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Michael Morton Act and *Brady* on Appeal

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In 2013, the Texas Legislature enacted the Michael Morton Act (“the Act”) (Senate Bill 1611). The Act revised Article 39.14 of the Code of Criminal Procedure and, *inter alia*, provided, “as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection . . . [of] 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.”

Applicable to Offenses Committed After January 1, 2014

Appellate courts uniformly have held that the Act applies to all offenses committed after January 1, 2014. Thus, in *Garza v. State*, 453 S.W.3d 548, 554 (Tex. App.—San Antonio 2014, pet. ref'd), the San Antonio Court of Appeals held that the Act did not apply to an offense that took place September 6, 2009, finding that “the historical notes specifically state the changes to Article 39.14 apply ‘to the prosecution of an offense committed on or after the effective date [January 1, 2014] of this Act.’” *Id.* (citing Tex. Code Crim. Proc. Ann. art. 39.14(h) historical note [Act of May 14, 2013, 83rd Leg., R.S., ch. 49, § 3, 2013 Tex. Sess. Law Serv. 106, 108]). Similarly, the San Antonio Court of Appeals, in an unpublished opinion, held that the Act did not apply to an offense occurring on July 7, 2011, even though the trial began February 18, 2014. *Gonzales v. State*, 04-14-00222-CR, 2015 WL 4273261, at *3 (Tex. App.—San Antonio July 15, 2015, no pet.) (“The Michael Morton Act applies to litigation of offenses that occurred *on or after* January 1, 2014.”).

Trial Court Jurisdiction Over Discovery

One of the most frequently contested issues before the appellate courts concerns whether the Act requires the State to disclose discovery materials to an individual after his arrest but before he has been indicted. In an unpublished concurring opinion from the Court of Criminal Appeals, an individual asserted that that he had been arrested but did not claim that any complaint, information, or indictment had been filed against him. *In re Lewis*, WR-83,367-01, 2015 WL 4775939, at *1 (Tex. Crim. App. June 24, 2015). He sought to compel the Travis County District Attorney to comply with the requirement of Article 39.14 that discovery be provided “as soon as practicable,” and he further sought to prohibit Travis County from withholding discovery until after the filing of an indictment. Arguing that the Act does not condition the State’s ministerial duty to provide discovery to the defendant¹ upon a filing of an

¹ For ease of reading, the party facing criminal charges is referred to as the “defendant” regardless of whether the case is a mandamus or direct appeal. However, when the issue involved is jurisdiction, courts refer to the party below as the “individual” when the party has not been formally charged with a crime.

indictment, the individual sought a declaration that he had a right to relief of pre-indictment discovery. The individual furthermore asserted that disclosure of discovery upon the State's decision to seek indictment would give the State the power to control the timeframe of discovery and potentially delay disclosure until an arbitrarily chosen time. The State, however, asserted that it had a policy not to release discovery under the Act until after an individual was indicted.

The Court of Criminal Appeals denied the individual leave to file writs of mandamus and prohibition. Justice Alcala filed a concurring statement finding that the language of Article 39.14 applies to a period of time after the individual has been charged with an offense, either by complaint, information or indictment. She found that the statutory language as a whole provides that a "defendant" will make a timely request in a "criminal case" or "action." This language applies to pending criminal charges, not to anticipated charges. Prior to indictment, there is still a chance that a criminal proceeding will not be commenced against an individual. Additionally, other statutory language refers to the involvement of the trial court in the discovery process, which suggests that Article 39.14 applies only after criminal proceedings commence.

A similar argument was raised in *In re Carrillo*, WR-83,345-01, 2015 WL 4776080, at *2 (Tex. Crim. App. June 24, 2015) and again the Court of Criminal Appeals denied relief and Justice Alcala filed a concurring statement. Here the individual was formally charged with a complaint for a criminal offense but he had not yet been indicted. Once again the individual asserted that the "as soon as practicable" language under Article 39.14 imposes a non-discretionary ministerial duty on the State to provide discovery within a reasonable time frame after the request of discovery. Permitting the State to disclose the requested material only after formal indictment, he argued, "unilaterally impose[s] [its] own temporal limitations into the statute." The State's refusal to turn over discoverable material pursuant to Article 39.14 is therefore a violation of a ministerial duty and the individual was entitled to mandamus relief. Like Travis County, the Lubbock County District Attorney asserted that it was not required to provide discovery until after a grand jury returned an indictment. Justice Alcala held that contrary to *Lewis* where no formal charges had been filed, here the individual had been charged by a formal criminal complaint. The Justice found that a defendant who has a formal complaint filed against him is entitled to discovery because this instance plainly falls within the provisions of Article 39.14, which require the State to provide discovery "as soon as practicable" upon a request from a "defendant" as to "any matter involved in the action." Further, Justice Alcala clarified that this statutory language cannot reasonably be interpreted to apply only to actions involving formal indictments. To condition a defendant's access to discovery upon a grand-jury indictment would be to read an additional provision into the statute. As discussed more thoroughly below, the mandamus action ultimately was denied despite the fact that the individual had successfully demonstrated a clear right to relief because he failed to show that he lacked an adequate remedy at law.

Finally, this issue was addressed at length in a case arising out of the Court of Appeals in Eastland. There an individual sought a court order compelling discovery prior to the filing of an indictment. *In re State ex rel. Munk*, 494 S.W.3d 370, 376 (Tex. App.—Eastland 2015, no pet.). The Court, however, found that the trial court did not have jurisdiction:

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