

## 2018 Mandatory *Brady* Training (taken from TDCAA) Resources

### Cases related to the prosecutor's *constitutional* duty to disclose favorable and material evidence to the defense.

- *Brady v. Maryland*, 373 U.S. 83 (1963)(Prosecutor mistakenly withheld statement of a co-defendant admitting to being the triggerman; “we now hold that the suppression by the prosecution of evidence favorable to the accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.”)
- *Banks v. Dretke*, 540 U.S. 668 (2004)(“Due process clause of the 14th A is violated when a prosecutor fails to disclose evidence that is favorable to the accused that creates a probability sufficient to undermine confidence in the outcome of the proceeding.”)
- *Graves v. Dretke*, 442 F. 3d 334 (5<sup>th</sup> Cir. 2006)(Inconsistent oral statements of state’s witness required disclosure.)
- *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992)(Prosecution is required to disclose favorable and material evidence.)
- *Ex parte Masonheimer*, 220 S.W. 3d. 494 (Tex. Crim. App. 2007)(Evidence supportive of defensive theory must be disclosed.)
- *Ex. parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002)(Prosecution has duty to disclose police officer diary detailing officer’s opinion that a state’s witness was not trustworthy.)
- *Johnston v. State*, 917 S.W.2d 135 (Tex. App. – Fort Worth 1996, pet. ref’d) (Prosecutor can’t engage in willing ignorance to avoid possible *Brady* evidence or information by not checking on hearsay, such as suspicion that the state’s witness had outstanding warrants.)
- *Havard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989)(rehearing reversed on other grounds)(*Brady* does not require disclosure of defendant’s own statement.)
- *Hayes v. State*, 85 S.W. 3d 809 (Tex. Crim. App 2002)(Letter defendant sent to a relative is not *Brady* evidence.)
- *State v. Blanco*, 953 S.W.2d 799 (Tex. App. – Corpus Christi 1997, pet. ref’d)(Exculpatory evidence in co-defendant’s file must be disclosed.)
- *Etheridge v. State*, 903 S.W.2d 1 (Tex. Crim. App. 1994)(Information about prior convictions turned over in trial was used effectively by the defense, so no harm for late disclosure.)
- *Castaneda v. State*, 28 S.W.3d 216 (Tex. App. – El Paso 2000, pet. ref’d)(Information that witness had used cocaine was turned over in time for defense to use on cross-examination, so no harm for late disclosure.)
- *Little v. State*, 991 S.W.2d 864 (Tex. Crim. App. 1999)(Lack of inculpatory evidence is not exculpatory evidence; missing paperwork supporting chemist’s testimony is not exculpatory.)
- *Ex parte Mares*, No. AP-76,219, 2010 Tex. Crim. App. Unpub. LEXIS 309 (Crim. App. May 19, 2010) (Defendant obtained a reversal by successfully arguing on appeal that had he known

that a witness identified a co-defendant as the shooter he never would have used an alibi defense.)

- *O'Rarden v. State*, 777 S.W.2d 455 (Tex. App.—Dallas 1989, pet. ref'd) (Conviction for child sex assault reversed after state failed to disclose no physical evidence of abuse pre-trial; without medical information defense used a “go for broke defense” by questioning CPS worker about other allegations against defendant that were unfounded.)
- *Imbler v. Pachtman*, 424 US 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)(No post-conviction duty to disclose under law.) *But see*, Art. 39.14(h); Tex. Code Crim. Pro.; Rule 3.09(d) TDRPC.
- *Simmons v. State*, 100 S.W. 3d 484 (Tex. App.—Texarkana 2003, pet. ref'd)(When state fails to preserve evidence only potentially useful to the defense, the appellant must show that the state acted in bad faith and that the evidence is material and favorable.)
- *Jackson v. State*, 50 S.W.3d 579 (Tex. App.—Fort Worth 2001, pet. ref'd)(State has duty to preserve exculpatory evidence, but no due process violation if the destruction is unintentional.)
- *Dalbosco v. State*, 978 S.W.2d 236 (Tex. App. – Texarkana 1998, pet. ref'd)(Officer fired for lying; good dicta about how the firing was inadmissible evidence but useful information in that the defense could call the police chief as a reputation witness.)
- *Ex parte Lewis*, 587 S.W.2d 697 (Tex. Crim. App. 1979)(Under *Brady* prosecutor must produce evidence of mental defect discovered through a psychiatric examination.)
- *Villareal v. State*, 576 S.W.2d 51 (Tex. Crim. App. 1978)(Granting an in camera inspection of potential *Brady* evidence is within the court's discretion.)
- *Ex parte Temple*, No. WR-78545-02, 2016 Tex. Crim. App. Unpub. LEXIS 1050 (Crim. App. Nov. 23, 2016)(While a prosecutor has responsibility to assess what information may be favorable and/or material to the defense, the prosecutor who withholds information that he or she does not believe to be *Brady* risks violating that standard.)

#### **Michael Morton Act, Art. 39.14 CCP**

#### **Statutes and cases related to the prosecutor's *statutory* duty to disclose favorable evidence and information:**

- Art. 39.14(h). Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeaching, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.
- Art. 39.14(k). If at any time before, during or after trial the state discovers any additional document, item, or information required to be disclosed under subsection (h), the state shall promptly disclose the existence of the document, item or information to the defendant or the court.

- *In re State ex rel. Munk*, 494 S.W.3d 370 (Tex. App.—Eastland 2015)(A district court can not order MMA discovery before indictment because the court does not have jurisdiction in the case prior to an indictment.)
- *State v. Norwood*, No. 09-15-00083-CR, 2015 Tex. App. LEXIS 9221 (App.—Beaumont Aug. 31, 2015)(CCP 39.14 only requires disclosure of evidence in the State’s possession. Items in the possession of the DEA are not considered in the “possession, custody, or control” of the state.)
- *In re State*, Nos. 09-15-00192-CR, 09-15-00193-CR, 2015 Tex. App. LEXIS 12083 (App.—Beaumont Nov. 25, 2015)(Art. 39.14 does not require the production of privileged confidential informant information.)
- *In re State ex rel. Skurka*, 512 S.W.3d 444 (Tex. App.—Corpus Christi 2016)(The court may require the state to disclose which jail calls it intends to use at trial.)
- *In re Hon*, No. 09-16-00301-CR, 2016 Tex. App. LEXIS 11313 (App.—Beaumont Oct. 19, 2016)(the discovery of proficiency tests results for personnel involved in the sample analysis and inspections of the lab 2 years after the sample was tested are not material nor otherwise authorized under CCP 39.14.)
- *Powell v. Hocker*, 516 S.W.3d 488 (Tex. Crim. App. 2017)(a defendant does not have the right under the MMA to personally retain a duplicate copy of any discovery material.)
- *In re State*, No. 08-16-00106-CR, 2017 Tex. App. LEXIS 3687 (App.—El Paso Apr. 26, 2017)(a trial judge is prohibited from allowing copies of recordings of forensic interviews of child victims in sexual abuse cases by Code of Criminal Procedure Art. 39.15.)
- *Davy v. State*, 525 S.W.3d 745 (Tex. App.—Amarillo 2017)(absent a timely request, the state is not required to turn over copies of a pen packet to the defense as part of general MMA discovery.)
- *In re State ex rel. Warren*, No. 02-17-00244-CV, 2017 Tex. App. LEXIS 7549 (App.—Fort Worth Aug. 9, 2017)(the defense may not request that a witness undergo a psychological examination, and the state has no authority to force such an examination. A defendant’s right to confront the witnesses against him does not allow for such an invasion of the victim’s right to privacy.)

#### **Recent cases from the 10<sup>th</sup> Court of Appeals:**

- *Watkins v. State*, No. 10-16-00377-CR, 2018 Tex. App. LEXIS 7065 (App.—Waco Aug. 22, 2018, no pet. h.) (Punishment evidence and evidence of extraneous offenses may be subject to disclosure under Art. 39.14 if it is material. Here, the documentary evidence of extraneous offenses was not material because there was not a reasonable probability that the outcome of the trial would have been different or that the defendant would have received a lesser sentence if the documents had been produced.)
- *Majors v. State*, No. 10-17-00041-CR, 2018 Tex. App. LEXIS 5752 (App.—Waco July 25, 2018, no pet.) (A motion for discovery that is not ruled on does not suffice as a request for discovery triggering the State’s duty under Code of Criminal Procedure Art. 39.14)

- *Hinojosa v. State*, No. 10-15-00356-CR, 2018 Tex. App. LEXIS 5744 (App.—Waco July 25, 2018, no pet.) (Code of Criminal Procedure Art. 39.14 does not require the State to provide discovery of evidence substantiating extraneous offenses. Notice requirements of extraneous offenses are governed by Rule of Evidence 404(b).)
- *Carrera v. State*, No. 10-16-00372-CR, 2018 Tex. App. LEXIS 5728 (App.—Waco July 25, 2018, no pet.) (The definition of “material” in Art. 39.14 is the same now as before the 2014 amendment. Under this definition, evidence is material and subject to mandatory disclosure if it is “indispensable to the State’s case” or there is “a reasonable probability that its production would result in a different outcome.” Here, the defendant made no showing that the exhibits were material and subject to disclosure under Art. 39.14.)

### **Rules and cases related to a prosecutor’s *ethical* duty to disclose favorable evidence and information**

- Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct. The prosecutor in a criminal case shall...make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
- Tex. Gov’t. Code Section 81.072(b)(11): The supreme court shall establish minimum standards and procedures for the attorney disciplinary and disability system. The standards and procedures for processing grievances against attorneys must provide for...the commission adopting rules that govern the use of private reprimand by grievance committees and that prohibit a committee...giving a private reprimand for a violation of a disciplinary rule that requires a prosecutor to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, including Rule 3.09(d), Texas Disciplinary rules of Professional Conduct.
- Tex. Gov’t. Code Section 81.072(b-1): In establishing minimum standards and procedures for the attorney disciplinary and disability system under Subsection (b), the supreme court must ensure that the statute of limitations applicable to a grievance filed against a prosecutor that alleges a violation of the disclosure rule does not begin to run until the date on which a wrongfully imprisoned person is released from a penal institution.
- Tex. Gov’t. Code Section 81.072(b-2): For purposes of Subsection (b-1):
  - (1) "Disclosure rule" means the disciplinary rule that requires a prosecutor to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, including Rule 3.09(d), Texas Disciplinary Rules of Professional Conduct.
  - (2) "Penal institution" has the meaning assigned by Article 62.001, Code of Criminal Procedure.
  - (3) "Wrongfully imprisoned person" has the meaning assigned by Section 501.101.

- *Schultz v. Commission for Lawyer Discipline of the State Bar of Texas*, No. 55649 (Tex. Dec. 17, 2015) (Rule 3.09(d) does not codify the constitutional duty to disclose exculpatory evidence under *Brady v. Maryland*. Furthermore, the Board found no materiality requirement for disclosures under Rule 3.09(d).)