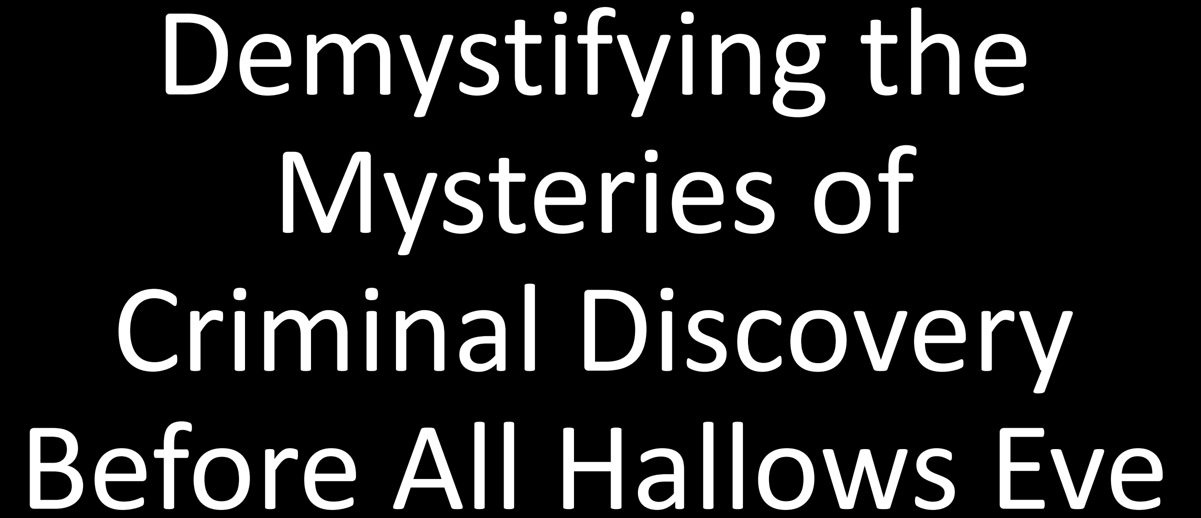

Demystifying the Mysteries of Criminal Discovery Before All Hallows Eve

Presented by the Honorable Sid Harle

Moderated by Stacey M. Soule

The Legend of the Michael Morton Act

A/K/A

Tex. Code Crim. Proc. art. 39.14

GEORGETOWN
MORTON FREED

Michael Morton Act Timeline

Approximately 25 Years

February 1987
Morton Sentenced to Life

Oct. 12, 2011
CCA Grants Habeas Relief

May 16, 2013
Morton Act Signed by the Governor

January 1, 2014
Morton Act Effective Date

"Michael Morton provided a significant spark the Legislature needed to completely change criminal discovery in Texas."

Watkins v. State
619 S.W.3d 265 (Tex. Crim. App. 2021)

Unraveling the mystery of
"material to any matter involved in the action"
in Article 39.14.

Watkins

The Morton Act

"revamped Article 39.14 completely."

Watkins

“[W]e hold that the word ‘material’ as it appears in the statute means ‘having a logical connection to a consequential fact’ and is synonymous with ‘relevant’ in light of the context in which it is used in the statute.”

Watkins

Additional Observations

- “must be disclosed upon request without any showing of ‘good cause’ or the need to secure a discretionary trial court order.”
- “must occur as soon as practicable”

Watkins

Art. 39.14(h): Surpassing *Brady*

“places upon the State a free-standing duty to disclose all ‘exculpatory, impeaching, and mitigating’ evidence to the defense that tends to negate guilt or reduce punishment.”

Creates “an independent and continuing duty for prosecutors to disclose evidence that may be favorable to the defense even if that evidence is not ‘material.’”

Clearing the Cobwebs of Disclosure

Fortuna v. State
665 S.W.3d 861 (Tex. App.—Houston [14th] 2023)

- **Subject to Disclosure**: Victim-assistance screening forms used by the victims' assistance coordinator marked "attorney work product" were discoverable because there was no evidence they were prepared at the request of the prosecutor in anticipation of prosecution.

- **Favorable**: The screening forms contained information about the victim's unwillingness to prosecute and inconsistent statements; thus, they provided exculpatory and impeachment evidence.

- **Material**: Contents highlight conflicts in evidence and could have been used to impeach the victim.

Fortuna

Harmless Error 44.2(b)

- The defense knew about the victim's desire to withdraw the charges and could cross-examine her.
- The time of reported injuries is evidence-neutral when injuries were documented on the offense date.
- The victim maintained she had been injured.
- The defendant's self-defense claim was not impaired.

In re State ex rel. McCain

670 S.W.3d 776 (Tex. App.—Texarkana 2023)

Tex. Family Code Section 264.408 and Tex. Code Crim. Proc. arts. 39.15 and 38.071 prohibit the duplication or reproduction of a forensic child interview.

Cautionary Tale: Waiver

Rodriguez v. State
630 S.W.3d 522 (Tex. App.—Waco 2021, no pet.)

Failure to request a continuance in response to the State's proffer of evidence on the first day of trial waives (forfeits) an appellate challenge that the "untimely" disclosure prejudiced defense counsel's assessment of the case and strategy.

Rationale: Counsel had the opportunity to avoid prejudice and impairment but chose not to.

C.J. Gray Concurrence

- “Unreasonable” that the District Clerk is not the “State.”
- Request for a continuance developed from the “surprise” line of cases doesn’t apply.
- Harm was irreversible if the trial strategy had been modified by untimely disclosure.

Issue Spotting

1. Who/what is the State?
2. What is the State's duty to obtain evidence earlier if it intends to use it at trial?
3. If the relief requested would cure the late disclosure, is that enough for preservation?
4. What prejudice evidence should the defendant have to proffer to support the requested form of relief?

Amoles v. State

No. 05-21-00556-CR (Tex. App.—Dallas Aug. 19, 2022, no pet.)

The defendant's complaint about the trial court's refusal to dismiss the indictment based on Article 39.12 and *Brady* violations because of the State's post-jury-selection (but pre-guilt phase) delay in providing recantation evidence to the defense was forfeited by the failure to seek a continuance.

Note: The State asserted the defense already knew about the recantation and used it during *voir dire*.

Amoles

Even assuming the failure-to-disclose under 39.14 and *Brady* was preserved, the error was harmless because:

- the defense knew the victim had recanted and was able to question the panel about the subject.
- a video of the recantation that the defense knew about was made seven months before the trial.
- the jury knew about the recantation.
- it was cumulative of other evidence.
- the defense's failure to request a continuance indicates no prejudice.

Shadowy Nexus

Evidence of past controlled drug buys involving the defendant and the identity of CI in another drug investigation were not material to any matter in the defendant's prosecution for possessing a gun and drugs.

Thurman v. State,

Nos. 01-19-00833-CR & 01-19-00834-CR (Tex. App.—Houston [1st Dist.] July 27, 2021, no pet.) (not designated for publication)

Conjuring Harm

Williamson v. State

No. 04-20-00268-CR (Tex. App.—San Antonio Oct. 27, 2021, pet. ref'd)

The exclusion of the domestic assault victim's arrest record for assault, which was not timely disclosed by the State, was harmless error under 44.2(b).

Williamson

Rationale

- Failed to identify how defensive theory would have changed if disclosed earlier.

- Other evidence exposed the victim's propensity for violence and arrest record would only have had an incremental benefit.

- Overwhelming evidence of assault.

Sopko v. State
637 S.W.3d 252 (Tex. App.—Fort Worth 2021, no pet.)

Holding

The trial court's denial of the defendant's oral discovery request at the revocation hearing was harmless under 44.2(b).

Rationale

- The State disclosed the evidence before the original plea hearing.
- Defense counsel used the evidence on direct and cross.
- Defense had independent access (*i.e.*, upon request) under 39.14.
- The trial court entered its own discovery order in excess of 39.14 and *Brady*.

Sopko

Holding

The defendant's complaint about not having time to prepare could have been alleviated with a continuance, so the complaint is forfeited.

Possession

Bennett v. State

No. 03-21-00225-CR, Tex. App.—Austin Nov. 17, 2022, pet. ref'd)

Rule

The State's ability to access is not the same as possession custody, or control.

The "trial court did not abuse its discretion by determining that the Michael Morton Act did not require the State to obtain from the cell-service provider and disclose to Bennett records of text exchanges that Bennett wanted disclosed but which were not in the possession, custody, or control of the State or someone under contract with the State."

What Lies Ahead

State v. Heath

- **Before the fourth jury setting, the State discovered there may be a 911 of the offense.**

- **Six days before trial, the State obtained the recording from the Sheriff's Department and gave a copy to the defense.**

- **The trial court granted the defendant's motion to suppress/exclude the 911 recording.**
  - ***Rationale*: The prosecutor should have determined the existence of the recording before and had a duty to disclose it as soon as practicable.**

Heath v. State
642 S.W.3d 591 (Tex. App.—Waco 2022)

- **Article 39.14(a)'s "'as soon as practicable,' . . . . [imposes] a duty of the prosecutor to timely search out discovery that may be in the State's custody, constructive possession, or control and then to provide it to the defendant in a timely manner in response to a discovery request."**

- **Even without bad faith, "[t]he trial court fashioned an appropriate sanction for the State's failure to timely produce the recording in response to the discovery request."**

- **Heath was not required to move for a continuance because the trial judge exercised his discretion to exclude it.**

Heath v. State
PD-0156-22 (submitted 6-21-23)

State's Issues Granted

1. **Has the State's statutory duty to disclose evidence "as soon as practicable" been violated if the prosecutor fails to disclose an item of evidence the D.A.'s Office does not know exists but that has been in police custody for months?**

2. **If so, does the trial court have authority to impose an exclusionary sanction when there has been no bad faith or demonstrable prejudice to the opposing party and the statute provides for no such sanction?**

Thank you.

Questions?