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The Road to Adopting and Implementing Systemic Disclosure Changes in the Dallas County District Attorney's Office

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CARDOZO LAW REVIEW
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THE ROAD TO ADOPTING AND IMPLEMENTING
SYSTEMIC DISCLOSURE CHANGES IN THE DALLAS
COUNTY DISTRICT ATTORNEY’S OFFICE

Susan Hawk[†] & Patricia J. Cummings[†]

TABLE OF CONTENTS

INTRODUCTION 152

I. MICHAEL MORTON: THE TEXAS CATALYST..... 156

 A. *The Case*..... 156

 B. *The Michael Morton Act* 158

 C. *The Undercurrent Complication* 161

II. THE DALLAS COUNTY DISTRICT ATTORNEY’S OFFICE APPROACH..... 162

 A. *Brady Training* 162

 B. *Special Directive—General Policy Regarding Disclosure of*

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<i>Exculpatory, Impeachment, or Mitigating Information</i>	163
C. <i>Performance Evaluations</i>	163
CONCLUSION	163

INTRODUCTION

Discovery and *Brady* are currently two of the most discussed and debated topics in our criminal justice system. Americans have become more and more aware of the number of individuals convicted and incarcerated for crimes they did not commit. In 2007, in a very bold and innovative move, the Dallas County District Attorney's Office created the Conviction Integrity Unit (CIU) to reexamine questionable convictions to determine if a particular defendant was in fact guilty.¹ Since 2007, there have been twenty-eight exonerations. There were eight exonerations prior to the creation of the unit.² As of July 28, 2016, The National Registry of Exonerations (the Registry) reports that there have been 1,855 exonerations nationwide.³ The Registry is a project of the University of Michigan Law School. Founded in 2012, its goal is to provide detailed information about every known exoneration in this country since 1989.⁴ "Exoneration" is generally defined by the Registry as a case "in which a person was wrongfully convicted of a crime and later cleared of all the charges based on new evidence of innocence."⁵

As exonerations are reported, people search for root causes and accountability. These searches have revealed common contributing factors, many related to discovery and *Brady* issues.⁶ Most, if not all, efforts for reform necessarily involve ethical considerations for all participants in the criminal justice system. Prosecutors in particular have become a focus of the accountability debate.⁷ Within this debate,

¹ See generally *Conviction Integrity Unit*, DALL. CTY. DIST. ATT'Y, https://www.dallascounty.org/department/da/conviction_integrity.php (last visited July 28, 2016).

² The Dallas County District Attorney's Office has actually had more than twenty-eight exonerations. However, the CIU has historically kept the statistics from 2001 until the present, as 2001 was when the Texas Legislature enacted Chapter 64 of the Texas Code of Criminal Procedure, a statute that allows post-conviction DNA testing. TEX. CODE CRIM. PROC. ANN. art. 64.01–64.05 (West 2015).

³ NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited July 28, 2016) [hereinafter NAT'L REGISTRY].

⁴ *Id.*

⁵ *Id.* However, the Dallas CIU has a narrower definition of exonerations, including only those cases where there has been a legal finding of actual innocence, i.e., by the Court of Criminal Appeals, a pardon, or a dismissal granted specifically on a finding of actual innocence.

⁶ See John Hollway, *Conviction Review Units: A National Perspective* (Uni. Pa. Law Sch. Faculty Scholarship Paper No. 1614, 2016), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship; NAT'L REGISTRY, *supra* note 3.

⁷ Editorial, *To Stop Bad Prosecutors, Call the Feds*, N.Y. TIMES (June 6, 2016), <http://>

questions are being raised regarding everything from civil liability to professional and criminal liability. For good or for bad, the Michael Morton case in Texas has become the central catalyst in this debate and many resulting reforms.⁸

An in depth review of the Morton case sheds light on causes of his wrongful conviction. In fact, that review, combined with lobbying efforts led by Morton himself, has led to the most sweeping legislative changes in Texas criminal discovery and disclosure in fifty years.⁹ To understand those changes from both an ethical and practical perspective, it is necessary to review not only the resulting legislation—the Michael Morton Act¹⁰—but also other legislative efforts to reform the criminal justice system, as well as case law interpreting the ethical and legal ramifications of the legislation.¹¹

In addition to creating a completely new statewide systemic approach to how discovery and disclosure is conducted, the Michael Morton Act represents a significant shift in the power dynamic in criminal cases. Simply put, prosecutors no longer have control over most of the decisions involving discovery. Prosecutors throughout Texas are left trying to adapt to, and to comply with, these sweeping

www.nytimes.com/2016/06/06/opinion/to-stop-bad-prosecutors-call-the-feds.html?_r=0. See also TRAINING SUBCOMM. ON EMERGING ISSUES, TEX. DIST. AND CTY. ATT'YS ASS'N, SETTING THE RECORD STRAIGHT ON PROSECUTORIAL MISCONDUCT 25 (2012), <http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutor-misconduct> [hereinafter SETTING THE RECORD STRAIGHT].

⁸ See *Morton v. State*, 761 S.W.2d 876 (Tex. Ct. App. 1988) (pet. granted); *Ex parte Morton*, No. AP-76663, 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011) (per curiam). See also *Michael Morton*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/michael-morton> (last visited July 31, 2016).

⁹ Patricia Cummings, *Prison is Prison: A Conversation with Michael Morton*, 75 TEX. B.J. 608, 610 (2012). See also Brandi Grissom, *From the Tea Party, a Softer Line in Criminal Justice*, TEX. TRIB. (July 10, 2013), <https://www.texastribune.org/2013/07/10/tea-party-influence-felt-criminal-justice> (“Legislators approved at least seven bills that advocates argue could help prevent future wrongful convictions. Certainly, Morton’s ubiquitous presence and lobbying efforts helped spur criminal justice reforms.”).

¹⁰ TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015).

¹¹ See generally, *In re State ex rel. Munk*, No. 11-15-00169-CV, 2015 Tex. App. LEXIS 10692 (Tex. App. Oct. 15, 2015) (granting mandamus); *Schultz v. Comm. for Lawyer Discipline*, No. 55649 (Board of Disciplinary Appeals, Dec. 17, 2015), <http://lawprofessors.typepad.com/files/schultz-v.-commission-for-lawyer-discipline.pdf>; H.B. 2090, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to written statements made by an accused as a result of custodial interrogation); H.B. 1847, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to continuing legal education for prosecutors in ethics or professional responsibility); S.B. 1292, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to DNA testing of biological evidence in certain capital cases); S.B. 1044, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to access to criminal history record by certain entities); S.B. 825, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to disciplinary standards and procedures for grievances stemming from prosecutorial misconduct); S.B. 344, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to the procedure for an application for a writ of habeas corpus based on relevant scientific evidence); S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013) (relating to discovery in a criminal case); Tex. Att’y Gen. Op. No. KP-0041 (2015); Tex. Comm. on Prof’l Ethics, Op. 646, 78 TEX. B.J. 78 (2015).

changes.¹² Complicating the process is an undercurrent felt by many prosecutors that these changes were an overreaction to one “proverbial bad apple,” given the fact that the Morton case involved what most people would agree were egregious *Brady* violations coupled with a very easy culprit to blame.¹³ Prosecutor offices are now at a crossroad—they must determine how to respond to a dramatically changed landscape.

In the recent past, some stakeholders in the criminal justice system have attempted to address, study, and analyze mistakes or errors in the criminal justice system through a “systems approach,” rather than through the traditional approach of finding someone to blame.¹⁴ Perhaps, we can draw a parallel between the mistake of convicting an innocent person and a plane crash. In the aviation industry, crashes are reviewed not just to assess blame, but also to understand the cause of the crash and to guard against similar problems in the future. Prosecutors should be asking whether reviewing legal errors and mistakes in an environment with less emphasis on blame can help us understand how the mistake or error occurred and allow us to put systems in place to minimize their reoccurrence in the future.¹⁵

The Dallas County District Attorney’s Office is uniquely situated to adopt and implement a system’s approach to discovery and disclosure of exculpatory, impeachment, and mitigating information. This is due in part to the office leadership’s commitment to cultural change as well as the work of its CIU.¹⁶ While some systemic changes have already been made, such as hiring practices focusing on ethics and *Brady*

¹² See MANAGING TO EXCELLENCE CORP., THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROGRESS CHANGES OF THE MICHAEL MORTON ACT (TCDLA, March 2015), <http://www.tcdla.com/Images/TCDLA/%20Temporary%20art/MMA%20Final%20Report.pdf> [<http://docplayer.net/980264-The-cost-of-compliance.html>].

¹³ See Randall Sims, *The Dawn of New Discovery Rules*, 43 THE PROSECUTOR No. 4 (July-August 2013), <http://www.tdcaa.com/journal/dawn-new-discovery-rules>; SETTING THE RECORD STRAIGHT, *supra* note 7, at 25.

¹⁴ For example, Harris County, Texas, is currently leading the nation in exonerations due to their systems approach of identifying cases where defendants plead guilty to drug possession, and it was later determined from lab reports that they did not illegally possess a drug or what they possessed was not what they were convicted of possessing. In addition to taking steps to exonerate these identified defendants, Harris County has identified the problems that led to the wrongful convictions and is putting procedures in place to prevent the problems from reoccurring. See Jessica Lussenhop, *Why Harris County, Texas, Leads the US in Exonerations*, BBC NEWS (Feb. 12, 2016), <http://www.bbc.com/news/magazine-35543898>. See generally Montgomery Cty. Dist. Att’y’s Office & Quattrone Ctr., *Using Root Cause Analysis to Instill a Culture of Self-Improvement* (April 20-21, 2015) (unpublished white paper), <https://www.law.upenn.edu/live/files/4291-impact-report-root-cause-analysis> [hereinafter *Using Root Cause Analysis*].

¹⁵ *Using Root Cause Analysis*, *supra* note 14.

¹⁶ See generally Terri Moore, *Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes “Conviction Integrity Unit”*, 26 CRIM. JUST., Fall 2011, at 4; Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting it Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033 (2011/12).

disclosure,¹⁷ others such as training, performance evaluations, supervision, and auditing are evolving to reflect the leadership's vision, lessons learned from exonerations, and the ethical and legal requirements of all prosecutors. To illustrate, the office recently held an in-house mandatory training for all prosecutors and investigators entitled "Discovery and *Brady*: Practical and Ethical Issues for Prosecutors."¹⁸ Evaluations from the training are currently being used to assess its effectiveness and determine how future trainings can be improved. The office has also recently adopted a special directive written policy regarding disclosure of exculpatory, impeachment, and mitigating evidence.¹⁹ This policy is designed to reduce unintentional failures to disclose (which represent the vast majority of disclosure errors), while also emphasizing that intentional failure to disclose will not be tolerated. Finally, written prosecutor performance evaluations have been modified to incorporate compliance with recent discovery changes and ethical and legal disclosure obligations.²⁰ A very important message in changing the culture is that ethical disclosure compliance is not only valued, it is a significant tool used to promote quality employee performance and ongoing professional growth.

¹⁷ During the hiring process at the Dallas District Attorney's Office, applicants for prosecutor positions are sent the following email:

Dear Applicant, Thank you for your interest with the District Attorney's Office. You have been chosen to come in for a personal interview scheduled on [date] at [time]. Also, please be prepared to discuss the following cases attached. Again, thank you for your interest in a career with Dallas County. Attachments: Ex parte Johnson, No. AP-76153, 2009 WL 1396807 (Tex. Crim. App. May 20, 2009) (not designated for publication); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

¹⁸ See Appendix A (agenda from mandatory in-house training).

¹⁹ See Appendix B (special directive regarding disclosure of information). Prior to adopting this policy, the Dallas District Attorney's Office had a written policy that read:

Brady Policy—I understand as a prosecutor that I have a Constitutional and ethical obligation under *Brady v. Maryland* and the Texas Rules of Ethics Rule 3.09 to timely notify the defendant of any exculpatory information I am aware of. I understand that my failure to comply with this policy may result in discipline including my termination. Further, I understand that any alleged *Brady* violations will be investigated by the administration. [Signature], [Date].

All prosecutors were required to sign and date the *Brady* Policy and a copy was placed in their personnel file. The special directive will also be disseminated to all prosecutors, who will be required to sign and date it, with a copy to be placed in their personnel file.

²⁰ See Appendix C (prosecutor performance evaluation).

I. MICHAEL MORTON: THE TEXAS CATALYST

A. *The Case*

On August 13, 1986, Christine Morton, a young married mother with a three-year-old son, was bludgeoned to death in her suburban home located in the southern edge of Austin, Williamson County, Texas.²¹ Christine's husband, Michael Morton, immediately became law enforcement's sole suspect in the crime.

Although the scene of the crime was geographically located in the City of Austin, home of the liberal and progressive University of Texas at Austin, it was also in Williamson County, a conservative county known for its no-nonsense "tough on crime" law enforcement community—the very same law enforcement community that had received accolades and national attention for being the first to prosecute Henry Lee Lucas and obtain a death sentence.²²

At the time of Christine's murder, the most powerful law enforcement men in Williamson County were Sheriff Jim Boutwell—famous for his heroism during the deadly University of Texas Tower shootings in 1966—and District Attorney Ken Anderson—a member of the Lucas prosecution team who was about to be named the Texas Prosecutor of the Year.²³ Working side by side from the very beginning of the investigation, these two men quickly concluded Morton was responsible for his wife's horrific murder.²⁴ An arrest and an indictment for murder soon followed. Then, just six months after the crime, a Williamson County jury convicted Morton and sentenced him to life in prison.²⁵

During the February 1987 jury trial, a hand written note Morton wrote to his wife Christine²⁶ was introduced to the jury to prove "motive," while testimony regarding a medical examiner's opinion on the time of Christine's death was used to prove "opportunity."²⁷ Persuaded by both, the jury deliberated for just a few hours before they reached a guilty verdict.²⁸

²¹ Wade Goodwyn, *Free After 25 Years: A Tale of Murder and Injustice*, NPR (Apr. 28, 2012 5:00 AM), <http://www.npr.org/2012/04/28/150996459/free-after-25-years-a-tale-of-murder-and-injustice>.

²² Brandi Grissom, *Michael Morton's Conviction Comes to Define Anderson*, TEX. TRIB. (Feb. 3, 2013), <https://www.texastribune.org/2013/02/03/tough-crime-prosecutor-set-rare-court-inquiry>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Appendix D (Michael Morton's handwritten note to Christine Morton).

²⁷ See *Morton v. State*, 761 S.W.2d 876, 877–78 (Tex. Ct. App. 1988).

²⁸ *Id.*

From the day Christine's body was discovered in August 1986 until October 2011, Morton told anyone who would listen that he was innocent. In 2011, DNA evidence and recently released offense reports from the original criminal investigation proved he was telling the truth.²⁹ Christine was murdered by an intruder. Although it took almost a quarter of a century, Morton was set free on bond on October 4, 2011.³⁰

The intruder, identified by DNA as Mark Alan Norwood, has since been convicted and sentenced to life in prison for Christine's murder.³¹ Norwood is also currently awaiting trial in Austin, Travis County, Texas, for capital murder—a crime committed in an eerily similar manner as the crime against Christine.³² This crime, however, involved the bludgeoning death of Debra Jan Baker and was committed approximately eighteen months after Christine's murder.³³

While Morton was free on a post-conviction bond, the highest criminal court in Texas—the Texas Court of Criminal Appeals—reviewed his post-conviction claim of actual innocence based on the newly discovered DNA evidence. Then, pursuant to *Ex Parte Elizondo*,³⁴ the Court set aside Morton's murder conviction and remanded him to the custody of the Sheriff of Williamson County to answer the charge against him.³⁵ Because the State agreed to relief on the DNA claim, the Court of Criminal Appeals never ruled on the merits of the due process claims involving *Brady* violations.³⁶

In addition to the DNA evidence, Morton's defense team uncovered evidence proving Anderson intentionally suppressed *Brady* evidence during Morton's trial.³⁷ The most notable evidence involved two separate offense reports detailing witness statements to investigators in the case. The first report detailed a telephone conversation with Christine's mother where she told the lead

²⁹ Grissom, *supra* note 22.

³⁰ Brandi Grissom, *Morton Released from East Texas Prison After 25 Years*, KUT NEWS (Oct. 4, 2011), <http://kut.org/post/morton-released-east-texas-prison-after-25-years>.

³¹ Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder*, TEX. MONTHLY (Mar. 27, 2013), <http://www.texasmonthly.com/articles/mark-alan-norwood-found-guilty-of-christine-mortons-murder>.

³² See *Travis County Criminal Case Settings*, TRAVIS CTY. (last updated Aug. 1, 2016), <https://www2.traviscountytx.gov/courts/files/uploads/crimsettingsbydefendant.pdf> (the trial date has been set to start on Sept. 15, 2016).

³³ Ricke, *supra* note 32.

³⁴ 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (establishing that a petitioner must show “by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence”).

³⁵ *Ex parte Morton*, No. AP-76663, 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011) (per curiam).

³⁶ *Id.*

³⁷ Grissom, *supra* note 22.

investigator that Christine and Morton's three-year old son, Eric, had witnessed his mother's murder and that Eric said his father was not home when the murder occurred.³⁸ The second report involved various witness accounts of a green van seen casing the Morton house days before the murder.³⁹

After the remand from the Court of Criminal Appeals and in the midst of a request for a court of inquiry⁴⁰ to investigate the *Brady* violations, the Williamson County District Attorney elected not to retry Morton for the murder and filed a motion to dismiss the charge against Morton on the grounds of actual innocence. The dismissal, however, did not stop the legal or public demand for accountability for the *Brady* violations.

After a lengthy legal battle, Anderson was arrested for three criminal offenses arising out of his prosecution of Morton: one felony count of tampering with evidence, one misdemeanor count of tampering with evidence, and one misdemeanor count of criminal contempt of court.⁴¹ Facing a criminal trial and a state bar disciplinary trial, Anderson cut a deal. He agreed to surrender his law license and plead no contest to criminal contempt.⁴² The agreed sentence was for ten days in the Williamson County Jail, a \$500.00 fine, and 500 hours of community service restitution.⁴³

B. *The Michael Morton Act*

Until recently, the Dallas County District Attorney's Office led the nation in the number of exonerations.⁴⁴ Many of the Dallas County men who were exonerated have chosen to use their individual tragedies as both lessons and tools to improve the criminal justice system. Their early efforts led to legislation creating: 1) the most robust compensation statute in the nation for individuals who have been legally declared actually innocent of crimes for which they were convicted;⁴⁵ 2) a

³⁸ *Id.* See Appendix E (monster transcript).

³⁹ Grissom, *supra* note 22. See Appendix F (green van report).

⁴⁰ See TEX. CODE CRIM. PROC. ANN. art. 52.01–52.09 (West 2015).

⁴¹ See Chuck Lindell, *Judge Finds that Anderson Hid Evidence in Morton Murder Trial*, AUSTIN-AM. STATESMAN (April 19, 2013 7:12 PM), <http://www.statesman.com/news/news/local/ken-anderson-court-of-inquiry-resumes/nXRLm>.

⁴² The criminal contempt charge was based on the fact that Anderson was not truthful to the trial court judge when he stated the State had no favorable evidence in its possession. See Appendix G (excerpt from pre-trial hearing in the original Morton case).

⁴³ Chuck Lindell, *Ken Anderson Gets 10-day Sentence, Surrenders Law License*, AUSTIN AM.-STATSMAN (Nov. 8, 2013 7:09 PM), <http://www.mystatesman.com/news/news/state-regional-govt-politics/ken-anderson-gets-10-day-sentence-surrenders-law-l/nbm8X>.

⁴⁴ NAT'L REGISTRY, *supra* note 3.

⁴⁵ TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–103.154 (West 2015).

commission to study wrongful convictions;⁴⁶ and 3) procedures for increasing the reliability of eyewitness identifications.⁴⁷ Legislative reforms in criminal discovery, however, did not appear to be on the horizon.

Prior to January 1, 2014, a defendant's right to criminal discovery in Texas was statutorily limited to disclosure of the defendant's own statements and inspection of physical evidence.⁴⁸ Additional discovery was allowed only if a prosecutor voluntarily agreed to the disclosure or if a trial court, upon a showing of good cause, ordered disclosure.⁴⁹ And, even if a trial court found good cause existed, the trial court generally could not order the production of offense reports because they were by definition, work product.⁵⁰

In 2013, for the first time in almost half a century, criminal discovery reform appeared to be on the horizon due, in part, to the Morton case and Morton's efforts to effectuate change. Morton, much like Dallas County Exonerates before him, used his personal tragedy to call for legislative reform.⁵¹ Due to the particular facts of his case, he very specifically targeted the discovery and disclosure laws that contributed to his wrongful conviction.⁵² Simply put, Morton and others sought to mandate an open file discovery system under which requested and produced information is recorded. Central to these suggested reforms was the belief that such a system would change the power dynamic in the process, while also reducing both *Brady* violations and ineffective assistance of counsel claims.

Senate Bill 1611, which was legislatively titled the Michael Morton Act, was signed into law on May 16, 2013 and became effective January 1, 2014.⁵³ In short, it requires prosecutors to essentially open their files (defined as all material information in their possession specifically including offense reports and witness statements) "as soon as practicable" upon a timely request from a defense lawyer.⁵⁴ The Act also imposes a continuing duty on the State to disclose exculpatory, impeachment, or mitigating information to the defense if it is in their possession, custody, or control without regard to "materiality" as

⁴⁶ TEX. CODE CRIM. PROC. ANN. art. 43.27 (West 2015).

⁴⁷ Art. 38.20.

⁴⁸ Art. 39.14(a) (West 2011) (amended 2013).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not* (Sept. 25, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665837.

⁵² *Id.* at 8–9.

⁵³ S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013).

⁵⁴ TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2015).

defined by *Brady* and its progeny.⁵⁵

In addition to the Michael Morton Act, the same legislature also passed two other significant and related pieces of legislation during the 83rd Regular Session. The more significant one resulted in an amendment to the Texas Disciplinary Rules of Professional Conduct and the Texas Government Code.⁵⁶

During the disciplinary proceedings against Morton's prosecutor, Anderson's attorneys argued that the State Bar proceedings against him were time barred by the four-year statute of limitations applicable to claims of professional misconduct because the alleged failure to disclose occurred in 1987.⁵⁷ In response, the State Bar relied on a fraud exception to the statute of limitations, arguing that the four-year time period runs from the date the misconduct was discovered rather than the date of the misconduct itself.⁵⁸ Since the disciplinary action was ultimately settled by the parties, the issue was never legally resolved.⁵⁹ The legislature codified language specifically stating that the four-year statute of limitations begins when a wrongfully imprisoned person is released from a penal institution in cases involving an alleged violation of a prosecutor's ethical disclosure obligation.⁶⁰

These amendments have already had an impact in Texas. Disciplinary complaints that had previously been dismissed based on the statute of limitations have been refiled against prosecutors. One of those complaints resulted in a disbarment and the other remains pending.⁶¹ The second piece of legislation involves a new law that

⁵⁵ Art. 39.14(h).

⁵⁶ TEX. RULES OF DISCIPLINARY P. R.15.06 (preventing the four-year limitation window for bringing disciplinary proceedings against prosecutors from running until the wrongfully imprisoned person is released from a penal institution); TEX. GOV'T CODE ANN. § 81.072(b-1) (West 2015) (statute of limitations applicable to grievances against prosecutors for violations of the disclosure rule do not begin to run until the date on which a wrongfully imprisoned person is released from a penal institution).

⁵⁷ *Latest for Judge Ken Anderson Charged in Wrongful Conviction Case*, DARE TO THINK (Feb. 12, 2013), <https://youcouldbewrong.wordpress.com/2013/02/12/texas-state-bar-sues-judge-over-wrongful-conviction>.

⁵⁸ *Id.*

⁵⁹ *In re Ken Anderson*, No. 13-9155 (Tex. Nov. 19, 2013), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/13/13915500.pdf. See also Chuck Lindell, *Ken Anderson's Law License Officially Canceled*, AUSTIN AM.-STATESMAN (Nov. 19, 2013), <http://www.statesman.com/news/news/local/ken-andersons-law-license-officially-canceled/nbxtf>.

⁶⁰ TEX. GOV'T CODE ANN. § 81.072(b-1).

⁶¹ See Amanda Holpuch, *Texas Prosecutor Officially Disbarred for Sending Innocent Man to Death Row*, THE GUARDIAN (Feb. 9, 2016 10:10 AM), <http://www.theguardian.com/us-news/2016/feb/09/texas-prosecutor-charles-sebesta-disbarred-anthony-graves-innocent-death-row>; Maurice Possley, *Prosecutor Accused of Misconduct in Disputed Texas Execution Case*, WASH. POST (Mar. 18, 2015), https://www.washingtonpost.com/politics/prosecutor-accused-of-misconduct-in-disputed-texas-execution-case/2015/03/18/caa37050-cd77-11e4-8a46-b1dc9be5a8ff_story.html; Edgar Walters, *State Bar Opens Investigation Into Prosecutor*, TEX.

mandates a yearly one-hour approved training course regarding a prosecutor's duty to disclose exculpatory and mitigating evidence and information.⁶² To help facilitate compliance with this new law, the Texas District and County Attorney's Association obtained funding to provide a one-hour training video approved by the Texas Court of Criminal Appeals.⁶³

C. *The Undercurrent Complication*

Prosecutors throughout the state are undergoing both practical and cultural changes.⁶⁴ This is true regardless of whether a particular office previously operated under a voluntarily created open file system or a system involving a strict construction of Article 39.14 of the Code of Criminal Procedure.⁶⁵

Five years ago, most prosecutors could not have fathomed a criminal prosecution against a prosecutor that stemmed from a *Brady* violation. Now, the pendulum has swung. The vast majority of prosecutors just want to make sure they, along with others in the prosecution team, are properly educated and equipped to fulfill their new disclosure obligations. Other prosecutors, however, have simply taken the approach that they are not Anderson, nor could they ever be Anderson—an attitude which appears to be rooted in the undercurrent notion that a proverbial bad apple is responsible for these "unnecessary sweeping changes."⁶⁶ The problem with that attitude is that it makes systemic changes more difficult.

Prosecutor offices throughout the state should seize the opportunity to create a systems approach to comply with both the legal and ethical disclosure obligations. The success of such an approach necessarily entails a thoughtful and consistent message to all prosecutors that our first and foremost obligation is to seek justice—not convictions. Any systemic approach must then embrace the fact that no one wants to convict an innocent person, yet despite that fact, we as prosecutors

TRIB. (Mar. 5, 2014), <https://www.texastribune.org/2014/03/05/death-row-exonerree-seeks-punishment-prosecutor>.

⁶² TEX. GOV'T CODE ANN. § 41.111.

⁶³ See *Mandatory Brady Training*, TDCAA, <http://tdcaa.litmos.com/self-signup/register/94678?type=1> (last visited July 31, 2016).

⁶⁴ See generally Sims, *supra* note 13.

⁶⁵ Tex. Comm. on Prof'l Ethics, Op. 646, 78 TEX. B.J. 78 (2015). Prior to the enactment of the Michael Morton Act, many prosecutor offices agreed to provide discovery above and beyond what the defense was statutorily entitled to under article 39.14. The mechanism for providing this discovery was often a discovery contract that enabled the prosecutor to dictate the terms and conditions under which the discovery was provided. However, given the ruling in Ethics Opinion no. 646, prosecutors who utilized these discovery contracts can no longer ethically impose restrictions on discovery in light of the passage of the Michael Morton Act.

⁶⁶ Sims, *supra* note 13.

make mistakes just like other stakeholders in the criminal justice system. And on occasion, there are wrongful convictions. Formal and informal steps must be taken to lessen the opportunity for disclosure failures and wrongful convictions to happen. When mistakes do occur, we must be willing to attempt to differentiate the unintentional from the intentional and proceed accordingly.

II. THE DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE APPROACH

Systemic change requires both the commitment of leadership and the implementation of safeguards. In Dallas, we have moved on several fronts.

A. Brady Training

On January 21 and 22, 2016, the office co-sponsored a mandatory half-day training for all prosecutors and investigators regarding discovery and *Brady*.⁶⁷ Individual and panel presentations were made by the District Attorney, the CIU, the Policy Director of the Innocence Project of Texas, and three men who have been exonerated in Dallas County.⁶⁸

Overall, the seminar addressed ethical issues confronted by prosecutors with a specific focus on *Brady* and evidentiary disclosure. Although the office had previously provided training on some of these topics before, this was the first time an in-house training attempted to teach the topics through the lens of “lessons learned from wrongful convictions.” Whether this new approach was successful is still being considered. While most of the evaluations of the training suggest it was a success, some suggest the difficulties inherent in focusing on actual innocence cases involving prosecutorial misconduct.⁶⁹

⁶⁷ See Appendix A.

⁶⁸ The three men, Christopher Scott, Richard Miles, and Johnnie Lindsey, collectively served fifty-four years in prison for crimes they did not commit. All were prosecuted by the Dallas District Attorney's Office. See *Christopher Shun Scott*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3620> (last visited July 31, 2016); *Richard Miles*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3881> (last visited July 31, 2016); *Johnnie Lindsey*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3384> (last visited July 31, 2016).

⁶⁹ Attendees were asked to evaluate the training on a scale of one to five (poor, fair, good, very good, and excellent, respectively). Thirty-seven attendees submitted anonymous evaluations and the overall rating for the quality of the program was a 4.49. Individual comments ranged from “the program offered balance between the head and heart—nicely done,” to “the entire thing was absolutely insulting and quite frankly it made me angry.”

B. *Special Directive—General Policy Regarding Disclosure of Exculpatory, Impeachment, or Mitigating Information*

Probably one of the most important safeguards a prosecutor's office can implement to reduce *Brady* and disclosure errors is an appropriate written office policy. In other words, offices should adopt a written policy that simultaneously communicates: (1) the right tone for the desired office culture; and (2) sufficient substantive and procedural guidance to all prosecutors regarding their ethical, constitutional, and statutory obligations. Accomplishing both goals in one written policy is of course easier said than done. Given the complexities of the goals, it is important not to write an oversimplified policy and it is equally as important not to write a treatise. The Special Directive recently adopted in Dallas County is an effort to achieve the aforementioned goals in a balanced manner.⁷⁰

C. *Performance Evaluations*

Performance evaluations have been and will always be an important yardstick used to measure salary increases and promotions in almost all employment settings. Historically, a lot of prosecutor offices evaluated performance, in part, based on convictions and sentences. Recent occurrences in the criminal justice system, however, have made some prosecutors rethink that practice and reconsider how to evaluate a prosecutor's performance. Simply put, if all stakeholders in the criminal justice system value the goal of not convicting an innocent person, it makes sense to evaluate prosecutor performance with that goal in mind. By regularly evaluating a prosecutor's discharge of his or her constitutional, statutory, and ethical disclosure obligations, offices can routinely emphasize an appropriate office culture as well as provide an additional layer of supervision and/or auditing to protect against wrongful convictions.⁷¹

CONCLUSION

Long-term success requires a willingness to consider new ideas and to be open to new ways to ensure our criminal system is just. By creating a systems approach to addressing disclosure based problems, the Dallas County District Attorney's Office is mapping out a road that

⁷⁰ See Appendix B.

⁷¹ See Appendix C.

will not only potentially reduce discovery and *Brady* errors, but also other errors that contribute to wrongful convictions.⁷²

⁷² Just how long the road to systemic disclosure changes in Dallas is hard to measure. Bumps, however, are to be expected in the future and have been encountered in the recent past. See e.g., Tanya Eiserer, *Attorneys Accuse Dallas DA's Office of Withholding Evidence*, WFAA (May 3, 2016 10:00 PM), <http://www.wfaa.com/news/local/dallas-county/attorneys-accuse-dallas-da-of-withholding-evidence/168229220>; JoAnne Musick, *Prosecutorial Misconduct in Dallas Ultimately Ended with Justice*, MIMESIS Law (May 9, 2016), <http://mimesislaw.com/fault-lines/prosecutorial-misconduct-in-dallas-ultimately-ended-with-justice/9526>.