

and more than
^
**Brady and Exculpatory
Evidence**

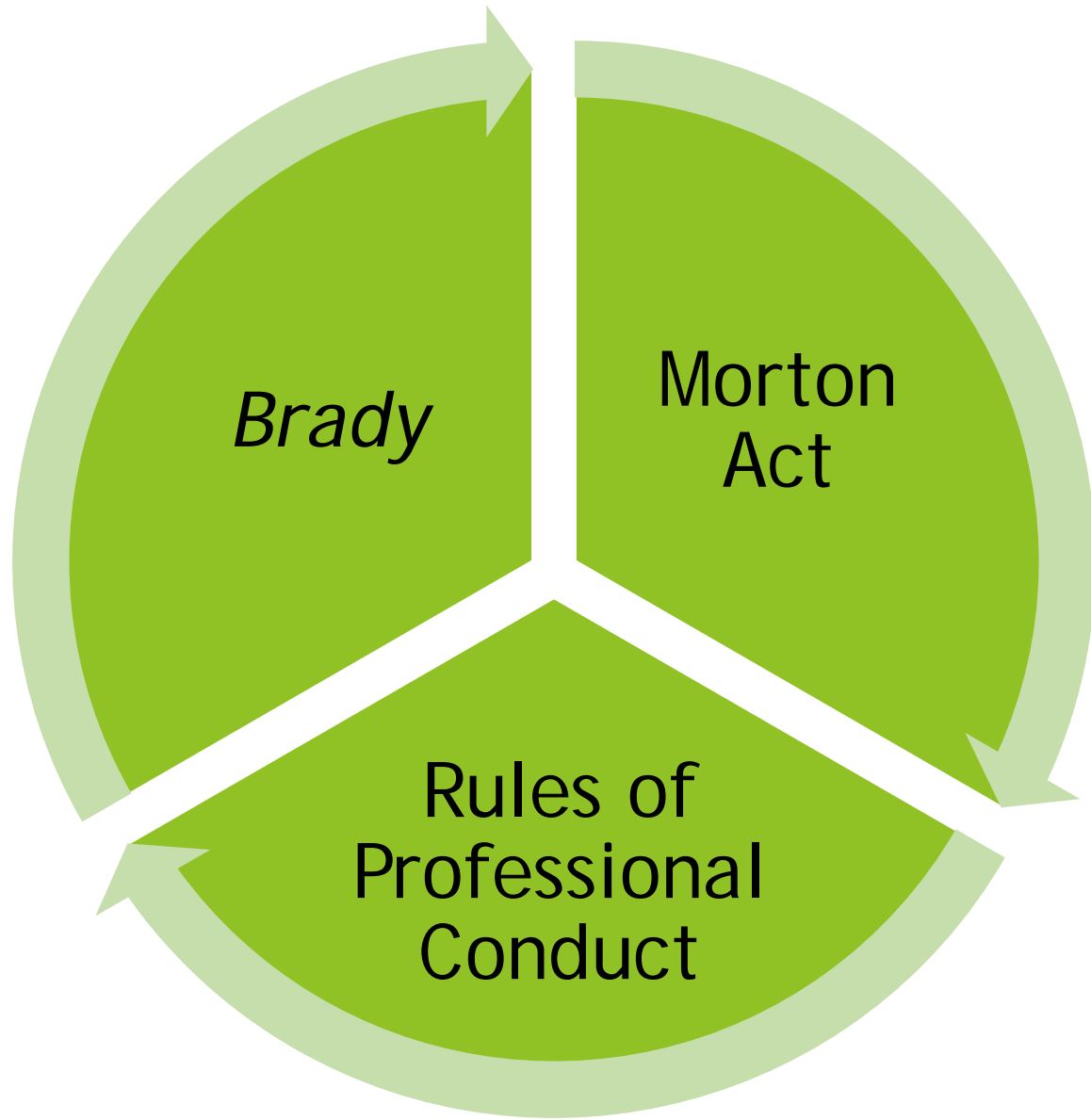
Stacey M . Soule
State Prosecuting Attorney

John R. Messinger
Assistant State Prosecuting
Attorney



@OSPATX

www.spa.texas.gov





1. Enforcement
2. Why
3. Who
4. When
5. How: Invoked & Satisfied
6. What

When can these rules be enforced?

Trial

Brady

Morton

Disciplinary Rule
*if actual
prejudice*

Motion for New Trial

Brady

Morton

Disciplinary Rule
*if actual
prejudice*

Appeal

Brady

Morton

Disciplinary Rule
*if actual
prejudice*

Habeas

Brady

Why



WAIT BUT WHY

The illustration features the words "WAIT BUT WHY" in a bold, orange, sans-serif font. Each letter has a small black stick figure on top of it. The figure on the 'W' is holding a parachute. The figure on the 'B' is pointing towards the right. The figure on the 'Y' is holding a small object. The background is white with a dark grey diagonal stripe on the left and a green diagonal stripe on the right.

A stylized graphic of the American flag, showing the stars and stripes, positioned on the left side of the slide. The stars are white on a blue field, and the stripes are red and white. The graphic is partially obscured by a green and purple abstract shape on the right.

Why: Under *Brady*

“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”

Brady v. M.D., 373 U.S. 83 (1963)



Why: Under Morton Act

“the exchange of *relevant* information between prosecutors and the defense prior to trial—is both necessary for a fair and just criminal justice system, and also required as part of a defendant's constitutional right to a full defense.”

Bill Analysis, S.B. 1161, Criminal
Justice Committee, July 26, 2013

Why: Rule of Professional Conduct

Rule 3.09: "A prosecutor has the responsibility to see that justice is done, and not simply be an advocate."



Who



Who: Under *Brady*

- Prosecutor
- Other Lawyers
- Other Employees
- Law Enforcement
- CPS
- CAC



See Ex parte Miles, 359 S.W.3d 647 (Tex. Crim. App. 2012)

Who: Under Morton Act

- Article 39.14(a): “that are in the possession, custody, or control of the State or any person under contract with the State.”
- Article 39.14(b): state shall disclose expert witnesses.
- Article 39.14(h): “Notwithstanding any other provision of this article, the state shall disclose to the defendant”
- Article 39.14(j): “If at any time before, during, or after trial the state discovers any additional . . . the state shall promptly disclose”

Who:
Under Morton Act



TEX. CODE CRIM. PROC. art.
39.14(b): the defense,
upon a timely request (30
days), shall disclose to the
State expert witnesses
within 20 days.

Who:

Under the Rules of Professional Conduct

- Preamble: “A Lawyer’s Responsibilities”
- Rule 3.09: “Special Responsibilities of a Prosecutor”
- Rule 5.01: Responsibilities of Supervisory Lawyer
- Rule 5.02: Responsibilities of Supervised Lawyer
- Rule 5.03: Responsibilities Regarding Nonlawyer Assistants
- Rule 8.03: “Reporting Professional Misconduct”

Hillman v. Nueces County & DA,
17-0588 (granted June 1, 2018)

Does sovereign immunity bar a former assistant DA from suing a county and DA for wrongful termination based on the assistant's refusal to violate the Morton Act?





Jail Calls

1. Does *Brady* impose a duty on a DA to review inmate jail calls to determine whether they contain exculpatory or impeachment evidence when the DA has not otherwise exercised its ability to access without a warrant?

2. Under *Morton*, are jail-inmate call recordings in the “possession, custody, or control of the State or a person under contract” if the DA does not access them?

3. Under *Morton*, does the ability of the DA to access the jail calls without a warrant equate to “possession, custody, or control” by the State or “a person under contract with the State?”

- State has no duty to listen to the recordings to determine if there is *Brady* material. Prosecutor is obligated to determine if others have discovered any.
- Civil: “possession, custody or control” means “physical access” or “right to possession that is equal or greater” than the party in actual possession.
- Will depend on the contract; but unfettered access would equate to “possession, custody, or control.”

Attorney General Opinion
No. KP-0041 (Oct. 2015)



When

**WAITING FOR A
RESPONSE**



When:
Under *Brady*

- Perpetual: affirmative duty to disclose. *U.S. v. Bagley*, 473 U.S. 667 (1985).
- Non-specific in Texas; likely timeliness requires that it not prejudice the defendant's rights.

Standard of Review for Tardy Disclosure Under *Brady Valdez v. State*, AP-77,042 (Tex. Crim. App. 2018) (unpublished)

- When evidence is disclosed during trial, courts ask whether the defendant was prejudiced by the tardy disclosure.
- To prove prejudice, a defendant must show a reasonable probability that, if the evidence had been disclosed to the defense earlier, the result of the proceeding would have been different.
- Failure to object and request a continuance waives a complaint that the State has violated *Brady* and suggests that the tardy disclosure was not prejudicial.

When: Under Morton Act

- Article 39.14(a): “as soon as practicable after receiving a timely request”
- Article 39.14(b): on request within 30 days, 20 days to disclose expert witness.
- Article 39.14(k): “if at any time before, during, or after trial the state discovers any additional document, item, or information required under Subsection (h), the state shall promptly disclose”
- Not before the filing of charging instrument. *In re Lewis*, Nos. WR-83,367 (Tex. Crim. App. 2015) (Alcala, J., concurring). *But see In re Carrillo*, WR-83,345 (Tex. Crim. App. 2015) (Alcala, J., concurring) (complaint enough to invoke 39.14).

When:

Under the Rules of Professional Conduct

- Rule 3.02: no unreasonable costs or delays.
- Rule 3.03(b): when false material evidence is discovered, duty to correct or withdraw the evidence or take other remedial measures.
- Rule 3.04(a): no unlawful obstruction of evidence access; no destruction or concealment.
- Rule 3.04(b): not falsifying or counseling or assisting others to do so.

When:

Under the Rules of Professional Conduct

- Rule 3.09(d): prosecutor must “make timely disclosure.”
 - Does not apply post-conviction. *Comm’n Lawyer Discipline v. Hanna*, 513 S.W.3d 175 (Tex. App.—Houston [14th] 2016).
- Rule 4.01(a): no false statements of material fact or law to third party.
- Rule 4.01(b): disclose a material fact to a third party when needed to avoid participation in fraudulent act.

How

Invoked
&
Satisfied



Invocation



How Invoked: Under *Brady*

- No request is needed. *U.S. v. Bagley*, 473 U.S. 667 (1985).
- But that continuing duty does not extend to post-conviction scientific testing of evidence in the State's possession. *Dist. Atty's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308 (2009).

How Invoked: Under Morton Act

- Article 39.14(a): “after receiving a timely request”
- Article 39.14(h): affirmative duty; no need to invoke.
- Article 39.14(h-1): affirmative duty for jail-house witnesses.
- Article 39.14(k): “If at any time before, during, or after trial the state discovers any additional . . . the state shall promptly disclose”

How Invoked: Under Morton Act

A motion for discovery directed to the trial court that has never been ruled upon does not invoke 39.14(a).

Majors v. State, No. 10-17-00041-CR
(Tex. App.—Waco July 25, 2018)

How Invoked: Under the Rules of Professional Conduct

- Rule 3.02: no unreasonable costs or delays.
- Rule 3.04(a): no unlawful obstruction of evidence access; no destruction or concealment.
- Rule 3.09: a prosecutor shall “make *timely* disclosure.”

Satisfaction



How Satisfied: Under *Brady*

- Does not include the unsupervised right to search through the State's file. *PA v. Ritchie*, 480 U.S. 39 (1987).
- Not required to deliver its entire file to the defense. *U.S. Agurs*, 427 U.S. 97 (1976).
- Does not have to make a complete and detailed accounting to the defense of all police investigatory work on a case. *Moore v. Illinois*, 408 U.S. 786 (1972).

How Satisfied: Under Morton Act

- Article 39.14(a): “state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant”
- Article 39.14(b): disclose in hard copy or electronic form the name and address of the expert witness.
- Article 39.14(c): disclose portion withheld or redacted.
- Article 39.14(h-1): disclose jail-house witness criminal history, reduced charge, deal with prosecution, other criminal cases person acted as a jail-house witness.

How Satisfied: Under Morton Act

- *In re District Attorney's Office of the 25th Judicial District*, 358 S.W.3d 244 (Tex. Crim. App. 2011): upheld order of trial court requiring the State to copy a DVD for the defendant.
- *Ehrke v. State*, 459 S.W.3d 606 (Tex. Crim. App. 2015): "inspection" includes the right to have drugs tested by defense chemist.
- *In re State of Texas ex. rel. Skurka*, 512 S.W.3d 444 (Tex. App.—Corpus Christi-Edinburg 2016): trial court can require the State to designate which jail calls it intends to use at trial.



Documenting Compliance Under the Morton Act

- Article 39.14(i): the state shall electronically record or otherwise document any document, item, or other information provided to the defendant.
- Article 39.14(j): Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article.

Preservation Required for Vague Discovery Log



“However, any lack of specificity in the discovery log was not raised before the trial court. Objecting to the adequacy of the discovery log would have provided a mechanism for this Court to potentially be able to review and determine what was or was not provided in discovery versus what has now been shown to exist.”

Horne v. State, No. 10-16-00371-
CR (Tex. App.—Waco July 25, 2018)

How Satisfied: Under the Rules of Professional Conduct

- Rule 3.01: shall not defend a proceeding or assert/controvert issue unless reasonable belief not frivolous.
- Rule 3.02: no unreasonable costs or delays.
- Rule 3.03(a)(1), (2), (4), (5): shall not make material false statement to tribunal, fail to disclose false statement, & offer or use a false statement.
- Rule 3.03(b): when discovered, correct material false evidence.

How Satisfied:

Under the Rules of Professional Conduct

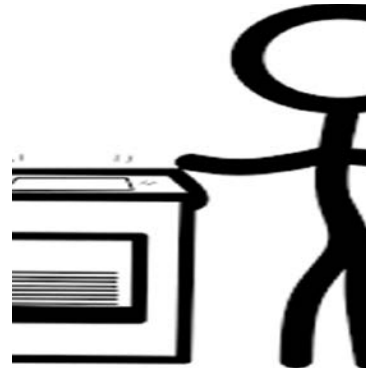
- Rule 3.04(a): no unlawful obstruction of access and no destruction or concealment of evidence with actual or potential evidentiary value.
- Rule 3.04(b): no falsifying evidence or assisting another to do so.
- Rule 3.04(c)(2): in court, cannot state or allude to something not relevant or not supported by admissible evidence.
- Rule 4.04(a): with no substantial purpose, cannot embarrass, delay, or burden a third person, or violate the legal rights of third person to obtain evidence.

Morton Act's Distinction Between Viewing and Copying



Article 39.14(f):
viewing authorized

Article 39.14(f): no
copies, except
defendant's statement



Query
Professional Ethics Committee
Opinion No. 646
(November 2014)



As a condition of allowing defense counsel to obtain information in the prosecution file, may a prosecutor require defense counsel to agree not to show or provide copies of the information?

Professional Ethics Committee

Opinion No. 646

(Nov. 2014)

“article 39.14 does not require (or permit a prosecutor to require) any concession by criminal defense lawyers or their clients in order to receive such discovery nor must defendants seek a court order to secure the discovery mandated by that article.”

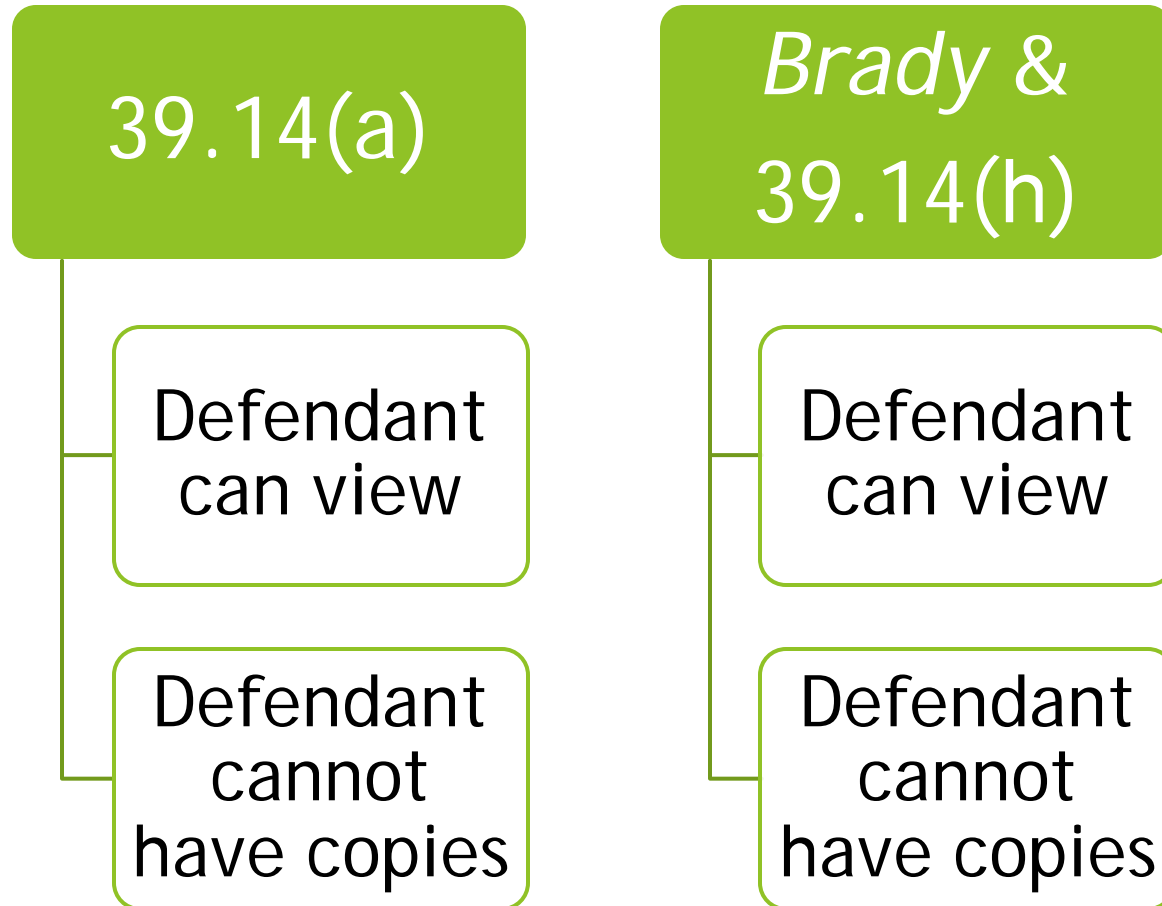
In re Powell v. Hocker,
516 S.W.3d 488
(Tex. Crim. App. 2017)



A trial court cannot circumvent the prohibition by court-order.

Under Article 39.14(f), a defendant represented by counsel is not entitled to copies of documents.

Opinion No. 646: Under 39.14(f)



In re McCann, 422 S.W.3d 701
(Tex. Crim. App. 2013)



“a client owns the
contents of his or
her file.”

To defend against an allegation of ineffective assistance, may the State obtain discovery of trial counsel's file?

Yes. The habeas judge, as the organizer of evidence and original factfinder, can manage discovery and order habeas counsel to disclose evidence in trial counsel's file that can be used to defend against an allegation of ineffective assistance.

In re Harris, 491 S.W.3d 332 (Tex. Crim. App. 2016)

What



What:
Under *Brady*

“evidence favorable to an accused” that is “material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

Brady v. Maryland, 373 U.S. 83 (1963)



Favorable Evidence v. Information

- Exculpatory - justify, excuse, clear the defendant
- Mitigating
- Impeachment - disputes, disparages, denies, or contradicts
- Admissible Evidence
- Inadmissible Information

Ex parte Miles, 359 S.W.3d 647
(Tex. Crim. App. 2012)

Favorable



“Favorable evidence is any evidence that, if disclosed and used effectively, may make a difference between conviction and acquittal”

Harm v. State, 183 S.W.3d 403 (Tex. Crim. App. 2006)



Guilty Plea Exception: Impeachment Information

Impeachment information goes to the fairness of a trial, not the voluntariness of a guilty plea.

U.S. v. Ruiz, 536 U.S. 622
(2002)

What the State is Not Obligated to Do Under *Brady*

- Does not have to seek out *Brady* evidence. *U.S. v. Bagley*, 473 U.S. 667 (1985).
- Does not require the disclosure of exculpatory information that the State does not have in its possession and that is not known. *Pena v. State*, 353 S.W.3d 797 (Tex. Crim. App. 2011).
- Does not have to create evidence. *In re State of Texas ex rel. Munk*, 448 S.W.3d 687 (Tex. App.—Eastland 2014) (criminal histories).
- Does not have to provide exculpatory information that is available to the defendant through an exercise of due diligence. *U.S. v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

Brady Materiality

- There is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.
 - *"undermines confidence in the outcome of the trial."*

Kyles v. Whitely, 115 S. Ct. 1555 (1995)

Brady Materiality

- Materiality under *Brady* involves balancing the strength of the exculpatory evidence against the evidence supporting conviction; material in light of the entire body of evidence.
- “Sometimes, what appears to be a relatively inconsequential piece of potentially exculpatory evidence may take on added significance in light of other evidence at trial.”

Hampton v. State, 86 S.W.3d 603 (Tex. Crim. App. 2002)

Canada v. State, 547 S.W.3d 4
(Tex. App.—Austin 2017)

Officer disciplinary file documenting a complaint about an accident unrelated to Canada's case against an officer for which no disciplinary action was taken did not need to be disclosed under *Brady*. It did not provide exculpatory material or impeachment evidence.

A prior erroneous report and suspension from job duties of the lab technician who conducted BAC test of Diamond's blood was not disclosed before she testified in violation of *Brady*. However, it was not "material" because it was not used for the .15 Class A enhancement and there was overwhelming evidence in support of her intoxication under the faculties theory.

Diamond v. State, ___ S.W.3d___,
No. 14-17-00005-CR (Tex.
App.—Houston [14th] 2018)



What:

Under the Rules of Professional Conduct

- Rule 3.03(a), (b): no false statement of *material* fact; remedy false evidence.
- Rule 3.03(a)(2), (3): disclose fact to *tribunal* to avoid assisting with crime or fraud; in *ex parte* proceeding, a fact needed for an entity to make an informed decision.
- Rule 3.04(a): no unlawful obstruction of access and destruction or concealment of evidence.
- Rule 3.09(d): “all the evidence or information *known* to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor”
- 4.01(b): to a third party, a *material* fact when needed to avoid becoming a party to a crime or fraud.



Schultz v. Comm. For Lawyer Discipline of the State Bar of Texas, No. 55649 (2015)

Rule 3.09(d) does not contain a materiality requirement.

No analysis is necessary to determine whether disclosure would probably have led to a different outcome. The Rule is intended to prevent incorrect judgment calls, so it errs on side of disclosure.

Rule 3.04 does not contain an "intent" element; culpable regardless of intent.

What: Under Morton Act

TEX. CODE CRIM. PROC. art. 39.14(h):
any exculpatory, impeachment, or
mitigating document, item, or information
. . . that tends to negate the guilt of the
defendant or would tend to reduce the
punishment for the offense charged.

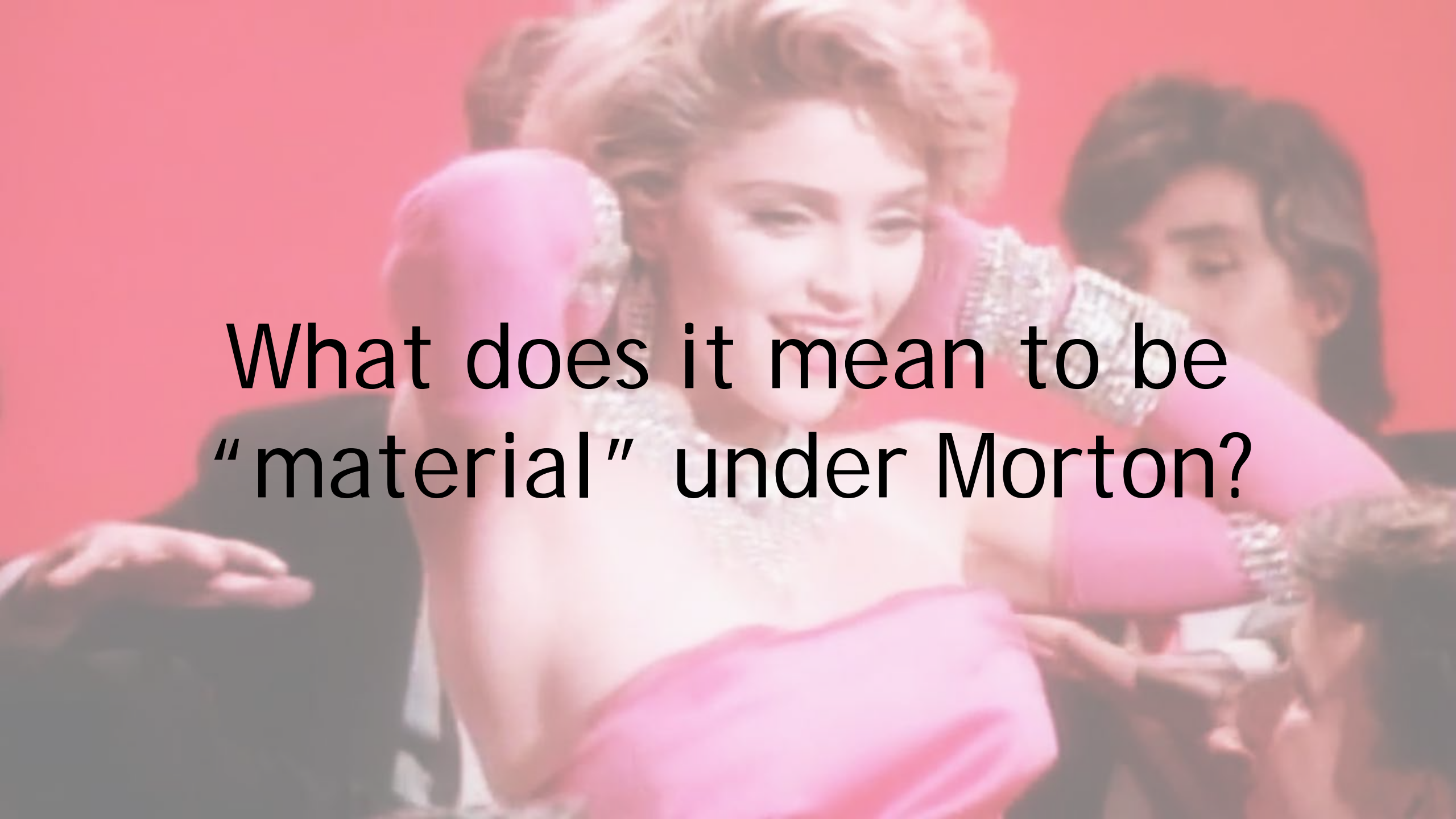
What: Under Morton Act

TEX. CODE CRIM. PROC. art. 39.14(a):

Offense reports, documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement, books, accounts, letters, photographs, or objects or other tangible things that constitute or contain evidence material to any matter involved in the action.

What the State is Not Obligated to Do Under Morton

- “The trial court does not have the authority under article 39.14 to order the State to create a document that it does not already have. Article 39.14 deals with the production of discovery materials, not their creation.” *In re Stormer*, WR-66,865-01 (Tex. Crim. App. 2007).
- Article 39.14(a): not work-product or privileged; not evidence under 39.15, 39.151, Family Code § 264.408.
- Article 39.14(c), (f), (g): portions properly withheld or redacted.

A woman with blonde hair, wearing a bright pink dress and a large, ornate necklace, is smiling and looking down. She is surrounded by other people, some of whom are also wearing pink. The background is a solid red color. The text "What does it mean to be 'material' under Morton?" is overlaid on the image in a large, black, sans-serif font.

What does it mean to be
"material" under Morton?

Art. 39.14(a) applies to things
“that constitute or contain
evidence **material to any matter
involved in the action**”

Relevant to any matter involved in the action

Material to any matter involved in the action

Material to **guilt or punishment**

The CoAs set a high threshold.



- ▶ Second Court
- ▶ Fifth Court (mandamus)
- ▶ Seventh Court
- ▶ Ninth Court (mandamus)
- ▶ Tenth Court

Two tracks

- ▶ “Material” is exactly the same as in *Brady*
- ▶ It is “material” if it satisfies *Brady* or is “indispensable evidence”

“We do not write on a clean slate.”

The phrase at issue, “that constitute or contain evidence material to any matter,” was present in Article 39.14 before it was amended by the Michael Morton Act. The phrase was not modified or 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.

Carrera v. State, No. 10-16-00372-CR, Slip op. at 3.

This phrase has not changed, but everything else has

- ▶ The original statute applied to (fewer) things “which constitute or contain evidence material to any matter involved in the action”
- ▶ But it also required a showing of “good cause”

The CCA cases (perhaps) conflate “good cause” with materiality

Quinones v. State 1980

McBride v. State 1992

Masse v. State 1996

Ex parte Miles 2012

Ehrke v. State 2015

Wha?

- ▶ Some cases apply *Brady* materiality to the judge's decision on "good cause"
- ▶ Most recognize a right to inspect "indispensable evidence" that cannot be attributed to *Brady* materiality
- ▶ Its latest pre-Morton case says "the court must permit inspection [of indispensable evidence], *even without a showing of good cause*, because the substance is material to the defense of the accused."

Did Morton change the meaning by changing the context?

- ▶ Does stripping the “good cause” requirement mean that cases defining entitlement pre-Morton no longer control?
- ▶ Does adding 39.14(h), with its lower-than-*Brady* standard for disclosure, change the calculus?

A cartoon illustration of a yellow character with glasses, looking thoughtful with a hand on their chin. The character has a large, prominent nose and is wearing a white shirt. The background is a plain, light gray color.

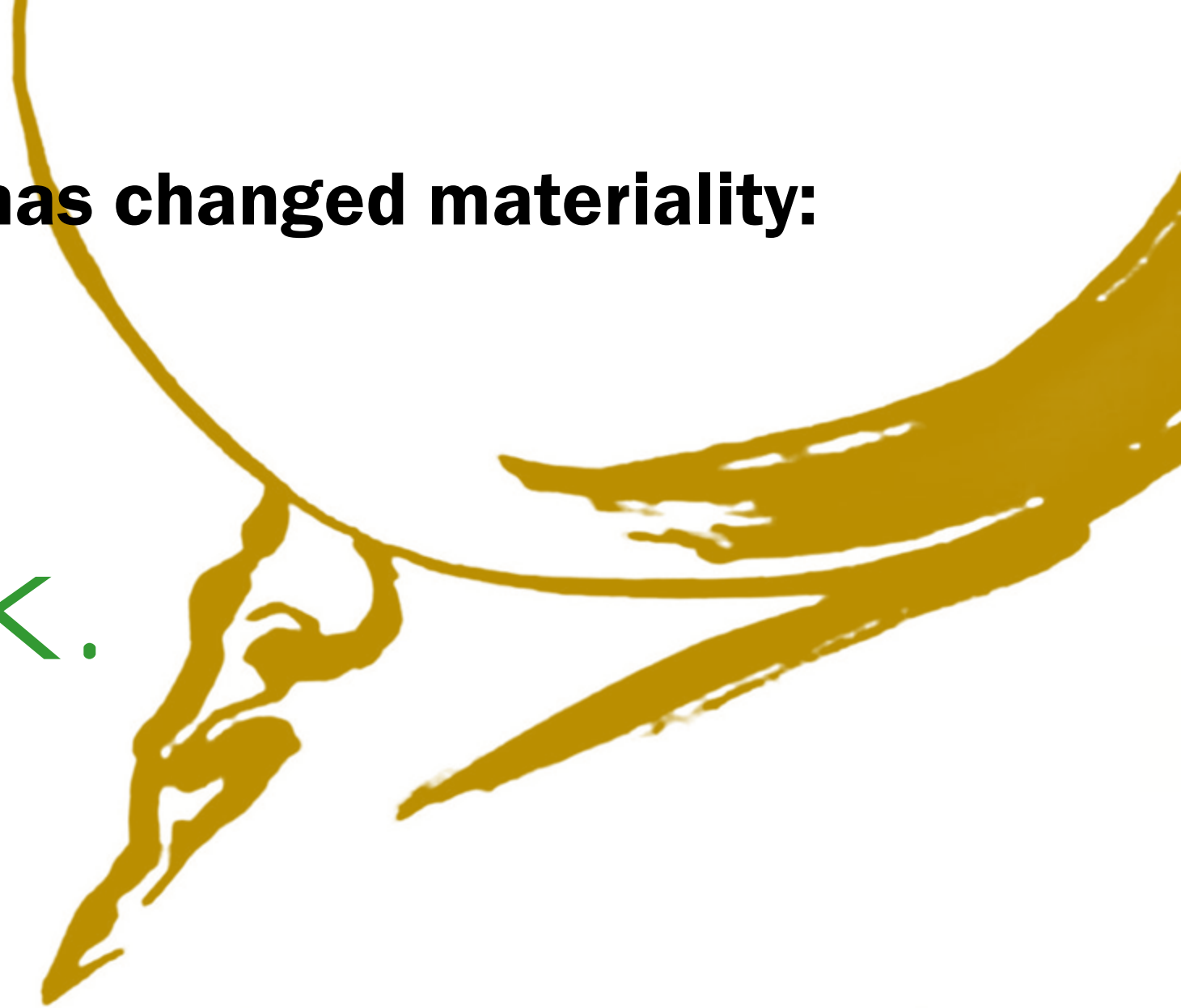
So what does all this mean for you?

If Morton has not changed “materiality”:



If Morton has changed materiality:

Good luck.





**A certain point of
view?**

Brady material

Inculpatory evidence about an alibi witness

Impeachment evidence about the crime scene photographer


Disciplinary records for the 12th officer on the accident scene

Pretrial practice:

Make specific requests for things
the value of which are not
immediately apparent.

Post-trial practice won't help

- ▶ You'll probably have to satisfy the standard *Brady* burden in a motion for new trial.
- ▶ Claims of ineffective assistance based on a new standard of Morton materiality will fail.



**8 Court of Criminal
Appeals Habeas Grants
from September until
now based on *Brady***