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# Beyond "If you have to ask…": Understanding *Brady* and the Michael Morton Act in 2023

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# Beyond "If you have to ask…": Understanding *Brady* and the Michael Morton Act in 2023

**By Holly Taylor**

Many an appellate prosecutor can recall a moment years ago when a trial prosecutor walked into their office and described some tricky piece of evidence or information. The description would inevitably be followed by a question: "Do I have to turn it over?" The appellate attorney's standard response would be, "Well, if you have to ask…," making it clear that the correct path forward under *Brady v. Maryland*[1] was disclosure of that tricky item. Two key principles seemed to come up the most:

1. "Impeachment evidence … as well as exculpatory evidence, falls within the *Brady* rule. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is 'evidence favorable to an accused,' *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985).
2. Prosecutors must not only disclose information within their own personal knowledge, but "have a duty to learn of any evidence favorable to the defense that is known to others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Everything changed on January 1, 2014, when the Michael Morton Act (Morton Act) took effect. *See* Act of May 14, 2013, 83d Leg., R.S., ch. 49, § 2, art. 39.14, 2013 Tex. Gen. Laws 106, 106 (codified at Tex. Code Crim. Proc. art. 39.14). The Morton Act extended criminal discovery in Texas far beyond the existing framework established by *Brady* and its progeny. As amended by the Morton Act, Article 39.14 requires that "after receiving a timely request from the defendant[,] the state shall produce … any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness … 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. art. 39.14(a).

No longer was any discovery motion or order, nor any showing that the evidence is favorable to the defendant, required to trigger the disclosure obligation. *Id.* Moreover, the Morton Act imposes on the prosecution an ongoing duty, extending into perpetuity, to disclose any "exculpatory, impeaching, and mitigating" evidence that merely "tends to" negate guilt or reduce punishment—no showing of materiality is required. *Id.* at art. 39.14(h), (k).

As the Court of Criminal Appeals (CCA) explained in its watershed 2021 decision, *Watkins v. State*, the Morton Act changed the practice of criminal discovery in Texas, "making disclosure the rule and non-disclosure the exception":

[1] 373 U.S. 83 (1963).

> On the whole, the statutory changes broaden criminal discovery for defendants, **making disclosure the rule and non-disclosure the exception.** Significantly, Article 39.14(h) 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. Our Legislature did not limit the applicability of Article 39.14(h) to "material" evidence, so this duty to disclose is much broader than the prosecutor's duty to disclose as a matter of due process under *Brady vs. Maryland*.
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> Any evidence that does not fall under Article 39.14(h)—that is, any evidence that does not tend to negate guilt or mitigate punishment—must be disclosed upon request without any showing of "good cause" or the need to secure a discretionary trial court order. Disclosure is mandatory and must occur "as soon as practicable."
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> Generally speaking, the current version of Article 39.14 **removes procedural hurdles to obtaining discovery, broadens the categories of discoverable evidence, and expands the State's obligation to disclose.** Further, the State's new, broader obligations **apply prior to trial, continue after conviction, and must be complied with quickly**. Article 39.14 also holds the State accountable to these new obligations by requiring prosecutors to document and put on the record what has been turned over before a criminal defendant can plead guilty.

619 S.W.3d 265, 277-78 (Tex. Crim. App. 2021) (emphasis added, citations omitted). The CCA interpreted the meaning of "material to any matter involved in the action" in Article 39.14(a) to mean, "having some logical connection to a fact of consequence"; this term "is synonymous with 'relevant' in light of the context in which it is used in the statute." *Id.* at 290-91.

Since the CCA's landmark decision in *Watkins*, Texas courts have issued several more published cases—and many unpublished ones—interpreting *Watkins*, *Brady*, and the Morton Act. The following collection includes summaries of some of the more significant of the post-*Watkins* cases, along with a few issued after Morton Act but before *Watkins*. *See, e.g., In re State ex rel. Best*, 616 S.W.3d 594 (Tex. Crim. App. 2021); *In re Moore*, 615 S.W.3d 162 (Tex. App. – Austin 2019, orig. proceeding).

The cases summarized below answer some questions, such as:

1. Can a district court order a police department to produce records to the court for in camera inspection but not to reveal the existence of the motion or order to the

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