**NO. PD_____-18**

**_____**

**IN THE**
**COURT OF CRIMINAL APPEALS**
**OF TEXAS**

**_____**

**Ralph Watkins,**
**Appellant**
**VS.**

**The State of Texas,**
**Appellee**

**_____**

**Appellant's Petition for Discretionary Review**

**_____**

**From Tenth Court of Appeals (Waco) No. 10-16-00377-CR, and**
**From Cause No. D36507-CR, in the 13th District Court, Navarro County**

_____

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**Oral Argument Requested**

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## Identity of Parties and Counsel

**1. Trial Judge:** The Honorable James Lagomarsino, Presiding Judge of the 13th Judicial District Court of Navarro County, P.O. Box 333 Corsicana, Texas 75151.

**2. Appellant:** Ralph Dewayne Watkins, TDCJ #02096743, 2664 FM 2054, Tennessee Colony, TX 75886.

**3. Counsel for Petitioner/Appellant:**

**a.** The Appellant was represented at the Trial Court by Michael Crawford, Attorney at Law, 416 N 14th St, Corsicana, TX 75110

b. Direct Appeal and Petition: J. Edward Niehaus, 207 W. Hickory St. Suite 309, Denton, Texas 76201.

**4. Counsel for the State of Texas:**

**a. Trial and Appeal:** The State is represented on appeal by and through R. Lowell Thompson, Criminal District Attorney of Navarro County, 300 W. 3rd Avenue Suite 203, Corsicana, TX 75110.

**IN THE**
**COURT OF CRIMINAL APPEALS**
**OF TEXAS**

**Ralph Watkins,**
**Appellant**
**VS.**

**The State of Texas,**
**Appellee**

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

**TO THE COURT OF CRIMINAL APPEALS OF TEXAS:**

Appellant, Ralph Watkins, respectfully submits this Petition for Discretionary Review and moves that this Honorable Court grant review of this cause and offers the following in support thereof:

**Ground One**

While reviewing a violation of the Michael Morton Act, the Court of Appeals erred in its materiality analysis.

**Reason for Review**

Appellant would submit that the Court of Appeals "has decided an important question of state or federal law that has not been, but should be, settled by the Court

of Criminal Appeals." Tex. R. App. Pro. 66.3(b). Alternatively, the Court of Appeals has misconstrued the interpretation of the Michael Morton Act resulting in the rendering of a substantively incorrect decision. Tex. R. App. Pro. 66.3(d).

## STATEMENT REGARDING ORAL ARGUMENT

The Appellant requests oral argument in this case because such argument may assist the Court in its decisional process. It is suggested that oral argument may help simplify the facts and clarify the issues.

## STATEMENT OF THE CASE

Appellant was convicted of possession of a penalty group one controlled substance in an amount greater than four grams but less than 200 grams and sentenced to seventy (70) years confinement as a habitual felon offender. Appellant timely filed notice of appeal.

In the Court of Appeals, Appellant raised three issues: first, he challenged the Court's admission of punishment evidence the State withheld from discovery as a violation of the Michael Morton Act. Second and Third he contested the Court's assessment of restitution and repayment of his court-appointed attorney's fees.

Appellant raised one issue in this petition: did the Court of Appeals err in applying the pre-*Morton* definition of materiality to the undisclosed evidence?

## STATEMENT OF PROCEDURAL HISTORY

On **July 25, 2018**, the Tenth Court of Appeals at Waco Texas, affirmed the

conviction. *Ralph Watkins v. State of Texas* 03-14-00605-CR, (Opinion at 1). Appellant filed a Motion for Reconsideration on **July 30, 2018**. The Motion for Reconsideration was denied with written order on **August 22, 2018**. This Petition for Discretionary Review is being filed on ***Monday, September 17, 2018***. Appellant will send this petition to the Court by delivering ten (10) file-stamped copies to FedEx on the ***date following*** its acceptance by the Clerk of the Court to be delivered by overnight delivery to the Court of Criminal Appeals.

## GROUND FOR REVIEW ONE

Ground for Review

While reviewing a violation of the Michael Morton Act, the Court of Appeals erred in its materiality analysis.

Reasons for Review

1) The Court of Appeals "has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals." Tex. R. App. Pro. 66.3(b)
2) The Court of Appeals has misconstrued the interpretation of the Michael Morton Act resulting in the rendering of a substantively incorrect decision. Tex. R. App. Pro. 66.3(d).

Facts

Trial counsel timely requested discovery. During trial, it came to the Court's attention that the State failed to turn over 32 of 34 punishment exhibits. Both during trial and on appeal, Appellant asserted that the State's failure to turn over punishment evidence (pen packets and booking sheets) which the State used to prove the enhancement paragraphs in the indictment violated the Michael Morton Act.

(Opinion at 2).

Article 39.14 was amended effective January 1, 2014 to expand the scope and availability of discovery required to be produced by the State in criminal proceedings. *See* Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (*eff.* Jan. 1, 2014) (*codified at* Tex. Code Crim. Proc. Ann. art. 39.14)(the "Michael Morton Act"). (Opinion at 2).

At trial, the State argued that the evidence was not subject to Article 39.14 because it was punishment evidence. (Opinion at 3). On appeal, the DA's Office and the State Prosecuting Attorney appear to disagree about whether the undisclosed extraneous offense evidence is "material to any matter involved in the action." (Opinion at 3).

The Court of Appeals refused to accept the State's assertions that Article 39.14 does not apply to punishment evidence or that it would never apply to extraneous offenses. (Opinion at 3). They went on to note that, "[i]f we were writing on a clean slate to interpret what evidence is "material to any matter," we would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial." (Opinion at 3).

The Court of Appeals concluded that "We do not write on a clean slate." (Opinion at 3). The phrase at issue, "that constitute or contain evidence material to

any matter involved in the action," was present in Article 39.14 before it was amended by the Michael Morton Act. (Opinion at 3). What is "material" had been subject to substantial judicial interpretation prior to the debate and passage of the Michael Morton Act. (Opinion at 4). Thus, applying well-established precedent from the Court of Criminal Appeals, by which this Court is bound, we are constrained to hold that the definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, regardless of what the Legislature may have thought or intended to accomplish. (Opinion at 4).

The Court of Appeals held that in order to establish that requested evidence is material, it is necessary that a defendant must provide more than a possibility that it would help the defense or affect the trial. (Opinion at 4). This definition of materiality pre-dates the Michael Morton Act and is based on a line of *Brady* cases.

**Argument:** The Court of Appeals erroneously defined materiality for purposes of reviewing a violation of the Michael Morton Act.

**Summary of the Argument:** By significantly alterating the discovery statute, the Legislature made the pre-*Morton* materiality standard inapplicable. The Court of Appeals erroneously applied the pre-*Morton* materiality requirement. Materiality, for purposes of the Court of Appeals analysis, was based on an old line of *Brady* cases that an overly restrictive outcome-of-proceedings analysis for materiality.

*Brady* and the Morton Act are not similar in scope and should not use the same definition of materiality. Materiality should be defined for purposes of the Morton Act.

### *1) The change in the language of Article 39.14(a) altered the materiality analysis.*

When amending 39.14(a), the Legislature eliminated two provisions relevant to making a materiality determination: First, they removed the requirement that a Defendant show good cause for requesting discovery. Second, they amended the timeline for disclosure of the evidence. These changes fundamentally alter the scope of what is discoverable.

a) The old discovery requirement of good cause does not apply to this case.

The predecessor version of Article 39.14(a) was significantly more restrictive than the current version. By applying that more restrictive version in this case, the Court of Appeals erred.

*i) The predecessor version of article 39.14(a) required a showing of good cause that has been eliminated by the Legislature*

Prior to the changes made by Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (*eff.* Jan. 1, 2014), criminal discovery was limited to (1) specifically listed as discoverable [and] (2) if good cause could be shown to obtain them. Illustratively, "[i]n discovery cases [appellate courts] will only reverse,

… if the omitted evidence creates a reasonable doubt which did not otherwise exist." *Aguero v. State*, 818 S.W.2d 128, 131 (Tex. App.—San Antonio 1991) quoting *Reed v. State*, 644 S.W.2d 494, 499 (Tex. App.--Corpus Christi 1982, *pet. ref'd*), citing *Quinones v. State*, 592 S.W.2d 933, 941 (Tex. Crim. App. 1980), *cert. denied*, 449 U.S. 893, 101 S. Ct. 256, 66 L. Ed. 2d 121 (1980).

At some point, this good cause requirement and the *Brady* exculpation requirement became inextricably intertwined when being analyzed. This was exacerbated by the United States Supreme Court decision in U.S. v. Bagley, defining materiality as "[t]he 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." *U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

*ii) The predecessor version of 39.14(a) strictly limited accessible evidence*

The predecessor version of Article 39.14(a) provided only the slimmest margin of evidence that could be uncovered. To gain discovery, the evidence sought must be outcome-determinative. See generally *Aguero v. State*, 818 S.W.2d 128, 131 (Tex. App.—San Antonio 1991)(Reversable error to refuse discovery only if the undisclosed information creates a reasonable doubt that does not otherwise exist.)

To illustrate how a rule this restrictive ultimately resulted in the need for the Michael Morton Act's substantive changes, consider the following examples:

- Witness statements were not discoverable because they were work-product *See Hoffman v. State*, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974).
- A chemical analysis of the drugs is excepted as part of the work product of the prosecutor and his investigators. *Feehery v. State*, 480 S.W.2d 649, 651 (Tex. Crim. App. 1972).
- "A police officer's arrest report has been held to be excepted by the discovery statute even though that report is made prior to any investigation conducted by the prosecutor." *Feehery v. State*, 480 S.W.2d 649, 651 (Tex. Crim. App. 1972) citing *Hart v. State*, 447 S.W.2d 944 (Tex.Crim.App. 1969)
- Grand jury testimony was not within the scope of discovery absent a showing of particularized need. *See Williams v. State*, 493 S.W. 2d 863 (Tex. Cr. App. 1973); *Garcia v. State*, 495 S.W. 2d 257 (Tex. Cr. App. 1973).

Many of these restrictions were eliminated by the amendment to Article 39.14(a). The time to produce discoverable evidence was also significantly altered.

*iii) Timing was limited to the vicinity of trial*

Prior to the amendments to Article 39.14(a), the court's order for production defined the time for providing discoverable evidence. The old statutory language allowed "[t]he court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce discovery." Tex. Code Crim. Proc. Ann. art. 39.14(a) (LexisNexis 2011). "[I]f defendant were "surprised" or otherwise at a disadvantage, he should have requested a continuance, and a continuance order could have been entered."[1] *State v. LaRue*, 108 S.W.3d 431,

[1] Whether a continuance is required to preserve a violation of the Michael Morton Act is not properly before the Court, as the Tenth Court of Appeals merits opinion is silent on the matter,

437 (Tex. App.—Beaumont 2003) *citing Ramirez v. State*, 815 S.W.2d 636, 649 (Tex. Crim. App. 1991) (State failed to produce evidence in response to discovery order, but appellant did not show surprise and did not move for continuance.); *see also Osbourn v. State*, 59 S.W.3d 809, 813 (Tex. App.--Austin 2001), aff'd, 92 S.W.3d 531 (Tex. Crim. App. 2002); *Wood v. State*, 18 S.W.3d 642, 647-48 (Tex. Crim. App. 2000) (Denying mistrial not abuse of discretion where defendant did not receive copy of subpoenaed evidence until trial; defendant did not request continuance, a much less drastic remedy.)

b) Because the old discovery statute failed to prevent miscarriages of justice, the Legislature fundamentally altered the scope of criminal discovery scope and process for obtaining it.

"[T]he Legislature passed the Michael Morton Act to ensure that defendants would receive discovery of the evidence the State had in its possession so that they could prepare a defense against it." *Ex parte Pruett*, 458 S.W.3d 537, 542 (Tex. Crim. App. 2015)(Alcala, J., Dissenting from denial of writ of habeas corpus). The old method wasn't working. Significant alteration to the process was necessary and was achieved in three ways.

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and the order on Appellant's motion for rehearing specifically states the Tenth Court of Appeals is not ruling on that issue. (See appendix)

*i) Good cause requirement specifically excised*

"The Legislature greatly enlarged the first section. No longer must the defendant show good cause." SIGNIFICANT CHANGES TO THE TEXAS CRIMINAL DISCOVERY STATUTE, 51 Houston Lawyer 10, 11 (hereafter cited as "Significant Changes"). Removing the good cause requirement and greatly expanding the scope of the statute both indicate an intent to broaden discovery, which cannot be accomplished without retreating from the prior definition of materiality.

*ii) Accessible evidence was greatly broadened*.

"[P]roduction of discoverable items is mandatory with only a few exceptions upon a "timely request from the defendant." And that production includes electronic duplication, copying, *and* photographing." SIGNIFICANT CHANGES at 10, 11. The amendments also required, for the first time, production of police offense reports, which were previously exempt as work product." *Id*. citing *Ex parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012) (noting the predecessor version of Article 39.14 generally protects offense and investigative reports from discovery as work product unless they contain exculpatory evidence).

Additionally, the State must now provide copies of designated documents, papers, written or recorded statements of the defendant, books, accounts, letters, photographs, objects or tangible things not otherwise privileged that contain material evidence and are in the possession of the State or any person under contract with the

State. SIGNIFICANT CHANGES at 10, 11. The new section (a) also includes the requirement that the State provide the written and recorded statements of all witnesses, "[i]ncluding witness statements of law enforcement officers." *Id.*

None of these pieces of evidence would have been "material" using the pre-*Morton* understanding of materiality. This evidences a specific intent to change how materiality is defined.

*iii) Timing of production significantly accelerated.*

The timing of discovery was altered to become "as soon as practicable after timely request" by the legislative change to Article 39.14(a) contained in Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (*eff.* Jan. 1, 2014). By deleting the "*before or during trial of a criminal action therein pending or on trial"* language from Article 39.14(a) and substituting in "as soon as practicable after a timely request" the Legislature significantly accelerated access to the data sought by the defense.[2] Whether this significant acceleration of access alters the requirement to request a continuance is an issue ripe for remand to the Court of Appeals, which specifically refused to address preservation in its opinion and on rehearing.

***2) The Legislature's significant alteration of the discovery statute authorized the Tenth Court of Appeals to decline to apply precedent defining materiality and the Court erred by not doing so.***

[2] The precise meaning of "as soon as practicable" is not before the Court.

a) Because the Legislature altered the law, the Tenth Court of Appeals was not bound by the prior definition of materiality.

A lower court has the authority to consider the continued applicability of a prior decision by a higher court when a statutory amendment supersedes the prior decision. *Phelps v. State*, 532 S.W.3d 437, 444 (Tex. App.—Texarkana 2017, pet. ref'd) *citing Sarmiento v. State*, 93 S.W.3d 566, 568 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *Gonzales v. State*, 697 S.W.2d 35, 38 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd) (holding that because the Legislature's post-decision amendments to Article 42.12 of the Texas Code of Criminal Procedure overruled the Court of Criminal Appeals' interpretation of the former version of that statute, it was no longer bound by the higher court's pre-amendment opinion)); *Coy v. State*, 831 S.W.2d 552, 556 n.4 (Tex. App.—Austin 1992, no pet.) (per curiam) ("The 1989 amendment of art. 37.07, § 3(a), effectively overrules *Murphy v. State*, 777 S.W.2d 44 (Tex. Crim. App. 1988.").

b) The State Prosecuting Attorney's Office and Appellant likely agree that materiality is broader than the Tenth Court of Appeals determined.

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." Acts 1965, 59th Leg., p. 475, ch. 722, §1, eff. Jan. 1, 1966.

In its Amicus Brief to the Tenth Court of Appeals, the State Prosecuting Attorney's Office took this position: "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." BLACK'S LAW DICTIONARY, p. 880 (Special Deluxe 5th Ed. 1979). This is also how Appellant defined material for purposes of briefing and argument. "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." *Id*. at 881. 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.[3]

The Court of Appeals agreed, but "because this Court is constrained to follow precedent established by the Court of Criminal Appeals, we are unable to follow the SPA's well-reasoned and sound arguments." (Opinion at 4).

When the Legislature amends a statute, the Court must presume that the Legislature meant to change the law and give effect to the intended change. *Trahan v. State*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979); *Phelps v. State*, 532 S.W.3d 437, 444 (Tex. App.—Texarkana 2017, pet. ref'd). Because the Michael Morton Act was a legislative alteration of the law the Court of Appeals was not bound by the preexisting definition of materiality. The Court of Appeals should have used a

[3] *See* Amicus Brief of the State Prosecuting Attorney filed in the 10th Court of Appeals

definition of materiality more in line with the scope of the Michael Morton Act.

### *3) By applying the old definition of materiality, Court of Appeals failed to effectuate the Legislative intent to change the law.*

When interpreting a statute, the Court presumes that each word of the statute has been chosen for a purpose by the Legislature and must be given effect if reasonably possible. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). In fact, it "is the duty of this Court to construe statutes so that the legislative intent of enacting constitutional statutes will be carried out[.]" *Faulk v. State*, 608 S.W.2d 625, 630 (Tex. Crim. App. 1980).

Further, "[i]n enacting an amendment the Legislature is presumed to have changed the law, and a construction should be adopted that gives effect to the intended change, rather than one that renders the amendment useless." *Ex parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979). Courts then should presume that the Legislature intended that the effect of the change be given to the entire statute. *Ex parte Austin*, 746 S.W.2d 226, 236 (Tex.Cr.App. 1988); V.T.C.A., Tex Gov't Code, § 311.021(2).

By applying the old materiality standard, the Court effectively removes the alterations to Article 39.14(a) that were put in place by its amendment. While applying precedent believed to be binding was an admirable exercise of judicial restraint, it was error.

***4) This Court may now craft a proper definition of materiality.***

As noted by the State Prosecuting Attorney's brief in the Court of Appeals: 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. The Legislature, in passing the *Morton Act*, removed that fight.

The Black's Law Dictionary definition of material as "[i]mportant," "having influence or effect," "going to the merits" is the correct materiality standard to effectuate the Legislature's intent as reflected by the amendment to Article 39.14(a). *See* BLACK'S LAW DICTIONARY, p. 880 (Special Deluxe 5th Ed. 1979). Appellant proposes this definition for purposes of interpreting Article 39.14(a) as it now reads.

**Conclusion**

The Court of Appeals stated that "[i]f we were writing on a clean slate to interpret what evidence is "material to any matter," we would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial. (Opinion at 3). That proposed standard is consistent with both the Black's

Law Dictionary definition of materiality and the legislative intent behind the expansion of discovery in criminal cases. The Court of Appeals recognized the appropriate standard but elected to defer to this Court to apply it. This Court should take the opportunity, with the question squarely and properly before it, to define materiality separately from *Brady* for purposes of interpreting and applying the Michael Morton Act.

## PRAYER FOR RELIEF

For the reasons stated above, it is respectfully submitted that the Court of Criminal Appeals of Texas should grant this Petition for Discretionary Review **reverse** the Court of Appeals and **remand** to the Court of Appeals with instructions to address whether the error was preserved or alternatively to order full merits briefing and oral argument on the Ground for Review identified herein.

**Respectfully submitted,**

**/s/ J. Edward Niehaus**
**J. Edward Niehaus**
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**ATTORNEY FOR APPELLANT**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Brief was mailed to Ralph Dewayne Watkins, TDCJ #02096743, 2664 FM 2054, Tennessee Colony, TX 75886, and that an electronic copy has been served on both the District Attorney's Office that tried the case and to the State Prosecuting Attorney's Office on the same date the brief was electronically filed - **September 18, 2018.**

**/s/J.Edward Niehaus_____**
**J. Edward Niehaus**

## CERTIFICATE OF COMPLIANCE

Calculated using Microsoft Word's word-count feature, and excluding the portions provided by Rule 9.4(i)(1), I certify that the number of words in this brief is 3,683.

**/s/J.Edward Niehaus_____**
**J. Edward Niehaus**

## APPENDIX: Opinion and Order on Rehearing

**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-16-00377-CR**

**RALPH DEWAYNE WATKINS,**

**Appellant**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

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**From the 13th District Court**
**Navarro County, Texas**
**Trial Court No. D36507**

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# OPINION

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Ralph Watkins appeals from a conviction for the offense of possession of a controlled substance of four grams or more but less than 200 grams. TEX. HEALTH & SAFETY CODE ANN. § 481.115(d) (West 2010). Watkins complains that the trial court abused its discretion by admitting evidence in the punishment phase of the trial that had not been provided pursuant to Article 39.14 of the Code of Criminal Procedure and that the trial court erred by ordering Watkins to pay restitution to DPS and assessing

attorney's fees. Because we find that the judgment should be reformed to delete the order of restitution and court appointed attorney's fees but find no other reversible error, we affirm the judgment of the trial court as reformed.

**ARTICLE 39.14**

In his first issue, Watkins complains that the trial court erred by admitting exhibits during the punishment phase of his trial that had not been produced by the State prior to trial in violation of Article 39.14(a) of the Code of Criminal Procedure. Article 39.14 was amended effective January 1, 2014 to expand the scope and availability of discovery required to be produced by the State in criminal proceedings. *See* Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (*eff.* Jan. 1, 2014) (*codified at* TEX. CODE CRIM. PROC. art. 39.14). The evidence at issue in this proceeding is punishment evidence in the form of pen packets and booking sheets, which were used by the State to prove the enhancement paragraphs in the indictment and other extraneous offenses that had been committed by Watkins.

Article 39.14(a) states that upon a timely request the State must provide "any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that *constitute or contain evidence material*

*to any matter involved in the action* and that are in the possession, custody, or control of the state or any person under contract with the state." TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (emphasis added). At trial, the State argued that the evidence was not subject to Article 39.14 because it was punishment evidence, but concedes in this appeal that Article 39.14 applies to punishment evidence. Rather, the State now argues that because the documents in question pertained to extraneous offenses, they were not discoverable because extraneous offense evidence is not "material to any matter involved in the action." *See id*. We are not willing to agree with the State's assertions that Article 39.14 does not apply to punishment evidence or that it would never apply to extraneous offenses.[1]

If we were writing on a clean slate to interpret what evidence is "material to any matter," we would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder in both the guilt and punishment phases of a trial. We do not write on a clean slate. The phrase at issue, "that constitute or contain evidence material to any matter involved in the action," was present in Article 39.14 before it was amended by the Michael Morton Act. *See* Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106 (*eff.* Jan. 1, 2014) (*codified at* TEX. CODE CRIM. PROC. art. 39.14). The phrase was not modified or

[1] The State also argues that Article 39.14 is in conflict with the notice provisions of Article 37.07 and Rule of Evidence 404(b). The State's argument continued by arguing that because the Rule 404(b) and Article 37.07 disclosures are more specific than Article 39.14 that they control over the production required by Article 39.14. Because we resolve this issue on another basis we do not reach and resolve this argument but nothing herein should be construed to mean that we agree with that aspect of the State's arguments.

defined by the Legislature when it passed the amendments to Article 39.14. What is "material" had been subject to substantial judicial interpretation prior to the debate and passage of the Michael Morton Act.[2] Thus, applying well-established precedent from the Court of Criminal Appeals, by which this Court is bound, we are constrained to hold that the definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, regardless of what the Legislature may have thought or intended to accomplish.[3]

Therefore, we hold that in order to establish that requested evidence is material, it is necessary that a defendant must provide more than a possibility that it would help the defense or affect the trial. *See Branum v. State*, 535 S.W.3d 217, 224-25 (Tex. App.—Fort Worth 2017, no pet.) (*citing U.S. v. Agurs*, 427 U.S. 97, 112 (1976)). Materiality for purposes of Article 39.14(a) means that "there is a reasonable probability that had the evidence been

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[2] The State Prosecuting Attorney, in its *amicus* brief filed with this Court, discussed the many difficulties presented in interpreting the statute as amended, especially relating to the definition of materiality and how the definition should not mirror the *Brady* definition used by the Court of Criminal Appeals and other Courts both prior and subsequent to the passage of the Michael Morton Act. We agree that it would seem that something different was intended by the Legislature. However, because this Court is constrained to follow precedent established by the Court of Criminal Appeals, we are unable to follow the SPA's well-reasoned and sound arguments.

[3] This is further shown in that several decisions from other courts of appeals regarding materiality pursuant to Article 39.14 have used the same definition for materiality subsequent to the passage of the Michael Morton Act in memorandum opinions, which require that the issues are settled, or in unpublished opinions, which have not been designated for publication and have no precedential value. TEX. R. APP. P. 47.4, 47.7; *See, e.g., In re Hawk*, No. 05-16-00462-CV, 2016 Tex. App. LEXIS 5760, 2016 WL 3085673, at *2 (Tex. App.—Dallas May 31, 2016, orig. proceeding) (mem. op.); *In re Hon*, No. 09-16-00301-CR, 2016 Tex. App. LEXIS 11313, 2016 WL 6110797 (Tex. App.—Beaumont Oct.19, 2016, no pet.) (mem. op., not designated for publication); *Meza v. State*, No. 07-15-00418-CR, No. 07-16-00167-CR, 2016 Tex. App. LEXIS 10690 (Tex. App.—Amarillo Sept. 29, 2016, pet. ref'd) (not designated for publication).

disclosed, the outcome of the trial would have been different." *Meza v. State*, No. 07-15-00418-CR, No. 07-16-00167-CR, 2016 Tex. App. LEXIS 10690 (Tex. App.—Amarillo Sept. 29, 2016, pet. ref'd) (not designated for publication) (*citing Evans v. State*, No. 07-07-0377-CR, 2009 Tex. App. LEXIS 150, at *7 (Tex. App.—Amarillo Jan. 9, 2009, pet. ref'd) (mem. op., not designated for publication); *see Ex parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012); *Quinones v. State*, 592 S.W.2d 933, 940-41 (Tex. Crim. App. 1980).[4]

At issue are exhibits providing documentary evidence of extraneous offenses that had resulted in convictions and incarceration that the State was using in part to establish the enhancement paragraphs of the indictment. Other documentary evidence of extraneous offenses was admitted in support of the State's pursuit of a lengthy sentence. The State had provided notice of its intent to produce evidence of these convictions both in its Article 37.07 notice as well as the enhancement paragraphs in the indictment itself. Watkins pled true to the enhancements at the punishment hearing. We do not believe that even if the exhibits had been produced that there is a reasonable probability that the outcome of the trial would have been different, or that the sentence Watkins received would have been reduced. Thus, under the standard for determining materiality by

[4] An aspect of this analysis that has not received much attention is the difference in perspectives based on when and by whom the determination of what constitutes material evidence is made. In the *Brady* context, the determination is made by an appellate court looking back at the entirety of the trial as it developed. But it might seem that when determining what evidence is "material," discovery should be examined from the perspective of the defendant in preparation for trial, including plea offer evaluations. And the determination of "materiality" is made by the State at least preliminarily. What is "material" in that context and from the defendant's vantage point may well be different from what may later be determined to be material to the result of the trial.

which we are bound, we do not find that the exhibits were material. Accordingly, we do not find that the trial court abused its discretion in admitting the exhibits that were not produced pursuant to Article 39.14(a). We overrule issue one.

**RESTITUTION TO DPS AND ATTORNEY'S FEES**

In his second issue, Watkins complains that the judgment is erroneous because it includes an order that restitution be paid to the Department of Public Safety which was not referenced in the trial court's oral pronouncement of the sentence. In his third issue, Watkins complains that the judgment is erroneous because it includes an order for Watkins to reimburse Navarro County for his court-appointed attorney's fees which were specifically excluded in the trial court's oral pronouncement of his sentence due to Watkins' indigence. The State agrees that the judgment erroneously includes these assessments. When the oral pronouncement of sentence and the written judgment vary, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). Therefore, we agree that the trial court's judgment is erroneous. We will reform the judgment to delete the sum of $180.00 in restitution to the Department of Public Safety and the "special findings and orders" in its entirety that assesses the DPS fee and requires Watkins to reimburse Navarro County for his court-appointed attorney's fees. We sustain issues two and three.

## CONCLUSION

Having found that the judgment should be reformed to delete the order of restitution and court-appointed attorney's fees but no other reversible error, we reform the judgment to delete the order of restitution in the amount of $180.00 payable to DPS and the statement "Reimburse Navarro County for Court Appointed Attorney Fee" and otherwise affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed as reformed
Opinion delivered and filed July 25, 2018
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[CRPM]

**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-16-00377-CR**

**RALPH DEWAYNE WATKINS,**

**Appellant**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

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**From the 13th District Court**
**Navarro County, Texas**
**Trial Court No. D36507**

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## ORDER ON REHEARING

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Appellant's motion for rehearing was filed on July 30, 2018. In the motion, appellant specifically argues that the Court should address the issue of whether a motion for continuance is necessary to preserve an issue for appellate review regarding the State's failure to produce arguably responsive documents in response to a proper discovery request. Specifically, appellant contends that the issue of the procedure necessary to preserve an issue for appellate review is important to the bench and bar for

future article 39.14 cases and should be addressed in the Court's opinion in this proceeding. By failing to address the preservation issue, the appellant contends we have violated Texas Rule of Appellate Procedure 47.1 by failing to address an issue necessary for disposition of the appeal. *See* TEX. R. APP. P. 47.1. While we agree that the issue is important, we do not believe that it is necessary to a disposition of the appeal.

It is very common for an appellate court to skip a preservation argument to reach the merits of the issue so long as the disposition on the merits does not result in a reversal of the judgment. This is most often seen in opinions by the use of a phrase such as, "assuming without deciding that the issue was preserved for appellate review" or similar phrases. *See e.g. Ransom v. State*, 789 S.W.2d 572, 585 (Tex. Crim. App. 1989) ("Assuming without deciding that appellant's general objection was sufficient to preserve the issue for our review, we hold that the trial court's instruction to disregard was sufficient to cure any error."); *Lamerand v. State*, 540 S.W.3d 252, 257 (Tex. App.—Houston [1st Dist.] 2018, pet. ref'd) ("Assuming without deciding…that [appellant] preserved the error, any error in admitting the report was harmless…."); *Ex parte Roldan*, 418 S.W.3d 143, 146 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("Assuming, without deciding, appellant preserved error on his contention, we conclude it lacks merit."); *Sanders v. State*, 346 S.W.3d 26, 35 (Tex. App.—Fort Worth 2011, pet. ref'd) ("Assuming without deciding [appellant] has preserved this issue for our review, … the trial court did not abuse its discretion…."); *Luna v. State*, 301 S.W.3d 322, 326 (Tex. App.—Waco 2009, no pet.)

("Assuming without deciding that this issue is preserved for appellate review …, we agree … that the error was harmless."); *Revels v. State*, 334 S.W.3d 46, 55 (Tex. App.—Dallas 2008, no pet.) ("Assuming without deciding that appellant's second issue was preserved for review," the issue was overruled.). This is most often done when the disposition on the merits is more efficient because the law on the merits is clear and the question of whether the issue is properly preserved is not, either factually or legally. However, if the review of the merits would result in a reversal, then a determination of whether the issue is preserved is necessary to the disposition of the appeal. *Obella v. State*, 532 S.W.3d 405, 407 (Tex. Crim. App. 2017) (appellate court may not reverse conviction without first addressing error preservation); *Gipson v. State*, 383 S.W.3d 152, 159 (Tex. Crim. App. 2012); (same) *Meadoux v. State*, 325 S.W.3d 189, 193 n.5 (Tex. Crim. App. 2010) (same). In this appeal, the disposition on the merits results in an affirmance of the trial court's judgment and therefore a ruling on the preservation analysis is not necessary to the disposition.

We do not disagree with appellant that there is a significant issue regarding the proper manner of preserving an objection to the State's failure to produce responsive documents in discovery pursuant to article 39.14. But we need not resolve that issue in this case. Until the issue is definitively resolved, the careful litigant will undoubtedly proceed until the litigant obtains an adverse ruling (object, move to strike, move for a

mistrial) and also move for a continuance to have time to investigate and prepare a response to the untimely production of the responsive discovery.

Based on the foregoing, we overrule the Appellant's July 30, 2018 motion for rehearing.[1]

PER CURIAM

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Motion denied
Order issued and filed August 22, 2018
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[1] In this proceeding and in *Carrera v. State*, 10-16-00372-CR, an Amicus Curiae Brief on Rehearing has been received. The brief asks the Court to reconsider the Court's analysis and holding regarding the determination of the meaning of "material" as used in article 39.14 after the passage of the Michael Morton Act. *See* TEX. CODE CRIM. PROC. art. 39.14, as amended by Acts 2013, 83rd Leg., ch. 49, § 2, p. 106, eff. Jan. 1, 2014. While we generally agree that a sea change in criminal discovery was anticipated, and probably intended as a result of the passage of the amendments, the legislature's writings do not always accomplish what was intended and further amendment is thus required. The legislature did not change a term in the existing statute that had already been interpreted by the State's highest court in criminal matters. As we explained in our opinion, we do not write on a clean slate. If we did, we may very well utilize the interpretive tools and analysis suggested by the Amicus Curiae on rehearing as well as the Amicus Curiae brief on original submission filed by the State Prosecuting Attorney. But we are bound by the prior holding and interpretation of the definition of "material" by this State's highest court on criminal matters. Accordingly, we decline the invitation of the Amicus Curiae to revisit our analysis and holding of the meaning of "material" as used in article 39.14.