Nos. 10-15-00356-CR, 10-16-00371-CR, 10-16-00372-CR, 10-16-00376-CR, 10-16-00377-CR, 10-17-00041-CR, 10-17-00242-CR

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

Maricela Hinojosa v. The State of Texas
Telvin Jamall Horne v. The State of Texas
Joel Carrera v. The State of Texas
Jesse Galindo Delafuente v. The State of Texas
Ralph Dewayne Watkins v. The State of Texas
Willie Dan Majors, III v. The State of Texas
Trevon Freeman v. The State of Texas

Appeals from McLennan, Johnson, and Navarro Counties

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STATE PROSECUTING ATTORNEY'S AMICUS BRIEF

* * * * *

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TO THE HONORABLE TENTH COURT OF APPEALS:

The 2013 passage of the Michael Morton Act (Act) amendments to article 39.14 of the Code of Criminal Procedure effected many changes in the way criminal discovery is conducted. The Court of Criminal Appeals has yet to address the questions raised by the changes, and some of the courts of appeals that have weighed in have not done litigants a service. The State Prosecuting Attorney submits her *Amicus* Brief as requested[1] to assist this Court in determining the Act's applicability, a defendant's duty to preserve his complaint, the meaning of the substantive provisions, and the proper standard for measuring harm.

ARGUMENT

I. The Act applies to every substantive proceeding related to crimes committed after January 1, 2014.

The Act applies only to offenses committed after its effective date.

When the Legislature amended art. 39.14, it included a savings clause:

> The change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act. The prosecution of an offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.[2]

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[1] Letter Issued 3/12/18. No fee has been received for this filing. TEX. R. APP. P. 11(c).

[2] Acts 2013, 83rd Leg., SB 1611, § 3, eff. Jan. 1, 2014.

If an element of the underlying offense occurred before January 1, 2014,[3] the Act does not apply to its "prosecution."[4] That term is global, in no way limited to any particular part of a defendant's adjudication and punishment. This means that if the Act did not apply at the prosecution's inception, it does not apply to any proceeding in the prosecution.

The Act applies to all aspects of the prosecution of a crime committed after its effective date.

The corollary is that, if the Act does apply, it applies to every proceeding necessary to determine guilt or punishment. In fairness, a contrary interpretation has some facial appeal notwithstanding the savings clause's reference to "prosecution." The only subsection of art. 39.14 with an explicit timing provision counts days from the beginning of either a jury or bench trial.[5] Similarly, the recently added provision on jailhouse witnesses refers to a "defendant's trial."[6] And other requirements also trigger before a plea or trial,[7] or "at any time before, during, or after trial."[8] These

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[3] 83rd Leg., SB 1611, § 4 ("This Act takes effect January 1, 2014.").

[4] For the purpose of savings clauses, the date of prior conviction elements—so-called "attendant circumstances"—are irrelevant. *Ex parte Carner*, 364 S.W.3d 896, 900 (Tex. Crim. App. 2012).

[5] TEX. CODE CRIM. PROC. art. 39.14(b).

[6] TEX. CODE CRIM. PROC. art. 39.14(h-1).

[7] TEX. CODE CRIM. PROC. art. 39.14(j).

[8] TEX. CODE CRIM. PROC. art. 39.14(k).

references all suggest a focus on "trial" as that term is commonly understood.

But the primary substantive provision, section (a), refers more broadly to "the case" and to "the action."[9] Article 39.14 had language (going back to its enactment) that required disclosure "before or during trial."[10] It was deleted from subsection (a) when the Act took effect. Subsection (h) was added to require disclosure of evidence that "tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."[11] As these are arguably the most important provisions in the statute, the absence of limitation to any particular proceeding or stage of prosecution is telling.

Read as a whole, art. 39.14 is intended to assist the defendant at both the guilt and punishment phases. As the punishment phase can occur immediately after a jury finding of guilt or following a deferred adjudication of guilt years after a plea, there is no way to give subsections (a) and (h) their full intended effect while categorically limiting their application to exclude revocation proceedings.

Although not obvious at first glance, the statute's plain language is broad enough to include evidence related to extraneous offenses that may become

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[9] TEX. CODE CRIM. PROC. art. 39.14(a).

[10] *See* Acts 1965, 59th Leg., p. 475, ch. 722, §1, eff. Jan. 1, 1966.

[11] TEX. CODE CRIM. PROC. art. 39.14(h).

admissible at guilt or, more likely, punishment.[12] As will be discussed below, the statute has never been a simple codification of the constitutional requirement of disclosure of certain exculpatory evidence. "[E]vidence material to any matter involved in the action" thus includes inculpatory evidence that could affect the determination of guilt or punishment, such as the admissibility of an unadjudicated extraneous offense at either phase. There is nothing absurd about requiring disclosure of such evidence already in the State's possession, custody, or control.[13] If there were any reason to look beyond the statute's language, the legislative history shows the intent that the Act not only prevent wrongful convictions but also conserve judicial resources by encouraging pleas through the pretrial disclosure of evidence.[14]

The Act does not apply equally to all evidence at all proceedings.

This is not to say that everything that must be disclosed in one part of a case must be disclosed at others. The things listed in subsection (a) must be disclosed "as soon as practicable after receiving a timely request from the defendant" so long as they are not privileged (subject to *Brady*, which trumps privilege) and are "material

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[12] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("[I]f the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning.").

[13] *See id*. ("There is, of course, a legitimate exception to this plain meaning rule: where application of a statute's plain language would lead to absurd consequences that the Legislature could not possibly have intended, we should not apply the language literally.").

[14] Acts 2013, 83rd Leg., SB 1611, eff. Jan. 1, 2014 (Senate Research Center Committee Report) (http://www.lrl.state.tx.us/scanned/srcBillAnalyses/83-0/SB1611RPT.PDF, last visited April 16, 2018).

to any matter involved in the action." As seen above and discussed below, that latter term is intentionally expansive. The duty to disclose experts, however, appears applicable only to "trial"; it triggers upon timely request before a bench or jury trial.[15] So while art. 39.14 applies to revocation proceedings, this particular duty does not.[16] Finally, the catchall provision, subsection (h), is a perpetual duty but it only applies to "exculpatory, impeachment, or mitigating" things that are favorable to the defendant. Thus, this "*Brady* Lite" clause is both broader and narrower than subsection (a).

The Act has not imposed a duty to create or compile evidence.

Both before and after its amendment, art. 39.14 concerned itself with items in "that are in the possession, custody, or control of the state."[17] Whereas a prior version specified that this included "any of its agencies[,]" the Act dropped that clarification and added the broader "or any person under contract with the state."[18] But this did not change the meaning of "possession, custody, or control." Article 39.14 imposes no duty upon the State to create evidence that is not already in its possession.[19]

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[15] TEX. CODE CRIM. PROC. art. 39.14(b).

[16] *Ex parte Doan*, 369 S.W.3d 205, 208 (Tex. Crim. App. 2012) ("A community supervision revocation hearing is distinct from a criminal trial . . . .").

[17] TEX. CODE CRIM. PROC. art. 39.14(a).

[18] *Id.*

[19] *See In re Stormer*, No. WR-66,865-01, 2007 Tex. Crim. App. Unpub. LEXIS 1154, at *7 (continued...)

II. The Act has not affected the usual rules for invocation and default.

Even if the Act applies to the prosecution of a given offense, its terms are not all invariably operable. Some require request, and all complaints related to trial disclosures can be forfeited.

When necessary, a standard request is sufficient to trigger the State's duty to comply with the Act.

The Act imposes some duties on the State that it must comply with regardless of whether the defendant requests it. The State has an affirmative obligation to disclose exculpatory, impeachment, or mitigating evidence that "tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged[,]" any time it is discovered.[20] The aforementioned duty to disclose a jailhouse witness also arises without action by the defense.[21] But the provision that gets the most work, subsection (a), requires a timely request from the defendant. The

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[19](...continued)
(Tex. Crim. App. June 20, 2007) (not designated for publication) ("Article 39.14 is specifically limited to the discovery of pre-existing documents and tangible items that are in the State's possession."); *In re Harris*, 491 S.W.3d 332, 336 n.11 (Tex. Crim. App. 2016) (acknowledging *Stormer*); *In re State ex rel. Skurka*, 512 S.W.3d 444, 455 (Tex. App.–Corpus Christi-Edinburg 2016) ("Article 39.14 does not give the trial court the authority to order the State to create a document that is not already in its possession, custody, or control."); *In re State ex rel. Munk*, 448 S.W.3d 687, 692 (Tex. App.–Eastland 2014, pet. ref'd) (trial court does not have authority under former Article 39.14 to require the State to conduct criminal history searches of the NCIC/TCIC databases or to provide information to the defendant from these databases that it has not already obtained).

[20] TEX. CODE CRIM. PROC. art. 39.14(h), (k).

[21] TEX. CODE CRIM. PROC. art. 39.14(h-1).

obligation of either party to disclose experts is also triggered by request.[22]

When a request is required, a general request directed at the State and citing the Act should be sufficient.[23] A party may also pursue a discovery order from the trial court. In the absence of language similar to that in the Act, however, the scope of discovery will be limited by the terms of the order.

But the Act does not require precognition.

Although there is nothing in the statute that suggests a request for specific evidence must be made in order to obtain relief, there is one caveat. As noted above, subsection (a) of the Act applies only to evidence that is listed or is "material to any matter involved in the action." As discussed in detail below, the meaning of "material" is confused by case law. Regardless of its meaning, however, review for materiality is typically retrospective from the point at which the State offers it or it is discovered post-trial. It should be measured instead from the State's point of view pretrial.

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[22] TEX. CODE CRIM. PROC. art. 39.14(b).

[23] *But see Davy v. State*, 525 S.W.3d 745, 750-51 (Tex. App.–Amarillo 2017, pet. ref'd), in which the appellate record did not contain a copy of Davy's discovery request and the court held, "Without a record showing the items of which appellant sought discovery under article 39.14(a), we are unable to say the trial court abused its discretion by admitting his penitentiary packet as punishment evidence." If subsection (a) covers pen packets, specific request should be unnecessary if the defendant does not artificially limit the scope of his request. As it was the absence of evidence of *any* pretrial request that prevented relief, the court's interest in the specificity of the request can be ignored.

In certain cases, it will be unfair to blame the State for not disclosing items that were neither specifically listed in subsection (a), nor apparently material before trial. This is especially true of evidence material to defensive theories that are unknown to the State. As trial counsel's primary motivation should be to ensure a fair trial—not merely to bank complaints for appeal—requests for specific discoverable items in the State's possession, custody, or control that might not have obvious materiality should be encouraged. That way, the State will know their importance, which will promote disclosure or at least make materiality review on appeal easier.[24]

And a defendant must still complain at the earliest opportunity and obtain an adverse ruling.

Although a "boiler-plate" request, without more, is usually enough to invoke the protections of art. 39.14, invocation is not enough to obtain relief should a trial violation occur. When a defendant becomes aware of undisclosed evidence when it is offered by the State at trial, more is required.

The primary purpose of discovery is to allow a defendant to adequately prepare his defense and prevent trial by ambush. While there is a body of law devoted to excluding evidence that was not disclosed in willful violation of a discovery order,[25]

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[24] *See United States v. Bagley*, 473 U.S. 667, 682-83 (1985) ("And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.").

[25] *Francis v. State*, details the standard:

(continued...)

the typical analysis hinges upon whether the defendant was disadvantaged by the lack of pretrial disclosure. Because the ultimate issue is one of evidentiary admissibility, however, a complaint about an alleged discovery violation is forfeited if not objected to.[26] And, as with any other claims of surprise, a defendant who alleges that his defense was impaired thereby must take action, usually in the form of a sworn, written request for continuance.[27] In the absence of a motion for continuance, the State's negligent or good faith violation of a discovery duty—statutory or otherwise—will not be reviewed on appeal.[28] Of course, preservation still requires

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[25](...continued)

> Because exclusion of evidence in this context is in the nature of a court-fashioned sanction for prosecutorial misconduct, whether the trial court should exclude evidence on this basis has been made to hinge on "whether the prosecutor acted with the specific intent to willfully disobey the discovery order[.]" Extreme negligence or even recklessness on the prosecutor's part in failing to comply with a discovery order will not, standing alone, justify the sanction of excluding relevant evidence.

428 S.W.3d 850, 854-55 (Tex. Crim. App. 2014)(alteration in original). Importantly, a "willful choice" does not necessarily establish a conscious objective to flout discovery. *Id*. at 856. And while a pattern of failures to comply is a relevant circumstance, it appears limited to the State's behavior in a given case, not over time. *Id*. at 857-58.

[26] *Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999) (*Brady* claim forfeitable); *Glover v. State*, 496 S.W.3d 812, 816 (Tex. App.–Houston [14th Dist.] 2016, pet. ref'd) (Art. 39.14); *Delijevic v. State*, 323 S.W.3d 606, 608 (Tex. App.–Amarillo 2010, no pet.) (Art. 39.14).

[27] TEX. CODE CRIM. PROC. arts. 29.13 ("A continuance or postponement may be granted on the motion of the State or defendant after the trial has begun, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial cannot be had."), 29.03 (must be written), 29.08 (must be sworn); *see Garcia v. State*, 981 S.W.2d 683, 687 (Tex. Crim. App. 1998) (Keller, J., concurring) ("If a defendant can show that he was unfairly surprised by the allegations developed at trial, he would be entitled to a continuance.").

[28] *Rodriguez v. State*, 597 S.W.2d 917, 919 (Tex. Crim. App. 1980) ("Finally, when . . . (continued...)

either an adverse ruling or a refusal to rule on the requested relief.[29] If a continuance is granted but the defendant believes it is insufficient to ameliorate the harm from late disclosure, he must move for a mistrial.

III. The Act is not a codification of *Brady*.

Non-disclosed evidence the defense claims it was entitled to is often referred to as "*Brady* evidence" even when the claim is statutory. The two are distinct, and always have been. This lack of discernment throughout the history of art. 39.14 is a cause of confusion when interpreting the Act.

Article 39.14 has never reflected the Brady formulation.

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process

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[28](...continued)
objection was first raised on the basis of violation of the discovery order, appellant moved for a mistrial, but did not request a postponement or continuance under Art. 29.13, V.A.C.C.P., on the basis of surprise. This default alone would waive any error urged on the basis of surprise."); *Prince v. State*, 499 S.W.3d 116, 121 (Tex. App.–San Antonio 2016, no pet.) ("Similarly, Prince's appellate contention regarding the trial court's denial of his motion for continuance based on the State's failure to comply with Criminal Procedure article 39.14, *i.e. Brady* material, is also subject to procedural default. . . . By failing to file a sworn, written motion for continuance, Prince failed to preserve error on either ground—the Sixth Amendment right to confrontation or any alleged discovery violation.") (citations omitted); *Yates v. State*, 941 S.W.2d 357, 364 (Tex. App.–Waco 1997, pet. ref'd) ("The failure to request a continuance waives any *Brady* violation.").

Although this is the accepted practice, it is conceivable that the Court of Criminal Appeals would recognize an exception for incurable prejudice from the admission of undisclosed evidence. In *Young v. State*, the Court acknowledged the possibility that "skipping" to a motion for mistrial preserves a claim if lesser relief could not fix the problem. 137 S.W.3d 65, 70 (Tex. Crim. App. 2004). If, for example, a defendant committed early in a trial to a strategy that depended upon the nonexistence of the evidence, a continuance would not fix the problem once the trial court overrules an objection to its admission.

[29] TEX. R. APP. P. 33.1(a)(2).

where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[30] In *United States v. Agurs*, that Court qualified the standard: "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."[31] It added, "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[32] And in *United States v. Bagley*, it adopted the standard used for ineffective assistance of counsel and promulgated the test we use for post-trial *Brady* claims to this day: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[33]

None of this language has ever appeared in art. 39.14. When first enacted along with the 1965 Code of Criminal Procedure, art. 39.14 applied to "objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action."[34] This plain language suggests materiality that goes

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[30] 373 U.S. 83, 87 (1963).

[31] 427 U.S. 97, 112 (1976).

[32] *Id*. at 109-10.

[33] 473 U.S. at 682.

[34] Acts 1965, 59th Leg., p. 475, ch. 722, §1, eff. Jan. 1, 1966. The substance of this language has carried forward unchanged.

to "smaller" issues than the ultimate questions of guilt and punishment. Although it is possible that the Legislature plucked the word "material" out of *Brady* intending for courts to use whatever meaning the Supreme Court assigned to it as time passed, it is unlikely. In the *Brady* context, the only two relevant matters are guilt and punishment. The Legislature could have easily said "material to guilt or punishment," but it did not. It is far more likely it intended that the common legal meaning be used. Black's Dictionary defines "material" as, *inter alia*, "[i]mportant," "having influence or effect," "going to the merits."[35] "Material evidence" is defined, *inter alia*, as, "That quality of evidence which tends to influence the trier of fact because of its logical connection with the issue."[36] In context, subsection (a) applies to evidence that could influence the jury on any number of subsidiary matters relevant to the ultimate issues of guilt and punishment.[37]

Notwithstanding the Legislature's apparent decision—at the time of art. 39.14's enactment or any of its revisions—not to copy and paste language from prominent *Brady* decisions, post-*Morton* courts of appeals cases have interpreted subsection (a) to mirror *Brady*. Consider *Branum v. State*,[38] from the Second Court

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[35] BLACK'S LAW DICTIONARY, p. 880 (Special Deluxe 5th Ed. 1979).

[36] *Id*. at 881.

[37] Moreover, art. 39.14 has always applied to inculpatory material, which fails the *Brady* test *ab initio*.

[38] *Branum v. State*, 535 S.W.3d 217 (Tex. App.–Fort Worth 2017, no pet.).

of Appeals. Branum was convicted of intoxication manslaughter for killing Bennett. Branum's theory was that Bennett could have been distracted by using his phone while driving.[39] The trial court reviewed the contents of Bennett's phone *in camera* and ruled it contained nothing relevant or material.[40] The court of appeals framed the issue thus:

> [A]rticle 39.14(a) requires the State to produce evidence in its possession only if that evidence is "material to any matter involved in the action." The evidence that the trial court reviewed in camera and the records the State provided to Branum pretrial revealed that at the time of the accident, which was the "matter involved in the action," Bennett's phone was not in use. To establish that requested evidence is material, a defendant must provide more than a possibility that it would help the defense or affect the trial. Evidence must be "indispensable to the State's case" or must provide a reasonable probability that its production would result in a different outcome to be considered material and subject to mandatory disclosure under article 39.14(a).[41]

The Seventh Court was more direct:

> Both the statute and *Brady* require that the data be "material" before it is discoverable. And, like the definition of "material" in a *Brady* setting, materiality for purposes of art. 39.14(a) means that "there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different."[42]

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[39] *Id*. at 221.

[40] *Id*. at 222.

[41] *Id*. at 217, 224-25 (citations omitted).

[42] *Meza v. State*, Nos. 07-15-00418, 07-16-00167-CR, 2016 Tex. App. LEXIS 10690, at *4-6 (Tex. App.–Amarillo Sep. 29, 2016, pet. ref'd) (not designated for publication) (internal citations omitted).

Neither of these cases explains why "material" must mean in art. 39.14 what it means in *Brady*, but both draw from the *Brady* line as applied by the Court of Criminal Appeals in cases like *Quinones v. State*[43] and *Ehrke v. State*.[44]

The Court of Criminal Appeals has muddied the issue.

Before the high court's cases can be considered, it must be remembered how art. 39.14 was structured pre-*Morton*. A defendant has never had a general right to discovery of evidence in possession of the State.[45] Outside of *Brady*, his rights are defined entirely by statute. Most of the discoverable material in subsection (a) of the Act was included in art. 39.14 from the beginning[46] but, until 2014, a defendant had to show "good cause" to get it. A showing of "good cause" made the trial court's refusal to permit discovery an abuse of discretion, and the Court of Criminal Appeals used the prevailing *Brady* standard for materiality to measure "good cause." Unfortunately, the language used—especially recently—is sloppy and so has blurred what began as a real distinction between what constitutes materiality and "good cause" for purposes of the statute. The result is shown above: courts of appeals using a defunct analysis to measure the State's threshold duty to disclose evidence.

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[43] 592 S.W.2d 933 (Tex. Crim. App. 1980).

[44] 459 S.W.3d 606 (Tex. Crim. App. 2015).

[45] *Kinnamon v. State*, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994).

[46] Aside from updating the statute over time to cover technological advancements, the only substantive change was the inclusion of offense reports and non-defendant witness statements.

The Court started off strong. In *Quinones*, decided in 1980, the Court reviewed whether a tape-recorded conversation between Quinones and an accomplice was discoverable under art. 39.14.[47] As a threshold matter, it held that "[t]ape recordings of a statement by the accused are 'objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action[,]'" quoting the statute.[48] If the point of the case was to define "material" as it is used in art. 39.14, that would have ended the error analysis. It did not. The Court continued with its determination of whether the trial court abused its discretion, notwithstanding its conclusion that the evidence was "material to a[] matter involved in the action":

> The legal standard employed in determining whether the trial court abused its discretion is not whether the error was harmless. A trial court is not obligated to allow discovery of evidence merely because its admission will harm the defendant. Instead, Texas has chosen to follow a rule which requires the trial court to permit discovery only if the evidence sought is material to the Defense of the accused.[49]

It went on to say that it had recently "expressly chosen to define 'materiality' under Texas law in the due process terms employed by the Supreme Court" in *Agurs*, the latest *Brady* case at the time.[50] Its analysis confirms this, as "materiality" in that case

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47 592 S.W.2d at 936, 939.

48 *Id*. at 939.

49 *Id*. at 940-41.

50 *Id*. at 941.

was judged according to *Agurs*, not any language in art. 39.14.[51]

McBride v. State, decided in 1992, clarified *Quinones*'s focus on the statutory requirement of "good cause":

> Art. 39.14 places a burden upon the defendant to show "good cause" for the inspection. The decision on what is discoverable is left to the discretion of the trial judge. We will not disturb a trial judge's decision under art. 39.14 absent an abuse of discretion. However, the trial judge is required "to permit discovery if the evidence sought is material to the defense of the accused."[52]

But *McBride* also put a wrinkle in the simplicity of that summary. The Court created a rule "that a criminal defendant has a right to inspect evidence indispensable to the State's case because that evidence is necessarily material to the defense of the accused."[53] In that case, McBride had a right to discovery of the cocaine he was alleged to have possessed.[54] But an "indispensable" exception does not conform to the *Brady* materiality standard because there is no way to know prior to re-testing whether, for example, the substance is not cocaine—it is a mere possibility. As noted above, the Supreme Court rejected this standard for materiality in *Agurs*. So where does the "indispensable" exception come from?

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[51] *Id*.

[52] 838 S.W.2d 248, 250 (Tex. Crim. App. 1992) (citations to *Quinones* omitted).

[53] *Id*. at 251.

[54] *Id*. It is not strictly true that the State cannot obtain a conviction for possession without presenting the controlled substance at trial. It's just more difficult.

The confusion continued. The Court repeated its dual-track formulation of "good cause" in *Massey v. State*:

> Article 39.14 governs discovery of evidence in criminal cases. The defendant bears the burden thereunder to show "good cause" for inspection of the sought after evidence. The trial court must allow discovery of evidence that is shown to be material to the defense of the accused. A defendant "has a right to inspect evidence indispensable to the State's case because that evidence is necessarily material to the defense of the accused."
>
> Appellant does not allege in his brief how the evidence was "material to the defense" or "indispensable to the State's case."[55]

But it appeared to return to a *Brady*-centric materiality analysis in *Ex parte Miles*:

> While Article 39.14 "makes it clear that the decision on what is discoverable is committed to the discretion of the trial court," the trial court must permit discovery if "the evidence sought is material to the [d]efense of the accused." The materiality standard for purposes of Article 39.14 is the same as that applied in our *Brady* analysis above. Therefore, because the two undisclosed reports were material to Applicant's defense, Article 39.14 does not exempt the reports from discovery.[56]

It could be the Court had no intent to (re)define the meaning of "material" in the context of art. 39.14, however, as that case concerned whether the police work-product exception to art. 39.14 trumped *Brady*. Only that Court can say.

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[55] 933 S.W.2d 141, 153 (Tex. Crim. App. 1996) (citations to *McBride* omitted).

[56] 359 S.W.3d 647, 670 (Tex. Crim. App. 2012) (citations to *Quinones* omitted).

The Court's most recent review of art. 39.14 is also its most confusing. In *Ehrke v. State*, the Court again considered whether a defendant charged with possession of a controlled substance has a right to inspect the controlled substance.[57] Although its analysis recognized the statutory requirement that the evidence be "material to any matter involved in the action," the Court focused on whether Ehrke met his burden of showing "good cause," thereby forcing the trial court to permit inspection.[58] The Court held that the materiality standard used in *Quinones* answered whether inspection was warranted. However, because *Quinones* was decided before *Bagley* adopted the *Strickland* standard now used for *Brady* claims, this 2015 case held that "[e]vidence is material if its omission would create 'a reasonable doubt that did not otherwise exist . . . .'"[59] This was (and is) not the *Brady* standard.

To further complicate matters, the Court ultimately reaffirmed *McBride* by holding that "[t]he right to inspect the alleged controlled substance is absolute—it requires no further showing beyond an initial timely request."[60] Under these circumstances, "the [trial] court must permit inspection, *even without a showing of*

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[57] 459 S.W.3d at 610-11.

[58] *Id*. at 611 (citing *Massey*).

[59] *Id*. (quoting *Agurs*, 427 U.S. at 112).

[60] *Id*. This includes testing the substance. *Id*. at 614.

good cause, because the substance is material to the defense of the accused."[61] This rule, while perhaps wise, cannot be justified by reliance on the language of the statute because a showing of good cause was required by law. It also strays from *Massey*, in which the Court positioned "indispensability" as a form of good cause. Nor can the holding be justified by using the *Brady* standard to circumvent the statute, as in *Miles*, because *Brady* requires a reasonable probability that inspection/testing would have led to a different outcome at trial. That was the rule long before *Ehrke* was decided. At best, the holding is a reflection of the truism that testing *could* matter, and a given finding *could* influence the jury. Again, that is the long-rejected "mere possibility" test. So while the holding of *Ehrke* is a fair one, it was not based in *Brady* and its progeny, as the Court has repeatedly claimed.

The Act's catchall provision drives the point home.

The 2014 addition of subsection (h) is proof that the Act was not intended to (re)codify *Brady*. Subsection (h) requires disclosure of "any exculpatory, impeachment, or mitigating" thing that "tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." This parallels the *Brady* formulation but adopts a lower standard for disclosure than *Brady* materiality. If the Legislature declined to use the *Brady* definition of "materiality" in its *Brady*-

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[61] *Id*. at 611 (emphasis added).

esque catchall provision, why would it implicitly require it for its disclosure-on-request provision? This is yet another indicator that the Legislature intended to grant defendants a statutory right to discovery beyond what *Brady* currently requires.

Subsection (a) ultimately applies to any item that is apparently relevant to the case.

As demonstrated, there is no indication that art. 39.14 was ever intended to be a mere codification of *Brady* or that the Court has treated it as such. Looking backward through this lens, the Court's cases make more sense. The tape recording in *Quinones*, the cocaine in *McBride*, the police reports in *Miles*, and the controlled substance in *Ehrke* were all "material to a matter involved in the action" without any proof that they created a reasonable probability that the outcome would have been different. The fight was not over whether they were "material," as contemplated by the statute; it was over whether the trial court could refuse inspection notwithstanding their materiality.

Because of the breadth of the phrase "to a matter involved in the action," it is impossible for a prosecutor to discern pretrial whether something before him is material to some subsidiary issue, no matter how small, or is merely relevant to its consideration. The best practice is thus to disclose anything in its case that is not privileged. That being said, the distinction between "material" and "relevant" is itself relevant only if the importance of the matter is apparent to the prosecutor at the time

of the request. The State cannot be faulted for not disclosing unidentified material that is in its constructive possession, custody, or control but reasonably not on its radar. Again, defense counsel must take some responsibility for ensuring a fair trial.

IV. Rule 44.2(b) is the proper harm standard for trial violations.[62]

Although the Act is intended to go beyond the constitutional right to disclosure, that does not make its violation a constitutional matter. "[W]hen only a statutory violation is claimed, the error must be treated as non-constitutional for the purpose of conducting a harm analysis[.]"[63] This is consistent with the treatment of other admissibility questions that arise during trial.[64] Numerous courts of appeals, including this one, have applied (or assumed the application of) this rule to violations

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[62] The State could find no cases in which a pure art. 39.14 claim was made in a motion for new trial for discovery violations discovered post-trial. Because art. 39.14 does not say otherwise, the general rule that a trial court's ruling on a motion for new trial is reviewed for abuse of discretion applies. *Compare Igo v. State*, 210 S.W.3d 645, 647 (Tex. Crim. App. 2006) (using harm standard from art. 36.19 for charge error raised on motion for new trial because "[a] statute cannot be superceded by a rule."). The familiar *Brady* standard provides fair review of such claims, although the Court of Criminal Appeals has held that "a trial court would not *generally* abuse its discretion in granting a motion for new trial if the defendant: (1) articulated a valid legal claim in his motion for new trial; (2) produced evidence or pointed to evidence in the trial record that substantiated his legal claim; and (3) showed prejudice to his substantial rights under the standards in Rule 44.2 of the Texas Rules of Appellate Procedure." *State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007) (emphasis added).

[63] *Gray v. State*, 159 S.W.3d 95, 98 (Tex. Crim. App. 2005).

[64] *Hernandez v. State*, 176 S.W.3d 821, 824 (Tex. Crim. App. 2005).

of art. 39.14.[65] Non-constitutional harm is measured by TEX. R. APP. P. 44.2(b). Such an error is harmful if it had a substantial and injurious effect or influence in determining the jury's verdict.[66] If the error did not influence the jury or had but a slight effect upon its deliberations, the error is harmless.[67] Keeping the proper standard in mind is important because, while *Brady* material would have a substantial and injurious effect on the verdict, a new trial could be warranted under Rule 44.2(b) by harm that does not reveal a reasonable probability that the outcome would have been different.

V. Conclusion

The Michael Morton Act increases a defendant's statutory right to discovery. Its language is plain enough to make it generally applicable upon request to the important phases of a prosecution—guilt and punishment—no matter the form they take. And its language offers nothing to suggest that standard rules for preservation and appellate review do not apply. A defendant is thus entitled to far more material than *Brady* would provide if he insists upon his statutory right both before and during trial.

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[65] *See*, *e.g.*, *Branum*, 535 S.W.3d at 226; *Kirksey v. State*, 132 S.W.3d 49, 55 (Tex. App.–Beaumont 2004, no pet.); *Martin v. State*, No. 10-03-00290-CR, 2004 Tex. App. LEXIS 9363, at *1 (Tex. App.–Waco Oct. 20, 2004, no pet.) (not designated for publication).

[66] *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010).

[67] *Id*.

PRAYER FOR RELIEF

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Respectfully submitted,

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The undersigned hereby certifies that on this 27th day of April, 2018, a true and correct copy of the State's *Amicus* Brief has been eFiled or e-mailed to the following:

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