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THE TRUTH MIGHT SET YOU FREE: HOW THE MICHAEL MORTON ACT COULD FUNDAMENTALLY CHANGE TEXAS CRIMINAL DISCOVERY, OR NOT

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I. INTRODUCTION

Civil litigators in Texas would be completely baffled by the "discovery" phase in a criminal case. The contrast between discovery in civil and criminal litigation, until very recently, has been extraordinary. Civil litigation practice usually involves relatively little trial work and a great deal of discovery activity.[1] Discovery is not unknown in criminal litigation, but often has been

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1. All civil litigation cases must be governed by a discovery control plan, which allows for a continuous flow of evidence and information regarding the trial. TEX. R. CIV. P. 190.1. The openness between case materials, evidence, and information allows parties to acquire full knowledge of the facts involved in the dispute, which often leads parties to find a suitable compromise without trying the lawsuit. GERALD S. REAMEY & CHARLES P. BUBANY, TEXAS CRIMINAL PROCEDURE 315 (11th ed. 2013). Section

defined more by investigation and the exploitation of procedures not designed for that purpose, than by the variety of effective discovery tools available in any civil case.[2] Interrogatories and requests for admissions simply do not exist in criminal cases. Depositions are available only in theory.[3] The decision whether to disclose material favorable to the defendant, which is required by due process, lies with the prosecutor whose failure to comply may, but easily may not, be discovered after the fact.[4] So many limitations existed on the scope and timing of required disclosures that the information released to the defense was often too little, and came too late.[5]

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9 of the Texas Rules of Civil Procedure governs the rules pertaining to discovery in all civil cases. *See generally* TEX. R. CIV. P. 190–215.

2. *See* REAMEY & BUBANY, *supra* note 1. The disparity between criminal and civil discovery is not apparent just by reading the rules. *Id.* Rather, the disparity can be seen from studying the cases that interpret the rules and realizing that discovery opportunities are very limited in scope. *Id.* As a result of the limited access to discovery, criminal practitioners have been forced to find other ways to discover the prosecution's case. *Id.*

3. In *James v. State*, the appellant sought depositions from various people involved in the case who had useful information. *See* James v. State, 563 S.W.2d 599, 602 (Tex. Crim. App. 1978). The appellant expressed his reasons for needing the depositions in an affidavit, which included: the officers' refusal to discuss any facts of the case with the appellant's court-appointed private investigator or attorney; the fact that a complainant in one of the related cases was out of state; and that two complainants, one of whom was the victim, had moved since the initial investigation and the Assistant District Attorney would not disclose their addresses. *Id.* Despite the establishment of these facts, the court denied the appellant's request to take the depositions, stating that the appellant did not prove he had good reason to take their depositions and, therefore, that the denial was not harmful to him. *Id.* at 602–03. "The trial court has wide discretion in either granting or denying a motion for taking a deposition." McKinney v. State, 505 S.W.2d 536, 540 (Tex. Crim. App. 1974), *abrogated by* Henson v. State, 407 S.W.3d 764 (Tex. Crim. App. 2013). "[T]he fact that witnesses of whom depositions are requested are adverse witnesses is not enough standing alone to show an abuse of discretion in denying the motion to take a deposition." *Id*. In the event the motion requesting depositions is denied, the party must demonstrate harm to establish an abuse of discretion by the trial court. *See James*, 563 S.W.2d at 602.

Failure to request a deposition, however, may constitute ineffective assistance of counsel. *See generally* Frangias v. State, 450 S.W.3d 125 (Tex. Crim. App. 2013) (holding that defense representation was deficient because counsel did not seek to depose an unavailable witness who could have corroborated defendant's potentially exculpatory testimony). In holding that a failure to request a deposition was deficient representation in *Frangias*, the Texas Court of Criminal Appeals cited and distinguished numerous cases in which trial courts denied such requests, all affirmed on appeal. *See id.* at 141 n.43. The court's opinion impliedly condemns requests for depositions based on "a bald and belated attempt at discovery" without explaining why defense discovery by deposition is inappropriate, even if it comes shortly before trial. *See id*. at 141. The implication seems to be that depositions are for the purpose of perpetuating testimony due to witness unavailability, and not for discovery generally.

4. *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxii (2015), http://georgetownlawjournal.org/files/2015/06/Kozinski_Preface.pdf. Federal appellate Judge Alex Kozinski recently noted the difficulty in unearthing violations of the obligation to reveal exculpatory information to the defense:

> Prosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory, and while they are required to provide exculpatory evidence to the defense under *Brady*, *Giglio*, and *Kyles v. Whitley*, it is very difficult for the defense to find out whether the prosecution is complying with this obligation.

Id.

5. *See* Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 St. Mary's L.J. 407, 412 (2015) ("Texas has traditionally recognized only limited pretrial discovery.").

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