wrote that he believed "the [majority] opinion le[ft] open a host of other procedural

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168. CRIM. PRO. art. 39.14(d) (emphasis added).

169. *See id.*; *id.* art. 39.14(a) (allowing defendants the right to inspect and review the prosecution's information: "[T]he state shall produce and permit the inspection and the electronic duplication, copying, and photographing, ..."). Because the Act does not define electronic duplication, it is unclear whether copying and photographing are included within the scope of the term, or are entirely separate processes. *See id.* art 39.14(a). Assuming, for argument's sake, that electronic duplication *includes* photographing and copying, the state has effectively stripped (unless the prosecutor agrees otherwise) pro se defendants of more than temporary access to discovery, as the means through which subsection (a) grants defendants access are through "inspection *and* . . . electronic duplication, copying, and photographing." *Id.* (emphasis added); *see id.* art. 39.14(d). If that is the case, then pro se defendants may only have access to inspection and review of discoverable information. *See id.* art. 39.14(d). Naturally, this limits pro se defendants' ability to study and understand what the State may use against them. Conversely, *even if* electronic duplication is separate and apart from photographing and copying, the Act still fails to extend the right of electronic duplication, which it explicitly confers upon represented defendants. *Id.* art. 39.14(a), (d).

170. *See id.* art. 39.14(a), (d).

171. *See id.*

172. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); Bradlow, *supra* note 81, at 676.

173. *See supra* notes 42, 52–56 and accompanying text.

174. "We would be naïve to believe there will not be some problems with the new rules. After all, most anything new has a few kinks to work out." Sims, *supra* note 108. *See generally* Interview with Robert Duncan, Chancellor, Tex. Tech Univ. Sys., in Lubbock, Tex. (Jan. 29, 2015) ("[W]e can't write a perfect statute . . . I have never written one, and I don't know of anybody else that has . . . ."); *supra* Part V.A (describing the inefficiencies and inconsistencies of the prior version of article 39.14).

questions."[175] Similarly, article 39.14(d) of the Texas Code of Criminal Procedure presents procedural questions that must be answered in the best interest of justice; particularly, what the provision means and how to navigate it.[176]

A. What Were They Thinking?

The "Big 'If'" is at the heart of the first prong of the *Mathews* test: the private interest at stake.[177] If Texas does not guarantee pro se defendants the right to discovery, that unbearably weighs against their individual interests in defending themselves and being heard. At first glance, it appears article 39.14(d) is partial to defendants with represented counsel.[178] But why is that? Why did the Michael Morton Act single out pro se defendants?[179] More importantly, how does article 39.14(d) fare under the U.S. Supreme Court's *Mathews* test?

The goal of the Michael Morton Act was clear from the beginning: Reform the broken criminal discovery system that failed Michael Morton.[180] If a major problem was prosecutors' failure to "produce and permit the inspection of their files," why enable that possibility for even the minority of defendants?[181] The answer lies in the third prong of the *Mathews* test—government interest.[182] Specifically, in subsection (f), article 39.14 of the Texas Code of Criminal Procedure.[183]

As discussed in Part III, a key government interest in crafting the Act was to protect the public.[184] Aside from locking away perpetrators and keeping the innocent out of prison, legislators sought to protect witnesses and victims from harm.[185] State Representative Senfronia Thompson, House sponsor of the Act, made that intent clear: "The major reform includes how things are disclosed, what exactly has to be disclosed, [and] places new protections for victims and witnesses by placing statutory restrictions on who

175. Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting). Some procedural questions Justice Blackmun believed *Faretta* left unanswered include the following: whether every defendant must be advised of the right to self-representation, and when such notice must be given, if at all; whether a self-represented defendant has a constitutional right to standby counsel; and whether a court must treat self-represented defendants differently than it would treat an attorney. *Id.*

176. *See supra* Part VII.

177. *See supra* notes 79–81, 169 and accompanying text.

178. McKinney, *supra* note 166; *see supra* Part VII.

179. *See supra* Part VII.

180. *See supra* notes 42, 45 and accompanying text.

181. *See* Tex. Comm. on Prof'l Ethics, *supra* note 104.

182. *See supra* Part IV.

183. Telephone Interview with Michael Morris, Criminal Dist. Attorney, Appellate Section, Hidalgo Cty., Tex. (Jan. 21, 2015).

184. *See supra* note 58 and accompanying text.

185. *See* H.J. of Tex., 83d Leg., R.S. 3103 (2013) (statement of Representative Senfronia Thompson).

the information gain[ed] under this statute can be shared with . . . ."[186] Subsection (f) lies upon this foundation—this government interest.[187]

> 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.[188]

Subsection (f) grants defense counsel the ability to show discovery materials to third parties on two conditions: (1) all personal and identifying information has been redacted and (2) third parties do not receive a copy of any discovery material unless it is a copy of the party's own statement.[189] Reading subsection (f) within the context of Representative Thompson's statements, it becomes clear that the mandatory redaction and no-copy requirements were enacted to protect victims and witnesses from potentially harmful defendants. Furthermore, redacting information that may enable a defendant to track down a victim or witness prevents defendants from harassing involved third parties and tampering with witnesses.[190]

B. (d) + (f) = ?

Just as subsection (f) is rooted in the protection of third parties, subsection (d) is too.[191] When asked why the Texas Legislature included a pro se provision in the Act, Senator Robert Duncan, co-author of the Act, answered that it was a matter of "trying to be comprehensive in the approach."[192] While "there *is* a different standard for pro se" defendants under the Act, the disparity is not unreasonable, as the provision is rooted in

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186. *Id.*; *see Senate Criminal Justice Committee Passes Michael Morton Act*, SENATOR RODNEY ELLIS (Mar. 26, 2013), http://www.rodneyellis.com/2013/03/26/senate-criminal-justice-committee-passes-michael-morton-act/.

187. *See supra* notes 116–17 and accompanying text.

188. TEX. CODE CRIM. PRO. ANN. art. 39.14(f) (West Supp. 2014).

189. *See id.*

190. Telephone Interview with Michael Morris, *supra* note 183.

191. *Id.*; Telephone Interview with Robert Kepple, Exec. Dir., Tex. Dist. and Cty. Attorneys Ass'n (Jan. 22, 2015); *see also supra* note 186 and accompanying text (quoting Rep. Thompson's statement to the Texas Legislature on the Act's built-in protections for third parties).

192. Interview with Robert Duncan, *supra* note 174.

a strong government interest in protecting third parties.[193] "If you have lawyers on both sides, . . . [the lawyers] have ethical duties with regard to protecting witnesses, . . . protecting the evidence, and . . . following the rules."[194] Conversely, pro se defendants are not charged with such duties. While it is ideal to assume that a pro se defendant will treat discovery materials and evidence with utmost care and ethical considerations, such a perspective is wholly utopian.

Robert Kepple, Executive Director of the Texas District and County Attorneys Association, and participant in the Act's negotiation, stated that an "overarching concern" throughout the negotiation process "was that defendants would get copies of the material and retaliate against witnesses."[195] The reason is that retaliation has been a "huge problem in other states."[196] Moreover, Kepple stated that the Act's pro se provision is not merely rooted in third-party protection, but is "*strictly* a [matter of] witness and victim protection" combined with "a balancing of due process rights."[197] Senator Duncan agreed. When asked if subsection (f) was the key to understanding subsection (d), he acknowledged that "there is sensitivity . . . [and] ethical responsibilities to protect the evidence . . . ."[198] "There are a lot of bad things that can happen in a criminal case with" respect to witnesses.[199] Dangers *especially* abound when pro se defendants are involved because pro se defendants "don't have . . . objective ethical obligations like an attorney would have, and should have, and should observe."[200]

C. Of Adversaries and Insurmountable Limitations

If subsection (f) explains the policy behind the Act's pro se provision, why did the Texas Legislature not make that explicitly clear? Why not incorporate textual references linking subsections (d) and (f)? While there may be several explanations, two in particular attract attention.

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193. *Id.* (emphasis added).

194. *Id.*

195. Telephone Interview with Robert Kepple, *supra* note 191. The Texas District and County Attorneys Association, the organization Kepple directs, is "a non-profit organization dedicated to serving Texas prosecutors and their staffs, as well as attorneys in government representation." *About TDCAA*, TEX. DISTRICT & COUNTY ATT'YS ASS'N, http://www.tdcaa.com/about (last visited Nov. 7, 2015). Kepple, who formerly served as a chief felony prosecutor in Harris County, is also an adjunct professor in the Prosecution Internship Program at the University of Texas School of Law in Austin, Texas. *Robert N. Kepple*, TEX. L., http://www.utexas.edu/law/faculty/rnk76/ (last visited Nov. 7, 2015).

196. Telephone Interview with Robert Kepple, *supra* note 191.

197. *Id.* (emphasis added).

198. Interview with Robert Duncan, *supra* note 174.

199. *Id.*

200. *Id.*

First, the negotiation process was extremely intense.[201] Bias was not unique to negotiating the Michael Morton Act, as any time bipartisanship or conflicting adversarial views come into play, parties "negotiate . . . from their own bias or perspective."[202] Thus, the fact that "this was not a partisan issue" substantially impacted the final text of the Act.[203] In fact, Senator Duncan noted that navigating the prosecutors' and defense bar's differing "advocacy interests" was "the biggest challenge in negotiating" the Act.[204] Because many parties were involved in the negotiation process, it was the legislators' job "to get everybody past the advocacy . . . to get everybody to set those biases aside . . . and [to determine] what is right . . . what the justice system ought to look like."[205] Senator Joan Huffman echoed Senator Duncan's sentiments: "I worked with the prosecutors and with the other stakeholders to kind of come up with some language that . . . hopefully we could all agree on, and after a little head butting, but some good substantive discussion, we were able to do that."[206]

Second, the Act did not go through Legislative Council.[207] To understand the significance of this fact, one must first understand what Legislative Council is, and the role it plays in the bill drafting process. "The Texas Legislative Council is a nonpartisan legislative agency that provides bill drafting, computing, research, publishing, and document distribution services to the Texas Legislature and the other legislative agencies."[208] Legislative Council is responsible for ensuring that bills are properly written in a way that accurately reflects legislative intent; this is done without giving consideration to party interests.[209] Legislative Council reviews most legislation prior to its enactment; it is a normative procedure in bill drafting.[210]

Why would legislators fail to submit a massive piece of legislation that completely overhauls the Texas discovery system for review? It was not for lack of encouragement, as sponsors were asked to submit the bill for

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201. *See id.*

202. *Id.*; *see also* notes 54–55, 59 and accompanying text (describing the bipartisan challenges inherent in bringing a bill to passage).

203. Interview with Robert Duncan, *supra* note 174.

204. *Id.*

205. *Id.*

206. S.J. of Tex., 83d Leg., R.S. 823 (2013) (statement of Senator Joan Huffman).

207. *See* Interview with Robert Duncan, *supra* note 174; Telephone Interview with Robert Kepple, *supra* note 191.

208. TEX. LEGIS. COUNCIL, http://www.tlc.state.tx.us/ (last visited Nov. 7, 2015); *see also* Interview with Robert Duncan, *supra* note 174 (describing Legislative Council as "a group of lawyers that [are] employed by the legislature and . . . have special training and experience in drafting"); Telephone Interview with Robert Kepple, *supra* note 191 (describing Legislative Council as a "body of lawyers hired by the Legislature to draft a bill and its amendments").

209. *See generally* Telephone Interview with Robert Kepple, *supra* note 191 (explaining that the purpose of Legislative Council is to "ensure that [a bill is] written in proper form to ensure consistency").

210. Interview with Robert Duncan, *supra* note 174.

review.[211] Rather, sponsors were "skittish" about doing so.[212] Senator Duncan explained that the hesitance stemmed from the tense negotiation process. Because "Council draft[s often] go through several different reviews and edits," the review process sometimes destroys what negotiating parties previously agreed to.[213] Parties did not want to risk that fate for S.B. 1611.[214] Although Legislative Council did not review the Act, the negotiating parties had faith in the text they agreed to.[215] After all, this negotiation involved "very well thought of and respected attorneys on both sides" of the docket, experts in their respective fields, who agreed to specific terms of art that they "live . . . everyday."[216] That was "the structure of the bill."[217]

Senator Duncan admits that the Act, including the pro se provision, is "not perfect." He noted that it is common for parties to sit around a table and discuss how proposed bill text would be interpreted in many different scenarios—"that's part of the negotiation"—and the legislators try to write around those scenarios.[218] In the end, however, the process has insurmountable limitations, as "there's only so much [legislators] can do."[219] Those obstacles leave all statutes—including article 39.14(d) of the Texas Code of Criminal Procedure—with "a little ambiguity."[220] While the parties may have meticulously negotiated the text of the Act, compromise may have come at the expense of clarity.[221]

IX. REAL TALK: HOW PRACTITIONERS SHOULD INTERPRET ARTICLE 39.14(D)

A. A Judge's Guide to Article 39.14(d)

The implementation of the Michael Morton Act lessened the burden for Texas judges. By making criminal discovery mandatory rather than discretionary, the Texas Legislature no longer required judges to determine whether there was good cause to grant a discovery request.[222] "In the case of

211. Telephone Interview with Robert Kepple, *supra* note 191.

212. *Id.*

213. Interview with Robert Duncan, *supra* note 174 ("Sometimes [parties] negotiate something . . . send that negotiated piece back to Legislative Council, and it won't survive the review process.").

214. *See id.*

215. *See id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. S.J. of Tex., 83d Leg., R.S. 823 (2013); *see* Interview with Robert Duncan, *supra* note 174 ("At the end of the day, [the prosecutors and defense bar] came together pretty well on [the Act].").

222. *See supra* notes 87–92, 104–08 and accompanying text (explaining how the Michael Morton Act made criminal discovery a requirement upon a defendant's request and a showing of good cause).

a pro se defendant," however, the legislature allowed a burden to remain.[223] Article 39.14(d) leaves judges in the predicament of determining whether to allow discovery in pro se cases.[224] Unlike the prior discovery rules, however, it does not set a standard that pro se defendants must meet, such as good cause.[225] Although amending the provision may be ideal, there is an immediate and practical necessity to understand how to interpret and apply the Act's pro se provision.[226] What is a judge to do?

1. Step One

In determining whether or not to grant discovery to a pro se defendant, judges should first analyze whether their decision comports with due process.[227] While discovery is not a constitutional requirement, making discovery decisions under the guidance of the *Mathews* test permits the criminal justice system to operate equitably.[228] This, of course, requires balancing individual interests, risks of erroneous deprivation, possible safeguards, and government interests.[229]

Texas's interest in protecting third parties is both legitimate and recognized.[230] Judges should similarly consider the pro se defendant's private interests.[231] Judges should also remember that a decision to deny any and all discovery may ultimately increase a pro se defendant's risk of erroneous deprivation by leaving a pro se defendant without the ability to provide a meaningful defense.[232] Because the *Mathews* test is adaptable to the unique facts of every case, its application will not always yield the same results.[233] Thus, rather than immediately dismissing a pro se defendant's discovery request, a judge should always weigh competing interests before making a decision concerning discovery.[234]

2. Step Two

The second thing judges can do to ensure justice for pro se defendants is to enable procedural protections, as indicated by the last part of the second

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223. TEX. CODE CRIM. PRO. ANN. art. 39.14(d) (West Supp. 2014). *But see* Telephone Interview with Robert Kepple, *supra* note 191 (noting that while early internal drafts of the bill did not leave discovery in pro se cases at the court's discretion, "that was changed at some point in time").

224. *See* CRIM. PRO. art. 39.14(d).

225. *Id.*

226. *See supra* Part VIII.B (discussing the difficult nature of the negotiation process).

227. *See supra* Part IV.

228. *See supra* notes 75–79 and accompanying text.

229. *See supra* notes 76–84 and accompanying text.

230. *See supra* Part VIII.

231. *See supra* notes 80–81 and accompanying text.

232. *See supra* Part IV.

233. *See supra* notes 77–79 and accompanying text.

234. *See supra* notes 230–33 and accompanying text.

prong of the *Mathews* test.[235] While pro se defendants may generally be held to the same procedural and evidentiary standards as represented defendants, enabling procedural protections helps pro se defendants navigate the complexities of the legal system.[236] It also furthers an overlooked population's right to be heard, thus fulfilling a judge's ethical duties.[237] By implementing procedural protections, judges benefit all parties directly and indirectly involved in a pro se case.[238] Moreover, procedural protections grant judges the opportunity to operate the uneven lanes of pro se discovery as a two-way street.[239]

First, procedural safeguards allow a pro se defendant to directly face the prosecution's evidence, which aids both parties in the search for truth.[240] Second, procedural safeguards allow pro se defendants to access the court system when they may otherwise be unable to do so.[241] Finally, procedural safeguards enable court supervision of the discovery process, which satisfies the Texas Legislature's desire to protect third parties, absent ethical obligations.[242] While a judge "does not have any duty to represent the pro se defendant," judicial supervision serves to "admonish" the pro se defendant of "the rules that [they] are to abide by [when] using [discovery] information."[243] Article 39.14(f) of the Texas Code of Criminal Procedure serves as an excellent template for judges to follow when establishing procedural safeguards for pro se defendants, as it satisfies both the pro se defendant and the government's interests.[244]

3. Step Three

Finally, judges should remember their central role in the criminal justice system.[245] Judges are to be "independent, fair and competent" and are to "interpret and apply the laws that govern us."[246] The duty to remain independent, fair, and competent includes acting in a manner that "promotes public confidence in the integrity and impartiality of the judiciary."[247] That

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235. *See supra* notes 82–83 and accompanying text.
236. *See supra* Part IV.A–B.
237. *See supra* note 13 and accompanying text.
238. *See infra* notes 240–42 and accompanying text.
239. *See supra* notes 72–75 and accompanying text.
240. *See supra* notes 72–75 and accompanying text.
241. *See supra* note 137 and accompanying text.
242. *See* Interview with Robert Duncan, *supra* note 174 ("[T]here needs to be some judicial supervision in the event of a pro se defendant, for a number of reasons, but one of them is . . . the protection of [third parties].").
243. *Id.*
244. *See supra* Part VII.
245. TEX. CODE JUD. CONDUCT, Preamble, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2015).
246. *Id.*
247. *Id.* at Canon 2(A).

is, a judge's actions must avoid even the appearance of impropriety.[248] Therefore, it is wise for judges to explain their decision regarding pro se discovery to the involved parties, particularly if a judge chooses not to grant discovery, so that the decision does not evoke appearances of impropriety or partiality.[249] Above all, the duty to interpret and apply governing laws speaks to the discretion granted to judges by the inherent nature of their position.[250] That is, a judge has the power to apply "the plain meaning of the words in the statute *to the facts*."[251]

There is not a one-size-fits-all application of the provision to pro se cases.[252] Rather, judges have a responsibility to "accord . . . every person who has a legal interest in a proceeding . . . the right to be heard according to law."[253] The ultimate interpretation—whether to grant or deny discovery—lies with the judge.[254]

B. A Prosecutor's Guide to Article 39.14(d)

Prosecutors typically juggle two advocacy roles at once: advocate for the State and advocate for justice.[255] Criminal discovery falls somewhere in between these roles, as it not only promotes justice but also enables the justice system to work efficiently.[256] Although the Michael Morton Act may help streamline the discovery process, the dynamic changes when a pro se defendant enters the picture.[257] What is a prosecutor to do? How much discretion should prosecutors exercise in their dealings with these individuals? Because the judge is the ultimate gatekeeper in deciding whether to allow discovery in pro se cases, the following recommendations assume discovery has been granted.[258]

1. Step One

The prosecutor's first duty is to comply with the minimum requirements of article 39.14(d).[259] Prosecutors should allow the pro se defendant to

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248. *Id.*
249. *See id.* at Preamble, Canons 1–2.
250. *See id.* at Preamble.
251. Interview with Robert Duncan, *supra* note 174 (emphasis added); *see* TEX. CODE JUD. CONDUCT, Preamble.
252. *See* TEX. CODE JUD. CONDUCT, Canon 3(B)(8).
253. *Id.*
254. TEX. CODE CRIM. PRO. ANN. art. 39.14(d) (West Supp. 2014).
255. *See* Fuller, *supra* note 12, at 423.
256. *See supra* notes 42–53 and accompanying text.
257. *See* Fuller, *supra* note 12, at 423; Telephone Interview with Michael Morris, *supra* note 183 (noting that "in some ways [the Michael Morton Act] streamlines" discovery in that once "the state has [compiled] the [discovery] packet," the State sends it to the defense, who can "review it at their leisure").
258. *See* CRIM. PRO. art. 39.14(d).
259. *Id.*

review whatever "document, item, or information" the court has granted the pro se defendant access to.[260] Although the provision does not speak to the rapidity with which prosecutors should grant disclosure, subsection (a)'s "as soon as practicable" instruction is worth emulating.[261] Prior to inspection, however, prosecutors should follow the redaction guidelines set forth in article 39.14(f).[262] This not only satisfies the pro se defendant's interests and allows the prosecutor to comply with the court's wishes but also protects third parties, as the Texas Legislature intended.[263]

Despite the absence of an explicit textual link between subsections (d) and (f), some practitioners have already made the connection between the two.[264] When approached with the idea of uniformly extending the same discovery rights to represented and pro se defendants alike, one criminal district attorney stated that there would be "difficulty in granting [pro se defendants] everything" because "they can't be their own agent."[265] Although extending subsection (a)'s rights to pro se defendants might be ideal, the strong government interest in protecting third parties conflicts with this openness.[266] Some prosecutors have already implemented the redaction practice, generally using subsection (f) to influence their interaction with pro se defendants.[267] Because the statute only requires an "inspect[ion] and review," the prosecutor is faced with determining whether to allow anything beyond that—electronic duplication.[268]

2. Step Two

At this point, prosecutors should examine their options—allow or prohibit electronic duplication—under the *Mathews* test.[269] This process is remarkably similar to the recommendations discussed earlier for judges.[270] The difference is that rather than determining whether to grant access to discovery material, prosecutors must determine the duration for which the

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260. *Id.*

261. *See id.* art. 39.14(a).

262. *See id.* art. 39.14(f).

263. *See id.* art. 39.14(d).

264. Michael Morris, an Hidalgo County criminal district appellate attorney, stated that based on his understanding of subsection (d), "the idea was to prevent . . . tampering." Telephone Interview with Michael Morris, *supra* note 183. Morris also stated that the Act generally works such that "the actual defense team . . . can talk to the witness, but anyone outside the professional people . . . [is] not given that information." *Id.*

265. *Id.* Morris referenced the following statement from subsection (f): "For purposes of this section, the defendant may not be the agent for the attorney representing the defendant." CRIM. PRO. art. 39.14(f).

266. *See* Telephone Interview with Michael Morris, *supra* note 183.

267. *See generally id.* (stating that because even represented defendants are not allowed to see and have copies of everything, there would be "difficulty" in granting pro se defendants the rights guaranteed by article 39.14(a)).

268. CRIM. PRO. art. 39.14(d).

269. *See id.*; *supra* notes 79–84 and accompanying text.

270. *See supra* Part IX.A.1–2.

pro se defendant will have access to the material.[271] In other words, by allowing electronic duplication, the prosecutor will enable the pro se defendant continued access beyond the scope of required inspection.[272] Conversely, prohibiting electronic duplication will inherently restrict the pro se defendant's access to discovery materials to the duration of the inspection session. Thus, it is critical for prosecutors to balance individual interests, risks of erroneous deprivation, possible safeguards, and government interests prior to deciding whether to allow electronic duplication in pro se cases.[273]

In considering private interests, prosecutors should consider what is at stake and whether the inspection will sufficiently allow the pro se defendant to present an adequate defense.[274] Next, prosecutors should consider what impact their decision to allow or prohibit electronic duplication will have on the defendant and ask: What degree of deprivation could result for the pro se defendant as a result of this decision?[275] Prosecutors should also consider the effectiveness of procedural safeguards.[276] While redaction should be common practice in pro se cases, the prosecutor is always free to consider whether additional protections might be appropriate to safeguard other interests.[277] Finally, prosecutors should consider the weighty government interest in protecting third parties and the impact their decision will have on that interest.[278] They should consider whether granting electronic duplication potentially places third parties at risk of harm, retaliation, or tampering, particularly because prosecutors are interacting with an ethically unbound pro se defendant rather than an ethically bound attorney.[279] In the end, a prosecutor must base his or her decision upon the totality of the circumstances of the case at bar.[280]

3. Step Three

Finally, prosecutors should look to their ethical and legal duties for guidance, as these are meant to inform their decisions.[281] Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct provides specific guidelines all prosecutors must follow.[282] Although prosecutors are not "forbid[den]" from engaging in "lawful questioning" of pro se defendants,

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271. *See* CRIM. PRO. art. 39.14(d).
272. *See id.* art. 39.14(a), (d).
273. *See supra* notes 76–84.
274. *See supra* notes 230–34 and accompanying text.
275. *See supra* notes 82–83 and accompanying text.
276. *See supra* notes 82–83 and accompanying text.
277. *See supra* notes 82–83 and accompanying text.
278. *See supra* note 84 and accompanying text.
279. Interview with Robert Duncan, *supra* note 174; *see* Fuller, *supra* note 12, at 423.
280. *See supra* notes 269–79 and accompanying text.
281. *See infra* notes 282–91 and accompanying text.
282. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar R. art. X, § 9).

they should first make "reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given a reasonable opportunity to obtain counsel."[283] Compliance with this ethical duty not only serves to advise the accused of their rights and raises the odds of their making an informed decision regarding representation but also may possibly eliminate pro se discovery altogether, if the accused chooses to forego self-representation.[284] Moreover, prosecutors are "obliged to see that the defendant is accorded procedural justice."[285] This does not imply that prosecutors must determine what materials to grant pro se defendants access to; the judge alone makes that decision.[286] Rather, prosecutors must always comply with the court's mandate, whatever it may be, to prevent a miscarriage of justice.[287]

The prosecutor's primary legal duty—"not to convict, but to see that justice is done"—is invariable.[288] Therefore, any discovery-related action a prosecutor takes with regard to a pro se defendant should comply with that duty.[289] The duty carries an integral discretion that enables a prosecutor to examine facts on a case-by-case basis, weigh the competing interests, and act in the best interest of justice.[290] In the end, justice takes many forms, as there is no absolute discovery procedure for prosecutors to follow in all pro se cases.[291]

X. A PRO SE DEFENDANT'S GUIDE TO ARTICLE 39.14(D)

While it is best to retain counsel, whether paid, appointed, or pro bono, some individuals "knowingly and intelligently" choose to represent themselves.[292] By waiving their right to counsel, pro se defendants place themselves in the minority of defendants and at the mercy of the criminal

283. *Id.* at 3.09(b).

284. *See generally* Faretta v. California, 422 U.S. 806, 835 (1975) (requiring pro se defendants to "*knowingly and intelligently*" waive their right to counsel (quoting Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)) (emphasis added)).

285. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09(b) cmt. 1.

286. *See* TEX. CODE CRIM. PRO. ANN. art. 39.14(d) (West Supp. 2014).

287. *Id.* The following is an example of a prosecutor failing to comply with the court's mandate: In the Court of Inquiry into Ken Anderson's misconduct, Judge Sterns stated that evidence indicated the presiding judge in Michael Morton's trial "specifically asked Mr. Anderson in open court whether the state had any evidence that was favorable to" Morton but that Anderson replied, "No, sir." Chuck Lindell, *Judge Finds That Anderson Hid Evidence in Morton Murder Trial*, STATESMAN (Apr. 19, 2013, 7:12 PM) (internal quotation marks omitted) (quoting Judge Sterns), http://www.statesman.com/news/news/local/ken-anderson-court-of-inquiry-resumes/nXRLm/.

288. CRIM. PRO. art. 2.01 ("It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.").

289. *See id.*

290. *See id.*

291. *See, e.g.*, *id.*

292. Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)).

justice system.[293] Because discovery is completely at the discretion of a third party (the judge), there are two important steps criminal pro se defendants should take to make the most of their situation.[294]

A. Step One

Pro se defendants should be aware of their rights under federal and state law. First, discovery is not a constitutional right.[295] Second, under federal law, the only information a pro se defendant is entitled to view before trial is materially exculpatory evidence in the State's possession pursuant to the U.S. Supreme Court's *Brady* decision.[296] Because states are required to operate the justice system fairly, the Texas Legislature has chosen to use *Brady* as a floor.[297] Thus, pro se defendants should always request discovery.[298] Moreover, pro se defendants should respectfully inform the court that they understand their *Brady* right to materially exculpatory information.[299] Although the court ultimately decides the matter, the judge has a duty to examine the case's facts in determining discoverable information.[300] If pro se defendants do not request discovery, however, they may potentially lose out on discoverable material that exceeds the scope of mandatory *Brady* disclosure.[301]

B. Step Two

Second, pro se defendants should understand the policy behind the Michael Morton Act and subsection (d).[302] The Act was intended to fix Texas's inconsistent discovery system and replace it with a system that would prevent future "miscarriage[s] of justice," like that suffered by Michael Morton.[303] The Act's failure to extend the same open file discovery system to pro se defendants is rooted in the protection of third parties.[304] Specifically, the provision is meant to prevent pro se defendants from engaging in retaliation, harassment, and witness tampering.[305]

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293. *See supra* note 170 and accompanying text.
294. *See supra* Part IX.A.
295. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).
296. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1964).
297. *See supra* notes 55, 72–74 and accompanying text.
298. *See* TEX. CODE CRIM. PRO. ANN. art. 39.14(d) (West Supp. 2014).
299. *See supra* notes 55, 128 and accompanying text.
300. *See supra* Part IX.A.
301. *See generally supra* notes 295–300 and accompanying text (explaining that *Brady* requires the disclosure of exculpatory material, and article 39.14(d) gives judges the power to determine whether to grant discovery in pro se cases).
302. *See supra* notes 54–58 and accompanying text.
303. Caird, *supra* note 87; *see supra* Parts III, V.
304. *See supra* Part VIII.
305. *See supra* Part VIII.B.

Because the standard is directly tied to the government's interest in protecting third parties, pro se defendants should strive to show the court that they are ethical and trustworthy.[306] That does not mean the judge will automatically grant discovery upon evidence that pro se defendants are ethical or trustworthy, but judges may take that into consideration when making a decision.[307] Additionally, pro se defendants should make their interests clear and articulate how the court's discovery decision will help or hurt the matter.[308] Because judges base their discovery decisions on the totality of the circumstances, pro se defendants would be wise to appeal to the judge's discretion.[309] The same principles apply to the pro se defendant's interaction with the prosecutor, as the prosecutor has discretion to determine, also upon the totality of the circumstances, whether to allow electronic duplication or merely a visual inspection of materials.[310]

XI. CONCLUSION: DONNIE DEFENDANT REVISITED

In Part I, the reader was introduced to Donnie Defendant. Ideally, Donnie would have fared better under the Michael Morton Act, but the truth is that he may or may not have.[311] After all, it is arguable that the prosecutor in Donnie's case had a *Brady* duty to disclose the existence of the bloody clothes. Under the Michael Morton Act, Donnie may have received access to the bloody clothes that could have exonerated him—or he may not have. He may have been pardoned—or he may have been executed as an innocent man. It is impossible to determine with certainty the outcome of the story because the ultimate decision is left to the court's discretion.

Legislators crafted the pro se provision in a way that protects victims and witnesses, complies with due process, and "keep[s] the system honest."[312] When examining the pro se provision under the *Mathews* test, prongs one and two seem to lean against a finding of due process. When considering the strong government interest in protecting third parties, however, the "Big 'If'" may be justifiable. In sum, there is due process when individual and government interests are adequately satisfied—when each side knows the facts and can suitably confront the evidence.[313]

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306. *See supra* Part VIII.

307. *See supra* note 91 and accompanying text.

308. *See generally supra* Part IX.A (recommending that judges consider the *Mathews* test when making pro se discovery decisions).

309. *See supra* Part IX.A.

310. *See supra* Part IX.B.

311. *See supra* Parts IX–X.

312. Interview with Robert Duncan, *supra* note 174.

313. *Id.* ("Each side needs to know what the facts are, and be able to confront those [facts] and confront that evidence.").

Senator Robert Duncan said, "When life and liberty are at stake . . . we really should not be hiding the ball . . . ."[314] Although article 39.14(d) sets a "different standard" for pro se defendants, its intent is rooted in the presumably legitimate government interest of protecting third parties.[315] Those ultimately tasked with making discovery determinations in pro se cases are judges and prosecutors. It is up to them to read the "[w]ords and phrases . . . in context and construe[] [them] according to the rules of grammar and common usage."[316] It is up to them to determine what is in the best interest of justice in a particular pro se case. It is up to them to determine the fate of Donnie Defendant.

314. *Id.*
315. *Id.*
316. TEX. GOV'T CODE ANN. § 311.011(a) (West 2015).