M. DISCOVERY

M.1. General Considerations

TITLE: Boss v. Pierce
INDEX NO.: M.1.
CITE: 263 F.3d 734 (7th Cir. 2001)
SUBJECT: Brady - Defense Witness Statement
HOLDING: Statement to police from defense alibi witness that third party had confessed crime to her was not available to defense through reasonable diligence. Defense counsel may be unable to extract all possible favorable evidence from defense witnesses, due to reluctance, forgetfulness, or a witness learning new facts after interview with defense. Moreover, defense counsel cannot be expected to ask witness about matters outside witness' particular role in case. Here, witness was D's sister-in-law, who served as defense alibi witness. Defense had no reason to ask her if anyone had ever confessed to her that they had committed the offense. Counsel cannot be expected to read minds of witnesses in order to obtain information outside scope of witness' role. Knowledge in a witness' mind is different from documents within general control of defense, and generally harder to get at. State court's determination that witness' knowledge was available to defense through reasonable diligence was unreasonable application of Brady and its progeny.

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M. DISCOVERY

M.1. General considerations

M.1.a. Due process issues/ Brady

TITLE: Banks v. Dretke
INDEX NO.: M.1.a.
CITE: 540 U.S. 668, 124 S. Ct. 1256, 157 L.Ed.2d 1166 (2004)
SUBJECT: Brady, Certificate of Appealability, Federal Habeas
HOLDING: Before Delma Banks' capital murder trial, the State told his lawyers that it would provide all discovery to which the defense was entitled. However, the State then withheld evidence which would have allowed Banks to discredit two key prosecution witnesses. One of the witnesses, Farr, was a paid police informant; the other witness, Cook, was extensively coached by the police and prosecutors. When Farr lied on the witness stand, claiming he had never given the police a statement, the prosecutor not only failed to correct his perjury, but compounded the lie by arguing to the jury that Farr had "been open and honest with you in every way."

As for Cook, the Court notes "[t]he prosecutor allowed [Cook] to convey, untruthfully, that his testimony was entirely unrehearsed." The State then allowed both witness's perjury to go uncorrected through direct appeal and state collateral review. Finally, in federal habeas discovery, "the long-suppressed evidence came to light."

"When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."

Cook's testimony was essential to the State's case; he testified that Banks had admitted to having "killed the white boy for the hell of it." On cross-examination he denied having talked to anyone about his testimony, when in fact he had been intensively coached by the police and the prosecutor for his trial testimony. The Court reviewed the transcript of the coaching session and concluded that it was "compelling evidence that Cook's testimony had been tutored by Banks's prosecutors."

Farr, the informant, denied under cross-examination that he had ever taken any money from police officers or given the police a statement. In fact, he had done both, and had actively helped set Banks up for arrest. The lead investigator on the case eventually admitted, at a discovery hearing in the federal habeas case, that Farr was an informant and had been paid for his involvement in the case.

The Magistrate Judge recommended a writ of habeas corpus with respect to the death sentence, but not the conviction, finding that the State's dishonesty about Farr, "coupled with trial counsel's dismal performance", undermined the reliability of the penalty phase verdict. However, she found no convincing evidence of a deal between the State and Cook and recommended no relief from the guilty verdict. The District Court adopted the recommendations, concluding that Banks had failed to properly plead a Brady claim with regard to the withheld transcript of Cook's trial coaching session. Banks sought a certificate of appealability on the issue of whether his Brady claim should have been treated as if raised in the pleadings; he had not discovered evidence to support it until 1999, three years after filing the habeas petition.

The 5th Circuit reversed the grant of habeas relief on the Farr Brady claim on the grounds that Banks had failed to develop the Farr Brady claim on state collateral review, and that therefore the evidentiary hearing in federal court was unwarranted. Banks, said the 5th Circuit, was not diligent enough in pursuing state court relief, and his federal claim was therefore procedurally barred. The 5th Circuit also denied a certificate of appealability on the Cook Brady claim.

On the same day as Banks' scheduled execution, March 12, 2003, the U.S. Supreme Court granted a stay with several hours to spare, and later granted certiorari on three issues: the Farr Brady claim, the Cook Brady claim, and the alleged penalty phase ineffective assistance of counsel claim.

The U.S. Supreme Court then reversed Banks' death sentence, finding that the Farr Brady claim entitled Banks to relief and was not procedurally barred. Banks's failure to develop the issue earlier was not due to lack of diligence but was because of the State's deception. It was "appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." The Court also reversed the denial of a certificate of appealability on the Cook Brady issue, holding that (at least) reasonable jurists could differ as to whether, under Federal Rule of Civil Procedure 15(b), Banks could be considered to have properly pleaded his claim.

TITLE: Bates v. State
INDEX NO.: M.1.a.
CITE: (5/23/2017), 77 N.E.3d 1223 (Ind. Ct. App. 2017)
SUBJECT: Late disclosure of evidence did not violate Brady
HOLDING: State's failure to disclose before trial the existence of a wallet found in area of a burglary did not violate Brady v. Maryland, 373 U.S. 83 (1963). Brady and its progeny apply to the State's failure to disclose favorable evidence that is material to the accused's guilt or punishment. Although Brady itself involved a request for pretrial disclosure, most courts agree that it does not impose a general requirement of pretrial disclosure of exculpatory evidence. Williams v. State, 714 N.E.2d 644, 649 (Ind. 1999). For most exculpatory evidence, the prosecution is able to satisfy its constitutional obligation by disclosing the evidence at trial. Defendant has the burden to establish that the lateness of the disclosure so prejudiced the preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. Moreover, failure to request a continuance when disclosure is first made at trial negates any claim of actual prejudice.

Here, police found awallet in the victim's subdivision during the investigation of a burglary. The owner of the wallet did not testify at trial, but told police he had lost it over two years earlier. Defendant failed to show that the owner could have offered evidence that was favorable to him, either becuase it was exculpatory or impeaching. Moreover, to the extent Defendant argues that the State's late disclosure prevented him from making such a showing, he did not request a continuance to pursue the matter. Thus, there was no Brady violation. Held, judgment affirmed.

RELATED CASES: Davis-Martin, 116 N.E.3d 1178 (Ind. Ct. App. 2019) (Ct. rejected D's Brady claim based on State's failure to turn over cell phone records in a timely manner, because the records were belatedly disclosed during trial)

TITLE: Bennett v. U.S.
INDEX NO.: M.1.a.
CITE: 797 A.2d 1251 (D.C. 2002)
SUBJECT: Brady Required Disclosure of Witness' Lie About Unrelated Murder
HOLDING: Where D was on trial for murder, fact that important eyewitness for state had lied to grand jury about other, unrelated murder should have been disclosed pursuant to Brady. Question of D's guilt or innocence turned entirely on credibility of state's witnesses, of whom this witness was arguably most important. Fact that witness had lied to grand jury about another unrelated murder was clearly impeaching. Witness was impeached at trial on basis of criminal record and drug use but lie about another murder was more significant and would potentially have undermined witness' credibility "to a very substantial degree." As such, evidence was material, and was not merely cumulative of other impeachment at trial. Suppression of evidence violated Brady and requires reversal.

TITLE: Booker v. State
INDEX NO.: M.1.a.
CITE: (3rd Dist., 03-25-09), 903 N.E.2d 502 (Ind. Ct. App. 2009)
SUBJECT: Failure to disclose inculpatory statement - no discovery violation
HOLDING: State has a constitutional duty to disclose evidence favorable to D, but there is no affirmative duty to provide inculpatory evidence. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Here, in dealing in cocaine prosecution, police officer did not disclose in his police report or deposition that D had said, "You know I'm not really a bad guy, I just sell a little here to make ends meet." Officer first told prosecutor about this statement a week before trial, but prosecutor did not share this information with defense counsel. Defense counsel first learned about D's alleged statement in State's direct examination of officer during its case in chief and moved for mistrial.

Discovery is governed by Ind. Trial Rule 26, which does not provide for mandatory disclosures. Further, D acknowledged an unrecorded oral statement does not fall under any of the categories of evidence covered by the discovery order issued in this case. Had D requested disclosure of all statements he was alleged to have made, State would have been required to comply. Long v. State, 431 N.E.2d 875, 877 (Ind. Ct. App. 1982). However, D made no such request, thus there was no discovery violation. Nevertheless, Court does not condone prosecutor's conduct and agreed with Tr. Ct. that disclosure would have promoted goals of discovery and been the "honorable" and "right" thing to do. ABA Standards for Criminal Justice provide a prosecutor should disclose "[a]ll written and all oral statements of the D or of any co-D that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements." Standard 11-2.1 of ABA Criminal Justice Standards: Discovery, available at www.abanet.org/crimjust/standards. Held, judgment affirmed.

TITLE: Bunch v. State
INDEX NO.: M.1.a.
CITE: (03-21-12), 964 N.E.2d 274 (Ind. Ct. App. 2012)
SUBJECT: Brady violation - suppressed scientific report
HOLDING: Post-conviction court abused its discretion by denying D's Petition for Post-conviction relief in an alleged arson where the State's suppression of a report regarding chemical testing of floor samples constituted a Brady violation. To prevail on a Brady claim, a D must establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial.

Here, in 1996, D was convicted of felony murder based on a fire in her home that killed her three-year-old son. Prior to trial, the State disclosed an ATF report that five floor samples testified positive for heavy petroleum distillate. The ATF expert at trial testified that although the carbon numbers found in samples 8 and 10 were different than those found in 4, 5 and 6, all five samples were within the positive range.

At the post-conviction level, D subpoenaed the ATF file and found a draft report in which the expert concluded that samples 8 and 10 were negative. At the hearing, D's new expert testified that the carbon numbers in 8 and 10 show that there was no heavy petroleum distillate in these samples. By not disclosing the first ATF report, the State suppressed the evidence. The fact that the ATF kept the complete file on its premises and D did not specifically request the entire file does not mitigate the State's obligation to disclose exculpatory evidence in the file. Further, the suppressed preliminary report was favorable to the defense and material. Even though D's post-conviction expert agreed with the ATF testing that samples 4, 5 and 6 contained petroleum distillate the expert disagreed with the second report and trial testimony stating that samples 8 and 10 did also. Because samples 8 and 10 were the only samples taken from the living room and D's son's bedroom, they undermined the State's theory that there were, multiple, and therefore, incendiary, fires. The ATF expert's conclusion that the floor samples in the living room and bedroom contained evidence of flammable or combustible liquid is the strongest, if not the only, evidence that there were two separate fires in the mobile home. Had the jury known of the report contradicting the ATF expert's opinion, there is a reasonable probability that the result of the trial would have been different. Thus, the post-conviction court abused its discretion by denying relief. Held, judgment reversed; Crone, J., dissenting on basis that the State's disclosure of the raw data underlying ATF report was sufficient.

RELATED CASES: Wearry, 136 S. Ct. 1002 (U.S. 2016) (in capital murder case, State violated D's Brady rights by failing to disclose evidence that woud have undermined credibility of State's star witnesses); Hollin, 970 N.E.2d 147 (Ind. 2012) (Tr. Ct. did not commit clear error in granting D's petition for PCR because State failed to turn over Brady material to D, i.e., accomplice's pending criminal matters and his pre-trial statement in which he changed his story).

TITLE: Crivens v. Roth
INDEX NO.: M.1.a.
CITE: 172 F.3d 991 (7th Cir. 1999)
SUBJECT: Brady -- Witness' Use of Aliases Does Not Excuse Failure to Disclose Criminal History
HOLDING: Fact that state's key witness used aliases when he was arrested does not justify prosecution's failure to disclose his criminal record to the defense. State claimed that witness' use of aliases foiled its attempt to ascertain his criminal history. Ct. rejects this claim, finding it incredible that Chicago Police Department could not have surmounted this problem. State also argued that defense could have asked witness himself during cross-examination about his criminal history, but Ct. notes that this does not excuse state's failure to comply with Brady obligation. Moreover, witness could simply have lied. Finally, quoting U.S. v. Perdomo, 929 F.2d 967, 971 (3d Cir. 1991), Ct. said that it agreed with those circuits "that have explained that 'the availability of [Brady] information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.'"

RELATED CASES: Carroll, App., 740 N.E.2d 1225 (criminal history of State's witness who had been convicted under alias was clearly within State's reach; however, nondisclosure was not prejudicial to D).

TITLE: Gibson v. State
INDEX NO.: M.1.a.
CITE: (2d Dist. 10/22/87), Ind. App., 514 N.E.2d 318
SUBJECT: Discovery - materiality; general vs. specific requests
HOLDING: Despite specificity of D's discovery request, state's failure to comply warrants reversal only if it "undermines confidence in the outcome." US v. Bagley, 473 U.S. 667. In US v. Agurs, 427 U.S. 97, S. Ct. set out less stringent standard for materiality of withheld evidence where D made specific request. In Bagley, however, the Agurs standards were reformulated into one: evidence is material only if there is reasonable probability that, had evidence been disclosed, result would have been different. Non-disclosure must undermine confidence in outcome of trial. Bagley. Here, statements withheld by state could have been used at trial to impeach state witnesses. Importance of impeachment evidence depends upon type & extent of impeachment & importance of witness to state's case. Deatrick, App., 392 N.E.2d 498. Here, one witness' statement contained inconsistencies which impeached her general credibility but did not refute any element of the offense. Second witness' statements contained inconsistencies with trial testimony, but D had employed other means of impeaching this witness at trial. Portions of second witness' testimony which were most damaging to D were corroborated by other witnesses. Held, statements properly ruled immaterial. **Note:** But see St. John, 523 N.E.2d 1353 (card at M.2.b.6) applying old Agurs standard of materiality for specific requests.

RELATED CASES: Overstreet, 783 N.E.2d 1140 (withheld evidence was not "impeaching," because evidence that would impeach witness's testimony given in court was known to defense); Woods, 677 N.E.2d 499 (State's failure to disclose fact that person who gave police information about D's whereabouts was not reversible error because evidence was not important at all in determining guilt or punishment); Washington, 669 F. Supp. 1447 (N.D. Ind.) (evidence which impeaches State witness' testimony at trial falls under Brady, 373 U.S. 83 if request is specific; general request for any information tending to impeach prosecution witness constitutes general request which would be treated as if no request had been made because it is insufficient notice on what to produce); Moore, 408 U.S. 786 (failure to reveal that witness previously misstated perpetrator's name did not result in reversal where at trial, witness in question, & other additional witnesses, successfully identified D as perpetrator).

TITLE: Goudy v. Basinger
INDEX NO.: M.1.a.
CITE: (05-03-10), 7th Cir., 604 F.3d 394
SUBJECT: Brady issues - standard to determine materiality of suppressed evidence
HOLDING: The Indiana Court of Appeals unreasonably applied federal law when it determined that prior witness statements of identification the government suppressed did not create a reasonable probability of a different result in D's trial. The standard for determining whether suppressed evidence is material is whether the cumulative effect of the new evidence creates a reasonable probability of a different result at trial. A D need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Here, in 1995, two men approached a car, and one shot repeatedly into the car. D was convicted of murder and attempted murder based on the testimony of five eyewitnesses who identified him as the shooter. One of these witnesses was a co-D. Although not intentionally, the government suppressed police reports where four of the eye-witnesses identified the co-D as the shooter and the co-D indicated that he had talked with one of the D's alibi witnesses who "wants to change her story." On appeal of the denial of post-conviction relief, the court of appeals found that the police reports, although suppressed, were not material. While the court of appeals initially identified the correct legal principle for determining whether suppressed evidence was material, its statements repeatedly dismissing the materiality of evidence on the basis that it "does not mean that Goudy was not the other shooter," misses the point. Moreover, at least three times, the court rejected the materiality of the individual pieces of evidence on the basis that the evidence did not conclusively establish innocence. Thus, the court of appeals placed a diametrically different burden on D by making him show that the new evidence necessarily "would have" established his innocence rather than simply showing the new evidence created a reasonable probability of a different result. Further, by not identifying the cumulative materiality standard and analyzing the suppressed evidence in isolation, the court of appeals deprived D of the full exculpatory value of this evidence and unreasonably applied clearly established law. The Brady error denied D a fair trial. Held, judgment reversed and remanded with instructions to grant D's request for a writ of habeas corpus. If the State elects not to retry D within 120 days, he shall be released from confinement.

RELATED CASES: Wetzel, 132 S. Ct. 1195 (2012) (notations on police report that purportedly indicated possible involvement of another person in the crime were too ambiguous to be material).

TITLE: Kyles v. Whitley
INDEX NO.: M.1.a.
CITE: 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)
SUBJECT: Brady Violation - Habeas; Standard
HOLDING: Because net effect of evidence withheld by prosecution, including conflicting eye-witness statements, records of ever-changing exchanges between police & informer, & internal police memorandum, raises reasonable probability of different result at trial if they had been revealed, habeas petitioner is entitled to new trial. Brady violation is not subject to harmless error analysis. In U.S. v. Bagley, (1985), 473 U.S. 667, Ct. held that, regardless of nature of request by D, favorable evidence is material, & constitutional error results from suppression by government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Majority emphasizes four aspects of materiality under Bagley. First, reasonable probability of different outcome does not require showing that, more likely than not, D would have received different result had evidence been disclosed, but rather that, governmental suppression undermines confidence in the outcome. Second, D need not show that, discounting inculpatory evidence in light of suppressed evidence, evidence would not have been sufficient to convict. Third, Brady - Bagley error is not subject to harmless error analysis. Finally, effect of suppressed evidence must be considered collectively, not item-by-item. Here, informer's ever-changing stories cast suspicion on him & raised possibility that physical evidence found in D's apartment could have been planted by informer; suppressed eye-witness statements would have provided grist for impeachment, & in fact could have been viewed as describing informer. These & numerous other items could well have resulted in different outcome at trial. Prosecution properly bears burden of determining whether evidence, including that in possession of police, is material & must be disclosed to defense. Held, reversed & remanded. Scalia, Rehnquist, Thomas, & Kennedy, JJ., DISSENT.

RELATED CASES: Wetzel, 132 S. Ct. 1195 (2012) (notations on police report that purportedly indicated possible involvement of another person in the crime were too ambiguous to be material).

TITLE: Leka v. Portuondo

INDEX NO.: M.1.a.

CITE: 257 F.3d 89 (2nd Cir. 2001)

SUBJECT: Late, Cursory Disclosure May Not Satisfy Brady

HOLDING: The 2d Cir. federal court of appeals recently held that cursory eve-of-trial disclosure of Brady material may not satisfy Brady. The Court reiterated that Brady is violated when evidence favorable to the defense is suppressed by the state and the defense is prejudiced. Whether disclosure is complete enough and timely enough to satisfy Brady must be evaluated in terms of the defense's opportunity to use the evidence when disclosure is made. Here, disclosure was made three days before trial, and the defense had time to interview the witness, but the investigator pissed him off and he wouldn't talk. The 2d Circuit found that the defense's "misstep" could easily be seen as the result of the state's breach of its Brady obligations - they created the hasty and disorderly conditions in which the defense was forced to conduct its essential business. They also noted that where the information disclosed on the eve of trial requires further investigation, Courts must take into account the fact that the defense may be unable to conduct the necessary investigation in the face of other pressing demands.

TITLE: Lyons v. State
INDEX NO.: M.1.a.
CITE: (1st Dist., 10-06-92), Ind. App., 600 N.E.2d 560
SUBJECT: No violation of Brady duty to disclose exculpatory evidence
HOLDING: State's failure to disclose photograph taken at time of D's arrest, & which did not match D's description given by victim & police investigator, did not require granting of petition for post-conviction relief because D did not show there was no reasonable probability that had photo been disclosed, result of trial would have been different. Photograph was merely cumulative of defense witness's testimony, & other evidence was more than sufficient to support conviction. Purpose of photograph would have been to show D had "full beard" upon arrest, contrary to witness's & officer's statements, but Ct. found debate was only quibbling over terms. Ct. found fact that officer failed to identify what he saw on D as full beard, thus corroborating victim who said he had no beard, did not raise inference of perjury, because identification of hair on D's face was matter of semantics, i.e., light beard, full beard or goatee. Ct. also found that even if D had made specific request for disclosure of photo (which Ct. questioned), he did not show materiality of evidence, i.e., that evidence might have affected outcome of trial. Held, denial of post-conviction relief affirmed.

RELATED CASES: Wetzel, 132 S. Ct. 1195 (2012) (notations on police report that purportedly indicated possible involvement of another person in the crime were too ambiguous to be material); Badelle, App., 754 N.E.2d 510 (no single alleged Brady violation was established as suppressed, favorable to defense and material to issue at trial; however, taken together, allegations raised concern as to whether State's conduct throughout discovery process impinged upon D's due process rights); Farris, App., 732 N.E.2d 230 (where evidence came out at trial & there were 3 other witnesses testifying against D, fact that State suppressed recanted testimony was not material); Boyd, App., 650 N.E.2d 745 (even assuming undisclosed fingerprint evidence could be considered exculpatory, it was not material enough to create reasonable doubt that did not otherwise exist).

TITLE: Martin v. State
INDEX NO.: M.1.a.
CITE: 839 So.2d 665 (Ala. Crim. App. 2001)
SUBJECT: Hypnosis of Eyewitness Should Have Been Disclosed
HOLDING: The prosecution's failure to disclose that the only eyewitness who identified D at trial had been hypnotized, and had given a statement while under hypnosis, violated Brady. State argued that disclosure was required by Brady, but that non-disclosure was not prejudicial so as to require reversal. The Court disagrees, finding that D was deprived the opportunity to challenge admissibility of the in-court identification based on the previous hypnosis, or to hire an expert to assist in challenging the identification.

TITLE: Ottinger v. State
INDEX NO.: M.1.a.
CITE: (11/21/77), Ind. App., 370 N.E.2d 912
SUBJECT: State must disclose exculpatory evidence to D regardless of discovery order
HOLDING: D was convicted of second-degree burglary. D appealed and claimed that State had duty to supplement its answer to interrogatory and disclose witness' statement. Court noted that State has duty to disclose to D any evidence which tends to exculpate him. This duty exists independent of any specific discovery proceedings or court order. Monserrate, 352 N.E.2d 721. Court held that witness's testimony disclosed no information unknown to D and that allegations that State suppressed evidence was spurious. Held, judgment affirmed.

RELATED CASES: Johnson, 584 N.E.2d 1092 (prosecution has constitutional mandate to turn over exculpatory evidence in its possession throughout preparation for trial and trial itself); Bocra, 623 F.2d 281 (3d Cir.) (when defense counsel makes appropriate request for discovery or disclosure of exculpatory evidence, prosecution must respond by turning over material at issue, either directly to D's counsel, or to trial judge via in-camera mechanism).

TITLE: Penley v. State
INDEX NO.: M.1.a.
CITE: (2nd Dist., 8-30-00), Ind. App., 734 N.E.2d 287
SUBJECT: Prosecutorial misconduct - Failure to disclose exculpatory evidence
HOLDING: In pointing a firearm prosecution, State's representation that there were two unnamed eyewitnesses who supported complaining witness's version of incident & its failure to provide defense with eyewitness's correct name prior to trial constituted misconduct. After trial, D learned for first time eyewitness's correct name. Eyewitness provided D with affidavit indicating that she had observed incident & did not see weapon. Prosecutor has duty to learn of any favorable evidence known to others acting on government's behalf in case, & thus is charged with knowledge of potentially exculpatory evidence of which police are aware. Turner, App., 684 N.E.2d 564. State is thus charged with knowledge of information eyewitness provided to investigating police officer who interviewed her at scene, despite its assertion after trial that State never had any information from eyewitness. Ct. held that unavailability of this evidence at trial due to State's misconduct undermined confidence in verdict, because jury's verdict was premised solely on witness credibility, & testimony of independent eyewitness who did not see gun could have created reasonable doubt that did not otherwise exist. Held, denial of D's motion to correct error reversed.

Note: See also Watkins v. Miller, 92 F.Supp.2d 824 (S.D. Ind. 2000) (petitioner entitled to federal writ of habeas corpus setting aside murder conviction because prosecution failed to disclose exculpatory material tending to show his innocence, & petitioner came forward with compelling DNA evidence that he was actually innocent of murder; State Ct. opinions denying post-conviction relief reflect clear misunderstanding of DNA evidence).

TITLE: Prewitt v. State
INDEX NO.: M.1.a.
CITE: (4th Dist., 12-13-04), Ind. App., 819 N.E.2d 393
SUBJECT: Non-disclosure of Brady evidence entitled D to new trial
HOLDING: In murder prosecution, State improperly withheld certain material, exculpatory evidence from D prior to trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). Appellate counsel sought a remand for purpose of investigating Brady claim & presenting evidence to Tr. Ct. at post-trial hearing, thus D did not waive issue regarding exculpatory evidence. Ct. held that State improperly suppressed the following evidence: evidence that D's son, Hunter, had blood on him the night victim died; that Hunter had communicated an intent to flee to California "if something happened;" other statements Hunter made to a number of witnesses suggesting that victim's death was not result of suicide; evidence that Hunter & another person had moved victim's body; & evidence that Hunter had previously offered money & drugs to another individual to beat up victim. D established that withheld evidence was exculpatory & favorable to D, that evidence was suppressed by State, & that evidence was material to issue at trial. Badelle, App., 754 N.E.2d 510. What defense counsel knew before trial was dramatically different -- & far less exculpatory -- than what the witnesses had, in fact, shared with the State prior to trial. Had Brady information been disclosed to D, she could have made claim that Hunter or someone else had committed the murder. *Citing* Banks v. Dretke, 124 S.Ct. 1256 (2004), Ct. rejected State's contention that D should or could have discovered suppressed evidence through exercise of due diligence. State clearly misled D under oath in early stages of investigation, D justifiably relied upon these affirmative misrepresentations, & that misfeasance was never corrected. Held, reversed & remanded for new trial.

RELATED CASES: Bowlds, App., 834 N.E.2d 669 (improperly supposed police reports raised questions of utmost importance about the manner, quality, & thoroughness of the police investigation & could have been used by D to show shortcomings in investigation & to cast suspicion on another suspect as possible shooter).

TITLE: Radford v. State
INDEX NO.: M.1.a.
CITE: (9/19/84), Ind., 468 N.E.2d 219
SUBJECT: Due process -- no duty to disclose
HOLDING: D was convicted of dealing in narcotic drug and was also found to be habitual offender. On appeal, D claimed that action of State in delaying filing of additional count was equivalent to withholding of discoverable information and constituted prosecutorial misconduct. Court held that very nature of habitual offender charge permits State to add this allegation at any time up to moment of trial, and that State's action of delaying filing of habitual offender count is not equivalent to withholding of material evidence. Held, judgment affirmed.

Note: Ind. Code 35-34-1-5(e) provides that amendment of indictment or information to include habitual offender charge under Ind. Code 35-50-2-8 must be made not later than ten days after omnibus date. However, upon showing of good cause, Court may permit filing of habitual offender charge at any time before commencement of trial.

TITLE: Rowe v. State
INDEX NO.: M.1.a.
CITE: (5th Dist., 1-29-99), Ind. App., 704 N.E.2d 1104
SUBJECT: Non-disclosure of favorable, material evidence entitled D to new trial
HOLDING: In post-conviction proceedings following D's convictions of murder & attempted murder, D demonstrated reasonable probability that result of trial would have been different had State disclosed that one of its key witnesses had previously been convicted of burglary & theft. Before trial, D filed two written motions for production which had specifically requested State to disclose arrest & criminal records of its witnesses. However, State failed to disclose that its main witness, Hodges, had criminal record.

At trial, Hodges was presented by State as reluctant to testify against D because of their intimate relationship. Hodges' testimony was devastating to D's insanity & intoxication defenses because it directly contradicted D's testimony & history relied upon by his experts regarding his habitual drug use & injection of large quantities of drugs on day of shooting. Hodges had significant incentive for failing to corroborate D's testimony regarding their use of illegal drugs because corroboration would have provided State with all evidence necessary to revoke his' probation. Moreover, considering that probation revocation proceedings were already pending against Hodges, D should have had opportunity to explore whether Hodges expected favorable treatment in exchange for his testimony. Ferguson, App., 670 N.E.2d 371.

Suppression by prosecution of evidence favorable to D upon request violates due process where evidence is material, irrespective of good faith or bad faith of prosecution. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995). Rejecting State's claim that error in this case was harmless, Ct. held that suppression of Hodges' criminal record undermined confidence in outcome of trial because D's intoxication & insanity defenses were completely hamstrung by Hodges' testimony. Held, reversed & remanded with instructions that D's post-conviction petition be granted; convictions reversed & remanded for new trial.

RELATED CASES: Bowens, App., 722 N.E.2d 368 (PCR properly granted where prosecution suppressed evidence of agreement between prosecution & State's key witness).

TITLE: Sewell v. State
INDEX NO.: M.1.a.
CITE: (3d Dist. 05/26/92), Ind. App., 592 N.E.2d 705
SUBJECT: Discovery of rape kit for DNA analysis under Brady
HOLDING: In conjunction with post-conviction relief (PCR) proceedings, due process concerns entitled D to obtain State's rape kit for laboratory examination & potential subjection to DNA testing. D was originally convicted of rape in 1981, & in 1990, he filed discovery motions for PCR, asking for access to 2 of State's evidence items, rape kit & laboratory records allegedly disclosing rapist's blood type. No blood sample was taken from D at time of trial, & no DNA analysis was performed then, as DNA comparisons were not available at that time. D may waive pre-trial discovery rights by failing to exercise them, & ordinarily 2nd opportunity to discover same evidence will be precluded. Because DNA comparisons were unavailable at time of trial, however, finding D to have waived his discovery right would be equivalent to requiring him to anticipate forensic scientific advances. Ct. considered implications of Brady v. Maryland, (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215, on post-trial proceedings when exculpatory potential of evidence is first discovered after trial & stated that: "Advances in technology may yield potential for exculpation where none previously existed. The primary goals of the Ct. when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice & the promotion of the orderly ascertainment of the truth." Ct. found permitting D's discovery would promote orderly ascertainment of truth under circumstances of case.

TITLE: Silva v. Brown
INDEX NO.: M.1.a.
CITE: 416 F.3d 980 (9th Cir. 2005)
SUBJECT: Brady - Deal Barring State's Witness from Undergoing Mental Exam
HOLDING: Ninth Circuit holds that the fact that a testifying accomplice had, as a condition of a plea agreement, agreed not to undergo a mental health exam until after testifying at D's trial should have been disclosed to the defense under Brady. D and accomplice were charged with robbery, kidnapping, and murder. Accomplice's counsel was concerned about his competence to stand trial and was planning to have him examined. However, State needed accomplice's testimony, and struck a deal dismissing the murder charge against accomplice in exchange for postponing mental health exam until after D's trial. The Ninth Circuit holds that the "legitimate question" whether the witness was competent creates a reasonable probability of a different result. The accomplice was the only witness who gave an account of the murder and identified D as the killer. The District Court had found that D's efforts to impeach the accomplice at trial showed that further impeachment would have been merely cumulative, but the Ninth Circuit rejects this reasoning.

TITLE: Sims v. Hyatte
INDEX NO.: M.1.a.
CITE: (2/1/2019), 914 F.3d 1078 (7th Cir. 2019)
SUBJECT: Brady violation - witness hypnosis evidence wrongfully withheld
HOLDING: Indiana Court of Appeals erred in not overturning D's attempted murder conviction because the State withheld evidence that the victim identified D as the shooter at trial after being hypnotized to "enhance his recollection of the shooting." The victim was shot in the face while sitting in his car, and D was found roughly 20 feet from where the shooting occurred. Although D had no weapons on his person, victim was the only witness who identified him at trial as the shooter. But when viewing a lineup the day after the shooting, victim merely stated D "looked like" the assailant because "at the time [he] was not extremely sure."

Court agreed that the State's concealment of the hypnosis information was a Brady violation because the evidence was material. "The known effects of hypnosis could explain [victim's] confidence, his claim that his memory of the shooting had improved over time, and the otherwise benign changes in his descriptions of the shooter. Reasonable judges cannot be confident that, if the jury had known that [the victim] had been hypnotized before he identified [D] at trial, they would have found his identification beyond reasonable doubt." Held, conviction reversed and remanded with instructions to grant D's habeas petition. Barrett, J., dissenting, agreed that the undisclosed hypnosis evidence constituted a Brady violation, but "it was neither contrary to, nor an unreasonable application of, clearly established federal law for the Indiana Court of Appeals to conclude otherwise" because there was other evidence linking D to the crime scene.

TITLE: Spicer v. Roxbury Correctional Institute

INDEX NO.: M.1.a.

CITE: 194 F.3d 547 (4th Cir. 1999)

SUBJECT: Brady -- Discrepancy Between Informer's Testimony & His Attorney's Proffer

HOLDING: The 4th Circuit Court of Appeals recently held that a prosecutor had a duty to disclose to the defense that an informer who testified that he had seen D beating victim had originally told his attorney that he had not seen the D on the day of the crime. After the informer's arrest on drug offenses, his attorney contacted the state and said that the informer had talked to D about the victim a few days before and a few days after the beating with which the D was charged, but that he had not seen the D on the day of the beating. He later testified before both the grand jury and at trial that he had seen the D beat the victim. The D was convicted, and the informer's attorney disclosed the discrepancy in the informer's accounts after trial and before D's sentencing. In state post- conviction proceedings, D alleged that the state had violated its obligations under Brady by failing to disclose that the informer's attorney had said that he had told him he was not a witness to the beating. The post-conviction ruled against the D, noting that this information was "of mere utility for impeachment purposes." The 4th Circuit reverses and grants habeas relief, first holding that the state court's opinion was "contrary to clearly established federal law to the extent that it fails to recognize unequivocally that impeachment evidence falls squarely within the parameters of Brady and therefore must be disclosed if material."

TITLE: State v. Hunt

INDEX NO.: M.1.a.

CITE: 615 N.W.2d 294 (Minn. 2000)

SUBJECT: Brady -- Nondisclosure of Witness Incompetency

HOLDING: State's failure to disclose, during trial, that psychologist had found that state's chief witness was incompetent to stand trial in his own prosecution warrants reversal of D's conviction. This is so despite fact that prosecution received results in middle of D's trial and subsequent competency evaluation found witness competent to stand trial.

TITLE: State v. Nelson
INDEX NO.: M.1.a.
CITE: 715 A.2d 281 (N.J. 1998)
SUBJECT: Brady -- Mitigating Evidence
HOLDING: Capital D found guilty of murdering police officers who came to search her home was entitled to disclosure of civil suit filed by wounded officer alleging improper training in execution of search warrants. Officers entered D's house to search for firearm they believed was in bedroom. When she became upset and fled toward bedroom, officers rushed her, and a gun battle ensued. Two officers were killed and another was wounded. A few months after the incident, and two years before D's trial on murder charges, wounded officer, who was also brother of one of the officers killed, served prosecutor's office with notice of tort claim filed against the prosecutor's office and the city. Officer's tort claim alleged that he and other officers had not been properly trained, and that their actions had caused D to react as she did. Prosecutor in D's case was personally unaware of claim and did not disclose it to defense counsel. At penalty phase of D's capital trial, defense alleged, as mitigating factor, improper police training in how to react to a mentally disturbed person with a firearm. Prosecutor had contested this allegation, and "excoriated the D for daring to question the conduct of deceased police officers." On appeal, D alleges that prosecutor had obligation, under Brady, to disclose civil suit of officer. New Jersey Supreme Court agrees, finding that the civil claim was material to the defense, was available to and suppressed by state, and was material to penalty issue. Had jury known that state's star witness agreed with D's allegation that improper police training caused D's violent reaction, it is reasonably probable that one or more additional jurors might have found existence of alleged mitigating circumstance. Held, death sentence vacated and new penalty phase ordered.

TITLE: State v. Nikolaenko
INDEX NO.: M.1.a.
CITE: (5th Dist., 10-31-97), Ind. App., 687 N.E.2d 581
SUBJECT: Brady claim - D's failure to exercise reasonable diligence
HOLDING: Tr. Ct. erred in granting D's motion to dismiss, which was based on prosecutor's failure to give D criminal history of State's informant. Successful Brady claim requires that D establish: (1) that prosecutor suppressed evidence; (2) that such evidence was favorable to defense; & (3) that suppressed evidence was material. U.S. v. Parks, 100 F.3d 1300 (7th Cir. 1996). State will not be found to have suppressed material information where that information was available to D through exercise of reasonable diligence. Id. Here, D did not request criminal history until day prior to trial & again on day of trial. Eventually, D obtained copy of criminal history through investigator with public defender's office on day of trial. Because D could have requested criminal history prior to day before trial & could have obtained it by exercising reasonable diligence, State did not suppress evidence & thus did not violate Brady. Held, reversed & remanded for new trial.

RELATED CASES: Williams, 714 N.E.2d 644 (it is wholly unreasonable to expect D to conduct repeated, periodic depositions or inquiries to ensure that agreement has not been made with every witness; rather, prosecutor's nondisclosure of "deal" with witness is tantamount to its suppression); Johnson, 693 N.E.2d 941 (D could have obtained information on other suspect because other suspect was involved with D in crime, & D could have obtained letters he wrote to friend because he knew of letters & contents).

TITLE: State v. Parchman

INDEX NO.: M.1.a.

CITE: (12/22/2022) 200 N.E.3d 499, Ind. Ct. App. 2022

SUBJECT: COA disapproved of State suppressing key witness's juvenile delinquency history but reversed order granting new trial for lack of prejudice

HOLDING: Defendant was charged with killing the victim and wounding the victim's brother, Ikeem Minor. During discovery, Defendant requested a copy of each State's witness's criminal and juvenile history. The State provided Minor's adult criminal history, of which there were no impeachable offenses, but did not provide Minor's juvenile delinquency history. After the jury returned guilty verdicts, the trial court discovered Minor had a JD adjudication for committing what would have been Class B felony burglary if committed by an adult. The disposition of it was 10 years and 7 months before Minor testified against Defendant. During the scheduled sentencing hearing, the trial court appointed Defendant a new attorney to investigate the possibility of filing a motion to correct error based on a Brady violation by the State's failure to disclose to Defendant Minor's juvenile delinquency adjudication. The trial court rescheduled the sentencing hearing. Defendant later filed a motion to vacate the sentencing hearing, which the trial court granted, and a motion to correct error asking the trial court to grant him a new trial. In its response, the State acknowledged it had inadvertently suppressed Minor's 2008 juvenile delinquency adjudication but argued Defendant had not been prejudiced by this inadvertent suppression. At the hearing on the motion, the State argued there was no prejudice from nondisclosure and that the adjudication would not have been admissible because it was more than 10 years old under Evidence Rule 609. The trial court issued an order granting a new trial. The State agreed it had suppressed impeachment evidence inadvertently, so the issue turned to whether the suppressed evidence was material under Brady v. Maryland. Relying on its previous decision in McKnight v. State, 1 N.E.3d 193 (Ind. Ct. App. 2013), the Court of Appeals concluded that, in light of all the evidence presented at trial, Minor's more than ten-year-old juvenile delinquency adjudication was negligible, at best. Defendant did not demonstrate a reasonable probability that the outcome of his trial would have been different had defense counsel known about Minor's juvenile history. Therefore, the trial court abused its discretion when it granted him a new trial. In a footnote, the Court said, "We note that the trial court was rightfully displeased upon discovering that the State had failed to comply with [the defendant's] discovery request, and we disapprove of the State's failure to provide [the defendant] with Minor's complete criminal history . . . Further we remind the State that whether evidence is prejudicial or inadmissible is within the discretion of the courts, not the State." Held: reversed. D

TITLE: State v. Sturgeon
INDEX NO.: M.1.a.
CITE: 605 N.W.2d 589 (Wis. Ct. App. 1999)
SUBJECT: Brady Violation Justifies Withdrawal of Guilty Plea After Sentencing
HOLDING: The Wisconsin Court of Appeals has held that the state's failure to disclose written evidence of the D's pretrial denials of criminal intent and notice that police officers remembered those denials justifies post-sentencing withdrawal of D's guilty plea. D was arrested for participating in a burglary in which he knocked on the back door of a house and asked for a fictitious person while two co-Ds entered through the front door and stole a purse. In a post-arrest statement, D admitted his involvement, but said he didn't know what his co-Ds were up to and didn't know that the person he asked for was fictitious. The officer who reduced this statement to writing did not include D's denials of criminal intent. D was interviewed a second time and again denied criminal intent, but the transcript of this interview was not disclosed to the defense prior to the guilty plea, despite a timely discovery request. Faced with his admission of involvement and his co- D's proffered testimony that he was in on the planned burglary D entered a guilty plea. Later, after learning that the transcript of the second interview existed, and that officers present at the first interview remembered his denials of criminal intent, D sought to withdraw his plea, alleging that the state's Brady violation had caused him to plead guilty. The state first denied a Brady violation, arguing that the exculpatory information was not within their exclusive control. They argued that the D could have asked the officers about the interviews at his preliminary hearing or suppression hearing, but the Court rejects this argument, noting that the purpose of these hearings was not to develop exculpatory evidence that the state denied existed. The state further argued simply that the D knew what he had said, to which the Court responded, "we see a marked difference between a D's exculpatory version of an event presented to his lawyer and the fact that the prosecution has in its exclusive possession evidence which independently corroborates that version." Turning to the issue of whether the discovery violation caused D's guilty plea, the Court stated that the appropriate inquiry is "whether there is a reasonable probability that, but for the failure to disclose, the D would have refused to plead and would have insisted on going to trial." Among the factors to be considered, the Court listed the following: (1) the relative strength and weakness of the state's case and the D's; (2) the persuasiveness of the withheld evidence; (3) D's stated reasons, if any, for pleading guilty; and (4) the thoroughness of the plea colloquy. After weighing all the factors, the Court allowed the D to withdraw his guilty plea.

TITLE: Strickler v. Greene
INDEX NO.: M.1.a.
CITE: 527 U.S. 263, 119 S. Ct. 1936 (1999)
SUBJECT: Brady material/exculpatory evidence, burden on appeal
HOLDING: Although petitioner demonstrated that the prosecutor failed to disclose relevant exculpatory evidence under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) & Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 155 (1995) & also demonstrated cause for failing to raise the Brady claim during trial or on state post-conviction review, he failed to show that there was a "reasonable probability that his conviction or sentence would have been different had these materials been disclosed."

One of the State witnesses gave extensive & detailed testimony identifying the petitioner as the primary perpetrator, which could have been significantly impeached by materials in the police files, including interview notes, letters from the witness, & recordings. The Court held that this witness's testimony did not bear directly on the sentencing issues.

Note: Souter, joined by Kennedy, dissented in part & would have remanded for reconsideration of the death sentence, arguing that the witness's colorful, detailed narrative casting the D as the leader & dominant perpetrator might have had enough effect on the jury's death recommendation to undermine confidence in the death sentence.

TITLE: Trammell v. McKune
INDEX NO.: M.1.a.
CITE: 485 F.3d 546 (10th Cir. 2007)
SUBJECT: Eyewitness IDs did not affect materiality of Brady violation
HOLDING: Tenth Circuit Court of Appeals held that eyewitness identifications of a D did not keep evidence linking a third party to the crime from qualifying as material exculpatory information for purposes of the prosecution's discovery obligations. Although on habeas corpus review of a state conviction, Court applied de novo review because the state appellate courts used the wrong legal standard when evaluating Petitioner's claim. Someone stole a tow truck from a gas station and then used it to steal a Corvette. Police found the tow truck in the parking lot of a hotel where a third party claimed it had been stolen by Petitioner. Petitioner was convicted after the Corvette owner and other eyewitnesses viewed police photo arrays and identified Petitioner. After trial, the prosecution revealed that it had failed to disclose to the defense that receipts from the stolen tow truck were found by police in the third party's hotel room. The district court denied relief finding that the receipts were not material to the defense and thus did not violate Brady obligations. Although finding it a "close case," Court found that the probative value of the identifications was diminished by the facts that Petitioner and the third party had similar appearances, and that the only eyewitness who was asked to choose between the two when making an identification fingered the third party.

TITLE: Turner v. U.S.
INDEX NO.: M.1.a.
CITE: (6/19/2017), 137 S. Ct. 1885 (2017)
SUBJECT: No Brady violation because information not "material"
HOLDING: The government did not violate Brady v. Maryland, 373 U. S. 83 (1963) when it withheld evidence favorable to the defendants because the evidence was not material; at best, it cast only minimal doubt on the government's theory that the victim was killed in a group attack. There was no reasonable possibility that had the evidence been disclosed, the results of the proceeding would have been different. Cone v. Bell, 556 U.S. 449, 469-70 (2009).

Defendant and several others were indicted for kidnapping, robbing, and murdering Catherine Fuller. The government argued that Fuller was attacked by a large group of individuals. Two participants, Calvin Alston and Harry Bennett, confessed to participating in a group attack, and several other witnesses corroborated aspects of Alston's and Bennett's testimony. None of the defendants rebutted the prosecution witnesses' claims that Fuller was killed in a group attack. Later on habeas review, the defendants claimed the government withheld seven pieces of evidence favorable to the defendants, including 1) the identity of a man seen running into the alley after the murder and stopping near the garage where Fuller's body had already been found; 2) the statement of a passerby who claimed to hear groans coming from a closed garage; and 3) evidence tending to impeach three key witnesses

The withheld evidence was not material; it was "too little, too weak" to undermine the government's theory of a group attack. Thus, there was no reasonable possibility that had that evidence had been disclosed the results of the proceeding would have been different. Held, *cert. granted*, Circuit Court of Appeals at 116 A.3d 894 affirmed, and judgment affirmed. Breyer, J., joined by Roberts, C.J., and Kennedy, Thomas, Alito, and Sotomayor, JJ; Kagan, J., dissenting, joined by Ginsburg, J.; Gorsuch, J., not participating.

TITLE: Turney v. State
INDEX NO.: M.1.a.
CITE: (12-13-01), Ind. App., 759 N.E.2d 671
SUBJECT: Rape Shield Statute concerns yield to Sixth Amendment rights
HOLDING: In child molesting prosecution, State committed Brady violation where it did not disclose complaining witness's (CW) prior sexual misconduct after introducing evidence of child sexual abuse accommodation syndrome, which made disclosure mandatory. D should have been made aware of CW's prior sexual misconduct under Brady because it could have been used for impeachment purposes & went to credibility of victim. State argued that even if information had been disclosed it would not have been admissible under Rape Shield Statute, Ind. Evidence Rule 412(a). Rape Shield Statute concerns must yield to Sixth Amendment right to cross-examination where it is posited that D was perpetrator & where it is apparent there could have been another possible source for acts of molestation. Steward v. State, 652 N.E.2d 490; Davis v. State, App., 749 N.E.2d 552. Therefore, D was entitled to impeach child sexual accommodation syndrome evidence through cross-examination that could have established another possible source for CW's emotional upset. Held, judgment reversed & remanded for new trial.

TITLE: U.S. v. Arnold
INDEX NO.: M.1.a.
CITE: 117 F.3d 1308 (11th Cir. 1997)
SUBJECT: Brady Material -- State's Witness' Conversations with Investigator
HOLDING: Taped conversations between incarcerated state's witness and government agent concerning, among other things, what witness hoped to gain in exchange for cooperation, should have been turned over to defense as Brady material. Taped conversations were inconsistent with witness' testimony in several respects, including fact that, while he testified that he did not expect reduction in sentence in exchange for cooperation, he told investigator he wanted "big-time credit" and was assured by investigator that he would get it. Further, tapes reveal that investigator expressed doubts about witness' truthfulness and questioned competency of an elderly witness. Under circumstances, "materiality" standard is test that applies when state knowingly uses perjured testimony -- "reasonable likelihood" that false testimony could have affected verdict. Court noted that even more stringent materiality standard applied in usual Brady case -- reasonable probability that disclosure would have produced different outcome, would be met here.

TITLE: United States v. Agurs

INDEX NO.: M.1.a.

CITE: 427 U.S. 97 (1976)

SUBJECT: When failure to disclose evidence requires reversal

HOLDING: Prosecutor's failure to disclose material evidence may result in reversal of conviction in three different situations. First, where prosecution presents, testimony it knew or should have known was perjured, reversal is required if there is any reasonable likelihood testimony could have affected judgment of jury. Second, if defense makes specific request for material that is later shown to be exculpatory, reversal is required if exculpatory evidence might have affected outcome of trial. Third, where D's request is phrased in general terms, or where there is no request, prosecutor's duty to disclose is determined by whether evidence in his possession is so obviously exculpatory that failure to provide evidence to D denies D fair trial. Here, defense counsel filed motion for new trial asserting that he had discovered (1) that murder victim had prior criminal record that would have further evidenced his violent character; (2) that prosecutor had failed to disclose this information to defense; & (3) that recent opinion made it clear that such evidence was admissible even if not known to D. District Ct. denied motion & assumed that evidence was admissible but held that it was not sufficiently material. Since arrest record was not requested & did not even arguably give rise to any inference of perjury, since after considering it in context of entire record trial judge remained convinced of respondent's guilt beyond reasonable doubt, & since Ct. was satisfied that trial judge's firsthand appraisal of record was thorough & entirely reasonable, Ct. held that prosecutor's failure to tender victim's record to defense did not deprive D of fair trial. Held, reversed; Marshall, J., dissenting.

TITLE: U.S. v. Lloyd
INDEX NO.: M.1.a.
CITE: 71 F.3d 408 (D.C. Cir. 1995)
SUBJECT: Non-disclosure - Brady Analysis Applies Even Where Non-Disclosure Was Fault of Court
HOLDING: Where Tr. Ct. improperly refused to grant D's discovery order, motion for new trial based on non-disclosure of requested evidence is governed by Brady standard, not newly discovered evidence standard. Although there was no wrongdoing on government's part, bad faith is not an element of due process violation identified in Brady v. Maryland, 373 U.S. 83 (1963). Under Brady and its progeny, evidence is material if there is a "reasonable probability" that result would have been different with it, and this standard is to be applied with an eye toward considering the fairness of forcing the D to trial without it. Purpose of Brady is not to punish wrongdoing, but to ensure that the D is not convicted without due process of law.

TITLE: U.S. v. Ruiz
INDEX NO.: M.1.a.
CITE: 536 U.S. 622, 122 S. Ct. 2450, 153 L.Ed.2d 586 (2002)
SUBJECT: Disclosure of impeachment evidence inapplicable at plea stage
HOLDING: United States Constitution did not require the Government to disclose material impeachment evidence prior to entering a "fast track" plea agreement with Respondent. The Government was not required to disclose its potential case, and thus the value of the evidence impeaching the Government's case was unknown. Further, Respondent's guilty plea under the plea agreement, with its accompanying waiver of constitutional rights, could have been accepted as knowing and voluntary despite any misapprehension by Respondent concerning the specific extent or nature of the impeachment evidence. Requiring disclosure of the evidence would improperly force the Government to disclose witness information and engage in substantial trial preparation prior to plea bargaining. Held, 9th Circuit opinion at 241 F.3d 1157 reversed.

TITLE: U.S. v. Sudikoff

INDEX NO.: M.1.a.

CITE: 36 F.Supp.2d 1196 (D.C. C. Cal. 1999)

SUBJECT: Brady -- Plea Proffers of Accomplice Witnesses

HOLDING: Proffers and statements made by an accomplice witness in negotiating with the government, along with information revealing the negotiating process, must be disclosed by the government under Brady and Giglio. Proffers and other materials concerning the pre-agreement negotiations may reasonably be considered favorable to the D, since they may include differing or inconsistent stories as negotiations proceed. Proffers can also fall within scope of Giglio, because they can show witness' motivation to testify. The Court wrote that its ruling extended to all proffers (defined as statements reflecting an indication of possible testimony) made by witnesses who receive immunity or leniency in exchange for testimony, including proffers made by counsel on behalf of witnesses, and further extended to notes or documents made by the government reflecting the information in proffers.

TITLE: Ware v. State
INDEX NO.: M.1.a.
CITE: 348 Md. 19; 702 A.2d 699 (Md. Ct. App. 1997)
SUBJECT: Brady -- testimony from case in another county
HOLDING: Prosecutors violated Brady where a capital D made specific request for information about any deals the state may have made with a potential "ear"-witness, and the state replied that it had nothing to disclose when in fact the witness had filed a motion to reduce his life sentence in another county, a member of the prosecution team had testified on his behalf regarding his cooperation against the D, and the judge held that motion under advisement pending the outcome of D's trial. The state argues that because the motion to reduce sentence was a public record, it was available to defense counsel through the exercise of due diligence. There is no public records exception for Brady. Where inculpatory information can be found in public records, the necessary inquiry is whether knew or should have known facts that would have allowed him to access the undisclosed evidence. The state is not relieved of its burden to disclose unless a reasonable D would have looked to the public record in the exercise of due diligence. Here, the state responded to D's discovery request by saying that it had nothing to disclose. At a hearing on the discovery request, the state represented that no deals had been made with the witness, and that it was a matter of conjecture whether he would testify at the D's trial. In light of these representations, it is unlikely that a reasonable D would have looked to the docket in the witness' case in another county. Even assuming that the D should have done so, in order to access the information that a deputy prosecutor had testified on the witness' behalf, that the court had taken the witness' motion under advisement pending the outcome of the D's case, and that in fact the witness' testimony regarding the murder with which the D was charged was significantly different at his own hearing than it was at the D's trial, the D would have had to have the hearing transcribed. The D could not have been expected to go on such a fishing expedition when the state had at least twice represented that it had no promises, understandings, or agreements with the witness. The suppressed evidence is clearly favorable to the D as impeachment against the state's chief witness. Given the witness' centrality to the state's case and the degree of the state's involvement in his reconsideration of sentence, the Court holds that there is a substantial possibility that the result would have been different, and that suppression of the evidence undermines confidence in the outcome of the case. D's murder conviction and death sentence are reversed.

TITLE: Wells v. State
INDEX NO.: M.1.a.
CITE: (11/12/82), Ind., 441 N.E.2d 458
SUBJECT: Discovery - due process
HOLDING: Rule of US v. Agurs, (1976), 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 presupposes that omitted evidence is neither disclosed to defense counsel before trial nor presented to jury during trial. Carey, 416 N.E.2d 1252, *citing* Brady v. MD, (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215; Sypniewski, 400 N.E.2d 1122. Here, D contends he should have been granted a new trial because prosecutor did not disclose that state's witness would recant prior statement incriminating D. Witness's testimony on stand was exculpatory to D. Held, since evidence was presented to jury, no error in denial of new trial.

RELATED CASES: House, App., 535 N.E.2d 103 (Crim. L. 627.8(2,6); failure to disclose possibly exculpatory evidence did not deny D due process); Eakins, App., 484 N.E.2d 607 (D, charged with telephone harassment, is not entitled to new trial for state's failure to disclose complaints by third party that D's son had made harassing telephone calls to her; different verdict would not have resulted even if evidence had been presented, *citing* Loyd, 398 N.E.2d 1260; here, evidence was presented raising inference that son had made calls to prosecutrix).

TITLE: Wetzel v. Lambert

INDEX NO.: M.1.a.

CITE: (02-21-12), 132 S. Ct. 1195 (U.S. 2012)

SUBJECT: Third circuit failed to address state court finding that evidence was too ambiguous to be material under Brady v. Maryland

HOLDING: In granting habeas relief, the Third Circuit Court of Appeals erred by examining only one of two reasons Pennsylvania state courts gave for finding that a police report was not material for purposes of Brady v, Maryland, 373 U.S. 83 (1963) - that the impeachment value of the report would have been merely cumulative. The Third Circuit failed to address the other state court finding: the notation in the police report that purportedly identified another person as the possible perpetrator or as another co-D was too ambiguous to be material and thus was not required to be turned over to Lambert as Brady material. The Court remanded the matter to the Third Circuit to address the issue of ambiguity. PER CURIAM Cert. granted and Third Circuit reversed. BREYER, J., DISSENTING, joined by GINSBURG and KAGAN, J.J.

TITLE: Youngblood v. West Virginia
INDEX NO.: M.1.a.
CITE: 547 U.S. 867, 126 S. Ct. 2188, 165 L.Ed.2d 269 (2006)
SUBJECT: Brady violation, remand for full analysis
HOLDING: In per curium opinion, Court remanded and requested full West Virginia Supreme Court to consider case in light that a Brady violation occurred when a state trooper failed to notify the prosecutor of a note from a complaining witness that indicated D engaged in consensual sex with the witness. The trooper allegedly read the note but declined to take possession of it and told the person who produced it to destroy it. The Tr. Ct. denied D a new trial, saying the note provided only impeachment, but not exculpatory, evidence. A bare majority of the West Virginia Supreme Court affirmed, finding no abuse of discretion on the part of the Tr. Ct., but without examining the specific constitutional claims associated with the alleged suppression of favorable evidence. A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused. The Court has held that the Brady duty extends to impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U. S. 667, 676 (1985), and Brady suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," Kyles, 514 U. S., at 438. See id., at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" Strickler v. Greene, 527 U. S. 263, 280 (1999), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the sup-pressed evidence would have resulted ultimately in the D's acquittal," Kyles, 514 U. S., at 434. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id., at 435. Remand appropriate for lower court to consider Brady issue, which was clearly presented. Held, judgment reversed and remanded for further proceedings; Scalia, J., dissenting, joined by Thomas, J., found the use of the Court's power to grant, vacate, and remand (GVR) inappropriate here as a sufficient record existed from the dissent below to address the constitutional issue if Court so chose; Kennedy, J., dissenting, noted that the GVR order in Lawrence v. Chater, 516 U.S. 163 (1996) (*per curiam)* had his assent as it involved a new administrative interpretation that the lower court did not have opportunity to consider, but Court's decision here went far beyond Lawrence and traditional practice of issuing a GVR order.

M. DISCOVERY

M.1. General considerations

M.1.b. Inherent discretionary power of Tr. Ct.s to order discovery

TITLE: Allen v. State
INDEX NO.: M.1.b.
CITE: (9/14/82), Ind., 439 N.E.2d 615
SUBJECT: Discovery order - substantial compliance
HOLDING: Tr. Ct. granted deference in finding what constitutes substantial compliance with discovery orders. Harris 425 N.E.2d 112; Spears 401 N.E.2d 331; Reid 372 N.E.2d 1149. Here, D given copies of certified documents of prior California conviction on second day of trial (3 days before habitual phase). Documents were not mailed from California until 2 days after date for close of discovery. D moved to suppress documents based on noncompliance with discovery order & also moved for continuance. Both motions denied. D failed to show how he was harmed by state's noncompliance. Further, D had opportunity to explain why he needed more time to prepare for habitual phase. D made no indication that he intended to argue mistaken identity or invalid guilty pleas which would involve additional preparation time. Held, no error.

TITLE: State ex rel. Keller v. Criminal Court of Marion County, Division IV
INDEX NO.: M.1.b.
CITE: (10/15/74), Ind., 317 N.E.2d 433
SUBJECT: Inherent discretionary power of court to order discovery reciprocity
HOLDING: Key to entire principle of discovery in criminal cases is that of reciprocity, balancing of right to discovery on both sides. In absence of strong showing of state interests to contrary, discovery must be two-way street. State may not insist that trials be run as search for truth so far as defense witnesses are concerned, while maintaining poker game secrecy for its own witnesses. Wardius, 412 U.S. 470. In addition, Tr. Ct. has inherent power to balance discovery privileges between parties. Here, judge issued wide-ranging discovery order, requiring substantially full pre-trial discovery by both prosecution & D. State objected to being compelled to disclose certain information, but Court held that discovery order was within discretionary power of trial judge. Held, discovery order affirmed; DeBruler, J., concurring & dissenting.

RELATED CASES: Cline, 693 N.E.2d 1 (1997 amendment to CR 21 superseded caselaw that states discovery in criminal cases is governed entirely by Tr. Ct.'s discretion); Wiseheart, 491 N.E.2d 985 (supreme court will require that discovery requirements be fairly balanced between State & D, in both issuing & in enforcing discovery orders).

M. DISCOVERY

M.1. General considerations

M.1.c. Applicability of Civil Trial Rules

TITLE: Gutowski v. State
INDEX NO.: M.1.c.
CITE: (9/14/76), Ind. App., 354 N.E.2d 293
SUBJECT: Applicability of civil trial rules
HOLDING: D found guilty of aggravated assault & battery. On appeal he contended that he was denied pretrial discovery when Tr. Ct. ruled that complaining witness need not answer interrogatories. Court held that Tr. Ct's ruling was not error under facts of case. Tr. Ct. has inherent power to apply techniques of discovery embodied in civil rues & is not bound by limiting language contained in those civil rules. In proper case, discovery by written interrogatories served on non-parties may well be appropriate as less cumbersome & less expensive technique than discovery by depositions. Held, judgment affirmed, Garrard, J., concurring.

RELATED CASES: Cline, 693 N.E.2d 1 (trial rules are generally applicable to all civil cases).

M. DISCOVERY

M.2. Discovery by D

TITLE: Fathke v. State
INDEX NO.: M.2.
CITE: 951 P.2d 1226 (Alaska Ct. App. 1998)
SUBJECT: Compulsory Process -- Palm Prints of Victim
HOLDING: Tr. Ct. abused its discretion in denying D's motion to compel victim to furnish palm prints, which could have supported inference that third person committed robbery. Victim, a sandwich shop employee, identified D in show-up shortly after robbery in which masked perpetrator displayed gun and took $80 and a sandwich. There were discrepancies between victim's original description and D's appearance, money was not found, but sandwich was found near shop, with bag bearing palm print not belonging to D. Taking of palmprints would have constituted only minimal intrusion on victim's privacy.

M. DISCOVERY

M.2. Discovery by D

M.2.a. In general (see also M.1.a)

TITLE: Commonwealth v. Liang
INDEX NO.: M.2.a.
CITE: 434 Mass. 131, 747 N.E.2d 112 (Mass. 2001)
SUBJECT: Victim Advocate's Notes Subject to Same Discovery as Prosecutor's Notes
HOLDING: Notes taken by victim-witness advocates in meetings with victims or witnesses are subject to discovery to same extent as prosecutor's notes would be. Victim advocates are part of prosecution team. Where victim advocate's notes include exculpatory material or verbatim witness statements, they are discoverable. Similarly, victim advocate's notes are protected by work product privilege to extent that they contain mental impressions about the witnesses.

TITLE: Jorgensen v. State
INDEX NO.: M.2.a.
CITE: (2/18/91), Ind. App., 567 N.E.2d 113, *rev'd on other grounds*, 574 N.E.2d 915
SUBJECT: Discovery must bear rational relationship to pending proceeding
HOLDING: D was convicted of conspiracy to commit murder. On appeal, D argued that it was error to deny her motion to inspect grand jury minutes regarding investigation of her escape. Court held that discovery is not treasure hunt in which D seeks to unearth exculpatory evidence from any location imaginable. D's explorations must bear some rational relationship to pending proceeding. Court would not occasion intrusion into wholly independent grand jury investigation absent substantial showing matters are relevant. Here, D was not being tried for escape, so Court could not conclude grand jury investigation concerning escape would have any relevance to D's trial. Held, judgment affirmed.

RELATED CASES: Majors, 773 N.E.2d 231 (Tr. Ct. did not err in denying D's post-verdict request to depose jurors, alternates & bailiffs to explore further his allegations of juror misconduct; see full review at D.9.e.2); Murphy, 352 N.E.2d 479 (absent showing D had no legitimate defense interest in seeking discovery or that State had paramount interest in non-disclosure, criminal Ds have right under statute & rules of procedure to discovery); Weatherford, 429 U.S. 545 (discovery in favor of criminal D not required by constitutional guarantee of due process).

TITLE: Jorgensen v. State
INDEX NO.: M.2.a.
CITE: (07/11/91), Ind., 574 N.E.2d 915
SUBJECT: D's right to depose witnesses
HOLDING: It was error to deny deposition of social worker & psychologist who might have had non-privileged information tending to show co-conspirator (CC) had committed murder at issue, reversing Jorgensen, App., 567 N.E.2d 113, on this issue. D was convicted of murder & conspiracy. While married to victim, she had relationship with CC, testimony at trial was that CC had told friend he wanted to kill victim. He also gave written confessions admitting to murder. D argued that CC had been counseled by social worker & psychologist who might have inculpatory information as to him & requested taking of depositions. Tr. Ct. denied request on ground that either information was privileged, or that D hadn't shown deposition information was material. S. Ct. held that if psychologist had information from CC relating to circumstances of homicide, it was not privileged under Ind. Code 25-33-1-17 psychologist-patient privilege, & that it was unclear what, if any, privilege applied to social worker. Ct. found D had adequately designated items she wanted in discovery, i.e., depositions of specific persons, but that she could not adequately show materiality without first finding out what information witnesses had. Therefore, Tr. Ct. should have allowed some discovery to determine whether witnesses possessed material relevant to defense. Held, opinion of Ct. App. vacated as to obtaining discovery from counselors, adopted as to all other issues, & remanded with instructions.

TITLE: Mason v. State
INDEX NO.: M.2.a.
CITE: (2d Dist. 8/11/87), Ind. App., 511 N.E.2d 487
SUBJECT: Discovery - D's request untimely
HOLDING: Tr. Ct. did not abuse discretion in denying D's request after voir dire had begun to depose 3 state witnesses. Tr. Ct. has inherent power to prevent use of discovery from unjustifiably delaying proceedings. Tinnin 416 N.E.2d 116. Here, D charged with child molesting sought to depose witnesses after Tr. Ct. vacated motion in limine (MIL) ruling excluding their testimony re uncharged sexual conduct with D. D argues deposition request was not untimely because of reliance on MIL ruling. Ct. rejects for 3 reasons: (1) D filed MIL only 6 days before trial; (2) MIL ruling is not final & is not sound basis for counsel to refrain from discovery; & (3) D had witnesses' written statements & heard their testimony at state's offer to prove hearing.

RELATED CASES: Williamson, 436 N.E.2d 90 (State responded in writing to D's request for discovery, informing him that entire prosecutor's file would be available to D for all purposes pertaining to discovery request; where D did not avail himself of prosecutor's offer to receive these items at prosecutor's office and did not request continuance or time to view exhibits, Court did not err in overruling D's motion for suppression of items).

TITLE: Morris v. State
INDEX NO.: M.2.a.
CITE: (12/6/84), Ind., 471 N.E.2d 288
SUBJECT: D's request for pre-trial lineup
HOLDING: Tr. Ct. did not err in denying D's petition for live lineup. Order for pretrial lineup requested by D is in nature of discovery order, which is discretionary with trial judge. In weighing equities, considerations are proximity in time of petition to offense, changed appearance of D, likelihood of misidentification and cost of conducting lineup. Requests for lineups should not be granted routinely or in perfunctory manner. Here, robbery victim positively identified getaway car and picked D's picture from "especially fair" photo display. D's petition came four months after offense and one week before trial. Ct. found no basis for concluding failure to require lineup appreciably diminished fairness of trial. Held, no error.

RELATED CASES: Howell, 493 N.E.2d 473 (Tr. Ct. did not abuse discretion by denying D's request for lineup; Court rejected D's contention that likelihood of misidentification existed; here, victim did not hesitate in selecting D's picture from photo display); Glover, 441 N.E.2d 1360 (although D's request for lineup was initially granted, State moved for reconsideration because D shaved off facial hair and all hair on his head in apparent attempt to disguise his appearance; State showed paramount interest; Tr. Ct. did not err in denying request for lineup).

TITLE: Suarez v. State

INDEX NO.: M.2.a.

CITE: (05-10-11), 947 N.E.2d 500 (Ind. Ct. App 2011)

SUBJECT: PCR - erroneous denial of complete record of guilty plea hearing

HOLDING: Court agreed with both D and State that post-conviction court abused its discretion when it denied D's request to have access to the electronic recording of her guilty plea hearing, whether by providing a copy of the recording or allowing access under court supervision. Because D's counsel had detected an irregularity in the translation between D and the interpreter, she sought to obtain a copy of the recording of the hearing to have an independent State-certified interpreter translate the Spanish portions of the hearing which were of legal concern. PCR court denied D's request, apparently on basis that it had already provided a transcript of the English portion of the hearing and that was all the court was required to do." There was no assertion that either the Spanish portions of the guilty plea hearing or the proceeding itself was privileged or confidential in any way. D met her burden of showing that the Spanish portion of the guilty plea hearing was relevant to her PCR petition. Held, judgment reversed.

M. DISCOVERY

M.2. Discovery by D

M.2.b. Discovery of specific items (motions to produce)

TITLE: Williams v. State
INDEX NO.: M.2.b.
CITE: (5th Dist., 10-13-04), Ind. App., 819 N.E.2d 381
SUBJECT: Discovery of complaining witness's (CW's) mental health & prescription records
HOLDING: In rape & criminal deviate conduct prosecution, Tr. Ct. erred in denying D's request for CW's prescription drug records, but properly denied request for CW's mental health records in custody of hospital where CW had been a patient. D argued that these records were necessary to establish that CW is bipolar & suffers from manic depression, thereby providing motivation for her to fabricate sexual assault charges. Discovery of mental health records are subject to particularized requirements of Ind. Code 16-39-3-3, which provides that a person seeking access to a patient's mental health record without patient's written consent may file a petition in circuit or superior Ct. requesting a release of the patient's mental health record. A notice of the hearing must be served on both the patient & provider maintaining the records at least 15 days in advance of hearing. Ind. Code 16-39-3-4. Here, D's motion does not mention Ind. Code 16-39-3 or its requirements & was served on State & Tr. Ct.-- not CW or hospital. Moreover, there was no evidence that either CW or hospital were provided notice of hearing or that either was present.

As to CW's prescription records, D made a sufficient showing of particularity & materiality in that records would provide insight on medication CW may have ingested the night of the alleged offense & relates to CW's ability to accurately perceive & recount events. State asserted that maintaining confidentiality of CW's prescription drug records pursuant to Ind. Code 25-26-13-15 presents a paramount interest in non-disclosure. However, Ct. held that the charged crimes in this case are of special significance. D & CW shared a prior intimate relationship before incident in question & D claimed that events were consensual based on couple's past romantic relationship & their particular sexual proclivities. Ct. noted that in sexual assault cases, perception of events & credibility are crucial factors with potential to significantly influence fact-finder's determination. Access to information that would call into question such perception could affect D's ability to adequately defend himself & is paramount to CW's confidentiality concerns asserted by State. Held, denial of D's discovery motion for access to prescription drug records reversed.

RELATED CASES: Williams, 959 N.E.2d 360 (Ind. Ct. App 2012) (D is entitled to prescription drug records from database of records maintained by the Board of Pharmacy; although patient is not one of the people to whom the legislature authorized disclosure, the privilege is meant to protect D; D can opt to waive privilege in order to assert his right to present a defense).

TITLE: WTHR-TV v. Cline
INDEX NO.: M.2.b.
CITE: (2-23-98), Ind., 693 N.E.2d 1
SUBJECT: D's discovery of unaired media footage - no reporter's privilege
HOLDING: Neither First Amend. nor Art. I, § 9 of Ind. Const. proscribe disclosure of unaired portions of media interview of D on grounds of privilege. Here, D served subpoenas on several TV stations for whatever they had relevant to her criminal case, including both broadcast & unaired portions of interview conducted while D was in police custody. With respect to interview, D made sufficient showing of materiality for discovery under Ind. Trial Rules, & media failed to show sufficient paramount interest to deny D copy of full interview. However, D's blanket discovery request, except as it pertained to videotaped interview, did not meet standard of Ind. Trial Rules, requiring discovery request to specify item or information sought with reasonable particularity & establish at least its potential materiality to case. Dillard, 274 N.E.2d 387. Materiality need not be shown prior to disclosure where relevance self-evident or precise nature of information unknown. Id.; Jorgensen, 574 N.E.2d 915. However, where materiality is challenged or unknown, showing of at least "potential materiality" generally required to obtain in camera review of disputed items. Following holding in Branzburg v. Hayes, 92 S. Ct. 2646, Ct. also concluded First Amend. does not require in every case a special showing of need & relevance beyond those imposed under discovery procedures when information in criminal case is demanded from reporter. Art. 1, § 9 of Ind. Const. likewise does not recognize qualified "reporter's privilege" to refuse to give evidence in criminal proceeding. Even if "material burden" on newsgathering ability could establish violation of Ind. Const., D's discovery demand in this case did not rise to level required to establish a § 9 violation. Held, transfer granted, cause remanded for in camera inspection of videotaped interviews by Tr. Ct.

RELATED CASES: Crawford, 948 N.E.2d 1165 (Ind. 2011) (the three-step test set forth in Cline applies only to requests for non-privileged materials; here, some of D's requests for footage from police show regarding this case were not sufficiently specific; Tr. Ct. properly granted the show's motion to quash those requests); Milam, App., 690 N.E.2d 1174 (D's discovery request failed entirely due to non-compliance with Trial Rules' requirement of reasonable particularity & materiality).

M. DISCOVERY

M.2. Discovery by D

M.2.b.1. Witnesses

TITLE: Johnson v. State
INDEX NO.: M.2.b.1.
CITE: (11-7-91), Ind., 580 N.E.2d 670
SUBJECT: State may amend witness list during trial
HOLDING: Tr. Ct. did not err in allowing State to amend its witness list during trial to admit testimony of additional witness where judge offered D opportunity to interview witness prior to cross-examination. Even after issuing pre-trial order, it is within Tr. Ct.'s discretion to allow or deny additions to witness list. Johnson v. State, 446 N.E.2d 1307. Decision should be based upon whether allowing such additions would prejudice opposing party. Here, State called witness who was not included in its witness list for purpose of establishing chain of custody of rape kit. Ct. found that any possible prejudice was cured by allowing D opportunity to interview witness. Held, conviction affirmed.

RELATED CASES: Kennedy, 578 N.E.2d 633 (D was not prejudiced where Tr. Ct. allowed State to call unlisted witness because D's counsel was given opportunity to interview witness and did adequate job of cross- examining him despite surprise); Agee, 544 N.E.2d 157 (Tr. Ct. properly allowed State to call unlisted witness where State was not aware of relevant statement made by additional witness at time witness list was compiled, and furnished D's counsel with copy of statement same day State learned of it); Staggers, 477 N.E.2d 539 (supplement to witness list on second day of trial did not prejudice D where D was aware of witness, as his name appeared on back of property receipt, and D failed to object at trial).

TITLE: Mauricio v. Duckworth
INDEX NO.: M.2.b.1.
CITE: 840 F.2d 454 (7th Cir. 1987
SUBJECT: Discovery by D - rebuttal witnesses
HOLDING: State's knowing failure to disclose identity of alibi rebuttal witness violated due process. Due Process Clause of 14th Amend. forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal Ds. Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208. Indiana's criminal discovery procedure, Ind. Code 35-36-4 et al., is not unconstitutionally non-reciprocal on its face. See Bruce. Duckworth, 7th Cir., 659 F.2d 776. Notwithstanding constitutionality of Indiana's discovery scheme, Ct. found that discovery procedures were not applied evenhandedly in D's case & violated D's due process rights. Although alibi statutes do not explicitly impose upon parties' affirmative obligation to disclose alibi & rebuttal witnesses, Tr. Ct.'s discovery order requiring D to list all his witnesses should have triggered corresponding & reciprocal obligation by State to list all its potential witnesses, including likely rebuttal witnesses. Ct. rejected State's claim that it should be excused from having to disclose identity of its alibi rebuttal witness because D did not specifically identify his alibi witnesses. Due process was violated because Tr. Ct.'s discovery order permitted State access to information it did not also afford D. In assessing whether constitutional errors require reversal, Cts must determine whether there are reasonable possibility errors complained of might have contributed to conviction. U.S. ex rel. Savory v. Lane, 7th Cir., 832 F.2d 1011. Other evidence of guilt must be overwhelming before Cts. will conclude constitutional error was harmless. Id. Ct. found, absent rebuttal witness' tainted rebuttal testimony, State's case was not "overwhelming," & thus failure to disclose rebuttal witness was not harmless error. Held, reversed & remanded.

TITLE: McCullough v. Archbold
INDEX NO.: M.2.b.1.
CITE: (01-06-93), Ind., 605 N.E.2d 175
SUBJECT: Pretrial discovery of rebuttal witnesses
HOLDING: Ct. adopted criminal law standard requiring disclosure of rebuttal witnesses. In so holding, Ct. said, "we hold that the Chatman v. State (1975), 263 Ind. 531, 334 N.E.2d 673] line of cases expressed the better rule: the nondisclosure of a rebuttal witness is excused only when that witness was unknown & unanticipated; known & anticipated witnesses, even if presented in rebuttal, must be identified pursuant to a Ct. order, such as a pre-trial order, or to a proper discovery request."

RELATED CASES: Carrigg, App., 696 N.E.2d 392 (no error in excluding testimony of D's rebuttal witness, because D had not previously disclosed him; witness was clearly known & anticipated before trial); Cliver, 666 N.E.2d 59 (declining to apply McCullough retroactively, although disclosure is required, issue of whether to impose sanction is within Tr. Ct.'s discretion); Hackett, App., 661 N.E.2d 1231 (no appellate IAC for failure to raise issue of State's nondisclosure of known & anticipated rebuttal witness; at time of D's trial, State was under no obligation to disclose); Sloan, App., 654 N.E.2d 797 (State's failure to disclose its known potential rebuttal witness to D was error; conviction reversed on other grounds); Jenkins, 627 N.E.2d 789 (Ct. rejected D's argument that rebuttal expert witness should not have been allowed to testify because he was not disclosed until 45 minutes before his testimony. McCullough would not apply to D, because it was only to be applied prospectively. Additionally, D did not move for continuance when faced with witness, & therefore waived any alleged error regarding discovery noncompliance. But, see Tyson v. State App., 619 N.E.2d 276, trans. denied); Dorsey, 490 N.E.2d 260 (rebuttal witnesses need not be disclosed by State when it is impossible to anticipate such witnesses would be called to testify at trial).

TITLE: Morgan v. State
INDEX NO.: M.2.b.1.
CITE: (10/20/82), Ind., 440 N.E.2d 1087
SUBJECT: Discovery by D - witnesses (W)
HOLDING: Where prosecutor opens entire case file (including informations filed on charge) & where W are endorsed on information, prosecutor will not be deemed in violation of D's discovery request for a list of names & addresses of W state intends to use in prosecution of case simply because W endorsed on information are not also listed in letter by prosecutor to D naming additional W. Here, D requested continuance to depose those W listed on informations called by state at trial. Continuance denied. Ct. holds no failure to disclose because W listed on charging instruments; letter sent by prosecutor & allegedly relied upon by D as complete list of possible W did not purport to be exclusive listing. Held, no error in denial of request for continuance.

RELATED CASES: Staggers, 477 N.E.2d 539 (no error in allowing state to file additional W lists on first & second days of trial where D did not request continuance or argue surprise, *citing* Lloyd 448 N.E.2d 1062 which held Tr. Ct.'s refusal to impose more severe sanction was proper where continuance was granted); Wallace, 474 N.E.2d 1006 (Crim L 1148, 1166(10.10); although Ct. finds state's W list containing 125 W unreasonable, it rejects D's contention that she was prejudiced by state's "deliberate deception" in that such a list prevented her from anticipating one W' testimony; because D took no action to compel more tenable W list, Ct. cannot find reversible error); Counceller, 466 N.E.2d 456 (no error in denial of continuance where D made motion at trial, Tr. Ct. did compel state to disclose all W, including 11 new W, & addresses not previously disclosed & D failed to show prejudice).

TITLE: Palmer v. State
INDEX NO.: M.2.b.1.
CITE: (4th Dist., 09-20-94), Ind. App., 640 N.E.2d 415
SUBJECT: Nondisclosure rebuttal witnesses - not reversible error
HOLDING: Although it appeared that State anticipated use of rebuttal witness it did not disclose, there was no evidence that nondisclosure was intentional act of bad faith & D did not move for continuance, so Tr. Ct. did not abuse discretion in allowing witnesses to testify. In D's trial for child molesting, State called two witnesses to testify in rebuttal to D's expert psychologist who testified as to suggestibility & memory problems of children. First witness was disclosed to D as potential witness in final witness & exhibit list, but second witness was never disclosed.

When Ct. order exists or proper discovery request is made, nondisclosure of rebuttal witness is excused only when witness was unknown & unanticipated by offering party. McCullough v. Archbold Ladder Co., Ind., 605 N.E.2d 175. Second witness had been deputy prosecutor assigned to D's case & conducted all actions regarding it until D's expert was disclosed as additional witness. After that disclosure, all subsequent motions were submitted by other deputies who also conducted trial.

Ct. noted it appeared from record that change of prosecutors was not just fortuitous act, & that it was possible that State made decision to re-assign case specifically so it could use former deputy to rebut D's expert's testimony. Because Ct. could not ascertain exactly what happened, however, it deferred to Tr. Ct., & found there was no hard evidence of bad faith in nondisclosure. D also waived any error regarding discovery noncompliance by failing to move for continuance. Held, conviction affirmed.

TITLE: Stevenson v. State
INDEX NO.: M.2.b.1.
CITE: (10-11-95), Ind., 656 N.E.2d 476
SUBJECT: Denial of motion to compel attendance of incarcerated witness affirmed
HOLDING: Tr. Ct. did not abuse discretion in denying D's motion to have incarcerated witness subpoenaed to testify. Standard applicable to ruling upon motion to produce witness incarcerated in penal institution is whether D has shown that testimony of incarcerated witness is material to case. Eubank v. State (1983), Ind., 456 N.E.2d 1012. Here, D made no showing that proposed witness had any knowledge or information regarding crimes for which D was charged. In his petition for writ of habeas corpus ad testificandum, D asserted only that proposed witness would have testified regarding witness's commission of unrelated robberies, & robbery that occurred approximately two weeks prior to robbery for which D was charged. Ct. concluded that D failed to make sufficient showing that proposed testimony was material to case. Held, judgment affirmed.

M. DISCOVERY

M.2. Discovery by D

M.2.b.2. Informants

TITLE: Alvarado v. Superior Court
INDEX NO.: M.2.b.2.
CITE: 23 Cal.4th 1121, 5 P.3d 203 (Cal. 2000)
SUBJECT: Identities of Key Witnesses
HOLDING: D's 6th Amendment confrontation right requires that identify of crucial states' witnesses be disclosed at trial, if not before. Although concerns about safety of informants can justify withholding their identities until trial, anonymous testimony will not be allowed.

TITLE: Beville v. State
INDEX NO.: M.2.b.2.
CITE: (3/17/2017), 71 N.E.3d 13 (Ind. 2017)
SUBJECT: Erroneous denial of motion to compel video of controlled buy
HOLDING: Trial court abused its discretion in denying Defendant's motion to compel video recording of an alleged controlled buy between him and a confidential informant, which he argued was fundamental to preparing a defense. The State argued that the informer's privilege entitled it to withhold disclosing the recording and that defense counsel could review it in the prosecutor's office. If the State meets its initial burden to demonstrate the informer's privilege applies, the three-part test for analyzing discovery requests set forth in Dillard v. State, 274 N.E.2d 387 (Ind. 1971) is not reached. In re Crisis Connection, Inc., 949 N.E.2d 789 (Ind. 2011). A valid assertion of the informer's privilege shifts the burden to the defendant to demonstrate that disclosure of the requested evidence is either relevant and helpful to his defense or necessary for a fair trial. In a situation in which it is unknown whether the informer's privilege applies, the State could ask the trial court to review the video in camera to determine whether it contains privileged information.

Here, the State failed to meet its burden of establishing the essential elements of the privilege (i.e., that the C.I.'s identity would be revealed if Defendant's discovery request is granted). Accordingly, trial court's denial of the motion to compel was an abuse of discretion. But even if the State had proven that the video would have revealed the informant's identity, Defendant would still have been entitled to the video because he carried his burden of establishing that the evidence was "relevant and helpful to his defense." Schlomer v. State, 580 N.E.2d 950 (Ind.1991). The State planned to admit the video recording at trial in lieu of calling the C.I. to testify, thus counsel reviewing the video with Defendant was "fundamental" to preparing his defense.

Where, as here, the defendant demonstrates that an exception to the informer's privilege applies, State must show why disclosure of this specific video is not necessary or that disclosure would threaten its ability to use or recruit C.I.s in the future. Other than asserting general policy reasons underlying the informer's privilege, the State presented no evidence to satisfy this burden. Held, transfer granted, Court of Appeals' opinion at 51 N.E.3d 1282 vacated, denial of motion to compel reversed.

TITLE: Burst v. State
INDEX NO.: M.2.b.2.
CITE: (4th Dist. 11/17/86), Ind. App., 499 N.E.2d 1140
SUBJECT: Discovery by D - informants; "special employee of state"
HOLDING: Tr. Ct. erred in refusing to require state to produce its confidential informant. Here, D requested name & address of informant & opportunity to depose him. General policy is to prevent disclosure of informant's identity unless D can show disclosure is relevant/helpful to defense/necessary for fair trial. Roviaro v. US (1957), 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639; Davenport 464 N.E.2d 1302. Ct. finds D demonstrated that CI was present & active in transactions forming basis of charges against him; therefore, CI was material witness. Dorsey 260 N.E.2d 800; Ortez, App., 333 N.E.2d 838. As in Dorsey & Ortez, CI was not concerned citizen offering casual observations but was used repeatedly by police over period of several months to establish contacts/facilitate/participate in transactions & was paid for his services, which rendered him a "special employee" of state. Where state actively makes its "special employee" unavailable to D & where D demonstrates materiality of "special employee", Cts. must reverse convictions so that D may receive fair trial. Held, certain counts reversed & remanded for new trial.

TITLE: Commonwealth v. Dias

INDEX NO.: M.2.b.2.

CITE: 451 Mass. 463, 886 N.E.2d 713 (Mass. 2008)

SUBJECT: D may be entitled to informer's identity even when informer will invoke 5th Amendment

HOLDING: Massachusetts Supreme Judicial Court held a D may be entitled to discovery of an informer's identity even when the informer would be able to avoid testifying at trial by asserting his or her Fifth Amendment privilege against self-incrimination. Ds were charged with drug offenses after police officers executing a search warrant found cocaine in Ds' apartment. The search warrant was based on an informer's, controlled purchase of cocaine from a third party who also was at the apartment. Ds sought discovery of the informer's identity after finding inconsistencies between the warrant application's description of the informer's statements and a summary of the third party's likely testimony at trial. Prosecutors argued Tr. Ct. abused its discretion with holding an in-camera hearing to determine whether the informer had a valid Fifth Amendment privilege against self-incrimination. Court made clear that "whether the informant could assert a valid Fifth Amendment privilege if called as a witness at trial is a distinct issue from whether the informant's identity must be disclosed before trial because it is apparent that he has information relevant and helpful to the defense." Calling the informer to the stand at trial is only one way a D could make use of the information about the informer's identity. For example, knowledge of the informer's identity could assist defense counsel in preparing for cross-examination of the third party who sold the informer cocaine. The question whether the informer has a valid Fifth Amendment privilege will not arise unless and until the informer is called to testify.

TITLE: Heyen v. State
INDEX NO.: M.2.b.2.
CITE: (10-28-10), 936 N.E.2d 294 (Ind. Ct. App 2010)
SUBJECT: Not divulging CI's identity harmless where D had knowledge
HOLDING: In prosecution for dealing in methamphetamine, any refusal by Tr. Ct. to disclose identity of confidential informant ("CI") to D was harmless error. A D bears the burden of proving his need for a CI's identity. Mengon v. State, 505 N.E.2d 788, 790 (Ind. 1987). Bare speculation that an informant's identity may prove useful does not justify disclosure. Mays v. State, 907 N.E.2d 128, 131 (Ind. Ct. App. 2009). If a D actually knows a CI's identity, the government has no legitimate need to protect it; however, withholding a CI's name under these circumstances is harmless error. Smith v. State, 829 N.E.2d 64, 71 (Ind. Ct. App. 2005).

Here, the evidence established that D knew CI's identity. The CI drove to D's residence without directions from police officers. The audio video tapes also showed D knew the CI. During the buy, D and CI discussed many mutual acquaintances and at one point, D said the CI was "a good dude." Thus, D failed to show he did not know CI's identity and any refusal by the Tr. Ct. to disclose his identity or to allow D to call CI as a witness was harmless error. Held, judgment affirmed.

TITLE: Moore v. State
INDEX NO.: M.2.b.2.
CITE: (12-1-05), Ind. App., 839 N.E.2d 178
SUBJECT: No error in limiting access to CI's file
HOLDING: Tr. Ct. did not abuse its discretion in modifying D's subpoena duces tecum requesting the entire file of a confidential informant (CI) who was victim in attempted murder case. Tr. Ct. did in camera review of file & provided D with portion of file involving D directly. D argued he needed a complete CI payment ledger to show the CI's level of dependence on the money he received to show bias & motive. Ct. determined that D accomplished this on cross by establishing the CI's only sources of income were his CI payments & disability pension. D also argued he needed the documents to determine the accuracy of the CI's information given to police to establish motives of both D & the CI. Ct. could not discern the relevance of this information as D argued self-defense at trial & not retaliation for past false accusations against him. Further, D could have attempted to depose the CI's police contacts to obtain this information. In footnote, Ct. rejected D's reliance on Mesarosh v. U.S., 352 U.S. 1 (1956), for proposition that "information regarding prior or contemporaneous perjury or bizarre testimony of an informant is discoverable," distinguishing case on basis that no indication existed that the State withheld such information. Ct. also rejected D's claim under Ind. Evid. Rule 613 that he needed the entire file to impeach the CI on any prior inconsistent statements, noting the only trial testimony on such subjects involved the CI's tenure as a CI and the generalities of his work, both of which easily could have been verified by a detective. Further, as in U.S. v. Bastanipour, 41 F.3d 1178 (7th Cir. 1994), the request was based on "nothing more than his speculation" that the file might contain impeachment evidence. Ct. also rejected D's claims that the denial infringed on his rights under the Confrontation Clause & denied him due process under the Fourteenth Amendment. Held, judgment affirmed.

TITLE: Powers v. State
INDEX NO.: M.2.b.2.
CITE: (10/21/82), Ind., 440 N.E.2d 1096
SUBJECT: Discovery by D - informants; disclosure
HOLDING: Disclosure of identity of confidential informants (C.I.) is not required unless D demonstrates disclosure is relevant & helpful or is necessary to assure a fair trial. Ryan 431 N.E.2d 115; Lewandowski 389 N.E.2d 706. D has burden. Here, Ct. decides inconsistencies in C.I.'s testimony at hearing on BMCE suggests C.I.'s testimony (at suppression hearing) would not necessarily have been relevant & helpful in preparing D's defense nor essential to fair determination of case. Fact D suspected Hartman was C.I. (shown by offer to prove identity of C.I. at suppression hearing) contributed to Ct.'s resolution of issue against D. Held, drug convictions affirmed.

RELATED CASES: Parker, App., 773 N.E.2d 867 (Tr. Ct. did not err in ruling that State did not have to reveal CI's identity; CI's information was only marginally helpful to investigation); Geiger, App., 721 N.E.2d 891 (because CI provided no direct information concerning D, State was not required to disclose CI's identity); Furman, App., 496 N.E.2d 811 (Ind. does not favor disclosing identity of C.I.; Tr. judge must balance public interest in encouraging free flow of information to authorities with D's interest in obtaining disclosure to prepare defense; Tr. Ct. should consider crime charged, defenses, possible significance of C.I.'s testimony & other relevant factors, *citing* Roviaro v. US (1957), 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639; Ct. finds probative evidence supporting decision to deny disclosure & also rejects D's argument that charges should have been dismissed after officer testified that he & C.I. were only witnesses to alleged crime; Ct. distinguishes Glover 251 N.E.2d 814: there, officer testified C.I. was reliable & Glover was denied opportunity to cross-examine officer; here, state did not inquire into substance of C.I.'s activities, statements, or information & D was not denied opportunity to cross-examine police officer); Carnes, App., 480 N.E.2d 581 (Ct. rejects Ds' contention that disclosure was necessary to ascertain whether C.I. in fact existed).

TITLE: Smith v. State
INDEX NO.: M.2.b.2.
CITE: (1st Dist., 6-9-05), Ind. App., 829 N.E.2d 64
SUBJECT: Failure to disclose confidential informants (CIs) -- no error
HOLDING: Tr. Ct. did not err in refusing to compel the State to disclose the names of CIs as to three separate drug buys. Distinguishing Roviaro v. U.S., 353 U.S. 53 (1957), Ct. found that while the CIs were material witnesses, they were not the "sole" material witnesses as D was accompanied by another individual during two of the buys & D did not allege that individual could not have testified at trial. However, as to the other buy where D was not accompanied by anyone else, Ct. held that since D apparently knew the identity of the CI, Roviaro did not apply. During a suppression hearing, D identified the CI while arguing that the State used outrageously dangerous conduct to obtain evidence because the CI drove to the buy while his license was suspended. A D's knowledge of an informant's identity is a factor to be considered in relation to a D's request for a CI's identity. Schlomer v. State, 580 N.E.2d 950 (Ind.1991). Roviaro, however, holds that a D's knowledge of an informant's identity actually requires disclosure because the government no longer has a legitimate need to protect it. Nevertheless, D's knowledge of the CI's identity also establishes harmless error as she could have subpoenaed him.

Ct. also found no error in the admission of lay opinion testimony an officer made about a videotape at the police station that allegedly displayed the D removing buy money from her vagina. D argued the State failed to show that the detective's testimony was admissible as lay opinion testimony under Ind. Evid. Rule 701 & that the average juror could interpret the videotape without commentary by the detective. However, Ct. found that the detective's extensive experience as a police officer & three & a half years on a drug task force gave her "knowledge beyond that of the average juror with regard to the drug culture." Held, judgment affirmed.

RELATED CASES: Heyen, 936 N.E.2d 294 (Ind. Ct. App 2010) (any refusal by Tr. Ct. to disclose identity of CI was harmless error because evidence established that D already knew CI's identity).

TITLE: State v. Cook
INDEX NO.: M.2.b.2.
CITE: (4th Dist. 12/10/91), Ind. App., 582 N.E.2d 444
SUBJECT: Disclosure of confidential informant (CI)
HOLDING: It was error for Tr. Ct. to order state to disclose identity of CI for purpose of allowing D to challenge probable cause affidavit, because D did not present sufficient evidence to warrant such disclosure. Police obtained search warrant for D's house, tavern, apartment & truck, based on officer's affidavit that he had good cause to believe D was dealing in drugs. Officer's belief was based in part on anonymous tipster's call detailing D's trip to Mexico or Texas to pick up drugs for sale. Officer's belief was also based on subsequent CI's statement about discussion she overheard where D described his Texas trip. CI had previously given correct information leading to successful completion of 2 other investigations. Execution of warrant revealed green leafy substance in slashed spare tire of truck & in house, & ten pounds of marijuana & small quantities of other drugs & paraphernalia in apartment.

D's motion to compel disclosure of CI alleged "false information was provided to the State of Ind. in obtaining search warrant & that same was made knowingly, intentionally, or with reckless disregard for the truth," & that D would present evidence at hearing. D also filed motion to suppress, alleging errors in information provided to police, & motion to compel disclosure because of desire to depose CI to insure "fair & impartial trial." Tr. Ct. ordered disclosure of identity & certified question for state's appeal. General rule is to prohibit disclosure of CI's identity unless D demonstrates disclosure relevant & helpful or necessary for fair trial, & burden is on D to show exception warranting disclosure. Brock, Ind., 540 N.E.2d 1236, & Mengon, Ind., 505 N.E.2d 788. Privilege should not yield to "fishing expedition" or bare speculation. D's reasons in instant case were "bare assertions" concerning necessity for information, & no evidence was presented to Ct. Held, Ct.'s ruling reversed.

RELATED CASES: Sheckles, 24 N.E.3d 978 (Ind. Ct. App 2015) (court rejected D's argument that he was entitled to disclosure of CI because there was a discrepency in the amount of cocaine sold); Beverly, 543 N.E.2d 1111 (Tr. Ct. did not err in refusing to compel disclosure of identity of CI where his only involvement with case was supplying initial tip to police that drugs could be found in D's apartment).

TITLE: State v. Jones
INDEX NO.: M.2.b.2.
CITE: (06/22/2021), Ind., 169 N.E.3d 397
SUBJECT: An informant's identity is inherently revealed at a face-to-face interview and the informer's privilege applies
HOLDING: A confidential informant (CI) provided police with information they used to determine Defendant was a suspect in offenses stemming from a home invasion. When Defendant and his codefendants attempted to learn the CI's identity, the State refused to disclose it, stating the witness was used only to develop potential suspects and would not testify at trial. After failed attempts to conduct an interview in a way that would conceal the CI's identity, the trial court ordered the State to produce the CI for a face-to-face interview with the condition defense counsel not ask questions that may disclose the CI's identity.

The Indiana Supreme Court found that physical appearance disclosed by a face-to-face interview inherently reveals a CI's identity and thus triggers application of the confidential informer's privilege. Once the State has met the threshold requirement to show the confidential informer's privilege applies, the burden shifts to the defendant to demonstrate that disclosure of identity is relevant and helpful to the defense or that it's necessary for a fair trial. If the defense meets that burden, it has shown an exception is warranted. The State then gets the opportunity to dispute whether disclosure is necessary to the defense or show that disclosure would threaten its ability to recruit or use Cis in the future. The trial court should balance the respective interests to determine whether the general rule of nondisclosure has been overcome. Held, transfer granted, Court of Appeals opinion at 155 N.E.3d 1287 vacated, reversed and remanded to the trial court to engage in the necessary balancing inquiry to determine whether an exception to nondisclosure was warranted.

TITLE: U.S. v. Fuentes
INDEX NO.: M.2.b.2.
CITE: 988 F. Supp. 861 (D.C. E. Pa. 1997)
SUBJECT: Discovery -- Identity of Informant
HOLDING: Ds accused of arranging sale of cocaine with undercover DEA agent and confidential informant should have been given true name and address of informant for use in investigation. Government's extensive disclosures about informant's life and past participation in drug operations were not adequate to provide defense with meaningful opportunity to investigate case and satisfy core values of 6th Amendment. Defense must be able to put witness' credibility to fair test.

M. DISCOVERY

M.2. Discovery by D

M.2.b.3. Statements of D

TITLE: Booker v. State
INDEX NO.: M.2.b.3.
CITE: (3rd Dist., 03-25-09), 903 N.E.2d 502 (Ind. Ct. App. 2009)
SUBJECT: Failure to disclose inculpatory statement - no discovery violation
HOLDING: State has a constitutional duty to disclose evidence favorable to D, but there is no affirmative duty to provide inculpatory evidence. Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Here, in dealing in cocaine prosecution, police officer did not disclose in his police report or deposition that D had said, "You know I'm not really a bad guy, I just sell a little here to make ends meet." Officer first told prosecutor about this statement a week before trial, but prosecutor did not share this information with defense counsel. Defense counsel first learned about D's alleged statement in State's direct examination of officer during its case in chief and moved for mistrial.

Discovery is governed by Ind. Trial Rule 26, which does not provide for mandatory disclosures. Further, D acknowledged an unrecorded oral statement does not fall under any of the categories of evidence covered by the discovery order issued in this case. Had D requested disclosure of all statements he was alleged to have made, State would have been required to comply. Long v. State, 431 N.E.2d 875, 877 (Ind. Ct. App 1982). However, D made no such request, thus there was no discovery violation. Nevertheless, Court does not condone prosecutor's conduct and agreed with Tr. Ct. that disclosure would have promoted goals of discovery and been the "honorable" and "right" thing to do. ABA Standards for Criminal Justice provide a prosecutor should disclose "[a]ll written and all oral statements of the D or of any coD that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements." Standard 11-2.1 of ABA Criminal Justice Standards: Discovery, available at www.abanet.org/crimjust/standards. Held, judgment affirmed.

TITLE: Drummond v. State
INDEX NO.: M.2.b.3.
CITE: (9/6/84), Ind., 467 N.E.2d 742
SUBJECT: Discovery by D - statements by D
HOLDING: Tr. Ct. did not err in admitting testimony of police officer re conversation he had with D. Here, D contends testimony should have been excluded because discovery failed to disclose conversation. Ct. finds argument without merit because D suffered no prejudice. Officer was listed as state's witness on discovery witness list. Defense counsel was afforded opportunity to cross-examine officer. Opinion does not state whether D's discovery motion specifically requested such statements. Held, no error.

RELATED CASES: Lagenour, 376 N.E.2d 475 (Tr. Ct. did not err in denying D new trial after State violated Tr. Ct. order requiring disclosure of any confessions or statements made by D. State failed to disclose that D made incriminating statement while in police custody. Ct. found that failure to disclose existence of statement was unintentional, and because statement was not used at trial, D could show no specific prejudice flowing from non-production); State ex rel. Keller, 317 N.E.2d 433 (items belonging to or obtained from D is discoverable by D); Sexton, 276 N.E.2d 836 (Tr. Ct. erred in denying D's motion for discovery of D's statement to police where statement was material to insanity defense, D had lost memory of incidents of crime following electro-shock treatments at psychiatric hospital and State failed to make sufficient showing of paramount interest in non-disclosure).

TITLE: State v. Rodriguez
INDEX NO.: M.2.b.3.
CITE: 985 S.W.2d 863 (Mo. Ct. App. 1998)
SUBJECT: Surprise Testimony of Defense Witness -- State Should Have Disclosed
HOLDING: Prosecutor's failure to disclose prior to trial that a key defense witness had flipped and was planning to give testimony destroying the defense case, at least where new account contained incriminating statement allegedly made by the D, denied the D a fair trial and required reversal. D's main witness was an acquaintance who had previously stated in a deposition that it was he who had purchased marijuana for which D was charged with possession. Two days before trial, this witness contacted the state and said that he would in fact testify that his prior statement was due to threats from the D and his family, and that the D had handed him the marijuana saying that it was his. The state did not disclose this to the defense, and when the defense called the witness at trial, he gave the new account. His testimony destroyed the defense case in a dramatic way, much more so than if the state had called the witness and he had been subject to impeachment by the defense. The Missouri Court of Appeals reverses and remands for a new trial. The Court identifies its primary reason for reversal as the fact that the witness' new account included an alleged statement by the D. The Court also noted that the failure to disclose the impending recantation, which resulted in D's trial by ambush, violated the spirit of the discovery rules and helped deprive the D of a fair trial.

M. DISCOVERY

M.2. Discovery by D

M.2.b.4. Pretrial statements/grand jury testimony of state witnesses

TITLE: Burns v. State
INDEX NO.: M.2.b.4.
CITE: (8/27/87), Ind., 511 N.E.2d 1052
SUBJECT: Discovery - D - pre-trial statements of state's witnesses
HOLDING: Tr. Ct. erred in applying work-product privilege to prior taped statements of witness who had already testified on direct examination. D has right to discover witness' statement for purposes of CX on laying of following foundation: (1) witness has testified on direct; (2) substantially verbatim transcription of witness' statement is probably within control of state; & (3) statements relate to matters covered in witness' testimony. Antrobus 254 N.E.2d 873. Tr. Ct. must grant motion to produce unless state alleges: (a) there are no such statements within state's control; (b) necessity for confidentiality; or (c) statement also contains irrelevant matter which state does not wish to reveal. Id. If state alleges (b) or (c), Tr. Ct. should conduct in camera hearing &, if necessary, deny motion or require state to turn over only relevant portions. Id. State argues that concealed statements were akin to "investigative notes," & thereby were protected work-product of prosecutor. Keaton 475 N.E.2d 1146. S.Ct. is unwilling to extend work-product privilege to verbatim statements covered by Antrobus. Givan DISSENTS.

TITLE: Hicks v. State
INDEX NO.: M.2.b.4.
CITE: (10/11/89), Ind., 544 N.E.2d 500
SUBJECT: Work product privilege - verbatim witness statements
HOLDING: Work-product doctrine is not applicable to shield verbatim witness statements from otherwise proper discovery. D was charged with murder, burglary, & numerous other counts in connection with break-in & killing. Before trial, Tr. Ct. granted D's motion to produce witness names, but denied it as to witness statements & statement summaries, consistent with granting of protective order shielding D's witness statements as attorney work product. On appeal D argues that state's concealment of incriminating witness statement deprived him of fair trial. Criminal Ds may obtain witness statements after witness testifies for possible use in cross-examination, Antrobus 254 N.E.2d 87, & Tr. Ct. may also require pretrial production of such statements. Dillard 274 N.E.2d 387. In Spears, 403 N.E.2d 828, Ind.S. Ct. ruled that witness statements taken on behalf of D may be shielded from discovery by timely work-product objection. Later cases extended privilege to state's witness statements. [Citations omitted.] However, essential function of work product privilege is to protect attorney's "mental impressions, conclusions, opinions, or legal theories" from disclosure. TR 26(B)(3). Because of potential role of verbatim witness statements as substantive evidence under Patterson 324 N.E.2d 482, such statements must be viewed as akin to other potential exhibits & physical evidence, discoverability of which is unquestioned even if prepared by or at direction of counsel. Therefore, work-product doctrine is not applicable to shield verbatim witness statements from otherwise proper discovery. To extent Spears is inconsistent, it is overruled. Held, because Tr. Ct. shielded witness statements of both D & state from discovery, D was not denied fair trial. Conviction affirmed. **Note:** CR 21 now provides that trial rules are generally applicable to all criminal “proceedings,” rather than merely to criminal “appeals” as prior version provided.

TITLE: State ex rel. Crawford v. Superior Ct. of Lake County
INDEX NO.: M.2.b.4.
CITE: (2/6/90), Ind., 549 N.E.2d 374
SUBJECT: Discovery of substantially verbatim witness statements (VWS)
HOLDING: Tr. Ct. did not exceed jurisdiction in ordering that both parties produce witness lists, together with witness' recorded or written statements. Prosecutor sought to prohibit Tr. Ct.'s order to produce VWS because D had not laid Antrobus foundation. In Antrobus 254 N.E.2d 873, Ind. S. Ct. set out foundation for D seeking VWS for use on cross-examination: (1) witness testified on direct; (2) VWS is shown probably to be within control of state; & (3) VWS relates to matters covered on direct. However, for purpose of pretrial discovery, inclusion of individual on witness list is sufficient to justify Tr. Ct.'s belief that he/she will testify & that VWS is relevant to issues at trial. State argues that because statements here are contained within police reports, they are shielded from pretrial discovery by work product privilege. Hicks 544 N.E.2d 504 (card at M.2.b.4; M.4). Police documents that purport to be actual words of witness, reduced to writing as witness spoke or shortly thereafter or transcribed from recording, are VWS discoverable under Hicks. These documents would typically contain little else & be written in 1st-person. Documents which are officer's record of investigation, typically written from his/her perspective, are police reports, shielded from discovery under Keaton. Where both witness statements & officer's impressions, opinions, & theories are intermingled, in camera inspection by Tr. Ct. is appropriate to determine whether document is discoverable & to what extent. Held, writ denied.

NOTE: In Minges v. State, 192 N.E.3d 893 (Ind. 2022), Supreme Court *overruled* State ex rel. Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985), which allowed prosecutors to assert blanket privilege over police reports. Trial Rule 26(B)(3) provides adequate guidance for the trial court to determine—on a case-by-case basis—whether a police report is protectible work product.

TITLE: Vance v. State
INDEX NO.: M.2.b.4.
CITE: (9-9-94), Ind., 640 N.E.2d 51
SUBJECT: Discovery of oral pre-trial statement of State's witness
HOLDING: Tr. Ct. did not err in allowing trial testimony of D's grandfather about previously unrevealed telephone conversation between D and grandfather wherein D confessed to participating in murder. Adequate foundation for requiring production of pre-trial statements made by State witnesses is laid when: (1) witness whose statement is sought has testified on direct examination, (2) substantially verbatim transcription of statements made by witness prior to trial is shown to probably be within control of prosecution, and (3) statements relate to matters covered in witness' testimony. Antrobus, 254 N.E.2d 873. State is not required to disclose contents of oral statement that has not been recorded or memorialized in any form. D may be able to discover statements before trial if person making statement appears on State's witness list. Crawford v. Super. Ct. of Lake County, 549 N.E.2d 374. Here, discovery order required State to produce oral statements of persons whom prosecutor intended to call as witnesses. D's grandfather reported D's confession to deputy prosecutor during telephone conversation, but State did not reveal contents of conversation to D. Ct. found that since grandfather's name appeared on State's witness list, D could have contacted witness on his own. Further, record revealed that defense counsel was aware of content of conversation, so D suffered no prejudice. Held, convictions affirmed.

RELATED CASES: Merritte, 438 N.E.2d 754 (witness' oral changes to prior written statement need not be disclosed if no written notes of changes were made).

M. DISCOVERY

M.2. Discovery by D

M.2.b.4.a. General right and foundation requirements

TITLE: Dinning v. State
INDEX NO.: M.2.b.4.a.
CITE: (5-11-71), Ind., 269 N.E.2d 371
SUBJECT: Access to transcript of grand jury proceedings
HOLDING: Tr. Ct. did not err in denying D's motion for transcript of proceedings before Grand Jury. D has no automatic right to inspect transcript of evidence taken before Grand Jury. Mahoney, 201 N.E.2d 271. If party desires certain testimony given before Grand Jury, party must show good cause with particularity as to why access to such testimony should be permitted. Antrobus, 254 N.E.2d 873. Here, D made motion prior to start of trial in anticipation of cross-examination and impeachment of State's witnesses. Ct. found that access to Grand Jury proceedings was unnecessary because D could have called member of Grand Jury to testify for purpose of ascertaining whether testimony of witness before Grand Jury was consistent with evidence given at trial. Held, judgment affirmed.

TITLE: Hinojosa v. State
INDEX NO.: M.2.b.4.a.
CITE: (1-15-03), Ind., 781 N.E.2d 677
SUBJECT: Discovery of grand jury testimony - "particularized need" requirement
HOLDING: To obtain transcript of grand jury testimony, a party must show, with particularity, a need to prevent injustice that outweighs reasons for long-established policy of grand jury secrecy. A showing of mere relevance does not constitute a need to prevent injustice. A party seeking determination of particularized need does so by written motion identifying desired transcripts & including explanation of purpose for which transcripts are to be used. Bustamante v. State, 557 N.E.2d 1313 (Ind. 1990). A necessary element for establishing need to prevent injustice is a showing that all reasonable alternative methods of gaining access to needed information have been exhausted. Tr. Ct. should balance reasons & policies supporting grand jury secrecy against exigencies of matter before it. Here, a police officer facing disciplinary charges sought grand jury transcripts to substantiate his claim of official "cover-up" of wrongdoing, noting that State based its case against other officers on testimony of grand jury participants. Officer claimed that attorneys for police department would not allow discovery but stated that he made no attempt to subpoena or depose individuals for whom he had requested testimony. Ct. remanded for Tr. Ct. to make finding in regard to whether moving party established particularized need for pretrial release of transcripts under Ind. Code 35-34-2-10(b). Held, transfer granted, Ct. App.' opinion at 752 N.E.2d 107 vacated, remanded for further proceedings.

TITLE: Sturgill v. State
INDEX NO.: M.2.b.4.a.
CITE: (1st Dist. 9/29/86), Ind. App., 497 N.E.2d 1070
SUBJECT: Discovery by D - victim's statements to welfare dept.
HOLDING: Tr. Ct. abused discretion by denying request by D (charged with incest) for pretrial discovery of statements made by stepdaughter to welfare dept. Here, D made specific discovery requests (set forth in opinion). Welfare Dept. refused to comply with request & Tr. Ct. affirmed based upon Ind. Code 31-6-11-18. Statute limits access to information gathered by Welfare Dept. during investigation of child molestations. Public & Ds accused of child abuse are not entitled to information under statute. Purpose is to "encourage effective reporting of suspected or known incidents of child abuse or neglect." Ind. Code 31-6-11-1. Ct. balances state's & D's interests as to discovery of this material. Basing its opinion upon Brady v. MD (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215, Ct. holds Ind. Code 31-6-11-18 unconstitutional as applied to facts of this case. Tr. Ct. should have conducted in camera inspection of victim's statements to determine whether they benefited D's defense. Case contains good discussion of law of discovery. Held, conviction reversed.

RELATED CASES: Pilarski, App., 635 N.E.2d 166 (No error in denying D access to welfare department reports he wanted to view with eye toward impeaching witness, because Tr. Ct. conducted proper in camera review of reports pursuant to Ind. Code 31-6-11-18(a)(8) & found no exculpatory information).

M. DISCOVERY

M.2. Discovery by D

M.2.b.5. Documents/reports/exhibits

TITLE: Friend v. State

INDEX NO.: M.2.b.5.

CITE: (10/8/19), Ind. Ct. Ind., 134 N.E.3d 441

SUBJECT: Denial of discovery of counseling records and exclusion of text messages and expert testimony affirmed

HOLDING: Defendant was convicted of Child Molestation as a Level 1 Felony. His theory of defense relied in part on the complaining witness's (C.W.'s) possible diagnosis of Reactive Attachment Disorder (RAD), which may cause increased dishonesty in an affected child. The trial court denied Defendant's preliminary discovery request for records from one-on-one sessions C.W. had with a social worker. The Court of Appeals held that because this information is privileged, Defendant was not entitled to it and denial of this request did not infringe his constitutional right to present a complete defense.

Defendant also attempted to introduce text messages between C.W. and her mother and testimony from his own expert witness to support his claim that C.W. had RAD. Court held that without an official diagnosis of RAD or a more solid foundation that C.W. was actually suffering from RAD, trial court did not err by excluding this evidence. Defendant also attempted to introduce specific evidence to show that C.W. was biased against him, but the Court of Appeals held that because Defendant did not show he was prejudiced by the exclusion of this evidence and because the evidence was not independently relevant, trial court did not err by refusing to admit it. Judge Crone, dissenting in part as to the discovery issue, opined it was an abuse of discretion to not have an in-camera review of the records Defendant attempted to obtain during discovery and noted that the trial court's rationale for excluding the proffered expert testimony would stand on much shakier ground if the records did reveal a diagnosis of RAD.

TITLE: Inman v. State
INDEX NO.: M.2.b.5.
CITE: (8/29/85), Ind., 482 N.E.2d 451
SUBJECT: Discovery by D - reports; polygraphs of state's witnesses
HOLDING: State did not violate discovery order by failing to reveal fact that key witness took polygraph test & answers indicated "an attempt at deception." Here, Ct. finds issue waived. D knew of polygraph during trial but made no objection & took no remedial steps but waited until MCE to raise issue. Ct. addresses merits because of "particular sensitivity to any claim that conviction has been obtained by fraudulent means employed by State." Record does not compel conclusion that answers were false, or if false, that state knew it. State's failure to provide information revealed by test did not hamper defense. Polygraph report is set forth in opinion. Conclusions of operator were not admissible (Smith 455 N.E.2d 346; Zupp 283 N.E.2d 540), so report could not be used to discredit witness. Answers given were consistent with witness' testimony, so report could not be used to impeach him. Held, no error.

RELATED CASES: Morrison, App., 542 N.E.2d 564 (Polygraph examinations of State's witnesses are discoverable, but failure of State to reveal existence of examinations did not constitute denial of fair trial where D failed to demonstrate that access to examinations would have led to discovery of other admissible, exculpatory evidence).

TITLE: Johnson v. State
INDEX NO.: M.2.b.5.
CITE: (2-6-02), Ind. App., 762 N.E.2d 222
SUBJECT: Documents attorney has received for client in course of employment are discoverable
HOLDING: Tr. Ct. erred in denying D's motion to compel production of documents from his former appellate counsel. In light of Ind. Code 33-21-1-9 & Ind. Professional Conduct Rule 1.16(d), granting of motion to compel production of documents which attorney has received for client in course of employment is not discretionary with Tr. Ct. McKim v. State, 528 N.E.2d 484 (Ind. Ct. App 1988). Thus, upon motion by party represented, Tr. Ct. shall require attorney to deliver all papers obtained pertaining to representation to which client is entitled. Held, judgment reversed & remanded with instructions to grant D's motion to compel.

RELATED CASES: Anonymous, 914 N.E.2d 265 (private reprimand for attorney who admitted to failing to surrender client's papers, in violation of Rule 1.16(d)); Ferguson, App., 773 N.E.2d 877 (Tr. Ct. erred in denying D's Motion to Compel Counsel to Deliver over Money & Papers).

TITLE: Klagiss v. State
INDEX NO.: M.2.b.5.
CITE: (1/30/92), Ind. App., 585 N.E.2d 674
SUBJECT: Compulsory process - subpoena to obtain videotape
HOLDING: D claimed Tr. Ct. deprived him of right to compulsory process when it quashed subpoena he served on TV broadcaster to obtain videotape he intended to use in cross-examining State's expert. Ds are guaranteed right to compulsory process for obtaining witnesses in their behalf. U.S. Const. Amend. 6,14; Ind. Const. Art. I, §13. However, right is subject to reasonable limitations, as D does not enjoy absolute right to subpoena anyone or anything for any purpose. When D alleges violation of right to compulsory process, ct. must make 2 inquiries: 1) whether Tr. Ct. arbitrarily denied 6th Amend. rights of D, & 2) whether witness was competent, & his testimony was relevant & material. Davis, App., 529 N.E.2d 112. Ct. found Tr. Ct. took reasonable steps to determine whether motion to quash should be granted & failed to find Tr. Ct. arbitrarily denied D right to compulsory process. Ct. concluded there was no deprivation of D's right to compulsory process by quashing subpoena of tape where counsel for TV station indicated no one with knowledge about making of tape or accuracy of its contents would be available to authenticate it or to be cross-examined by State. Ct. noted any error committed by Tr. Ct. in granting motion to quash D's subpoena would have been harmless, because he wished to use tape for improper purpose. Held, conviction affirmed.

TITLE: Lundy v. State
INDEX NO.: M.2.b.5.
CITE: (2/20/2015), 26 N.E.3d 656 (2015)
SUBJECT: D may seek prescription records from State database
HOLDING: In possession of controlled substance prosecution, Tr. Ct. abused its discretion in granting Board of Pharmacy's motion to quash D's non-party subpoena for her own pharmaceutical records. The existence of a valid prescription for a controlled substance is a defense to the crime of possession. Williams v. State, 959 N.E.2d 360 (Ind. Ct. App 2012). Prescription records are confidential pursuant to Ind. Code § 35-48-7-11.1(d), and the list of people to whom the Board can disclose information does not include the patient.

Here, Tr. Ct. granted Board's motion because it found that D had to make a threshold showing that she could not get her prescription records elsewhere before she was entitled to her report from the INSPECT RX database. Board did not challenge the relevancy/materiality part of the balancing test for discoverable information, but argued the prescription records were readily available to D because she knew where she could possibly obtain them. But "readily available" does not equate to knowledge. In addition, the particularity requirement is not to be construed strictly against the D but should be administered so as to maximize pretrial discovery. As in Williams, D waived confidentiality by requesting the information and exercising her right to present a complete defense to possession charge. Held, judgment reversed and remanded.

TITLE: Mahla v. State
INDEX NO.: M.2.b.5.
CITE: (8/20/86), Ind., 496 N.E.2d 568
SUBJECT: Discovery by D - police memoranda
HOLDING: D, charged with child molesting, was not entitled to investigating officer's typewritten memoranda made after interviews with victim & family. Here, officer testified he made written notes concerning initial interviews with victim & other family members & later reduced notes to typewritten memoranda. After officer testified, defense counsel requested Tr. Ct. to order state to make memoranda available for inspection, ostensibly to compare detective's impressions of interviews with statements by victim/family members to be given at trial. Tr. judge denied request, reserved opportunity to later reconsider it, & specifically admonished prosecutor to give D any exculpatory material present in typewritten notes. Ct. finds no abuse of discretion in refusing to require additional discovery. Defense had access to videotaped statement of victim & took depositions of victim & victim's mother. Their trial testimony was generally consistent with pretrial statements; Ct. finds defense was not surprised by their testimony. Held, conviction affirmed.

RELATED CASES: Smith v. Cain, 132 S. Ct. 627 (2012) (Brady v. Maryland required prosecutor to give D notes taken by lead detective interviewing sole witness at trial to identify D as perpetrator; the notes contradicted witness's in-court identification because notes indicated that witness could not identify any perpetrators of alleged crime); McGowan, App., 671 N.E.2d 872 (D failed to show any prejudice from Tr. Ct.'s ruling that state police undercover officer's policy manual was not discoverable).

TITLE: Minges v. State

INDEX NO.: M.2.b.5.

CITE: (08/23/22), Ind., 192 N.E.3d 893

SUBJECT: Supreme Court overruled 38-year-old case that allowed prosecutors to assert blanket privilege over police reports

HOLDING: This is an interlocutory appeal from the denial of Defendant's motion to compel discovery. Following an operating while intoxicated charge in Dearborn County, Defendant filed a motion for discovery requesting "[a]ny and all reports known to the State made in writing by any policeman or investigating officer which are relevant to the charge against Defendant." In response, the State refused to produce a copy of a police report created by the Dearborn County Sheriff's Department, saying that it was "available to review upon appointment" with the Dearborn County Prosecutor's Office. The prosecutor's office would only provide a copy of the report to defense counsel if he signed a "protective order," which prohibited counsel from making copies of the police report or providing a copy to anyone, including Defendant, and required counsel to return the police report to the prosecutor's office after disposition of the criminal matter. Defense counsel reviewed the police report at the prosecutor's office but did not get a copy because he refused to sign the protective order, citing ethical obligations. Defendant moved to compel the State to produce the police report. At a hearing on the motion, the prosecutor admitted there was no harm in providing a copy of the report to Defendant but refused to do so because police reports are the work product of the prosecuting attorney under State ex rel. Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985). The trial court denied the motion to compel, concluding that it had "no discretion" to compel the State to produce the police report under Keaton. The Court of Appeals affirmed the trial court but urged the Supreme Court to reconsider Keaton. The Supreme Court granted transfer and expressly overruled Keaton. The Court determined that Keaton conflicts with Indiana's liberal discovery rules, including Trial Rule 26(B), noting the 1985 decision contains no reference to Trial Rule 26 (possibly because it predated the amendment to Criminal Rule 21 that clarified the trial rules are applicable to all criminal proceedings). "Accordingly, it is not only possible, but probable, our Court would have decided Keaton differently under the amended Criminal Rule 21." The Court also observed that "rightly or wrongly," courts have interpreted Keaton as providing a blanket privilege to police reports, effectively depriving a trial court from exercising discretion in compelling disclosure over the prosecuting attorney's timely work-product objection. Yet, Indiana generally disfavors bare assertions of privilege in the context of discovery. The Court saw no reason to perpetuate such a broad reading of Keaton when Trial Rule 26(B)(3) provides the appropriate framework for analyzing whether the work product doctrine protects a police report from disclosure. The Court also found the reasoning underlying Keaton - that redacting police reports would place an undue burden on prosecutors and that defense counsel might use them to "subject [police] officers to unfair and misleading cross-examination" - no longer viable in today's age. "Decided in a time when lawyers redacted documents using Marks-a-Lot markers, the Keaton court was unlikely to fathom electronic filing or software programs readily accessible to legal professionals today." And we can rely on trial judges to control the conduct and scope of cross-examination. Lastly, the Court disagreed with the State's assertion that police officers are per se agents of its prosecuting attorneys and pointed out that the State's concerns about the dissemination of sensitive information can be dealt with by other measures like redaction, a motion for protective order, or even in camera inspection. The Court stressed that its decision does not suggest that police reports may never qualify as work product. It merely clarifies that Trial Rule 26(B)(3) supersedes any reliance on Keaton as preventing trial courts from

exercising discretion in determining whether the work product privilege protects a particular police report from disclosure. To the extent these cases suggest otherwise, the Court expressly disapproves of them: Goolsby v. State, 517 N.E.2d 54, 60 (Ind. 1987); Beckham v. State, 531 N.E.2d 475, 476 (Ind. 1988); State ex rel. Crawford v. Super. Ct. of Lake Cnty., Crim. Div., Room II, 549 N.E.2d 374, 376 (Ind. 1990); Robinson v. State, 693 N.E.2d 548 (Ind. 1998); Gault v. State, 878 N.E.2d 1260, 1266 (Ind. 2008); and Johnson v. State, 584 N.E.2d 1092, 1103 (Ind. 1992). Held: remanded for consideration of the State's claim of privilege under Trial Rule 26(B)(3).

TITLE: Moore v. State
INDEX NO.: M.2.b.5.
CITE: (5th Dist., 4-10-91), Ind. App., 569 N.E.2d 695
SUBJECT: State's failure to produce exhibits does not require exclusion at trial
HOLDING: Tr. Ct. did not abuse discretion by admitting into evidence exhibits that State failed to produce before trial despite discovery order. When "surprise" evidence appears at trial, ordinary remedy is continuance, which is not favored in criminal trials and can be had only upon showing of good cause. Jacobs, 436 N.E.2d 1176. D who fails to move for continuance will usually have waived any error, except where State blatantly and deliberately disregards Tr. Ct.'s order. Butler, 372 N.E.2d 190. Here, although Tr. Ct. issued mutual discovery order, State did not give D itemized list of prospective exhibits, but rather sent police and lab reports expecting D to infer existence of tangible objects from documents supplied. Ct. found that State's failure to disclose exhibits did not constitute blatant and deliberate disregard of discovery order, and D waived issue by failure to request continuance once defense learned of exhibits. Held, judgment affirmed.

RELATED CASES: Helton, 539 N.E.2d 956 (Tr. Ct. did not err in admitting floor plan diagram of burglarized premises drawn by witness where State had indicated intention to use diagram in supplemental discovery response but did not produce exhibit prior to trial. Appropriate remedy for non-production of documentary evidence is continuance or recess to afford surprised party opportunity to examine exhibit. Wallace, 474 N.E.2d 1006).

TITLE: Norton v. State
INDEX NO.: M.2.b.5.
CITE: (12-04-2019) 137 N.E.3d 974 (Ind. Ct. App.)
SUBJECT: Denial of D's request to review medical records affirmed
HOLDING: In sexual misconduct with a minor prosecution, trial court did not err in declining to release complaining witness's (C.W.'s) mental health records after reviewing them *in camera*. Defendant argued the records were material to his defense. But because Defendant could have called C.W. to the stand and asked her if she had disclosed to her mental health service providers that she had been a victim of an intimate crime, it was not error for the trial court to refuse to release the records. Under Ind. Code § 16-39-3-7(1), Defendant failed to show that there were no other reasonable methods to obtain the information he was requesting. Held, level 5 felony sexual misconduct with a minor conviction and sentence affirmed.

TITLE: Pennsylvania v. Ritchie

INDEX NO.: M.2.b.5.

CITE: 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987)

SUBJECT: Due process / compulsory process - pretrial access to confidential files

HOLDING: Compulsory Process Clause requires that Ds have right to government's assistance in compelling attendance of favorable witnesses at trial & to put before jury evidence that might influence determination of guilt. Court adopts due process analysis because applicability of 6th Amend. is unclear. Here, D was charged with sexual abuse of minor daughter. At trial, he was denied access to reports concerning investigation prepared by Children & Youth Services (CYS). D argues failure to disclose these files violated his right to compulsory process in that Tr. Ct.'s ruling prevented him from learning names of "witnesses in his favor" as well as other evidence in file. Government has obligation to disclose evidence that is both favorable to accused & material to guilt or punishment. U.S. v. Agurs (1976), 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342; Brady v. MD (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A `reasonable probability' is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley (1985), 473 U.S. 667, 685, 105 S. Ct. 3375, 87 L.Ed.2d 481. Court states public interest in protecting sensitive information is strong, but this interest does not necessarily prevent disclosure in all cases. Because state statute permits disclosure in certain circumstances, including when CYS is directed to do so by court order, Court directs Tr. Ct. to conduct an, *in camera* inspection of documents to determine whether they contain information that probably would have changed outcome. Held, remanded for in camera review. Stevens, joined by Brennan & Marshall, DISSENTS.

TITLE: Rubalcada v. State
INDEX NO.: M.2.b.5.
CITE: (6-30-00), Ind., 731 N.E.2d 1015
SUBJECT: Due process / compulsory process - pretrial access to police files
HOLDING: In felony murder prosecution, D was not denied his federal constitutional rights to due process, confrontation, & compulsory process when Tr. Ct. restricted his review of police intelligence records concerning victim. Challenged intelligence material involved victim's drug- dealing activities. In camera review hearing resulted in Tr. Ct. ordering five pages of records disclosed to D. However, Tr. Ct. concluded that because remaining fifty pages & audiotape met definition of criminal intelligence information under Ind. Code 5-2-4-1, they need not be disclosed. Tr. Ct. did not refer to impeachment value or materiality of intelligence records but determined that they were irrelevant & contained no exculpatory value.

Ct. reviewed undisclosed pages & concluded that they were individually of minimal probative value & weight. Considered cumulatively, there was no reasonable probability that disclosure of information would have led to different result. Evidence at trial established that victim was marijuana dealer & that most of State's witnesses associated with him were also involved in illegal drug activity. Further, D was not denied his right to confrontation because he was able to adequately address relationship between victim & witnesses, including their involvement in illegal drug transactions. Held, no error.

TITLE: State v. Bacon
INDEX NO.: M.2.b.5
CITE: 702 A.2d 116 (Vt. 1997)
SUBJECT: Access to Co-D's Presentence Report (PSI)
HOLDING: Where D makes plausible showing of materiality, Tr. Ct. must conduct in-camera inspection of PSI's of others, including co-D, and disclose to D any information material to D's sentence

TITLE: Thompson v. State
INDEX NO.: M.2.b.5.
CITE: (4-16-02), Ind., 765 N.E.2d 1273
SUBJECT: Discovery of mental health records of non-party witness
HOLDING: In murder prosecution, Tr. Ct. did not err in denying D's request for an, *in camera* review of mental health records of one of State's witnesses. Ind. Code 16-39-3-3, -6, & -7 permits party to a legal proceeding who seeks access to patient's mental health record to file petition requesting release of record. Notice of hearing at least 15 days in advance must be served on patient, any guardian, & provider who maintains record. Ind. Code 16-39-3-4. Here, less than week before jury trial was to commence, D filed emergency motion for order to release witness' mental health records for in camera review. It was impossible for Tr. Ct. to comply with compulsory fifteen-day advance notice to patient & opportunity to be heard. Held, judgment affirmed.

M. DISCOVERY

M.2. Discovery by D

M.2.b.6. Deals/promises (Newman v. State, Giglio v. U.S., Napue v. Illinois, (impeachment, see O.6.c)

TITLE: Asbell v. State
INDEX NO.: M.2.b.6.
CITE: (10/2/84), Ind., 468 N.E.2d 845
SUBJECT: Discovery by D - deals/promises; coparticipant
HOLDING: D is not entitled to reversal of his conviction where no concrete evidence exists that prosecutor promised leniency to witness in exchange for his testimony. Here, D's brother-in-law (Ricky) was co-participant in several burglaries. Ricky turned state's evidence & was not prosecuted. D contends state's failure to prosecute Ricky establishes Ricky gave testimony in exchange for forbearance. When prosecutor relies on coconspirator's testimony to obtain D's conviction, co-conspirator's credibility is important issue in case & evidence of any understanding/agreement must be disclosed. Newman 334 N.E.2d 684. Valid claim of nondisclosure requires concrete evidence of understanding/agreement; mere speculation re circumstances surrounding decision not to prosecute witness is not sufficient. Bivens 258 N.E.2d 644; Johnson, App., 423 N.E.2d 623. Ricky testified he had not been arrested for burglaries & that no agreement had been made. Jury was made aware of Ricky's role in burglaries & his cooperation with police. Held, conviction affirmed.

RELATED CASES: Wright, 690 N.E.2d 1098 (D did not meet burden of establishing that prosecutor failed to disclose secret agreement that was made prior to trial); Douglas 490 N.E.2d 270 (Crim L 919(1); despite detective's statements, Ct. finds no evidence of agreement of leniency in exchange for D's wife's testimony against him in rape trial; DISSENT by DeBruler finds prosecutorial overreaching & would reverse); Aubrey 478 N.E.2d 70 (where prosecutor told witness he could not discuss parole intervention until trial, there was nothing prosecutor was required to reveal to D; held, denial of PCR affirmed); Bland 468 N.E.2d 1032 (Crim L 707; D has no right to discredit testimony of witness by inquiring re nonexistent agreements, *citing* Sims, 456 N.E.2d 386 & Campbell, 409 N.E.2d 568).

TITLE: Commonwealth v. Strong
INDEX NO.: M.2.b.6.
CITE: 563 Pa. 455, 761 A.2d 1167 (Pa. 2000)
SUBJECT: State's "Understanding" with Witness
HOLDING: A majority of the Pennsylvania Supreme Court holds that the state's cooperative relationship with a prosecution witness need not reach the level of a formal agreement for leniency in exchange for testimony in order to trigger the state's obligation to make the relationship known to the defense. The fact that a witness has been encouraged to hope for lenient treatment as a reward for testifying is enough. Here, the elected prosecutor testified that his practice was to refrain from entering into formal plea agreements with witnesses until after they provided the testimony sought, and that his normal course of action was merely to make it known that a witness' truthful cooperation would be considered in the witness' own case. The majority found this sufficient to trigger a Brady obligation, even though deputy prosecutor trying the D's case was unaware of the "understanding" with the witness.

TITLE: Dodd v. State
INDEX NO.: M.2.b.6.
CITE: 993 P.2d 778 (Okla. Crim. App. 2000)
SUBJECT: Jailhouse Informers -- Special Discovery Requirements and Jury Instructions
HOLDING: On rehearing, Oklahoma Court of Criminal Appeals holds that when state plans to have jailhouse informer testify at trial, it must comply with special discovery scheme and jury must be given special instruction on reliability of jailhouse informers. At least 10 days before trial, state must disclose the following: 1)the complete criminal history of the informer; 2) any "deal, promise, inducement, or benefit that the offering party has made or may make in the future" to the informer; 3)specific statments the D is alleged to have made and the time, place, and manner of their making; 4)all other cases in which the informer testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informer received any deals, inducements, promises or benefits in exchange for or subsequent to that testimony or statement; 5)whether at any time the informer recanted that testimony or statement and, if so, a transcript or copy of such recantation; and 6)any other information relevant to the informer's credibility. If the informer testifies, the jury must be specially instructed on the credibility of informers, beginning with the following statement: "The testimony of an informer who provides evidence against a D must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the D is for you to determine." The instruction goes on to list five factors for the jurors to consider: 1)whether the witness has received anything in exchange for his/her testimony; 2)any other case in which the informer testified or offered statements, whether the statements were admitted, and whether the informer received any sort of benefit in exchange for the testimony or statements; 3)whether the informer has ever changed his or her testimony; 4)the informer's criminal history; and 5)any other evidence relevant to the informer's credibility.

TITLE: Ferguson v. State
INDEX NO.: M.2.b.6.
CITE: (1st Dist., 9-17-96), Ind. App., 670 N.E.2d 371
SUBJECT: Procuring testimony of prosecuting attorney - compulsory process
HOLDING: Tr. Ct. abused discretion in quashing D's subpoena to obtain deputy prosecutor's testimony regarding any understanding he had with State's witness. Witness was uncharged co-conspirator who testified that she had not entered into any agreement with State in exchange for her testimony against D. However, quantity & quality of circumstantial evidence supporting D's assertion that State & witness had agreement was "most compelling." Truth-seeking process requires that evidence of any consideration felon-witness receives in exchange for testifying on behalf of State be made available to defense & disclosed to jury, because any deal or understanding further undermines credibility of felon-witness. Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App 1994); Giglio v. United States, 405 U.S.150 (1972). Moreover, D's right to compulsory process for obtaining witnesses in his behalf is guaranteed by both federal & Ind. constitutions. Klagiss v. State, 585 N.E.2d 674; Washington v. Texas, 388 U.S. 14 (1967). Where prosecutor is only witness available to testify regarding whether State's witness' testimony was procured by agreement, testimony of prosecutor is essential to get at truth. Worthington v. State, 405 N.E.2d 913 (Ind. 1980). Ct. held that in this case, D established compelling, legitimate need to obtain testimony of deputy prosecutor, who was only source from which evidence of agreement could have been obtained. Thus, Tr. Ct. committed reversible error in quashing D's subpoena, which violated his right to compulsory process, & denied him due process of law. Held, reversed & remanded.

TITLE: Goodner v. State
INDEX NO.: M.2.b.6.
CITE: (7-23-99), Ind., 714 N.E.2d 638
SUBJECT: Failure to disclose promises/deals with State witnesses until trial - remedy for abuse
HOLDING: Ind. Professional Conduct Rule 3.8(d) requires prosecutor to make timely disclosure to defense of all evidence or information known to prosecutor that tends to negate guilt of accused or mitigates offense. Here, on second day of murder trial, prosecutor revealed to defense counsel that he offered to recommend bond reduction for State's witness on unrelated charge in exchange for testimony against D. Under current Ind. law, belated disclosure did not require reversal because arrangement with witness was ultimately presented to jury & D was not denied fair trial. Carey, 416 N.E.2d 1252. Characterizing recurring scenario of belated disclosures by prosecutors as "highly problematic," Ct. indicated that continued abuses of this sort may require prophylactic rule requiring reversal. In meantime, Ct. reminded members of bar & bench of their obligation under Prof. Cond. R. 8.3(a) to report such misconduct to appropriate authorities. Held, conviction affirmed.

RELATED CASES: Lowrimore, 728 N.E.2d 860 (disclosure of accomplice's petition for post-conviction relief after defense counsel's cross-examination did not prejudice D because D was given another opportunity to question accomplice about petition; prejudice must be shown from belated disclosure until issue is presented in trial occurring after Goodner was issued); Gardner et al., App., 724 N.E.2d 624 (Ct. declined to extend Goodner to adopt prophylactic rule requiring reversal where, as here, prosecutors failed to provide discovery).

TITLE: McCord v. State
INDEX NO.: M.2.b.6.
CITE: (10-26-93), Ind., 622 N.E.2d 504
SUBJECT: Disclosure of witness "deal" not required
HOLDING: Where substantial evidence supported Tr. Ct.'s finding that actual agreement with witness did not exist, State was not required to disclose agreement to D. Prosecution's duty to disclose arises only when agreement involves confirmed promise. Preliminary discussions need not be disclosed, & expectations coupled with evidence of deal after in-Ct. testimony is insufficient to require disclosure, McBroom, 530 N.E.2d 725, Abbott, 535 N.E.2d 1169.

Here witness was arrested for burglary in Delaware County & his attorney contacted prosecutor to discuss possible dismissal of charges because witness was expected to testify for State in D's murder trial in Randolph County. Prosecutor apparently told attorney that if witness so testified, he would "see about" dismissing Delaware County charges. Parties adopted "wait & see" approach, & at MCE hearing prosecutor testified he considered that to be firm offer. Witness' attorney then contacted Randolph County prosecutor & suggested that witness would like testimonial immunity in Randolph County. This prosecutor confirmed witness' pretrial preparation cooperation, but no deals were struck. Prosecutor told witness during meetings that there were absolutely no deals on his end. Witness did testify in Randolph County, & Delaware County charges were dismissed, but in response to request for information concerning deals between State & its witnesses, no information concerning his situation was disclosed.

Ct. found existence of agreement was question of fact, & there was substantial evidence to support determination that no agreement existed. Ct. also found even if negotiations were considered new evidence, they would only impeach witness' credibility & not be likely to produce different result. Held, conviction affirmed, Shepard, C.J., & DeBruler, J., dissenting, Krahulik, J., concurring in result.

RELATED CASES: Tibbs, 59 N.E.3d 1005 (Ind. Ct. App 2016) (evidence supported Tr. Ct.'s findings that no offer or agreement for leniency in exchange for felon witness's testimony existed); Donnegan, App., 889 N.E.2d 886 (because State did not enter into an express agreement with co-D or witness to modify their sentences in return for their testimony, prosecutor did not commit misconduct by failing to disclose such); Rubalcada, 731 N.E.2d 1015 (at time of trial, no concrete agreement existed; although witness may have hoped for more lenient plea bargain ultimately received, there was no evidence that state confirmed his hope that lesser term might be offered after he testified); Sigler, App., 700 N.E.2d 809 (express agreement exists where there is confirmed promise of lenience in exchange for witness's testimony); Morrison, 686 N.E.2d 817 (no deal to disclose to jury because co-D failed polygraph examination, & no reason to disclose deal to jury because jury was well aware that co-D had reason to be prejudiced against D since co-D was charged with murder, tried jointly with D & facing possibility of 65 years in prison).

TITLE: Overstreet v. State
INDEX NO.: M.2.b.6.
CITE: (2-24-03), Ind., 783 N.E.2d 1140
SUBJECT: State's failure to disclose witness's change in testimony prior to trial - remedy sufficient
HOLDING: Tr. Ct. did not abuse its discretion in denying D's request for mistrial when it discovered that State had failed to disclose to D that D's wife had changed her testimony prior to trial. Prior to trial, D's wife repeatedly stated that she had no knowledge of D's activities on Monday following murder & that she had no further information relevant to investigation. During trial, however, wife testified that on Monday following the offense, she, D, & their four children took D's van to car wash, did not wash its exterior but focused on bed area in rear of van. Prosecutor told Tr. Ct. that wife had said she had not described this event in her other statements because D had physically abused her in past & she feared what he might do to her in future should he be acquitted knowing she had incriminated him. Tr. Ct. found the withholding of this information to have been improper. Instead of declaring mistrial, Tr. Ct. fashioned its own remedy & barred State from rehabilitating this witness after D impeached her testimony with her prior inconsistent statements. Ct. held that State's failure to disclose wife's testimony did not constitute violation of Brady v. Maryland, 373 U.S. 83 (1963), as Brady applies to discovery of favorable evidence after trial. In support of his prosecutorial misconduct claim, D argued that his unawareness of wife's testimony fatally damaged D's due process right to an adequate cross-examination by limiting his tactical options. Ct. concluded that although State should have disclosed evidence in question, State's failure to disclose was adequately remedied by Tr. Ct. because parties were placed in position they would have been in had disclosure been properly made. Held, convictions & death sentence affirmed.

TITLE: Rowe v. State
INDEX NO.: M.2.b.6.
CITE: (5th Dist., 1-29-99), Ind. App., 704 N.E.2d 1104
SUBJECT: Non-disclosure of favorable, material evidence entitled D to new trial
HOLDING: In post-conviction proceedings following D's convictions of murder & attempted murder, D demonstrated reasonable probability that result of trial would have been different had State disclosed that one of its key witnesses had previously been convicted of burglary & theft. Before trial, D filed two written motions for production which had specifically requested State to disclose arrest & criminal records of its witnesses. However, State failed to disclose that its main witness, Hodges, had criminal record.

At trial, Hodges was presented by State as reluctant to testify against D because of their intimate relationship. Hodges' testimony was devastating to D's insanity & intoxication defenses because it directly contradicted D's testimony & history relied upon by his experts regarding his habitual drug use & injection of large quantities of drugs on day of shooting. Hodges had significant incentive for failing to corroborate D's testimony regarding their use of illegal drugs because corroboration would have provided State with all evidence necessary to revoke Hodges' probation. Moreover, considering that probation revocation proceedings were already pending against Hodges, D should have had opportunity to explore whether Hodges expected favorable treatment in exchange for his testimony. Ferguson, App., 670 N.E.2d 371.

Suppression by prosecution of evidence favorable to D upon request violates due process where evidence is material, irrespective of good faith or bad faith of prosecution. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). Rejecting State's claim that error in this case was harmless, Ct. held that suppression of Hodges' criminal record undermined confidence in outcome of trial because D's intoxication & insanity defenses were completely hamstrung by Hodges' testimony. Held, reversed & remanded with instructions that D's post-conviction petition be granted; convictions reversed & remanded for new trial.

TITLE: Schmanski v. State
INDEX NO.: M.2.b.6.
CITE: (7/26/84), Ind., 466 N.E.2d 14
SUBJECT: Discovery by D - deals/promises; prejudice
HOLDING: If D suffers no prejudice from prosecution's nondisclosure of inducement provided one of its witnesses, reversal is not required. Here, D appeals denial of PCR. During trial & before D's girlfriend testified, trial counsel learned that girlfriend had been induced to provide police with statement re D's request that she dispose of murder weapon. Counsel did not attempt to impeach witness. D contends prior knowledge of inducement would have affected defense strategy. State must disclose promises/offers of immunity/leniency/money/other benefits made to state's witness because they tend to impair credibility of witness & show interest/bias/motive. Hoskins 375 N.E.2d 191; Bewley 220 N.E.2d 612. Such evidence is material; suppression of it may deprive D of due process. Giglio v. US (1972), 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104. Ct. finds earlier disclosure would have had minimal effect on defense. Held, denial of PCR affirmed.

RELATED CASES: Wright, 690 N.E.2d 1098 (acknowledging importance of fully disclosing express plea agreements or understandings between State & witnesses, even where those agreements are not reduced to writing).

TITLE: St. John v. State
INDEX NO.: M.2.b.6.
CITE: (5/27/88), Ind., 523 N.E.2d 1353
SUBJECT: Discovery - inducement to testify
HOLDING: State's failure to disclose implied threat of prosecution, communicated to witness through third party, did not deprive D of due process. Failure to disclose use of promises & offers of immunity, leniency, money, or other benefit to induce cooperation of state's witness requires reversal if such evidence "might have affected the outcome of the trial." Richard 382 N.E.2d 899 (*quoting* US v. Agurs (1976), 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342. See also Schmanski 466 N.E.2d 14 (card at M.2.b.6). On first day of trial, prosecutor told other witnesses that charges could still be filed against absent witness, & that if she was trying to avoid service of process, state would "take that into consideration." Another witness passed this information on to absent witness, who subsequently appeared to testify. Disclosure has been required only when actual agreement had been reached between state & witness. See Carey 416 N.E.2d 1252; Newman 334 N.E.2d 684. Concrete evidence of agreement or understanding is required. [Citations omitted.] Here, though there was concrete evidence of communication between state & witness, no agreement or understanding existed. Had state chosen to prosecute witness following her testimony, she would have had no enforceable agreement not to do so. Held, conviction affirmed. **Note:** Ct. applies Agurs standard of materiality for information specifically requested. Cf. Gibson 514 N.E.2d 318 (card at M.1.a).

RELATED CASES: Burris, 465 N.E.2d 171 (State is only obligated to disclose inducement used to gain cooperation of witness, not "deal" made before witness spoke with D); Marshall v. State, 621 N.E.2d 308 (Where attorney for State's witness was present in courtroom at D's trial, State was not required to disclose witness' criminal history prior to deposition or trial because D's counsel could confer with witness' attorney during D's trial).

M. DISCOVERY

M.2. Discovery by D

M.2.b.7. Pretrial Identification Photos

TITLE: Reed v. State
INDEX NO.: M.2.b.7.
CITE: (2nd Dist., 10-28-97), Ind. App., 687 N.E.2d 209
SUBJECT: Discovery of photo array not used in investigation
HOLDING: Tr. Ct. did not err in denying D's discovery request to have access to second photo array & request to question, in presence of jury, officer about second photo array not used in investigation. Tr. Ct. should allow D access to evidence only if such evidence is material to defense. Jorgensen, 574 N.E.2d 915. Here, although D's first discovery request was denied, D's emergency motion for order to produce evidence, which included second photo array given to officer by another detective, was granted. In addition, D was permitted to question officer on second photo array outside presence of jury. Questioning indicated that second group of photos was nothing more than photograph of D as used in initial photo array but with different alternative choices & offer of proof only showed that second array was not used as investigative tool. Thus, second photo array was not material to defense. Held, no error; Staton, J, concurring.

TITLE: Rowe v. State
INDEX NO.: M.2.b.7.
CITE: (7-26-74), Ind., 314 N.E.2d 745
SUBJECT: Discovery - identification photographs
HOLDING: Tr. Ct. erroneously denied D's motion for production of picture display used by police in out-of-court identification procedure. In deciding discovery requests of D, Tr. Ct. considers whether there has been sufficient designation of items sought to be discovered and whether items sought to be discovered are material to defense. If these factors are satisfied, Tr. Ct. must grant discovery motion unless State makes showing of paramount interest in non-disclosure. Sexton, 276 N.E.2d 836. Here, D made in-trial request for production of photographic display that police had shown to crime witness prior to trial for purpose of identifying D. Ct. found photographs were material to defense, and Tr. Ct. should have ordered State to produce photographs unless it was able to demonstrate paramount interest in non-disclosure. Ct. found that error in denial of D's motion was not substantial enough in its effect on D's interest to require reversal of conviction. Held, conviction affirmed.

M. DISCOVERY

M.2. Discovery by D

M.2.b.9. Independent defense testing of physical evidence

TITLE: Mahrdt v. State
INDEX NO.: M.2.b.9.
CITE: (2/14/94), Ind. App., 629 N.E.2d 244
SUBJECT: Independent defense testing of physical evidence -- access to breathalyzer
HOLDING: Fact that State prevented D from testing breathalyzer numerous times in defiance of court orders and destroyed any possible exculpatory evidence by recertifying breathalyzer before D could inspect it required suppression of test results. State's burden of proving that D was operating vehicle with at least .10% BAC was made easier with enactment of Ind. Code 9-30-6-15, which created rebuttable presumption that chemical test result of at least .10% BAC taken within certain period of time indicates that D had at least .10% BAC at time of operating. One method of rebutting presumption is by showing that testing device was not working properly. Here, D was charged with operating vehicle while intoxicated and operating vehicle with at least .10% BAC. Court held that State's refusal to comply with discovery orders allowing D to inspect breathalyzer foreclosed opportunity for D to rebut presumption that she had .14% BAC at time of operating. In addition, because chemical test result of at least .10% BAC is prima facie evidence of intoxication, uncertainty of accuracy of machine's .14% reading is also material to charge of operating vehicle while intoxicated. Tr. Ct. erred by denying motion to suppress test result. Held, judgment affirmed in part, reversed in part and remanded.

TITLE: Schwartz v. State
INDEX NO.: M.2.b.9.
CITE: (3rd Dist., 8-16-78), Ind. App., 379 N.E.2d 480
SUBJECT: Independent defense testing of physical evidence - insufficient quantity of substance
HOLDING: D was not denied due process rights as result of inability to perform independent laboratory testing of substance alleged to be LSD, where State testing of substance exhausted entire supply. Negligent destruction or withholding of evidence by prosecution would present grounds for reversal of conviction on due process theory only if such evidence is demonstrated to have been material to defense. Hale, 230 N.E.2d 432. Here, D requested samples of substances alleged in charging affidavit. In response, State attached copy of laboratory reports from its testing of substance, but available quantity of substance had been exhausted during State's tests. Ct. found that D failed to demonstrate that evidence which could have been produced through defense examination of substance would have been material. D did not introduce evidence that independent analysis would have exculpated him, nor did D introduce expert testimony contradicting chemical reports submitted by State. Because D had opportunity to examine State's laboratory procedures and testing methods and to cross-examine chemist employed by State, D was not denied due process rights. Held, judgment affirmed.

RELATED CASES: Turnpaugh, 521 N.E.2d 690 (D's inability to perform independent testing of rape kit due to State's negligent loss of kit did not constitute violation of D's due process rights where State made no attempt to directly link D with evidence obtained from kit, and there was independent evidence that D had intercourse with victim); Frias, 547 N.E.2d 809 (D has no right to have expert test physical evidence which has already been tested by State where defense is allowed to use State's testing reports and probe veracity of those reports. Seay, 529 N.E.2d 106; Everroad, 442 N.E.2d 994).

M. DISCOVERY

M.3. Discovery techniques

M.3.a. Interrogatories

TITLE: Gutowski v. State
INDEX NO.: M.3.a.
CITE: (9/14/76), Ind. App., 354 N.E.2d 203
SUBJECT: Applicability of civil trial rules -- interrogatories
HOLDING: D found guilty of aggravated assault and battery. On appeal he contended that he was denied pretrial discovery when Tr. Ct. ruled that complaining witness need not answer interrogatories. Court held that Tr. Ct.'s ruling was not error under facts of case. Tr. Ct. has inherent power to apply techniques of discovery embodied in civil rues and is not bound by limiting language contained in those civil rules. In proper case, discovery by written interrogatories served on non-parties may well be appropriate as less cumbersome and less expensive technique than discovery by depositions. Held, judgment affirmed Garrard, J., concurring.

TITLE: State ex rel. Grammer v. Tippecanoe Circuit Ct.
INDEX NO.: M.3.a.
CITE: (7/11/78), Ind., 377 N.E.2d 1359
SUBJECT: Interrogatories not appropriate where information requested is public record
HOLDING: It is not duty of prosecutor to bear burden of assembling defense counsel's evidence.

Wright, 372 N.E.2d 453. Here, D was charged with second-degree murder and filed extensive interrogatories to be answered by prosecuting attorney. State never answered interrogatories but filed belated Motion for Protective Order which was granted. D brought action for writ of prohibition and writ of mandate and claimed that Tr. Ct. erred by granting protective order because it was filed three months after deadline for filing objections to interrogatories. Court held that D requested information that was available as matter of public record and that it cannot allow interrogatories to be used as device to force State to formulate material already available as matter of public record. Held, conviction affirmed.

RELATED CASES: Gutowski, 354 N.E.2d 293 (in proper criminal case, discovery by written interrogatories served on non-parties (i.e., complaining witness) may be appropriate as less cumbersome and less expensive technique than discovery by deposition); Marcovich, 413 N.E.2d 935 (interrogatory not appropriate for obtaining documents, but is appropriate for determining existence of documents).

M. DISCOVERY

M.3. Discovery techniques

M.3.b. Depositions (IC 35-37-4-3)

TITLE: Archer v. State

INDEX NO.: M.3.b.

CITE: (04/12/21), Ind. Ct. App., 166 N.E.3d 963

SUBJECT: Erroneous quash of defense subpoena to depose alleged victim; no showing of paramount interest in non-disclosure

HOLDING: After Defendant's child molesting conviction was affirmed on direct appeal, Court of Appeals vacated the conviction and remanded for a new trial on appeal from denial of post-conviction relief. In preparation for the new trial, counsel requested to depose the alleged victim (AV) seven years after her original allegations. When trial counsel issued a subpoena to depose the AV, the State move to quash the subpoena. The trial court granted the State's motion to quash notice of deposition and trial counsel moved for interlocutory appeal, which was granted. Because the Order granting the State's motion to quash was non-specific, leaving the Court of Appeals with no details about the grounds on which it relied, the Court of Appeals review was akin to de novo. The Court of Appeals relies on the three-part test outlined in Dillard v. State, 274 N.E.3d 387 (Ind. 1971), to determine if the discovery request should have been granted. The test is: 1) whether there is sufficient particularity of items to be discovered, 2) whether the items sought to be discovered are relevant and 3) does the State have a paramount interest in non-disclosure. Here, the Court determined that the Defendant's request did show sufficient particularity, specifically that trial counsel should be permitted to determine what a witness remembers many years after the event. The request was also relevant, as this was a new trial where the defense needed to form a specific defense strategy and the State failed to show a paramount interest in non-disclosure. The Court emphasized the State failed to make a record to support that any trauma the AV would experience would outweigh trial counsel's need to take the deposition to properly defend her client. On balance, the 20-50-year exposure of the client and the need for counsel to depose the AV to properly prepare a defense outweighed any uncomfortable feeling the AV may have about being deposed. In this instance the State did not meet its burden of showing paramount interest in non-disclosure under the Dillard test and therefore the trial court abused its discretion by quashing the subpoena for the AV's deposition. Held, judgment reversed and remanded for further proceedings.

TITLE: Church v. State

INDEX NO.: M.3.b.

CITE: (06/23/2022), Ind., 189 N.E.3d 580

SUBJECT: Statute limiting depositions of child sex victims not in conflict with trial rules or defendant's constitutional rights.

HOLDING: This case comes from an interlocutory appeal after Church was denied authorization to depose the eight-year-old child he is accused of molesting. His request was denied under IC 35-40-5-11.5, which requires "extraordinary circumstances" or prosecutorial consent to depose an alleged child victim under sixteen years of age. The Court began its opinion by noting Indiana is an outlier as one of only seven states that permit criminal defendants to depose prosecution witnesses. Although Church was charged before the statute went into effect, the Court found no retroactivity problem in applying the deposition statute to Church. Church made his request to depose the child after the statute became effective. Here, the Court held that "a statute operates prospectively when it is applied to the operative event of the statute, and that event occurs after the statute took effect." The triggering event was seeking to depose the child, so the statute is being applied prospectively. The Court further held that the statute does not impermissibly conflict with the trial rules. It is within the General Assembly's "power to narrow the scope of its substantive grant of deposition rights for criminal defendants in the service of protecting children." The Court adopted a "predominant purpose distinction" for deciding whether a statute is procedural or substantive, and it announced the following test: "If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive." The child deposition statute lays out the procedure for how competing rights interact, but that does not alter the statute's "true nature" as a substantive right for this class of victims and a limitation on the substantive rights of defendants. The Court rejected Church's other arguments that the statute violates his constitutional rights. It noted criminal defendants have no constitutional right to discovery but have a right to disclosure of Brady information. The statute does not fall under the reciprocal discovery right recognized in Wardius v. Oregon, 412 U.S. 470 (1973) because Church is not being required to divulge any details of his own case. There is no absolute right to reciprocity under Wardius. Defendants are only entitled to reciprocal discovery when they are required to divulge details of their case to the State. The Court concluded, "Denying Church the opportunity to conduct a pretrial deposition—a limitation defendants routinely operate under in most jurisdictions in this country—does not deny him fundamental fairness or the ability to prepare a defense." Held: affirmed. Justice Goff concurred in the judgment, finding the statute is procedural but the Court could, in its discretion, decide to treat the otherwise incompatible statute as an exception to the rules of court because it "harmonizes with our concern for child welfare."

TITLE: Diggs v. State
INDEX NO.: M.3.b.
CITE: (12/7/88), Ind., 531 N.E.2d 461
SUBJECT: Depositions -- used in trial when witness is unavailable
HOLDING: D was convicted of delivering controlled substance, possession of cocaine, & dealing in controlled substance. On appeal, D claimed that prosecutor committed misconduct. Just prior to presentation of evidence for defense, prosecutor approached witness in corridor. Prosecutor informed him that if he testified to same statements he did in his deposition, he would be charged, according to his own testimony. Witness subsequently invoked his Fifth Amendment privilege & refused to testify when called as witness. Court held that witness' deposition was admissible because deponent invoked his Fifth Amendment privilege to remain silent when called as witness; prosecutor's warning of criminal charges during personal interview with witness improperly denied D use of that witness's testimony regardless of prosecutor's good intentions. Morrison, 535 F.2d.223. Held, judgment affirmed; DeBruler, J., dissenting.

RELATED CASES: Jackson, 735 N.E.2d 1146 (State failed to demonstrate that witness was unavailable for live testimony; see full review at O.9.c.11); Abner, 479 N.E.2d 1254 (whether exceptional circumstances exist to justify admitting deposition under T.R. 32(A)(3)(e) is left to discretion of Tr. Ct.); Jackson, 575 N.E.2d 617 (no abuse of discretion in admitting videotaped deposition of witness on grounds of medical unavailability; during deposition, witness testified that due to physical ailments & limitations she was unable to attend trial in order to testify); Cherry, 414 N.E.2d 301 (admission or exclusion of prior testimony of unavailable witness is subject to discretion of Tr. Ct. when certain requirements are met); Ingram, 547 N.E.2d 823 (where defense counsel takes deposition & actively participates in it, D is deemed to have waived his right of confrontation at trial).

TITLE: Drake v. State
INDEX NO.: M.3.b.
CITE: (8/31/84), Ind., 467 N.E.2d 686
SUBJECT: Depositions - TR 32(A)(3); Ind. Code 35-37-4-3
HOLDING: Tr. Ct. did not err in permitting state to take doctor's deposition. Here, doctor who performed autopsy was to be out of country at trial. State moved to take deposition. D contends provisions of TR 32(A)(3) do not allow deposition to be taken. Ct. notes Tr. Ct. has broad discretion in control of proceedings (Ingram 426 N.E.2d 18), does not specifically address D's argument, but finds no error. D also contends procedure violated Ind. Code 35-1-31-8 because state is precluded from taking depositions if D takes none. TRs & appropriate case law govern taking of depositions in criminal cases. Murphy 352 N.E.2d 479. Held, no error.

TITLE: Driver v. State
INDEX NO.: M.3.b.
CITE: (6/24/92), Ind. App., 594 N.E.2d 488
SUBJECT: Depositions -- waiver of face-to-face confrontation
HOLDING: D convicted of dealing in Schedule I, II, or III controlled substance. D appealed and claimed in part that he was denied his right to confront and cross-examine witnesses because at his second trial, Tr. Ct. admitted testimony of police officer who was dead by time D was retried. D had been retried because he had not knowingly, intelligently and voluntarily waived his right to be present at his first trial. Court held that D who was not present at first trial but who did waive his right to be present at his first trial does not waive right to face-to-face confrontation with witness against him and therefore, testimony of that witness who had since died could not be used on retrial. Held, reversed and remanded for new trial.

RELATED CASES: Roberts, 375 N.E.2d 215 (D requested deposition of witness, and so waived his right of confrontation of that witness at trial).

TITLE: Griffin v. State
INDEX NO.: M.3.b.
CITE: (1st Dist., 9-11-98), Ind. App., 698 N.E.2d 1261
SUBJECT: Use of unadmitted deposition testimony as substantive evidence of guilt - no error
HOLDING: In bench trial for burglary, Tr. Ct. did not err in using published but never admitted deposition testimony as substantive evidence of D's guilt. D argued that use of deposition testimony was erroneous because that testimony was never admitted as evidence, & because two of depositions contained hearsay accounts & other evidence implicating D in prior burglaries. If deposition or discovery document is to be used, then proper procedure pursuant to Ind. Trial Rule 5(D)(5) is to file it with Tr. Ct. Once deposition has been filed, it is available for any use to which it might be put, subject to provisions of Ind. Trial Rules 26(C) & 37. Additionally, Indiana Trial Rule 32(A) provides that deposition may be used against any party who was present or represented at taking of deposition, for purpose of contradicting or impeaching testimony of deponent as witness. In this case, all four deposition witnesses were present at trial, testified during State's case-in-chief, & were subject to cross-examination. In attempt to impeach police officer's credibility during cross-examination, defense counsel referenced portion of officer's deposition & pointed out inconsistencies between his pre-trial statements & his testimony during trial. Ct. held that this use of officer's deposition testimony was appropriate pursuant to T.R. 32(A)(1), but any use of deposition testimony for non-impeachment purposes was erroneous because there was no showing that foundational requirements set forth in T.R. 32 were satisfied.

However, D failed to demonstrate that Tr. Ct. specifically took into account inadmissible evidence of his prior misconduct in reaching its judgment of guilty. Further, to extent that defense counsel did not use deposition testimony to impeach three of four witnesses, Ct. assumed testimony was consistent with witness's in-Ct. statements, & thus deposition testimony was, in large part, cumulative of other properly presented evidence. Even if counsel was deficient in failing to object to Tr. Ct.'s use of deposition testimony, error did not render result of proceeding fundamentally unfair or unreliable. Held, denial of post-conviction relief affirmed.

TITLE: Hale v. State
INDEX NO.: M.3.b.
CITE: (6/16/2016), 54 N.E.3d 355 (Ind. 2016)
SUBJECT: Conviction reversed for denying public funds for deposition
HOLDING: Court reversed conviction for class A felony Dealing Methamphetamine because Tr. Ct. abused its discretion in denying D's request to depose two State witnesses at public expense. D sought to depose his two co-Ds, who had accepted pleas and agreed to testify against him. D's request 1) sufficiently designated the items to be discovered, i.e., it identified the witnesses he wanted to depose and 2) explained why the proposed deponents were material to the case; 3) while the State did not make a significant showing of paramount interest in non-disclosure, in other words, it failed to demonstrate a compelling reason to not allow D to depose the co-Ds. See Dillard v. State, 274 N.E.2d 387, 392 (Ind. 1971); Crawford v. State, 948 N.E.2d 1165, 1168 (Ind. 2011); see also Murphy v. State, 352 N.E.2d 479, 482 (Ind. 1976). D did not waive this claim by failing to object to each co-D's testimony at trial, and the Tr. Ct.'s error is not subject to harmless error analysis. Henceforth, when denying an indigent D's request for public funds to depose a witness, a trial judge must issue factual findings that address each factor of the Dillard/Crawford test. "[W]ithout the benefit of knowing the Tr. Ct.'s rationale, our appellate courts are forced to presume that 'exculpatory or mitigating evidence would have surfaced from the depositions sought.' Murphy, 265 Ind. at 121, 352 N.E.2d at 483. Specific findings by the Tr. Ct., however, should resolve that ambiguity going forward." Held, transfer granted, Court of Appeals opinion vacated, judgment reversed, and remanded for new trial.

TITLE: Hall v. State
INDEX NO: M.3.b.
CITE: 36 N.E. 3d 459 (Ind. 2015)
SUBJECT: Discovery - questions leading to admissible evidence
HOLDING: Tr. Ct. abused its discretion when it denied D's motion to compel a witness to answer a deposition question about an alleged prior false accusation of sexual misconduct made by her daughter, who was the alleged victim. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Trial Rule 26(B)(1). Here, D was charged with Class A felony molestation. During a deposition of the alleged victim's mother, D asked the mother about an incident in Kentucky in which the alleged victim made a similar accusation as the instant case. The mother had mentioned the incident to D in a phone conversation, but did not provide any details. In the deposition, the mother refused to answer the question. D certified the question and filed a Motion to Compel the mother to answer the question. The Tr. Ct. erroneously denied the motion. Prior false accusations of sexual misconduct are admissible. Depending on the answer to the posed question, the prior incident in Kentucky could be sufficiently similar to the instant case to constitute an admissible prior false accusation. Thus, the question was proper. Held, judgment affirmed due to harmless error; Rucker, J., joined by Rush, C.J., dissenting on basis that error was not harmless beyond a reasonable doubt.

TITLE: Jarvis v. State
INDEX NO.: M.3.b.
CITE: (10/26/82), Ind., 441 N.E.2d 1
SUBJECT: Depositions - filing/admissibility
HOLDING: Failure to promptly file deposition (TR 30(F)(1)) is harmless where adverse party saw deposition prior to trial. McVay v. Cincinnati Union Terminal Co. (CA6 1969), 416 F.2d 853. Admission of deposition into evidence is reviewable only for abuse of discretion. Thomas, App., 423 N.E.2d 682. Here, D contends Tr. Ct. erred in allowing state's witness to read deposition into evidence because it had not been filed pursuant to TR 30(F)(1). Tr. Ct. found that original deposition, taken on D's order, had not been processed/forwarded to Ct. because Ct. reporter had not been paid. Judge relied on Ind. Code 34-1-16-2 to accept certified copy of deposition for publication. Ct. finds defense counsel was present at taking of deposition & notes D does not contest accuracy of deposition. Held, no error in admission of deposition.

RELATED CASES: Drummond 467 N.E.2d 742 (safeguards of requirement for publication met where Tr. Ct. conducted hearing re admissibility, deponent had been given opportunity to read/sign deposition, & defense counsel was present at deposition & had copy); Gallagher, App., 466 N.E.2d 1382 (TR 30(E)(3) & (4) contemplate admission of unsigned deposition at trial; here, witness disappeared 5 days after deposition & did not appear at trial; held, deposition properly admitted).

TITLE: Jones v. State
INDEX NO.: M.3.b.
CITE: (2/23/83), Ind., 445 N.E.2d 98
SUBJECT: Deposition - D's presence at
HOLDING: Where witness later testifies against D at trial, Ct.-ordered absence of D at taking of deposition does not violate D's right to confront witnesses. Bowen 334 N.E.2d 691. Here, D was charged with child molesting. Victim was 11-year-old daughter. Other witnesses were 13-year-old daughter & D's son. D petitioned Ct. to allow him to be present when depositions of these 3 witnesses were taken. Hearing held; request denied. D acknowledges Bowen but asks Ct. to change rule, as it is possible deposition may be read into evidence at trial, in lieu of a face-to-face confrontation. F.R. Crim.P. 15(b) requires presence of D at taking of depositions. In US v. Benfield (CA8 1979), 593 F.2d 815, D was barred from deposition of prosecuting witness, but watched on video monitor. Witness did not testify at trial; deposition was offered into evidence against D. Witness' doctors had testified that face-to-face confrontation with D would risk witness's health. CA8 reversed conviction finding D's confrontation rights had been too severely abridged under circumstances. IN Ct. finds fact situation distinguishable from Benfield, refuses to alter rule enunciated in Bowen & affirms D's conviction. Held, no error.

RELATED CASES: Owings, 622 N.E.2d 948 (admission at trial of deposition which D was not permitted to attend, taken by State and given by witness unavailable for trial, results in D never having opportunity to confront that witness; such procedure may violate D's right to confrontation); Kindred, 540 N.E.2d 1161 (Tr. Ct.'s recognition of pro se D's repeated escape attempts and its refusal to permit D to be transported from reformatory to jail in order to depose witnesses did not evidence imbalance in discovery process and did not violate due process; Tr. Ct. permitted D's standby counsel to depose State witnesses); Miller, 517 N.E.2d 64 (deposition of child victim witness was not admissible when D was denied right to be present or to cross-examine at deposition and at trial, under Indiana Constitution); Gallagher, App., 466 N.E.2d 1382 (admission of deposition, requested by D & taken by counsel (D not present), was proper where witness was unavailable & statements contain sufficient indicia of reliability).

TITLE: Karlos v. State
INDEX NO.: M.3.b.
CITE: (4/17/85), Ind., 476 N.E.2d 819
SUBJECT: Depositions - used to refresh testimony
HOLDING: Tr. Ct. did not err in allowing witness to refresh memory by reading deposition given 15 months after date of crime. Here, D contends Clark (1853) 4 Ind. 156 & Carter, App., 412 N.E.2d 825 require deposition used to refresh memory be made at or near time of occurrences. Witness admitted giving deposition & stated rereading it refreshed his memory. Tr. Ct. must determine whether remoteness renders deposition unreliable. Gaunt 457 N.E.2d 211. Held, no abuse of discretion.

TITLE: Murphy v. State
INDEX NO.: M.3.b.
CITE: (8-10-76), Ind. 352 N.E.2d 479
SUBJECT: Indigent D's right to depositions
HOLDING: Tr. Ct. erred in denying D's motion to depose State's witnesses, because there was no showing D's purpose was not bona fide, petition was timely filed, there was no motion for protective order, & there was no showing of undue burden or expense. D was assigned pauper counsel for robbery trial & filed motion to authorize taking depositions of certain State's witnesses at public expense. Arguments of counsel at hearing on motion were made, but record did not show State's objections or reasons Tr. Ct. denied motion.

Absent showing there is no legitimate defense interest in taking depositions or that State has paramount interest to protect, Ds have right to discovery, including taking of depositions of State's witnesses. Ct. rejected State's argument that any error in denying depositions was harmless because there was sufficient evidence to convict D from testimony of those he did not seek to depose. Ct. could not say inability to depose witnesses was harmless, even though there was other evidence to sustain conviction, because it could not presume that no exculpatory or mitigating evidence would have arisen from depositions. Even if, in retrospect, it was found that there was no discoverable evidence to aid in defense, Ct. refused to discount effect of denial of depositions. Held, reversed & remanded for new trial.

RELATED CASES: Hale, 54 N.E.3d 355 (Ind. 2016) (when denying an indigent D's request for public funds to depose a witness, Tr. Ct. must issue factual findings addressing 3 factors of Dillard/Murphy/Crawford test; otherwise, appellate courts are forced to presume exculpatory or mitigating evidence would have surfaced from the deposition; see full review, this section); Majors, 773 N.E.2d 231 (Tr. Ct. did not err in denying D's post-verdict request to depose jurors, alternates & bailiffs to explore further his allegations of juror misconduct; see full review at D.9.e.2); Thompson, App., 702 N.E.2d 1129 (where D failed to specify persons he wished to depose & information he hoped to obtain, Tr. Ct. did not abuse its discretion in denying D's request for discovery at public expense); Haskett, App., 386 N.E.2d 1012 (Tr. Ct. did not err by denying D's request to take depositions in Florida at state expense because D could use less expensive written deposition).

TITLE: Owen v. State
INDEX NO.: M.3.b.
CITE: (7/16/80), Ind. App., 406 N.E.2d 1249
SUBJECT: Request to depose -- hearing required
HOLDING: D was convicted of conspiracy to deliver controlled substance and dealing in controlled substance. On appeal, he claimed in part that it was error to summarily deny his motion to depose police informant. Court held that it was arbitrary and abuse of discretion for Tr. Ct. to deny D's motion to depose informant without hearing, when it appeared that informant was involved in events surrounding offense. Held, affirmed in part and reversed in part.

RELATED CASES: Tinnin, 416 N.E.2d 116 (motion to take key witness' deposition denied, due to D's lack of diligence); Haskett, 386 N.E.2d 1012 (in light of high cost to State for D's attorney to take depositions in Florida, written depositions were sufficient).

TITLE: Robinett v. State
INDEX NO.: M.3.b.
CITE: (11/27/90), Ind., 563 N.E.2d 97
SUBJECT: Depositions -- interviewing State's witness in private
HOLDING: On appeal of murder conviction, D claimed that Tr. Ct. committed reversible error in denying his motion for continuance of trial. During trial and outside presence of jury, counsel objected to fact that during defense counsel's interviews with State witnesses agent for State was present. He claims presence of agent hampered interview. Counsel also argued that interviews should have been conducted in private and with assistance of his own investigator. Tr. Ct. ruled that if particular witness wanted representative present, then representative would be present. Also, D does not have right to interview State's witness in private. Court held that presence of State agent was not error and did not violate D's right to work product. Held, judgment affirmed; DeBruler, J., concurring.

TITLE: Sowers v. LaPorte Superior Court, No. II
INDEX NO.: M.3.b.
CITE: (8/29/91), Ind. App., 577 N.E.2d 250
SUBJECT: Depositions -- appropriate to memorialize known evidence
HOLDING: Petitioner, who was inmate, field motion to perpetuate testimony in anticipation of his Tort Claims Act lawsuit alleging that corrections officers had negligently lost items of his personal property. D appealed and claimed that Tr. Ct. abused its discretion in denying D's request to perpetuate testimony prior to commencement of his lawsuit. Court held that prospective litigant has no absolute entitlement to perpetuate testimony in advance of litigation. Grant or denial of motion to perpetuate testimony lies within sound discretion of Tr. Ct., whose ruling will not be disturbed on appeal absent showing abuse of discretion. Tr. Ct. did not abuse its discretion because 90 day waiting period prescribed by Tort Claims Act for filing suit did not sufficiently demonstrate danger of lost evidence, notwithstanding inmate's claim that he was susceptible to transfer, segregation and removal from facility or that corrections officers expected to be called as witnesses were subject to transfer or termination of their employment. Held, judgment affirmed.

TITLE: State v. Bailey
INDEX NO.: M.3.b.
CITE: (3d Dist., 7-22-99), Ind. App., 714 N.E.2d 1144
SUBJECT: Deposition of State's witnesses - fees; factual issues versus professional opinions
HOLDING: Absent showing that D has no legitimate defense interest or that State has paramount interest to protect, criminal Ds have right to depose those persons listed as potential State's witnesses. Tinnin, 275 Ind. 203, 416 N.E.2d 116. However, professional persons have right to be free from compelled professional service in form of answers to questions that call for professional opinion & analysis without being reasonably compensated for that service. Buchman, 59 Ind. 1 (1877).

Here, D sought to depose social worker & clinical psychologist who examined victim of alleged child molestation. Witnesses filed motion for protective order, insisting that they be compensated for their depositions by payment of minimum & hourly fees. D & State agreed that witnesses were not to be called as expert witnesses, & that they would not be asked to give professional opinions in depositions. Implicit in this agreement was recognition that if witnesses were to be examined as to their professional opinions & impressions, they would need to be compensated accordingly. Ct. held that professionals can be made witnesses in deposition as to facts learned while engaged in that profession upon tender of statutory witness fee & without compensation on professional fee basis. Because witnesses answered only those questions they believed to be factual & that did not require expert opinion or testimony, Ct. could not conclude that defense counsel exceeded intended scope of depositions. Held, denial of motion to quash deposition subpoenas & motion for protective order affirmed.

TITLE: State v. McKinney
INDEX NO.: M.3.b.
CITE: (8/9/2017), 82 N.E.3d 290 (Ind. Ct. App 2017)
SUBJECT: No right for D to attend deposition
HOLDING: On interlocutory review, Court of Appeals held the Tr. Ct. abused its discretion in denying the State's motion to prevent D from attending the deposition of an eight-year-old child, whom D allegedly molested on four separate occasions. Ds generally have no constitutional right to attend depositions. State v. Owings, 622 N.E.2d 948, 951 (Ind. 1993). Refusing to allow a D to attend the deposition of an alleged victim of child molesting does not violate the right of confrontation guaranteed under the Indiana Constitution. Jones v. State, 445 N.E.2d 98, 100 (Ind. 1983); Bowen v. State, 334 N.E.2d 691 (Ind. 1975). The right of face-to-face confrontation applies only to those criminal proceedings that may cause grievous loss to a D's liberty or property. Id. at 695. A deposition to discover information cannot have such a result. Id. And here, uncontested testimony established that the alleged victim would be emotionally traumatized by D's attendance at the deposition. Held, judgment reversed.

M. DISCOVERY

M.3. Discovery techniques

M.3.c. Psychiatric/medical examinations of state witnesses

TITLE: Bellmore v. State
INDEX NO.: M.3.c.
CITE: (10/29/92), Ind., 602 N.E.2d 111
SUBJECT: Witness competency - psychiatric examinations
HOLDING: In death penalty case, D claimed Tr. Ct. abused its discretion by refusing to order psychiatric examination of two State witnesses. Competent witness is one who has sufficient mental capacity to perceive, to remember and to narrate incident he has observed and to understand and appreciate the nature and obligation of an oath. Ware, 376 N.E.2d 1150. Witness is presumed competent. Gosnell, Ind., 376 N.E.2d 471. If evidence places competency of witness in doubt, Tr. Ct. should order psychiatric examination. Mengon, 505 N.E.2d 788. Tr. Ct. has wide discretion in denying motions for psychiatric examination and will be reversed only for manifest abuse of discretion. Stewart, 442 N.E.2d 1026. Here, Tr. Ct. did not abuse discretion in refusing to order psychiatric examinations of two State witnesses to determine their competency despite allegations that one witness had previously attempted suicide & that other witness had been involuntarily committed to mental institution for ten years prior to trial. Held, judgment affirmed.

RELATED CASES: Hoover, App., 582 N.E.2d 403, adopted and incorporated by reference, 589 N.E.2d 243 (D charged with sex offense does not have right to subject victim to psychiatric examination; unlike Easterday, no evidence of fabrication or implication of others).

TITLE: Estelle v. Smith
INDEX NO.: M.3.c.
CITE: 451 U.S. 454 (1981)
SUBJECT: Competency determination -- privilege against self-incrimination
HOLDING: D was indicted in Texas for murder & State sought death penalty. D was examined by psychiatrist who determined that D was competent to stand trial. Doctor's testimony that D would be dangerous to society if set free was later admitted at penalty phase to determine whether D would be dangerous in future. Jury resolved issue of future dangerousness against D & D was sentenced to death. Ct. held that admission of doctor's testimony at penalty phase violated D's Fifth Amendment privilege against compelled self-incrimination because he was not advised before pretrial psychiatric examination that he had right to remain silent & that any statement he made could be used against him at capital sentencing proceeding. Held, judgment affirmed; Marshall J., concurring in part; Stewart & Rehnquist, JJ., concurring.

RELATED CASES: Dickson, 533 N.E.2d 586 (physicians ere not required to warn D of right to remain silent & did not violate privilege against self-incrimination, where D initiated & approved examinations).

TITLE: Jacob v. Chaplin
INDEX NO.: M.3.c.
CITE: (9/6/94), Ind., 639 N.E.2d 1010
SUBJECT: Right to have counsel present at/or to record exam
HOLDING: Personal injury plaintiff moved for protective order to allow him to tape-record court-ordered physical examination. Tr. Ct. granted motion and Ds appealed, claiming that Tr. Ct. abused its discretion by issuing protective order which in effect said that personal injury plaintiff ordered to undergo routine T.R. 35 examination, is entitled as matter of right to tape record all conversations with physician selected by Ds. Supreme Court held that Tr. Ct. properly exercised its discretion and recognized the justness of permitting recording of the examination to take place in an open manner, in the absence of some overriding reason to prohibit that recording. Although the text of Ind. Trial R. 35 is silent with regards to tape recording conversations occurring during the medical examination, the rule does require the Tr. Ct. to set the conditions for the examination, upon a showing of good cause. Also, Ind. Trial R. 26(C) allows a Tr. Ct. to impose certain conditions upon discovery, upon a showing of good cause, when a party from whom discovery is sought requests judicial protection from perceived abuse of the discovery process. Held, transfer granted, Court of Appeals' opinion at 625 N.E.2d 486 vacated cause remanded for further proceedings.

RELATED CASES: Old Ind. Ltd. Liab. Co. v. Montano, 732 N.E.2d 179 (Ind. Ct. App. 2000) (not abuse of discretion to deny taping of plaintiff's psychological exam and pre-submission of questions).

TITLE: James v. State
INDEX NO.: M.3.c.
CITE: (10/28/80), Ind., 411 N.E.2d 618
SUBJECT: Psychiatric/medical examinations -- waiver of physician-patient privilege
HOLDING: D was convicted of murder. On appeal he claimed that Tr. Ct. erred in allowing rebuttal testimony of States' witness for purpose of impeachment because it violated D's physician-patient privilege. D had entered plea of not guilty by reason of insanity; doctor had examined him at court order and had interviewed him as result of that plea. D later withdrew his insanity pleas. Court held that at time of psychiatric examination, D had waived privilege by pleading insanity, and when doctor's testimony was offered on rebuttal after insanity plea was withdrawn, for purpose of impeaching D's own alibi testimony, violation of physician-patient privilege was doubtful. Regardless, where no proper and contemporaneous objection was made, right to assert error was not preserved. Held, cause remanded with instructions to vacate judgments and sentences for murder on various counts; judgment in all other respects affirmed.

RELATED CASES: Lockridge, 338 N.E.2d 275 (D's pleas of not guilty by reason of insanity acted as waiver of physician-patent privilege in respect to all physicians who might testify at trial); Canfield, 563 N.E.2d 526 (patient, by bringing personal injury suit, waives physician-patient privilege only to those matters causally and historically related to condition put in issue and which have direct medical relevance to claim, counterclaim, or defense; medical information unrelated to condition in issue and irrelevant to cause remains privileged and therefore protected from discovery).

TITLE: Solomon v. State
INDEX NO.: M.3.c.
CITE: (9/1/82), Ind., 439 N.E.2d 570
SUBJECT: Psychiatric examination of state witness
HOLDING: D on trial for a sex offense has no right to subject victim to a psychiatric examination. Page, 410 N.E.2d 1304; Holder, 396 N.E.2d 112; Easterday, 256 N.E.2d 901. Ct. distinguishes Easterday, a case in which Tr. Ct. was held to have abused its discretion in refusing to grant defense motion for psychiatric exam of prosecuting witness (10 year-old girl with history of implicating men in acts of sexual misconduct & who previously had been known to fabricate stories of sexual incidents). Here, victim was 30-year-old woman; D presented no evidence to Tr. Ct. suggesting any reason to conduct psychiatric exam to determine victim's competency to testify. Held, no abuse of discretion.

RELATED CASES: Hoover, 589 N.E.2d 243 (case appears to overrule dicta in Easterday, supra, suggesting desirability of inquiring into sex offense prosecuting witness' social & mental make up through psychiatric examination. Ct. noted that Easterday specifically held only that D has no right to subject prosecuting witness in sex offense case to psychiatric examination, but that Ct. may exercise its discretion in ordering such exam); Mengon, 505 N.E.2d 788 (Mental H 434; Tr. Ct. did not err in denying D's request for psychiatric exam of undercover police officer to whom D sold drugs; during competency exam officer acknowledged he was recovering alcoholic & others who were acquainted with him testified).

M. DISCOVERY

M.3. Discovery techniques

M.3.d. Subpoena

TITLE: Collins v. State
INDEX NO: M.3.d.
CITE: (7/25/2014), 14 N.E.3d 80 (Ind. Ct. App 2014)
SUBJECT: Denial of request to issue subpoena to out-of-state resident for PCR hearing affirmed
HOLDING: In post-conviction proceedings, petitioners are entitled to request issuance of subpoenas accompanied by an affidavit stating the reason for calling the witness and the expected testimony. Indiana Post-Conviction Rule 1(9)(b). Here, it was within Tr. Ct.'s discretion to conclude that prosecutor and judge would not provide relevant and probative testimony and to deny D's subpoena request. Tr. Ct. was unable to issue a subpoena to public defender who supervised certified legal intern, because she resided in Florida. There are no provisions for compulsory attendance of out-of-state residents in civil actions. See Indiana Practice Series, Trial Handbook § 16:4. Thus, Tr. Ct.'s denial of request to subpoena public defender was not an abuse of discretion. Held, judgment affirmed.

TITLE: Forbes v. State
INDEX NO.: M.3.d.
CITE: (1st Dist., 6-22-04), Ind., 810 N.E.2d 681
SUBJECT: Discovery of blood test results from another jurisdiction
HOLDING: On interlocutory appeal, Ct. affirmed Tr. Ct.'s denial of D's motion to suppress & reversed Ct. App.' holding that blood alcohol test records retrieved from out-of-state hospital must be suppressed due to State's failure to comply with the Uniform Act to Secure the Attendance of Witnesses from Without the State. Ind. Code 35-37-5-1. After a fatal traffic accident, D was taken to a Kentucky hospital. Indiana's implied consent law does not control the release of medical records in another jurisdiction. Thus, police simply issued subpoenas to the hospital without initiating a legal action as required by the Uniform Act, & the hospital provided the records. Ct. noted that the Uniform Act does not provide any explicit remedies for failure to follow its procedures & does not purport to be the exclusive method for getting information from across state lines. Ct. concluded that the Act is "permissive" legislation & offers a formal manner to compel out-of- state witnesses to participate in Indiana litigation. The procedure is for the benefit of the witness, not the parties. While the Ct. agreed the subpoena was facially overbroad in requesting all of D's medical records, the BAC results were not suppressible on this issue. A different case would be presented if D or the hospital objected at the time the subpoena was served, but police verbally only asked for the BAC results & that is what they received. Right to privacy is not implicated here because no protected information was sought or obtained. Held, transfer granted, Ct. App. opinion at 793 N.E.2d 1112 vacated, judgment of Tr. Ct. denying D's motion to suppress affirmed & case remanded for further proceedings.

TITLE: In Re Thompson
INDEX NO.: M.3.d.
CITE: (1st Dist. 7/3/85), Ind. App., 479 N.E.2d 1344
SUBJECT: Subpoena duces tecum (SDT)
HOLDING: Tr. Ct. did not err in denying bank's motion to quash SDT ordering production of D's December bank records. Prohibitions of 4th Amend are inapplicable to SDT because "subpoenas are incapable of accomplishing constitutionality proscribed conduct." State ex rel. Pollard v. Criminal Ct. of Marion County 329 N.E.2d 573. Bank had no expectation of privacy in records requested. 4th Amend requirement of probable cause applies to SDT only to extent that prosecutor, in issuing SDT, may not act arbitrarily or in excess of statutory authority. Id. Greatest protection afforded person subject to SDT is requirement of reasonableness (Id.), which guards against too much indefiniteness or breadth in description of materials to be produced (OK Press Publishing Co. v. Walling (1946), 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614). Here, SDT satisfies all requirements. Held, no abuse of discretion.

TITLE: Oman v. State
INDEX NO.: M.3.d.
CITE: (9-26-00), Ind., 737 N.E.2d 1131
SUBJECT: Subpoena - procedure for obtaining pre-charge subpoena
HOLDING: In order for prosecutor, acting without grand jury, to issue investigative subpoena duces tecum prior to charges being filed, prosecutor must seek leave of Ct. & subpoena must be reasonable. Prosecutor is not limited to issuing grand jury subpoena to acquire evidence in criminal case, but can, *through appropriate Ct.*, subpoena witnesses for production of documentary evidence maintained by third party. In re Order for Indiana Bell Telephone to Disclose Records, 274 Ind. 131, 409 N.E.2d 1089 (1980). "Whenever any prosecuting or district attorney shall receive information of commission of any felony or such district attorney of commission of any misdemeanor he shall *cause process to issue from Ct.* having jurisdiction to issue same to proper officer, directing him to subpoena persons . . .." Ind. Code 33-14-1-3. Here, Ct. held that "through appropriate Ct." in In re Order for Indiana Bell Telephone to Disclose Records, & "cause process to issue from Ct." in Ind. Code 33-14-1-3 require prosecutors to seek leave of Ct. prior to issuing investigatory subpoena duces tecum to third parties prior to charges being filed. Although prosecutor in this case did not seek leave of Ct. prior to issuing investigatory subpoena duces tecum on third party, reversal is not required. Because Ct. characterized holding as new rule of law, new rule applies only to investigative subpoenas issued after date of this decision. Held, Tr. Ct.'s judgment affirmed, & Ct. App.' opinion at, 707 N.E.2d 325 (Ind. Ct. App 1999), vacated & reversed; Boehm & Dickson, J.J., concurring on basis that Ct. should not recognize difference between investigatory subpoenas to testify & subpoenas requiring production of physical evidence.

RELATED CASES: S.H., 984 N.E.2d 630 (Ind. 2013) (prosecutor's pre-charge subpoena authority does not extend to a request for a grant of use immunity; see full review at J.8.a); Eichhorst, App., 879 N.E.2d 1144 (investigatory subpoena for medical records, including blood alcohol test, of driver involved in an accident was reasonable; accident was proper basis for investigation).

TITLE: Percifield v. State
INDEX NO.: M.3.d.
CITE: (4th Dist., 9-10-04), Ind. App., 814 N.E.2d 710
SUBJECT: Prosecutorial investigative subpoena may be issued by Circuit Ct.
HOLDING: Tr. Ct. did not err by denying D's motion to suppress his cellular phone records, which were obtained when circuit Ct. approved a prosecutor subpoena duces tecum. Ind. Code 33-39- 1-4 appears to expressly preclude circuit Cts. from issuing subpoena duces tecum, & historically circuit Cts. were exempt from subpoena power of statute because it "had ample means, by use of the grand jury, to inquire into & punish all criminal offenses of which it had jurisdiction." Ellison v. State, 125 Ind. 492, 497, 24 N.E.2d 739, 741 (1890). Ct. noted that given current Ct. structure & organization of prosecutors, the exception that has remained in statute is an anachronism. Purpose of Ind. Code 33-39-1-4 is to enable prosecutors, not to limit jurisdiction of circuit Cts., & main purpose is to provide review by a Ct. to see that a subpoena is warranted by circumstances & that its scope is appropriate. Oman v. State, 737 N.E.2d 1131 (Ind. 2000). Ct. also held that, even excluding evidence of D's tainted admission after he invoked right to counsel, there was substantial basis to conclude that probable cause existed to search D's residence. Held, judgment affirmed.

M. DISCOVERY

M.3. Discovery techniques

M.3.e. Motion for Production

TITLE: Grammer v. Tippecanoe Circuit Court
INDEX NO.: M.3.e.
CITE: (7/11/78), Ind., 377 N.E.2d 1359
SUBJECT: Discovery -- requests for admission; usually not used in criminal cases
HOLDING: D was charged with second-degree murder and filed request for admissions. On appeal, D claimed that Tr. Ct. committed error by denying this. Court held that request for admissions is used in civil cases as device to get uncontested facts out of way. It is unnecessary to use this device in criminal cases as there is already mechanism established for this purpose in form of omnibus hearing and pretrial conference. Furthermore, prosecutor is under constitutional duty to disclose any exculpatory evidence to defense. Agurs, 427 U.S 97.

RELATED CASES: Royston, 397 N.E.2d 285 (because D's physical characteristics, as observed by three witnesses, were testified to at trial, there was no abuse of discretion in denial of pre-trial requests for admission as to certain physical and dental characteristics).

TITLE: White v. State
INDEX NO.: M.3.e.
CITE: (6/26/75), Ind., 330 N.E.2d 84
SUBJECT: Discovery -- motion for production
HOLDING: D was convicted of kidnaping and rape while armed with deadly weapon. On appeal, D claimed that it was reversible error for Tr. Ct. to overrule his motion for production of exculpatory evidence. Court held that State had duty to reveal sua sponte any exculpatory evidence and that to order State to reveal such evidence would be redundant Also, it is not error for Tr. Ct. to deny such motion unless it is specific and exculpatory evidence is shown to have existed. Held, judgment affirmed.

M. DISCOVERY

M.4. Work-product privilege

TITLE: Commonwealth v. Liang
INDEX NO.: M.4.
CITE: 434 Mass. 131, 747 N.E.2d 112 (Mass. 2001)
SUBJECT: Victim Advocate's Notes Subject to Same Discovery as Prosecutor's Notes
HOLDING: Notes taken by victim-witness advocates in meetings with victims or witnesses are subject to discovery to same extent as prosecutor's notes would be. Victim advocates are part of prosecution team. Where victim advocate's notes include exculpatory material or verbatim witness statements, they are discoverable. Similarly, victim advocate's notes are protected by work product privilege to extent that they contain mental impressions about the witnesses.

TITLE: Hicks v. State
INDEX NO.: M.4.
CITE: (10/11/89), Ind., 544 N.E.2d 500
SUBJECT: Work product privilege - verbatim witness statements
HOLDING: Work-product doctrine is not applicable to shield verbatim witness statements from otherwise proper discovery. D was charged with murder, burglary, & numerous other counts in connection with break-in & killing. Before trial, Tr. Ct. granted D's motion to produce witness names, but denied it as to witness statements & statement summaries, consistent with granting of protective order shielding D's witness statements as attorney work product. On appeal D argues that state's concealment of incriminating witness statement deprived him of fair trial. Criminal Ds may obtain witness statements after witness testifies for possible use in cross-examination, Antrobus 254 N.E.2d 87, & Tr. Ct. may also require pretrial production of such statements. Dillard 274 N.E.2d 387. In Spears, 403 N.E.2d 828, Ind.S. Ct. ruled that witness statements taken on behalf of D may be shielded from discovery by timely work-product objection. Later cases extended privilege to state's witness statements. [Citations omitted.] However, essential function of work product privilege is to protect attorney's "mental impressions, conclusions, opinions, or legal theories" from disclosure. TR 26(B)(3). Because of potential role of verbatim witness statements as substantive evidence under Patterson 324 N.E.2d 482, such statements must be viewed as akin to other potential exhibits & physical evidence, discoverability of which is unquestioned even if prepared by or at direction of counsel. Therefore, work-product doctrine is not applicable to shield verbatim witness statements from otherwise proper discovery. To extent Spears is inconsistent, it is overruled. Held, because Tr. Ct. shielded witness statements of both D & state from discovery, D was not denied fair trial. Conviction affirmed. **Note:** CR 21 now provides that trial rules are generally applicable to all criminal “proceedings,” rather than merely to criminal “appeals” as prior version provided.

TITLE: Matter of Snyder
INDEX NO.: M.4.
CITE: (1st Dist., 3/31/81), Ind. App., 418 N.E.2d 1171
SUBJECT: Caseworker's notes not protected by work product privilege
HOLDING: In termination of parental rights case, Tr. Ct. erred in denying mother's request for discovery of Department of Public Welfare (DPW) caseworker's notes. DPW caseworker's notes were not protected by work product privilege. Mother argued that she signed consent to terminate parental rights involuntarily, and caseworker's notes might have demonstrated undue influence exerted upon her by caseworker. Ct. found that notes were not prepared in anticipation of litigation because child wardship cases do not necessarily lead to petition for termination of parental rights. Held, termination of parental rights reversed in part and remanded for further proceeding consistent with opinion.

TITLE: State ex rel. Crawford v. Superior Ct. of Lake County
INDEX NO.: M.4.
CITE: (2/6/90), Ind., 549 N.E.2d 374
SUBJECT: Discovery of substantially verbatim witness statements (VWS)
HOLDING: Tr. Ct. did not exceed jurisdiction in ordering that both parties produce witness lists, together with witness' recorded or written statements. Prosecutor sought to prohibit Tr. Ct.'s order to produce VWS because D had not laid Antrobus foundation. In Antrobus 254 N.E.2d 873, Ind. S. Ct. set out foundation for D seeking VWS for use on cross-examination: (1) witness testified on direct; (2) VWS is shown probably to be within control of state; & (3) VWS relates to matters covered on direct. However, for purpose of pretrial discovery, inclusion of individual on witness list is sufficient to justify Tr. Ct.'s belief that he/she will testify & that VWS is relevant to issues at trial. State argues that because statements here are contained within police reports, they are shielded from pretrial discovery by work product privilege. Keaton 475 N.E.2d 1146, which state *cites*, did provide such protection for police reports. However, VWS themselves are not work product. Hicks 544 N.E.2d 504 (card at M.2.b.4; M.4). Police documents that purport to be actual words of witness, reduced to writing as witness spoke or shortly thereafter or transcribed from recording, are VWS discoverable under Hicks. These documents would typically contain little else & be written in 1st-person. Documents which are officer's record of investigation, typically written from his/her perspective, are police reports, shielded from discovery under Keaton. Where both witness statements & officer's impressions, opinions, & theories are intermingled, in camera inspection by Tr. Ct. is appropriate to determine whether document is discoverable & to what extent. Held, writ denied.

M. DISCOVERY

M.4. Work-product privilege

M.4.a. Of State

TITLE: Goolsby v. State
INDEX NO.: M.4.a.
CITE: (12/29/87), Ind., 517 N.E.2d 54
SUBJECT: Work-product privilege -- prosecutor responsible for knowledge held by police
HOLDING: D claimed that Tr. Ct. erred by denying him opportunity to review police officer's report during officer's cross-examination. Work product doctrine extends protection to materials prepared by agents of attorney as well as those prepared by attorney himself. Nobles, 422 U.S. 225. Police reports, which constitute work product of prosecuting attorney, are also afforded protection. Held, judgment affirmed; Givan, J., dissenting in part and concurring in part.

NOTE: In Minges v. State, 192 N.E.3d 893 (Ind. 2022), Supreme Court *overruled* State ex rel. Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985), which allowed prosecutors to assert blanket privilege over police reports. Trial Rule 26(B)(3) provides adequate guidance for the trial court to determine—on a case-by-case basis—whether a police report is protectible work product.

TITLE: Minges v. State
INDEX NO.: M.4.a.
CITE: (08/23/22), Ind., 192 N.E.3d 893
SUBJECT: Supreme Court overruled 38-year-old case that allowed prosecutors to assert blanket privilege over police reports
HOLDING: This is an interlocutory appeal from the denial of Defendant's motion to compel discovery. Following an operating while intoxicated charge in Dearborn County, Defendant filed a motion for discovery requesting "[a]ny and all reports known to the State made in writing by any policeman or investigating officer which are relevant to the charge against Defendant." In response, the State refused to produce a copy of a police report created by the Dearborn County Sheriff's Department, saying that it was "available to review upon appointment" with the Dearborn County Prosecutor's Office. The prosecutor's office would only provide a copy of the report to defense counsel if he signed a "protective order," which prohibited counsel from making copies of the police report or providing a copy to anyone, including Defendant, and required counsel to return the police report to the prosecutor's office after disposition of the criminal matter. Defense counsel reviewed the police report at the prosecutor's office but did not get a copy because he refused to sign the protective order, *citing* ethical obligations. Defendant moved to compel the State to produce the police report. At a hearing on the motion, the prosecutor admitted there was no harm in providing a copy of the report to Defendant but refused to do so because police reports are the work product of the prosecuting attorney under State ex rel. Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985). The trial court denied the motion to compel, concluding that it had "no discretion" to compel the State to produce the police report under Keaton. The Court of Appeals affirmed the trial court but urged the Supreme Court to reconsider Keaton. The Supreme Court granted transfer and expressly *overruled* Keaton. The Court determined that Keaton conflicts with Indiana's liberal discovery rules, including Trial Rule 26(B), noting the 1985 decision contains no reference to Trial Rule 26 (possibly because it predated the amendment to Criminal Rule 21 that clarified the trial rules are applicable to all criminal proceedings). "Accordingly, it is not only possible, but probable, our Court would have decided Keaton differently under the amended Criminal Rule 21." The Court also observed that "rightly or wrongly," courts have interpreted Keaton as providing a blanket privilege to police reports, effectively depriving a trial court from exercising discretion in compelling disclosure over the prosecuting attorney's timely work-product objection. Yet, Indiana generally disfavors bare assertions of privilege in the context of discovery. The Court saw no reason to perpetuate such a broad reading of Keaton when Trial Rule 26(B)(3) provides the appropriate framework for analyzing whether the work product doctrine protects a police report from disclosure. The Court also found the reasoning underlying Keaton - that redacting police reports would place an undue burden on prosecutors and that defense counsel might use them to "subject [police] officers to unfair and misleading cross-examination" - no longer viable in today's age. "Decided in a time when lawyers redacted documents using Marks-a-Lot markers, the Keaton court was unlikely to fathom electronic filing or software programs readily accessible to legal professionals today." And we can rely on trial judges to control the conduct and scope of cross-examination. Lastly, the Court disagreed with the State's assertion that police officers are per se agents of its prosecuting attorneys and pointed out that the State's concerns about the dissemination of sensitive information can be dealt with by other measures like redaction, a motion for protective order, or even in camera inspection. The Court stressed that its decision does not suggest that police reports may never qualify as work product. It merely clarifies that Trial Rule 26(B)(3) supersedes any reliance on Keaton as preventing trial courts from

exercising discretion in determining whether the work product privilege protects a particular police report from disclosure. To the extent these cases suggest otherwise, the Court expressly disapproves of them: Goolsby v. State, 517 N.E.2d 54, 60 (Ind. 1987); Beckham v. State, 531 N.E.2d 475, 476 (Ind. 1988); State ex rel. Crawford v. Super. Ct. of Lake Cnty., Crim. Div., Room II, 549 N.E.2d 374, 376 (Ind. 1990); Robinson v. State, 693 N.E.2d 548 (Ind. 1998); Gault v. State, 878 N.E.2d 1260, 1266 (Ind. 2008); and Johnson v. State, 584 N.E.2d 1092, 1103 (Ind. 1992). Held: remanded for consideration of the State's claim of privilege under Trial Rule 26(B)(3).

M. DISCOVERY

M.4. Work-product privilege

M.4.b. Of D

TITLE: Hergenrother v. State
INDEX NO.: M.4.b.
CITE: (9/1/81), Ind. App., 425 N.E.2d 225
SUBJECT: Work product of D -- production of accident report compiled by D's insurance company
HOLDING: Witness' statements taken by D, his agents or his attorney, in anticipation of litigation are not subject to pre-trial discovery over timely work-product objections. Spears, 403 N.E.2d 828. Here, D was convicted of reckless homicide. On appeal, he argued that Tr. Ct. abused its discretion in requiring him to turn over his insurance company's accident report to State. Court held that erroneous discovery order does not require reversal unless D has been prejudiced by evidence produced. Although Tr. Ct. erred by ordering that State be given report because report was prepared in preparation for civil litigation arising from reckless homicide case and should not have been subject to discovery, D was not prejudiced by production of report in criminal proceeding. Held, judgment affirmed.

TITLE: Partlow v. State
INDEX NO.: M.4.b.
CITE: (9/22/83), Ind., 453 N.E.2d 259
SUBJECT: Work-product privilege - "abstract" of defense testimony
HOLDING: Tr. Ct. did not err in ordering D to give prosecutor summary of testimony of defense witnesses; such a summary is not work product. Here, D contends order violates Spears 230 N.E.2d 536 (attorney's work product is not discoverable over timely work product objection). List of witnesses & short abstract of their testimony provided in this case differs from State ex rel. Meyers v. Tippecanoe Superior Ct. 438 N.E.2d 989 (D's request for "each [prosecution] witness' expected testimony with respect to each essential element of each offense charged" sought work product & should have been denied). Held, no error.

TITLE: People v. Spiezer
INDEX NO.: M.4.b.
CITE: 735 N.E.2d 1017 (Ill. App. Ct. 2000)
SUBJECT: Work-Product Privilege Extends to Report of Non-Testifying Expert
HOLDING: Work-Product privilege protects criminal defense attorney from having to disclose report by expert he hired but does not intend to call at trial. Purpose of privilege is to facilitate flow of information leading to theories and strategies to be employed by attorney at trial. Privilege extends not only to report by non-testifying expert, but to fact of attorney's consultation with expert and type of assistance requested. Privilege may be overcome only if state shows "special need."

TITLE: Robinson v. State
INDEX NO.: M.4.b.
CITE: 730 A.2d 181 (Md. 1999)
SUBJECT: Officers' Statements to Internal Affairs Department (IAD) -- In Possession of State
HOLDING: Maryland Supreme Court finds that officers' statements to IAD regarding shoot- out with D should were within possession of state for purposes of requirement that they be disclosed to defense after officers testified at trial. State argued that because statute restricted access to IAD records, IAD statements were not in its possession. Court rejects this, noting that statutory confidentiality provisions go to discoverability, but do not affect state's possession of information in control of police. And while confidentiality may go to discoverability, it does not insulate IAD records entirely from disclosure. Balancing officers' confidentiality interests against D's due process and confrontation rights, Court finds that D's rights predominate. The Court noted that in this case, the statements did not contain sensitive information about the officers, but rather consisted explanations as to why the officers fired shots at D during his arrest.

TITLE: Salt Lake Legal Defender Association v. Uno
INDEX NO.: M.4.b.
CITE: 932 P.2d 589 (Utah 1997)
SUBJECT: Work Product Privilege -- Ineffective Assistance of Counsel (IAC) Claim
HOLDING: Former criminal client's post-conviction claim that trial lawyer provided IAC does not automatically lift work product protection of lawyer's files from discovery by state. Unlike malpractice and "advice of counsel" cases, IAC claim does not create adversary relationship between client and counsel. Further, what is at issue is performance of counsel during preparation and trial, not solely internal processes in compiling file. Contents of counsel's files may or may not have bearing on specific IAC claims raised. Further, in capital case, such as here, relationship between attorney and client is very sensitive and requires high level of trust, reliance, and open communication. Good defense lawyer in capital case should be privy to vast amounts of information about D and crime which make their way into file. Discovery policy which creates significant likelihood that such files will be opened in subsequent proceedings to state would dramatically impair trial preparation process. "There is simply no way to protect against improper use of information damaging to the client that might be available in the files." Under Trial Rule 26, state is required to show that it has "substantial need" and that it cannot, without "undue hardship," obtain substantial equivalent of information in files by other means. Consequently, disclosure of items in file will be required only if (1) these two requirements of T.R. 26 are met for each document sought; (2) the "at issue" exception is directly applicable to specific document; and (3) document is edited to prevent disclosure of any information not related to IAC claim. These requirements will require trial counsel to prepare index of files sufficient to allow state to attempt to make its initial showing of substantial need and undue hardship. If state makes this threshold showing, Tr. Ct. must then conduct in camera review to determine whether state is entitled to document and to ensure that it does not contain extraneous information that should not be revealed.

TITLE: State v. Dunn
INDEX NO.: M.4.b.
CITE: 154 N.C. App. 1, 571 S.E.2d 650 (N.C. Ct. app. 2002)
SUBJECT: Consulting Experts -- State Cannot Discover
HOLDING: Consulting experts whom defense retained but does not intend to call as witnesses may not be discovered or compelled to testify by prosecution. North Carolina Court of Appeals holds that allowing state to contact and call defense consulting experts violates both the 6th Amendment right to effective assistance of counsel and the work product doctrine. The Court cites cases from other jurisdictions in support of both rationales. Work Product Doctrine: U.S. v. Walker, 910 F. Supp. 861 (N.D. N.Y. 1995); People v. Spiezer, 735 N.E.2d 1017 (Ill. Ct. App. 2000). Effective Assistance of Counsel: State v. Mingo, 392 A.2d 590 (N.J. 1978); Hutchinson v. People, 742 P.2d 875 (Colo. 1987).

M. DISCOVERY

M.5. Discovery by State

M.5.a. General discovery privileges

TITLE: Miller v. State
INDEX NO.: M.5.a.
CITE: (2nd Dist., 04-20-05), Ind. App., 825 N.E.2d 884
SUBJECT: State's examination of D's mental capacity
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion in allowing State to conduct discovery regarding D's mental capacity. Tr. Ct.'s prior finding of D's mental retardation does not preclude parties from presenting evidence of his mental capacity for another purpose at second trial namely to assist jury in determining voluntariness of his statement to police. In Miller v. State, 770 N.E.2d 763 (Ind. 2002), Ct. found that D's expert opinion testimony regarding effects of police interrogation upon mentally retarded individuals is admissible at retrial of this case to assist jury in determining his statement's weight & credibility. Therefore, State must be also be permitted to present evidence on issue of D's mental capacity for same purpose. Ind. Trial Rule 43(D); Ind. Crim. Rule 21. Held, order granting State's motion to interview & examine D affirmed.

TITLE: Partlow v. State
INDEX NO.: M.5.a.
CITE: (9/22/83), Ind., 453 N.E.2d 259
SUBJECT: Discovery by state - "abstract" of defense testimony
HOLDING: Tr. Ct. did not err in ordering D to give prosecutor summary of testimony of defense witnesses; such a summary is not work product. Here, D contends order violates Spears, 230 N.E.2d 536 (attorney's work product is not discoverable over timely work product objection). List of witnesses & short abstract of their testimony provided in this case differs from State ex rel. Meyers v. Tippecanoe Superior Ct., 438 N.E.2d 989 (D's request for "each [prosecution] witness' expected testimony with respect to each essential element of each offense charged" sought work product & should have been denied). Held, no error.

TITLE: Rita v. State
INDEX NO.: M.5.a.
CITE: (12-31-96), Ind., 674 N.E.2d 968
SUBJECT: Prosecutor may not obtain investigatory subpoena after D charged
HOLDING: Tr. Ct. erred in allowing State, but not defense, to use subpoenas to take ex parte statements from witnesses after D was charged with crime. Tr. Ct. relied upon Ind. Code 33-14-1-3 in granting State's request to issue investigatory subpoenas to two witnesses who had refused to speak to prosecution. Ind. Code 33-14-1-3 allows State to subpoena witnesses for questioning prior to charging D with felony. Here, D argued that same right should have been granted to defense, & alternatively that statute applies only to pre-charge investigation by prosecution. Ct. found that plain language of statute defines its purpose as tool for prosecutors to investigate crimes prior to filing criminal charges. Statute is not applicable at post-indictment or post-information stage. Permitting only one side to question prospective witnesses, ex parte conflicts with reciprocal discovery rights secured by Indiana Trial Rules 30 & 31, which afford all parties right to receive notice of & be present at any questioning. Ct. held that remedy is to exclude statements given in response to ex parte subpoenas & permit D to depose witnesses prior to retrial. Held, transfer granted, decision of Ct. App. at 663 N.E.2d 1201 affirmed on all other issues; case remanded for further proceedings; Sullivan, J. dissenting.

RELATED CASES: Baugh, App., 719 N.E.2d 848 (reasoning in Rita equally applicable to issuance of post-indictment ex parte subpoena duces tecum for D's bank records).

M. DISCOVERY

M.5. Discovery by State

M.5.b. Alibi (IC 35-36-4)

TITLE: Baxter v. State
INDEX NO.: M.5.b.
CITE: (4/25/88), Ind., 522 N.E.2d 362
SUBJECT: Alibi - untimely filings; constitutional challenge
HOLDING: While constitution may sometimes prohibit exclusion of alibi evidence due to untimely notice, D here failed to establish that his rights outweighed state's. Ind. Code 35-36-4 sets time for filing alibi notice. Tr. Ct. has discretion to allow untimely notice only if D shows good cause. Hartman, 376 N.E.2d 100; Stapp, 287 N.E.2d 252. D here did not show good cause but argues that refusal to allow his own alibi testimony violates his 5th, 6th, & 14th Amend. right to testify. Although U.S. S. Ct. has never expressly recognized such right, 7th Cir. has done so. See, e.g., Alicea v. Gagnon (7th Cir. 1982), 675 F.2d 913. Ind. S. Ct. now accepts that such right is constitutionally based. D's right to testify is not absolute, however, & may bow to accommodate other legitimate interests. McMorris v. Israel, (7th Cir. 1981), 643 F.2d 458. Purpose of alibi - notice statute is to prevent fabrication & enable state to prepare adequately for trial. Riggs, 376 N.E.2d 483. Whether D's interest outweighs states depends on facts. Where D files tardy notice simply because of failure to aggressively pursue it, & state is not deprived of adequate time to prepare, at least D's testimony should be allowed. Here, however, D was clearly dilatory in mounting alibi defense. D offered only bare assertion of whereabouts at time of alleged offenses & made no offer to prove. D failed to establish that his right to testify outweighs state's interests protected by alibi notice requirement. Held, Tr. Ct. properly excluded alibi testimony. DeBruler, J., DISSENTS, characterizing state's interests as "small potatoes."

TITLE: Campbell v. State
INDEX NO.: M.5.b.
CITE: (10-25-93), Ind., 622 N.E.2d 495
SUBJECT: Alibi testimony of D
HOLDING: Exclusion of D's own alibi testimony under Ind. Code 35-36-4-1 is unconstitutional infringement on right of accused to testify guaranteed by Art. I, 13 of Ind. Const.; reversing memorandum decision on this issue. D was precluded at trial from introducing any evidence related to alibi defense, including his own testimony, because he did not timely file notice of alibi. Ct. App. upheld restriction on testimony, but S. Ct. found D was entitled to new trial because of exclusion of his own alibi testimony. D filed notice of alibi two days before trial, & after hearing, Tr. Ct. ruled that no alibi evidence could be admitted by D. In offer to prove at close of State's case, D stated he was at sister's home during time in question, & that they would both testify to that fact. Propriety of exclusion of D's own alibi testimony because of failure to conform to statutory requirements has been raised in several other jurisdictions. Decisions holding Ds still had right to so testify came from Colorado, Iowa, Michigan, New York, & DC & 7th Cir. federal appellate courts. Jurisdictions holding that Ds could be precluded from offering their own testimony included Kansas, Missouri, New Jersey, & Wisconsin. Ct. noted that in Lake, 274 N.E.2d 249, it had adopted reasoning of Wisconsin court precluding such testimony, but that it was going to reconsider its position. Art. I, 13 of Ind. Const. provides in part that: "[i]n all criminal prosecutions, the accused shall have the right…to be heard by himself & counsel...." Language places "unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom & state what in his mind constitutes a predicate for his innocence of the charges." Ct. found surprise testimony by D is rarely overwhelming & continuance by State would be appropriate to meet surprise. In Baxter 522 N.E.2d 362, Ct. recognized that constitution seemed to require allowance of at least D's testimony, even where statute was not followed, but upheld exclusion of testimony because it appeared D was trying to be evasive & there was high risk he had fabricated story. Ct. concluded that in light of strong constitutional bias in favor of personal testimony of accused & remedy of continuance, exclusion of testimony was unjustified & overbroad intrusion on right of accused to testify on own behalf. Ct. also found crucial issue was credibility of victim & her identification of D, & therefore error in exclusion of testimony was not harmless. Held, reversed & remanded for retrial, Givan, J., dissenting. (In concurrence, Shepard, C.J., emphasized that Baxter was based only on U.S. Const., & was still stare decisis as to federal issues resolved, but did not drive present decision concerning Ind.'s Bill of Rights.)

RELATED CASES: Palmer, App., 654 N.E.2d 844 (exclusion of D's alibi evidence was harmless error; record did not indicate means through which D would have offered testimony); Preston, App., 644 N.E.2d 585 (because D made proper objection to exclusion of evidence & his case was pending on direct appeal, holding in Campbell would be applied retroactively).

TITLE: Edwards v. State
INDEX NO.: M.5.b.
CITE: (7-13-10), 930 N.E.2d 48 (Ind. Ct. App. 2010)
SUBJECT: Evidence D was not at crime scene is not alibi evidence
HOLDING: Tr. Ct. erred in excluding testimony of defense witnesses because they were purported "alibi" witness and the D did not file a Notice of Alibi. Because the witnesses would have testified only that D was not at the scene (but not that the D was at another specific location), the witnesses were "rebuttal witnesses," not alibi witness, and thus D was not required to file a Notice of Alibi. The purpose of the alibi notice statute is to ensure that the prosecution is not surprised by alibi testimony that the D was somewhere else, so the statute sets a deadline for notice of alibi so prosecutor has ample time to investigate claim that the D was at another specific location. Testimony that a D was not at crime scene requires no further investigation.

Court rejected State's claim that error was harmless because there was not overwhelming evidence that D was at the scene. In doing so, the Court also said the right to present a defense, including the right to call certain witnesses, is a "fundamental element of due process of law." Held, judgment reversed and remanded for new trial.

TITLE: Gibbs v. State
INDEX NO.: M.5.b.
CITE: (1st Dist. 11/26/84), Ind. App., 471 N.E.2d 20
SUBJECT: Alibi - effect of state's failure to respond
HOLDING: Tr. Ct. properly allowed state to introduce evidence consistent with charging papers. Where state fails to respond to D's notice of Alibi Defense, Ind. Code 35-36-4-3 provides that Tr. Ct. must exclude evidence offered by state which varies from date/place of crime alleged in indictment/information.

RELATED CASES: Sisson, 985 N.E.2d 1 (Ind. Ct. App. 2012) (State need not respond where D does not request narrowed time-frame, and date of offense is hotly disputed at trial); Mayes, 467 N.E.2d 1189 (Indict 176; state need not respond to D's alibi notice unless D requests more specific statement re time/place crime committed; Ct. finds no variance).

TITLE: Griffin v. State
INDEX NO.: M.5.b.
CITE: (5th Dist., 4-16-96), Ind. App., 664 N.E.2d 373
SUBJECT: Erroneous exclusion of alibi evidence - reversible error
HOLDING: Tr. Ct.'s incorrect exclusion of alibi witnesses from trial affected D's substantial rights, & therefore required new trial. Ind. Code 35-36-4-1 requires D to file notice of intention to offer alibi defense no later than 20 days prior to omnibus date. Here, D's first attorney filed notice of alibi defense four days before original omnibus date. Tr. Ct. granted attorney's motion to withdraw & extended omnibus date by approximately 40 days. New attorney filed correction & clarification of pre-trial notice of alibi defense by adding new witnesses & also filed motion for extension of time to file notice of alibi defense, which Tr. Ct. denied as untimely. During trial, D proffered five witnesses' testimonial evidence of alibi after trial judge excluded their testimony. Ct. held that if omnibus date is moved, at least 20-day period between initial notice of alibi filing date & subsequent omnibus date is effectively created, & purposes of alibi statute are served by treating D's initial notice as timely filed. Because new omnibus date was set, D effectively filed his notice 20 days before omnibus date & thus it was timely filed. Applying harmless error standard, Ct. found that where, as here, D has testified regarding alibi, but all other alibi evidence has been erroneously excluded, excluded alibi evidence is not merely cumulative, but lends substantial credibility to D's testimony. While there was sufficient evidence to support D's guilt, Ct. held that excluded evidence's probable impact on jury affected D's substantial rights. Held, reversed & remanded.

TITLE: Jennings v. State
INDEX NO.: M.5.b.
CITE: (11/6/87), Ind., 514 N.E.2d 836
SUBJECT: Alibi - date; restriction of state's proof
HOLDING: Tr. Ct.'s instruction overriding alibi defense was reversible error. Filing of alibi defense does not impose on state greater burden of proof than usual. Merritt, 371 N.E.2d 382. Alibi defense does, however, make time of alleged defense critical. Quillen, 391 N.E.2d 817. Effect of state's answer to alibi notice is to restrict it to proof of date in answer. Here, despite D's alibi defense, Tr. Ct. instructed jury that if it found crimes charged were committed by D, state was not required to prove commission on particular date. Error is such that whole charge misled jury on law of case. [Citations omitted.] Held, reversed & remanded.

TITLE: Kappos v. State
INDEX NO.: M.5.b.
CITE: (7/17/84), Ind., 465 N.E.2d 1092
SUBJECT: Alibi - applicability; murder for hire
HOLDING: State's failure to respond to D's notice of alibi was not error because alibi notice provisions are inapplicable to D's situation (D paid third party $500 to murder his wife). Here, D filed notice of alibi & requested that state file specific statement re date/place D was alleged to have committed/participated in offense (murder). State refused to respond. Act of hiring another to commit murder does not fall within parameters of participation necessary to activate alibi statutes. Further, Ct. has refused to adopt rule excluding all evidence of events occurring outside time/spatial limits raised by notice of alibi. Woods, 235 N.E.2d 479; Lee, App., 328 N.E.2d 745. Held, no error.

TITLE: Kellems v. State
INDEX NO.: M.5.b.
CITE: (5th Dist., 6-7-95), Ind. App., 651 N.E.2d 326
SUBJECT: Erroneous exclusion of alibi evidence
HOLDING: In prosecution for Dealing in Cocaine, exclusion of D's alibi evidence was reversible error. Before trial, D filed timely notice of alibi, stating that on date & time in question he was in route from Kentucky to Ind., & was accompanied by his girlfriend & sister. Prosecutor filed perjury charges against D's alibi witnesses based on their depositions. When called by D to testify at trial, witnesses invoked their Fifth Amendment privilege against self-incrimination. D sought to introduce depositions, which Tr. Ct. ruled inadmissible under Ind. Evidence Rule 403. Ct. disagreed with reasoning of Tr. Ct. & concluded that admission of deposition testimony did not so prejudice State as to outweigh D's right to present witnesses essential to his defense. Truth or falsity of witnesses' testimony was matter for jury, & in this case Ct. perceived at most minimal prejudice to State in having to attempt to cast doubt on credibility of witnesses. It should not have been too difficult to discredit witnesses, because State thought it had sufficient information to obtain perjury convictions & had already demonstrated that probable cause existed to believe their testimony was perjured. Held, reversed & remanded for new trial. **Note:** Ct. noted that "propriety of prosecutor's actions in filing perjury charges against D's alibi witnesses, prior to D's trial, is certainly questionable."

TITLE: Manning v. State
INDEX NO.: M.5.b.
CITE: (4th Dist. 7/24/90), Ind. App., 557 N.E.2d 1335
SUBJECT: Alibi notice - D admits presence during part of time alleged
HOLDING: Where D admits presence at scene of offense during part of time offense was alleged to have been committed but offers evidence that he was elsewhere during remaining portion of time, alibi notice is required. D was charged with 2 counts of rape & 2 counts of confinement, based on offenses alleged to have occurred over 4-hour period. At trial, D admitted that he was present in victims' apartment, but testified that he was there for only 2 hours. D also sought to introduce testimony from another witness as to what time he arrived home on night in question, but Tr. Ct. ruled this evidence inadmissible because it constituted alibi evidence, & D had failed to file alibi notice as required by Ind. Code 35-36-4-1. Whether evidence offered here constitutes alibi evidence is question of first impression in Indiana. Michigan Ct. App. has held that such evidence is alibi evidence, because it is offered for sole purpose of placing D elsewhere than at scene of crime during its commission. People v. Watkins, (1974), 221 N.W.2d 437. Other jurisdictions have held otherwise. [Citations omitted.] Ct. App. here agrees with Michigan Ct. D argues that he had good faith belief that alibi notice was not necessary. D argues that because he offered evidence only to contradict victims' testimony as to how long he was in apartment, he believed that it was impeachment evidence rather than alibi. However, determination whether this misunderstanding constituted good cause for waiving alibi statute's notice requirements was within sound discretion of Tr. Ct., & Ct. App. finds no abuse of discretion. Ct. also rejects additional 5th & 6th Amend. arguments based on assertion that evidence was offered for purpose of impeachment. Held, conviction affirmed.

TITLE: McKinstry v. State
INDEX NO.: M.5.b.
CITE: (3rd Dist., 1-26-96), Ind. App., 660 N.E.2d 1052
SUBJECT: Admission of alibi statements during State's case-in-chief
HOLDING: Depending upon circumstances of utterance, D's false alibi statements may be found relevant & admissible as part of State's case in chief. Over defense objection, State was permitted to introduce in evidence D's statements to police that he had been visiting his mother at nursing home at time of robbery, together with contrary testimony from nursing home personnel that D had left by time of offense. D argued that this testimony was not relevant under Ind. Evid. Rule 401, or if it was, any relevance was substantially outweighed by its potential to unduly prejudice jury. In affirming Tr. Ct.'s discretion to admit this evidence, Ct. noted that before adoption of Ind. Rules of Evidence, decisions permitted evidence of false alibi to be introduced at trial to establish D's consciousness of guilt. Barton v. State, (1986), Ind., 490 N.E.2d 317; Harris v. State, (1972), 281 N.E.2d 85. Here, statements were made to police officers at time when attention was focused upon D as robbery suspect. It was well within province of trial judge to determine that D's statements created reasonable inference of attempted false alibi due to his consciousness of guilt. Held, judgment affirmed.

TITLE: Payne v. State
INDEX NO.: M.5.b.
CITE: (7/17/86), Ind., 495 N.E.2d 183
SUBJECT: Alibi - untimely filing; "good cause"
HOLDING: Ct. rejects D's contention that state's naming of co-D as witness provided good cause under statute to allow for his untimely filing of notice of alibi. Ind. Code 35-36-4-1; Ind. Code 35-36-4-3(b). Here, Ct. finds naming of co-D as witness did not in any respect change material allegations re charge/date/place/victim. Ct. notes that although Tr. Ct. properly disallowed D's alibi witness to testify, it did allow D himself to testify he was at another location when robbery occurred. Tr. Ct. was not required to allow such testimony even from D in absence of proper notice. Cf. James, 411 N.E.2d 618. Held, no error.

RELATED CASES: Harvey, App., 621 N.E.2d 362 (Ct. rejected D's good cause argument based on State's late production of tape recording of drug buy. After hearing tape, D claimed his voice was not on tape & attempted to show he was out of state on date of buy. Ct. noted information specifically charged date of offense as on or about April 8, 1992, & found D was aware of critical date since filing of information. D's lack of diligence in pursuing alibi until after receiving tape was not reasonable, & therefore did not constitute good cause.).

TITLE: Randall v. State
INDEX NO.: M.5.b.
CITE: (11/17/83), Ind., 455 N.E.2d 916)
SUBJECT: Alibi - notice used to impeach
HOLDING: Tr. Ct. did not err in permitting reference to D's notice of alibi during his cross-examination & in admitting notice of alibi into evidence. Here, D's direct testimony conflicted with specific times, places & individuals alleged in alibi notice. D attacks ruling on 2 grounds; (1) document is required pleading; (2) notice is neither certified to nor signed by D personally. Ct. finds notice of alibi is D's statement & is voluntarily filed. Admission of document was proper because references were being made to it. D's claim that he did not remember anything about notice of alibi goes to weight, not admissibility. Held, no error.

TITLE: Remsen v. State
INDEX NO.: M.5.b.
CITE: (7/18/86), Ind., 495 N.E.2d 184
SUBJECT: Alibi - instruction
HOLDING: Alibi instruction (set forth in opinion) did not destroy presumption of innocence or shift burden of proof to D on essential element of offense. Ct. distinguishes instruction given in present case with one pointed out in D's brief from case of Waters v. People (1898), 172 Ill. 367. Held, no error.

TITLE: Smith v. State
INDEX NO.: M.5.b.
CITE: (9/24/82), Ind., 439 N.E.2d 634
SUBJECT: Alibi - variance in state's proof
HOLDING: A variance by state during proof or argument as to time crime occurred from that alleged by state in response to D's notice of alibi is reversible only if of such a substantial nature that D was misled in preparing or maintaining a defense. Denton, 203 N.E.2d 539. See also Monserrate, 352 N.E.2d 721; Riddle, 275 N.E.2d 788. Here, state's response to alibi stated that attempted rape occurred at approximately 12:45 a.m., proof at trial was crime commenced at 12:25 a.m. & was completed at 12:45 a.m. Such variance did not mislead D or render his alibi useless. Held, no error.

RELATED CASES: Williams, 478 N.E.2d 47 (Crim. L 629; Tr. Ct. did not err in overruling D's motion to strike testimony of rape prosecutrix which indicated day of offense (9/1) different from time stated in information & state's response to D's notice of alibi (9/2); Ct. rejects D's reliance on statute [IC 35-36-4-3] authorizing exclusion of "evidence offered by [prosecutor]" under specified circumstances by finding varying testimony was in response to D's cross-exam & thus was not evidence offered by prosecutor; D was entitled to no more than reasonable continuance to expand alibi coverage to include 9/1).

TITLE: Sangsland v. State
INDEX NO.: M.5.b.
CITE: (4th Dist., 8-4-99), Ind. App., 715 N.E.2d 875
SUBJECT: Alibi defense - proof of precise dates alleged in State's answers not necessarily required
HOLDING: Mere fact that D raises alibi defense does not necessarily make time an essential element of offense. D argued that there was insufficient evidence to support his convictions because State failed to prove beyond reasonable doubt that burglary occurred between February 9 & 11, 1997, as alleged in State's answer to his notice of alibi. State's evidence at trial was consistent with that answer although there was evidence that suggested that crimes could have occurred as early as February 1. Any variance in time frame alleged & State's proof at trial did not circumvent or nullify D's opportunity to assert his alibi defense to jury. Although filing of notice of alibi makes time of offense critical or "of the essence," mere filing of alibi defense does not impose greater burden of proof on State than would be otherwise required absent such filing. Jennings v. State, 514 N.E.2d 836. Where State at trial restricts its proof to time frame within information or within its answer to notice of alibi, it has met its obligation under alibi statute. Stewart, 521 N.E.2d 675. Thus, proof of precise dates alleged in State's answer to D's notice of alibi was not necessary to sustain convictions. Held, convictions affirmed; Robb, J., concurring, believing that while time was of essence of the offenses, State met its burden of proof.

TITLE: Thurston v. State
INDEX NO.: M.5.b.
CITE: (1/4/85), Ind., 472 N.E.2d 198
SUBJECT: Alibi - state's response; adequacy; sex crime charged
HOLDING: Tr. Ct. did not err in denying D's motion to strike state's response to notice of alibi. Here, D contends state's response was overbroad because it encompassed 2-month period rather than indicating specific date of offense. Purpose of alibi statute is to narrow factual issues of time & place to degree practicable. Bruce, 372 N.E.2d 1042 (statement that murder occurred on 2/4/74 was as precise as reasonably possible & satisfied statute). State's proof showed weekly meetings & repeated sexually aggressive acts between D & 10-year-old victim on Thursdays over 3-hour time span. Victim was unable to recall/relate specific date. Ct. finds D's ability to adequately prepare defense was not affected. Held, no error.

RELATED CASES: McNeely, App., 529 N.E.2d 1317 (Crim L 629.5(6); Indict 87 (2); 2-week period sufficiently specific for child molest charge; state need not file response to alibi notice if it intends to prove time alleged in indictment); Clifford, 474 N.E.2d 963 (Indict 87(7); criminal deviate conduct conviction reversed on other grounds).

TITLE: Tolbert v. State
INDEX NO.: M.5.b.
CITE: (3/2/84), Ind., 459 N.E.2d 1189
SUBJECT: Alibi - specificity; state's answer
HOLDING: Tr. Ct. did not err in refusing to exclude state's evidence for failure to timely answer D's alibi notice where D knew specific time & place of crime through deposition of victim. Willis, 411 N.E.2d 696. Here, state filed answer first day of trial. D filed motion in limine same day to exclude all evidence relating to date crime allegedly occurred. D argued state had failed to timely file answer & that sanction under Ind. Code 35-5-1-3 [now Ind. Code 35-36-4-3] was exclusion of evidence. Despite mandatory language of statute, reversal is not required where D has not been misled in trial preparation/maintenance of defense/is not placed in double jeopardy. Williams, 406 N.E.2d 241. Purpose of notice of alibi is to narrow factual issues of time & place. Bruce, 375 N.E.2d 1042. State did not totally fail to file answer, as in Dew, 416 N.E.2d 1245 (held, Tr. Ct. erred in permitting state to introduce evidence re time/place). D was not misled in preparation/defense. D rejected continuance. Held, no error.

RELATED CASES: Graham, 464 N.E.2d 1 (D's notice of alibi stating he was in Indianapolis on date/time alleged in information was so broad it did not meet Ind. Code 35-5-1-1; state's failure to answer until trial was excusable; D refused continuance; held, no error).

TITLE: Tyree v. State
INDEX NO.: M.5.b.
CITE: (03-12-20), Ind. Ct. App., 143 N.E.3d 991
SUBJECT: Refiling of additional charges in response to Defendant's alibi notices
HOLDING: Trial court did not abuse its discretion in denying Defendant's motion to dismiss in response to State's refiling of charges (including additional charges) in response to Defendant's Notice of Alibi and Motion to Elect Specific Act. Defendant was charged with a single count of sexual misconduct with a minor. After he filed a Notice of Alibi, the State expanded the range of dates alleged and Defendant filed another, also expanded, Notice of Alibi. Defendant also filed a "Motion for State to Elect Specific Act for Which State of Indiana Intends to Seek Conviction," which trial court granted after State agreed its charging information was flawed or "sloppy." Subsequently, the State charged Defendant with three counts of sexual misconduct with a minor under a new cause number, refiling the original charge and adding two additional counts. At the probable cause hearing, the trial court denied Defendant's motion to dismiss the new cause number and *sua sponte* dismissed the prior cause. Distinguishing Davenport v. State, 689 N.E.2d 1226 (Ind. 1997), affirmed on *reh'g* 696 N.E.2d 870 (Ind. 1998), the Court of Appeals affirmed because Defendant brought an interlocutory appeal with no set trial date and the refiling of charges did not prejudice his ability to defend himself against the original or additional charges. Additionally, the charges in the new cause number involved the same complaining witness and roughly the same time frame.

TITLE: Washington v. State
INDEX NO.: M.5.b.
CITE: (2nd Dist., 01-19-06), Ind. App., 840 N.E.2d 873
SUBJECT: Late third-party alibi witness improperly excluded - harmless error
HOLDING: Tr. Ct. erred in excluding D's belated notice of alibi witnesses, but error was harmless because witnesses did not provide a complete alibi & other significant evidence existed that D committed burglary & kidnapping & conspired to commit kidnapping. After the jury was impaneled, D filed a late notice of alibi defense listing two independent witnesses to testify. D proffered two reasons for the late filing, including that several different attorneys had been assigned to D with present defense counsel coming to the case late & a miscommunication apparently occurred in counsel's office where counsel had dictated a notice to office staff but it did not get filed. Based on Baxter v. State, 522 N.E.2d 362 (Ind.1988), & Taylor v. Illinois, 484 U.S. 400 (1988), Court noted that a Sixth Amendment right to present a defense is not absolute & the statutory notice of alibi requirement negates unfair surprise to the State & the orderly administration of justice. These cases distinguished between willful delay to gain a tactical advantage & mere negligence. Belated filing in this case appeared to be the product of negligence rather than willful or purposeful misconduct & although State was prejudiced, the prejudice was not severe. Calling it a "close case," Court held D's rights under the Compulsory Process Clause were violated by the exclusion of witnesses.

However, an error in the exclusion of evidence is harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the D's substantial rights. Williams v. State, 714 N.E.2d 644 (Ind.1999). Here, D never argued the Sixth Amendment to the Tr. Ct.; D did not give good cause for the late filing under Ind. Code 35-36-4-3(b); D was able to testify to his alibi through his own testimony; &, as admitted by defense counsel, the witnesses did not offer a complete alibi & even with their testimony it would still have been possible for D to have participated in the kidnapping. Further, significant physical evidence linking D to the kidnapping was found on him at the time of arrest. D's rights under Art. 1, Sec. 13 of the Indiana Constitution were also violated, but Court likewise found harmless error. See Campbell v. State, 622 N.E.2d 495 (Ind.1993).

RELATED CASES: Saintignon, 118 N.E.3d 778 (Ind. Ct. App. 2019) (information concerning belated alibi witness came from D's self-serving explanation just days before trial that he was using drugs at time of murder which prevented him from remembering; good cause for late filing not shown).

M. DISCOVERY

M.5. Discovery by State

M.5.d. Physical evidence/samples

TITLE: Carr v. State
INDEX NO.: M.5.d.
CITE: (4-18-00), Ind., 728 N.E.2d 125
SUBJECT: Anesthetization for dental impression - no constitutional violation
HOLDING: State did not violate D's Fourth Amendment right to be free from unreasonable searches & seizures when it collected his dental impressions while he was anesthetized. Voluntary dental impression is easily performed without resort to anesthesia or serious bodily intrusion. More drastic procedures, including anesthesia, were required in this case because of D's refusal to comply with valid search warrant for dental impressions. Balancing test set forth by Winston v. Lee, 479 U.S. 753 (1985), is inapplicable where, as here, allegedly drastic & invasive procedure is necessitated by D's refusal to comply with valid search warrant. Held, judgment affirmed.

TITLE: Denton v. State
INDEX NO.: M.5.d.
CITE: (8/22/86), Ind., 496 N.E.2d 576
SUBJECT: Fingerprinting during trial
HOLDING: Tr.Ct did not err in compelling D to submit to fingerprinting during trial. Here, D contends such compulsion violates his 5th Amend. right against self-incrimination. Ct. finds right against self-incrimination protects D from testimonial compulsion & not against compulsory submission to physical tests such as fingerprinting. Kalady 462 N.E.2d 1299; Pearson 441 N.E.2d 468. Held, no error.

TITLE: In re C.T.L.
INDEX NO.: M.5.d.
CITE: 722 N.W.2d 484 (Minn.Ct. App. 2006)
SUBJECT: Search warrant required for DNA testing prior to conviction
HOLDING: Minnesota Court of Appeals held law enforcement officials must obtain a search warrant before requiring a person who has been charged with but not yet convicted of a crime submit a biological sample for DNA testing. Striking down a state law that compels Ds to provide such samples after a judge has found probable cause for criminal charges, the Court said such a finding cannot substitute for the determination of probable cause necessary to get a warrant to search for evidence in a particular place. State argued that the probable cause requirement was satisfied by the DNA statute itself because the law prohibits police officers from collecting a sample until a court has made a probable cause determination with respect to the D. However, "probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant." Probable cause to support a criminal charge exists when the relevant evidence against the D makes it reasonably probable that he engaged in the charged conduct, while probable cause to support the issuance of a search warrant exists when, under the totality of the circumstances, there is a fair probability that evidence of a crime will be found in a particular place. Court found that DNA statute was not consistent with Schmerber v. California, 384 U.S. 757 (1966), which established that probable cause to arrest a person does not, by itself, allow the state to take a blood sample from a charged person without a warrant. Court noted that statute, in essence, dispensed with the requirement that there is a fair probability that the search will produce contraband or evidence of a crime because the statute renders it unnecessary for anyone to consider whether the biological specimen to be taken is related in any way to the charged crime or to any other criminal activity. Court distinguished from cases holding that requiring criminal offenders to submit a sample for DNA testing without a warrant does not violate his right to be free from unreasonable searches and seizures, noting statutes involved in those case required samples to be taken after - not prior to - a D's conviction, at a time when a D has a reduced expectation of privacy that does not outweigh the State's interest in DNA testing.

TITLE: Kalady v. State
INDEX NO.: M.5.d.
CITE: (5/10/84), Ind., 462 N.E.2d 1299
SUBJECT: Samples from D - self-incrimination
HOLDING: Tr. Ct. properly ordered D (in bounced check case) to furnish handwriting sample. State needed sample to prove that D made & presented check. Self-incrimination protects D from testimonial compulsion. It does not protect against compulsory submission to purely physical tests such as fingerprinting, handwriting & voice exemplars. State ex rel. Keller v. Criminal Ct. of Marion County, 317 N.E.2d 433; Hollars 286 N.E.2d 166. Held, theft conviction affirmed.

RELATED CASES: Muniz, 496 U.S. 582 (1990) (requiring D to talk in order to illustrate slurred speech is not testimonial for purposes of privilege against self-incrimination); Gillie, 465 N.E.2d 1380 (taking hair samples from D did not violate D's Fifth Amendment privilege against self-incrimination); Ewing, App., 310 N.E.2d 571 (urinalysis can be categorized as test for real or physical evidence; it is not dissimilar to blood test or breathalyser test, and may be utilized over objection that such use would violate privilege against self- incrimination); McDonald, App., 328 N.E.2d 436 (State cannot order D to take polygraph exam because exam is protected under Fifth Amendment); Wade 490 N.E.2d 1097(Tr. Ct. grant of state's motion (accompanied by affidavit of probable cause) for oral examination & impression of D's teeth did not violate D's 5th Amend right against self-incrimination, *citing* Schmerber v. CA (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908); Hutchinson 477 N.E.2d 850 (no error in Ct.-ordered handwriting exemplar); Staggers 477 N.E.2d 539 (Tr. Ct. did not err in granting state's motion to compel fingerprint exemplars made on first day of trial, *citing* Scott 434 N.E.2d 86; D's only remedy was continuance to prepare for introduction of prints, which D did not seek); Partlow 453 N.E.2d 259 (request that D don jacket & demonstrate wearing & zipping it for Neville, 459 U.S. 553 (refusal to take blood test may be used in evidence without violating Fifth Amendment privilege against self-incrimination); Cupp, 412 U.S. 291 (taking of fingernail scraping does not involve personal intrusion). jury did not require D to incriminate himself); Smith, App., 496 N.E.2d 778 (even though D was in custody, Miranda warnings were not necessary before field sobriety tests because such tests are not testimonial or communicative in nature; case contains good review of case law on testing/samples).

TITLE: Pennsylvania v. Muniz

INDEX NO.: M.5.d.

CITE: 496 U.S. 582, 110 S.Ct. 2638 (1990)

SUBJECT: Physical evidence - D's statements at arrest for driving under influence of alcohol (DUI)

HOLDING: Tr. Ct. erred in admitting D's responses to police interrogation where responses were testimonial & incriminating, & D had not been advised of Miranda rights. Privilege against self-incrimination does not protect suspect from being compelled to produce "real or physical" evidence, but D may not be compelled to provide State with evidence of testimonial or communicative nature. Schmerber v. California, 86 S.Ct. 1826 (1966). In order to be testimonial, D's communication must explicitly or implicitly relate factual assertion or belief or disclose information. Doe v. U.S., 108 S.Ct. 2341 (1988). Here, police videotaped questioning & examination of D, who was DUI suspect, prior to giving Miranda warnings. Police asked D to state date of his sixth birthday & to perform field sobriety tests. D made incriminating statements regarding his state of inebriation & refused breathalyser test. D slurred his speech noticeably throughout questioning & did not know date of his sixth birthday. Both video & audio portions of videotape were admitted during D's bench trial. P.A.Sup.Ct. reversed conviction, finding that entire audio portion of videotape was testimonial in nature & inadmissible. Ct. found that slurring of speech & any other evidence of lack of muscular coordination were non-testimonial & admissible. D's voluntary statements made during sobriety tests were not prompted by interrogation & were also admissible.

In reference to D's responses to police interrogation, though, Ct. found that admissibility depends on whether incriminating inference is drawn from content of D's answer or from physical demonstration of mental confusion. Ct. found that D's statement that he could not recall the date of his sixth birthday was incriminating because of content of response. D was faced with "cruel trilema" of admitting he did not know answer, risking answering falsely or remaining silent, & inherently coercive environment created by custodial interrogation precluded option of remaining silent. Held, judgment of P.A.Sup.Ct. vacated & case remanded for further proceedings consistent with opinion.

RELATED CASES: South Dakota v. Neville, 103 S.Ct. 916 (1983) (Admission of D's refusal to submit to blood-alcohol test as evidence of guilt did not violate privilege against self- incrimination.)

TITLE: People v. Havrish
INDEX NO.: M.5.d.
CITE: 834 N.Y.S.2d 681, 866 N.E.2d 1009 (N.Y. 2007)
SUBJECT: 5th Amendment protected turning over unlicensed pistol
HOLDING: The New York Court of Appeals held that D's act of producing an unlicensed pistol in compliance with a protective order directing him to "surrender any and all firearms owned or possessed" was protected by his Fifth Amendment right against compelled self-incrimination. Court noted the case differs from others in which the compelled production of physical evidence has been held to fall outside the boundaries of the Fifth Amendment in that D's act of turning over the gun -- whose existence was unknown to the police at the time -- was both testimonial and incriminating. Distinguishing from Schmerber v. California, 384 U.S. 757 (1966), which allows the production of real or physical evidence such as fingerprints, handwriting samples, or a blood sample, Court held that here "the item produced is distinct from the act of production itself." Thus, "even when the thing demanded is not privileged, the act of production may be." The surrender of evidence -- even that which is not privileged -- may fall within the protection of the Fifth Amendment "if the very act of production has communicative or testimonial aspects."

The act of production doctrine is often applied to the surrender of subpoenaed documents, but the Supreme Court made clear in U.S. v. Fisher, 425 U.S. 391 (1976), that the Fifth Amendment privilege does not come into play where the existence and possession of the subpoenaed records are a "foregone conclusion." Thus, whether D's act of producing the unlicensed handgun was privileged turned on: (1) whether the compelled act of production was sufficiently testimonial, and (2) whether the act was incriminating.

Evidence is testimonial for purposes of the Fifth Amendment "when it reveals a D's subjective knowledge or thought processes -- when it expresses the contents of the D's mind." Court noted that the act of surrendering evidence can itself be testimonial if it confirms that the item demanded exists or is in the D's possession when those facts are unknown to the authorities and would not have been discovered by them through independent means. If the authorities know that a D possesses a certain item, then its production will not be sufficiently testimonial to implicate the Fifth Amendment. However, if it is not a "foregone conclusion" that the physical evidence is within D's control, then the act of production itself may be testimonial. Court also found that the surrender of the handgun to police was sufficiently incriminating to give rise to Fifth Amendment protection.

TITLE: Sipress v. State
INDEX NO.: M.5.d.
CITE: (3rd Dist., 11-20-90), Ind. App., 562 N.E.2d 758
SUBJECT: Physical evidence - court-ordered demonstration by D at trial
HOLDING: Where D claimed that alleged abuse of his minor child was accidental, Tr. Ct. did not err in forcing D to demonstrate in open court how child victim's injuries were caused. It is within Tr. Ct.'s discretion to permit physical demonstration in courtroom. Partlow, 453 N.E.2d 259. Here, D testified on direct examination that he was holding kettle full of hot water when, in attempt to push family dog away from child, water from kettle burned his hand, causing him to spill scalding water onto his daughter. On cross-examination, State asked D to stand up and demonstrate how incident occurred. D argued that he could not duplicate incident and that requiring him to do so ultimately misled jury and resulted in prejudice. Ct. found that D's difficulty re-creating incident merely went to his credibility as witness, and Tr. Ct. did not abuse its discretion in requiring demonstration. Held, judgment of Tr. Ct. affirmed.

RELATED CASES: Murray, 182 N.E.3d 270 (Ind. Ct. App. 2022) (5th Amendment right against self-incrimination is not violated when a defendant is ordered to show their teeth to the jury because doing so is a non-testimonial physical demonstration); Dooley, 428 N.E.2d 1 (Where D in rape trial had gained considerable amount of weight between time of crime and time of trial, State was allowed to weigh D during trial because information was not privileged and was relevant to victim's description of her assailant.); Allen, 428 N.E.2d 1237 (Privilege against compulsory self-incrimination did not preclude Tr. Ct. from ordering D to speak aloud in court words spoken by perpetrator at time of robbery.); Springer, App., 372 N.E.2d 466 (privilege against self-incrimination does not protect D against compulsion to display hands to jury).

TITLE: Thompkins v. State
INDEX NO.: M.5.d.
CITE: (12/27/78), Ind., 383 N.E.2d 347
SUBJECT: Physical evidence/samples -- discovery of body requires court order
HOLDING: Ordering of blood sample, without search warrant, from D, who was charged with crime was not error. At trial, serologist who analyzed D's blood testified that blood sample had been taken according to accepted medical practices. Court held that where blood test is performed in proper manner pursuant to discovery order and required no unreasonable intrusion into D's person, there is no error in admission of D's blood test results. Held, affirmed and remanded with instructions.

TITLE: Turner v. State
INDEX NO.: M.5.d.
CITE: (6/4/87), Ind., 508 N.E.2d 541
SUBJECT: Samples from juvenile D - fingerprinting
HOLDING: Blood, saliva, & fingerprint samples were properly taken from juvenile D. Here, D was waived to adult Ct. on charges of rape, robbery, & burglary. Ct. rejects D's contention that samples were taken without proper waiver of his constitutional rights as required by Lewis 288 N.E.2d 138 & Ind. Code 31-6-7-3. These constitutional rights do not extend to compulsory submission to purely physical tests such as giving blood samples, fingerprinting, & giving voice or handwriting exemplars. Kalady 462 N.E.2d 1299; Clark 436 N.E.2d 779. Police substantially complied with juvenile code in taking these physical tests. Ind. Code 31-6-8-1.5 provides for fingerprinting & photographing of juveniles. Here, police found fingerprints at scene of crime & had probable cause to believe prints were D's since victim knew D & identified him as perpetrator. Ct. rejects D's construction of statute that would require written notice to child & parent be given prior to taking fingerprints. Held, conviction affirmed.

TITLE: Winston v. Lee
INDEX NO.: M.5.d.
CITE: 470 U.S. 753 (1985)
SUBJECT: Discovery by State -- obtaining physical evidence; constitutional violations
HOLDING: Shopkeeper, who was wounded by gunshot during attempted robbery, shot his assailant. Shopkeeper later identified assailant at hospital. Thereafter, Commonwealth of Virginia moved in State Ct. for order directing D to undergo surgery to remove bullet from D. However, bullet was found to be deeper than originally thought & surgeon concluded that general anesthetic would be needed. D eventually enjoined threatened surgery in district Ct., & Ct. of appeals affirmed. Ct. held that surgical intrusion to recover bullet was unreasonable under Fourth Amendment where surgery would require suspect to be put under general anesthesia, where medical risks, although apparently not extremely severe, were subject of considerable dispute, & where there was no compelling need to recover bullet in light of other available evidence. Held, affirmed Burger, C. J., concurring.

RELATED CASES: Rochin, 342 U.S. 165 (police officers broke into suspect's room, attempted to extract narcotics capsules he had put in his mouth, took him to hospital, & directed that emetic be administered to induce vomiting; Ct. recognized individual's interest in human dignity & held search & seizure unconstitutional under Due Process Clause); Schmerber, 384 U.S. 757 (in footnote 9, Ct. disapproved of State threatening use of intrusive test in order to extract confession).

M. DISCOVERY

M.5. Discovery by State

M.5.e. Documents/reports/exhibits

TITLE: Akinribade v. State

INDEX NO.: M.5.e.

CITE: (01/27/2023) Ind. Ct. App., 202 N.E.3d 468

SUBJECT: Discoverability of defense expert's consultation report -- no showing of substantial need or exceptional circumstances

HOLDING: In rape prosecution, trial court abused its discretion in ordering Defendant to disclose his DNA expert's entire consultation summary of the State's lab report. The State's DNA analyst generated a profile from Defendant's DNA sample and compared it with DNA profiles generated from the alleged victim's sexual assault kit, then compiled a report of her findings. Defendant obtained a copy of the report and retained an expert who prepared a seven-page "Consultation Summary." During Defendant's deposition of the State's analyst, Defendant handed her the consultation summary's third page, which was entered into the record, and questioned her about it. Following the deposition, the State requested disclosure of the entire summary, which the trial court granted without a hearing. Defendant then filed a motion to reconsider, acknowledging that although the State is "entitled to reports and identities of any expert witnesses" intended to be called as witnesses at a trial or hearing, he did not intend to call any expert witnesses other than the State's analyst, thus his expert's consultation summary was protected by the work-product privilege. At a hearing on the motion to reconsider, the Sate argued Defendant waived the privilege with respect to the entire summary by introducing the single page into evidence at the DNA analyst's deposition. The trial court agreed with the State and an interlocutory appeal ensued.

In a split decision, the Court of Appeals held that Defendant waived any objection to the disclosure of one page of the summary that he introduced into evidence at the deposition, but the State failed to make the requisite threshold showing of either substantial need or exceptional circumstances to justify disclosure of the remaining pages of the summary under Indiana Trial Rule 26(B). Thus, the Court did not reach the question of whether Defendant waived the work-product privilege pursuant to Indiana Evidence Rule 502. Held, judgment affirmed in part, reversed in part, and remanded. May, J., dissenting, argued that Defendant waived work-product privilege when he intentionally introduced a portion of the expert report during a deposition, opening the door to discovery of all seven pages pursuant to Indiana Evidence Rule 502(a).

TITLE: Doe v. United States

INDEX NO.: M.5.e.

CITE: 487 U.S. 201, 108 S. Ct. 2341, 101 L.Ed.2d 184 (1988)

SUBJECT: Privilege against self-incrimination - non-testimonial compulsion

HOLDING: 5th Amend. privilege against self-incrimination protects person from being incriminated by his own compelled testimonial communications. Fisher v. US (1976), 425 U.S. 391, 409, 96 S.Ct. 1569, 48 L.Ed.2d 39. Here, court ordered D to sign consent decree which authorized foreign banks to disclose records of any accounts over which D had right to withdraw funds, without identifying or acknowledging existence of any such account. 5th Amend. protects only against compelled testimony. In order to be testimonial, D's communication must, itself, explicitly or implicitly, relate factual assertion or disclose information. Execution of consent decree, here, is not testimonial because it is drafted in such a way that it does not acknowledge existence of any account. Executed form allows Government access to potential source of evidence, it does not point Government toward information that will assist in prosecution. Nor does compelled act of signing have any testimonial significance. By signing form, D makes no statement, explicit or implicit, regarding existence of foreign bank account. Act of signing does not admit authenticity of any records produced by bank. Held, privilege against self-incrimination is inapplicable because compelled act of signing consent decree is not "testimonial." Stevens, DISSENTS.

RELATED CASES: U.S. v. Hubbell, 120 S.Ct. 2037 (2000) (act of producing subpoenaed documents may have compelled testimonial aspect; see full review at J.8.d). Seo v. State, 109 N.E.3d 418 (Ind. Ct. App 2018) (Tr. Ct. may not order a criminal defendant to unlock her smartphone, even in the presence of probable cause because such an order violates her guarantee against self-incrimination under the 5th & 14th amendments; see full review at J.8.a)

M. DISCOVERY

M.6. Sanctions/remedies

TITLE: Baughman v. State
INDEX NO.: M.6.
CITE: (11-6-02), Ind. App., 777 N.E.2d 1175
SUBJECT: Imposition of sanctions for violation of discovery process - hearing required
HOLDING: Tr. Ct. erroneously imposed sanctions against D & her defense attorney for abuse of subpoena power without first conducting hearing. Trial judge ordered D to pay $250 to Jennings County based only on State's assertions that police officers had been subpoenaed to deposition where they were not asked questions relating to charge, but rather were subjected to "fishing expedition" for statements regarding officer's tactical approach to stopping vehicles. When party files petition for imposition of sanctions, Tr. Ct. must ordinarily conduct hearing thereon to determine whether reason for not imposing sanctions exists. Hatfield v. Edward J. DeBartolo Corp., 676 N.E.2d 395 (Ind. Ct. App. 1997); Ind. Trial Rule 37(B). Neither D nor her attorney were given opportunity to respond to State's request for sanctions; thus, Tr. Ct.'s order imposing sanctions may not stand. Held, judgment reversed & remanded.

TITLE: Gossmeyer v. State
INDEX NO.: M.6.
CITE: (8/28/85), Ind., 482 N.E.2d 239
SUBJECT: Sanctions/remedies -- missing witness instruction
HOLDING: D tendered instruction proposing that since State had failed to produce certain witness at trial, jury should infer that witness's testimony would have been unfavorable to State. Tr. Ct. had refused tendered "missing witness" instruction which is not generally favored in Indiana. Hedrick, 430 N.E.2d 1150. D appealed & claimed that this was error. Court held that instruction calling for adverse inference to be drawn from failure to produce certain evidence is appropriate only where evidence withheld is material to trial issues & not cumulative & that there was no such showing here. Held, conviction affirmed.

RELATED CASES: Ray, App., 838 N.E.2d 480 (no error in denying D's jury instruction placing a presumption that evidence not produced by the State would be unfavorable to the State; State's experts provided an explanation for the missing evidence & the instruction misled & invaded the province of the jury); Whitehair, 654 N.E.2d 296 (no error in refusing missing witness instruction; appropriate only when witness is available to be produced by one party but not the other, Metcalf, 451 N.E.2d 321).

TITLE: Murray v. State
INDEX NO.: M.6.
CITE: (12/14/82), Ind., 442 N.E.2d 1012
SUBJECT: Discovery sanctions/remedies
HOLDING: Tr. Ct. given wide latitude in discovery proceedings. Harris 425 N.E.2d 112; Spears 401 N.E.2d 331; Johns 240 N.E.2d 60. Prosecutor's duty to disclose measured by whether evidence in his/her possession is so "obviously exculpatory" that failure to turn it over denies D fair trial. US v. Agurs (1976), 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342; Richard 382 N.E.2d 899. Mere possibility undisclosed info might have helped defense or might have affected outcome of trial does not establish materiality in constitutional sense. Agurs; Birkla 323 N.E.2d 645; Dillard 274 N.E.2d 387. If properly discoverable evidence is revealed for first time at trial, D has 2 remedies: (1) move for continuance; (2) move for exclusion of evidence. Reid 372 N.E.2d 1149. Evidence is excludable when Tr. Ct. finds proscutor blatantly & deliberately refused to comply with discovery order. Sparks 393 N.E.2d 151; Reid; Johnson, App., 384 N.E.2d 1035. Imposition of sanctions for failure to comply with discovery orders is discretionary rather than mandatory. Rowley 394 N.E.2d 928; Popplewell 281 N.E.2d 79. Only upon clear error may Tr. Ct.'s determination on violations/sanctions be overturned (Reid) & then only upon showing error prejudiced D (Smith 432 N.E.2d 1363). Here, D points out eight failures of state to comply with discovery. Ct. examines each, finds state filed eight supplemental responses to discovery in attempt to comply with discovery obligations & finds no evidence of prosecutorial bad faith. Held, no error.

M. DISCOVERY

M.6. Sanctions/remedies

M.6.a. Motion to compel

TITLE: Beville v. State
INDEX NO.: M.6.a.
CITE: (3/17/2017), 71 N.E.3d 13 (Ind. 2017)
SUBJECT: Erroneous denial of motion to compel video of controlled buy
HOLDING: Trial court abused its discretion in denying Defendant's motion to compel video recording of an alleged controlled buy between him and a confidential informant, which he argued was fundamental to preparing a defense. The State argued that the informer's privilege entitled it to withhold disclosing the recording and that defense counsel could review it in the prosecutor's office. If the State meets its initial burden to demonstrate the informer's privilege applies, the three-part test for analyzing discovery requests set forth in Dillard v. State, 274 N.E.2d 387 (Ind. 1971) is not reached. In re Crisis Connection, Inc., 949 N.E.2d 789 (Ind. 2011). A valid assertion of the informer's privilege shifts the burden to the defendant to demonstrate that disclosure of the requested evidence is either relevant and helpful to his defense or necessary for a fair trial. In a situation in which it is unknown whether the informer's privilege applies, the State could ask the trial court to review the video in camera to determine whether it contains privileged information.

Here, the State failed to meet its burden of establishing the essential elements of the privilege (i.e., that the C.I.'s identity would be revealed if Defendant's discovery request is granted). Accordingly, trial court's denial of the motion to compel was an abuse of discretion. But even if the State had proven that the video would have revealed the informant's identity, Defendant would still have been entitled to the video because he carried his burden of establishing that the evidence was "relevant and helpful to his defense." Schlomer v. State, 580 N.E.2d 950 (Ind.1991). The State planned to admit the video recording at trial in lieu of calling the C.I. to testify, thus counsel reviewing the video with Defendant was "fundamental" to preparing his defense.

Where, as here, the defendant demonstrates that an exception to the informer's privilege applies, State must show why disclosure of this specific video is not necessary or that disclosure would threaten its ability to use or recruit C.I.s in the future. Other than asserting general policy reasons underlying the informer's privilege, the State presented no evidence to satisfy this burden. Held, transfer granted, Court of Appeals' opinion at 51 N.E.3d 1282 vacated, denial of motion to compel reversed.

TITLE: Glover v. State
INDEX NO.: M.6.a.
CITE: (11/30/82), Ind., 441 N.E.2d 1360
SUBJECT: Discovery remedies - motion to compel
HOLDING: If D does not utilize methods to compel appearance at deposition, D cannot later complain that witness' failure to attend deposition is sufficient grounds for exclusion of their testimony at trial. TR 45(D) provides for issuance of subpoenas for taking depositions; TR 45(F) indicates failure to obey subpoena is deemed contempt of Ct., absent adequate excuse. Held, Tr. Ct. did not abuse discretion in allowing testimony.

TITLE: Hinkle v. State
INDEX NO.: M.6.a.
CITE: (3/26/2018), 97 N.E.3d 654 (Ind. Ct. App 2018)
SUBJECT: Motion to compel post-conviction discovery properly denied; no right to discovery for mere "possible" claims
HOLDING: Because D's broad, vague discovery request in his post-conviction action merely sought to investigate possible ineffective assistance of counsel and Brady claims instead of seeking information to vindicate actual claims, the Tr. Ct. did not abuse its discretion in denying D's motion to compel the State to provide discovery.

D was charged with molesting S.B. S.B. made several video-taped statements. The State allowed trial counsel to review the State's entire file, including the videos, but only because counsel signed the State's "Discovery Compliance Agreement," which barred counsel from revealing privileged information to "anyone," which apparently included D. D was convicted of Class A felony Child Molesting and D felony Sexual Misconduct with a Minor and was adjudicated as a repeat sexual offender. In his post-conviction case, he asked the State to provide, inter alia, "all documents, reports, affidavits, memorandum, police reports, [and] audio / videos" related to the case and "any and all" information that might support a claim that trial counsel was ineffective. The State declined the request, *citing* the Discovery Compliance Agreement, so D filed a motion to compel, which the post-conviction court denied.

Post-conviction relief is "not a device for investigating possible claims but a means for vindicating actual claims." Roche v. State, 690 N.E.2d 1115, 1132-33 (Ind. 1997) (*quoting* State v. Marshall, 690 A.2d 1, 91-92 (N.J. 1997) (Emphasis added)). "[T]here is no post-conviction right to 'fish' through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief may exist." Id. Thus, it is not enough, as D did here, to allege that the requested discovery might divulge Brady violations or instances of ineffective assistance. See Roche, 690 N.E.2d at 1133. Accordingly, the post-conviction court did not abuse its discretion in denying D's motion to compel. Held, judgment affirmed.

M. DISCOVERY

M.6. Sanctions/remedies

M.6.b. Exclusion of evidence

TITLE: Alexander v. State
INDEX NO.: M.6.b.
CITE: (1st Dist., 12-23-04), Ind. App., 819 N.E.2d 533
SUBJECT: Exclusion of D's expert witness - reversible error
HOLDING: Tr. Ct. abused its discretion in excluding an expert witness revealed only after Ct.-appointed experts all found D to be sane at time he killed wife. Tr. Cts. have discretion to exclude belatedly disclosed witnesses upon evidence of bad faith or a showing of substantial prejudice. Williams v. State, 714 N.E.2d 644 (Ind. 1999). However, a strong presumption exists to allow testimony for the defense in these situations because of D's constitutional right to compulsory process. Although on appeal State argued bad faith, Ct. did not address it as this reason was not forwarded at trial & the Tr. Ct. did not base its exclusion on bad faith. Ct. rejected Tr. Ct.'s substantial prejudice finding where rebuttal witness, who previously had only been retained as a consulting expert, was disclosed two weeks prior to trial & soon after Ct.-appointed experts rendered their adverse opinions. Witness exclusion is an extreme measure & under these circumstances Tr. Ct. should have either allowed the defense expert to testify or provided the State a brief continuance to investigate the expert's testimony & retain its own expert. Publicity surrounding the trial & a congested calendar did not justify the exclusion of the defense witness. Further, Ct. could not find harmless error as the expert here was the sole witness prepared to testify that D was insane at time of crime. Held, conviction reversed & remanded.

RELATED CASES: Escobedo, 987 N.E.2d 103 (Ind. Ct. App 2013) *sum. aff'd*, 989 N.E.2d 1248 (no error in allowing D's late-disclosed expert witness to testify while limiting the subject area of his testimony, which balanced interests of both parties); Vasquez, 868 N.E.2d 473 (an accused citizen's rights to present evidence & to have a fair trial "are of immense importance"; here, Tr. Ct. improperly excluded testimony of late-disclosed defense witness).

TITLE: Beavers v. State
INDEX NO.: M.6.b.
CITE: (7/24/84), Ind., 465 N.E.2d 1388
SUBJECT: Discovery remedies - exclusion of evidence [witnesses]
HOLDING: Tr. Ct. did not err in denying D's motion to strike testimony for failure to comply with discovery order. Here, prosecution was to produce prior convictions of its witnesses & did not disclose any for co-D/witness Duh. Duh told defense counsel immediately before trial he had prior MO conviction. During cross-exam, counsel's attempts to explore conviction were curtailed. D moved to strike Duh's testimony. Duh's conviction had been expunged. Motion to strike testimony is severe sanction proper only upon showing prosecution engaged in deliberate/reprehensible conduct that thwarted/obstructed legitimate aims of discovery order. Brown 417 N.E.2d 333. Prosecution made reasonable efforts to discover witness' prior convictions without success. Held, no error.

RELATED CASES: Lindsey, App., 877 N.E.2d 190 (where D, with the exercise of due diligence, could have determined State had proof of D's prior convictions to prove the HSO, D could not then argue State's failure to disclose its documentary proof, i.e., State's exhibits 1, 2, 4, & 5, prejudiced him); Phillips, 550 N.E.2d 1290 (even if State had violated Tr. Ct.'s discovery order by failing to inform D of particular witness, D would not have been entitled to have that witness' testimony stricken where prosecution had not attempted to hide witness or block D's access to him); Shumaker 523 N.E.2d 1381 (exclusion of witnesses proper even though omission was inadvertent; omission continued throughout state's case-in-chief, & witness' testimony was largely cumulative); Averhart 470 N.E.2d 666 (Tr. Ct. did not err in denying D's motion for mistrial; exclusion of evidence was proper where nondisclosure by state of report & fingerprint index cards was inadvertent & evidence was not exculpatory); Taylor v. Illinois (1988), U.S., 108 S.Ct. 646, 98 L.Ed.2d 798 (witnesses may be excluded as discovery sanction without offending 6th Amend. when discovery violation willful & blatant); Hovis, 455 N.E.2d 577 (Tr. Ct. did not err in allowing testimony of State's witness whose prior criminal history was not revealed until trial despite discovery order requiring disclosure; late compliance with discovery order is insufficient to impose sanction of exclusion of evidence).

TITLE: Cain v. State
INDEX NO.: M.6.b.
CITE: (10-18-11), 955 N.E.2d 714 (Ind. 2011)
SUBJECT: Mid-trial plea with co-D - no error in exclude co-D's testimony
HOLDING: Tr. Ct. did not abuse its discretion by refusing to exclude co-D's testimony when the prosecutor waited until trial had begun to offer him a plea. Exclusion of evidence due to a discovery violation is only appropriate if the D shows that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the D from receiving a fair trial. Here, D and three others were charged with Murder, Felony Murder and Robbery. D initially confessed to being the trigger man, but later recanted. The prosecutor referred to this case as a "Let's Make a Deal Prosecution," in which she offered plea deals to the three co-Ds in exchange for their testimony against D. One co-D took the deal before trial and testified at D's trial. Another originally entered into a plea agreement but later withdrew from the agreement. And the third co-D, Hess, consistently rejected the prosecutor's offer until the first day of D's trial, when the State offered Hess a drastically lower charge and sentence. Prosecutor claimed that she waited until the first day of D's trial to offer Hess the better plea because she wanted to wait until the second co-D's plea was officially withdrawn. Whether she based this decision on ethics or tactics is immaterial. It was her decision to make and there is no evidence that she made it with the deliberate or intentional aim to deprive D of a fair trial. Nor is there any other evidence of bad faith or otherwise reprehensible conduct. Moreover, D also failed to show evidence of unfair surprise or substantial unfair prejudice resulting from Hess's decision to testify. Prosecutor told D about the plea the day the agreement was reached, D was given the opportunity to depose Hess and Hess was listed as a State's witness all along in light of D's confession (although recanted) to the murder, Hess's testimony was not a substantial blow to the defense. Thus, under these circumstances, Tr. Ct. was well within its discretion to deny D's motion to exclude Hess=s testimony. Held, judgment affirmed.

RELATED CASES: Tavake, 131 N.E.3d 696 (Ind. Ct. App. 2019) (D waived argument that the State belatedly gave him evidence because he failed to request a continuance and there was no indication the State's late disclosure was intentional).

TITLE: Lewis v. State
INDEX NO.: M.6.b.
CITE: (2nd Dist., 10-13-98), Ind. App., 700 N.E.2d 485
SUBJECT: Discovery sanctions - failure to exclude evidence; reversible error
HOLDING: Exclusion of evidence as remedy for discovery abuse is only proper where there is showing that State's actions were deliberate or otherwise reprehensible, & this conduct prevented fair trial. Cliver, 666 N.E.2d 59. Here, two days prior to trial, State informed D that it intended to introduce fingerprint evidence taken from scene of burglary. Tr. Ct. erred in refusing to exclude this evidence, which should have been disclosed to D within thirty days of initial hearing, pursuant to local automatic discovery rule.

Ct. held that State's disclosure of this evidence immediately before trial prejudiced D in his consideration of plea offer. Had D known of evidence withheld by State & had defense counsel had more than ten minutes to discuss plea offer with him, D could have avoided seven & one half years of prison time.

Even if State's conduct was neither deliberate nor reprehensible, thereby eliminating exclusion of evidence as remedy, Tr. Ct. still committed error by refusing to provide D with continuance without limitation. D did not waive his right to challenge admission of this evidence due to his failure to request continuance, because Tr. Ct. affirmatively stated that it would not grant continuance unless it appeared that there was problem with how fingerprint evidence was collected. Held, rehearing granted, convictions vacated & remanded for new trial; Garrard, J., dissenting.

TITLE: Lockhart v. State
INDEX NO.: M.6.b.
CITE: (5th Dist., 10-7-96), Ind. App., 671 N.E.2d 893
SUBJECT: Exclusion of defense witness & medical evidence - no error
HOLDING: Tr. Ct. properly excluded from evidence testimony of urologist & D's medical record, which D offered to demonstrate continuing impotency problem beginning before alleged incidents of child molestation. State's motion to exclude this evidence was granted because urologist was not on witness list, & medical record had never been disclosed to State. Tr. Ct. concluded that although defense counsel did not intentionally violate pretrial discovery order, oversight was equivalent of bad faith & that State would suffer substantial prejudice from any delay. Ct. found that Tr. Ct. thoroughly reviewed factors enumerated by Wiseheart v. State, 491 N.E.2d 985, when it assessed both parties' right to fair trial & D's right to present witnesses. Held, judgment affirmed.

TITLE: Mahrdt v. State
INDEX NO.: M.6.b.
CITE: (1st Dist., 02-14-94), Ind. App., 629 N.E.2d 244
SUBJECT: Discovery sanction - exclusion of evidence
HOLDING: Where State refused to comply with discovery order allowing D to inspect breath test device, Tr. Ct. abused discretion in refusing to suppress evidence of breath alcohol content (BAC) test results. D was given two breath tests on BAC Datamaster, one yielding result of .14% BAC, & the other not being recorded. D immediately filed request to inspect Datamaster & run sample test, & Ct. granted expedited hearing because machine has to be recertified every 180 days, & at latest certification (one month previously) machine experienced voltage problems. Recertification destroys all evidence of whether machine was working properly. D's expert testified that video of breath test indicated machine might have voltage setting problems, & Ct. granted motion to inspect if member of Dept. of Toxicology (IDT) was present. When IDT refused to attend inspection, D obtained order requiring IDT to be present & monitor inspection on August 3, 1992, but when member arrived, he refused to give secret access code & key to machine so tests could be conducted. D then filed another petition, asking for order commanding IDT to cooperate. Tr. Ct., without notifying parties, called Sheriff's office to reschedule inspection, & learned IDT had recertified machine on August 3, same day it failed to cooperate in D's test. Tr. Ct. informed parties of situation & denied petition for reinspection. D's motion to suppress test results was denied, & interlocutory appeal followed.

Ct. rejected State's argument that Tr. Ct. had merely ordered IDT to "monitor" inspection & didn't require him to cooperate. Ct. found State violated first discovery order when IDT refused to attend & violated second discovery order when it refused to provide access code & key. Ct. found State's arguments that D's expert could have attempted test without access code & key or tested machine by having person with known alcohol contest submit breath sample, to be "risible," (laughable, comical) noting order did not limit testing methods available. Ct. also rejected State's argument that D intended to tamper with machine rather than inspect it, because order for IDT to be present would have inhibited any tampering. Ct. found refusal to provide access code & key effectively denied access to machine & violated discovery order.

Although Tr. Ct. has wide discretion in dealing with discovery abuses, exclusion of evidence may be proper for flagrant & deliberate noncompliance, Vanwaye, 541 N.E.2d 523. Here entry of discovery order shows Tr. Ct. found D had right to examine machine, & test result's accuracy was crucial to defense. Ct. relied on Turnbaugh, 521 N.E.2d 690, 692-93, where Ct. stated: "A serious breach of duty occurs when the prosecution willfully or intentionally, when unjustified by a public policy, obstructs the access of the defense to material evidence in its possession. It is likewise a serious breach when through lack of vigilance the negligent destruction or withholding of material evidence by law enforcement officers or the prosecutor occurs. In such instances ground for reversal may exist." Ct. found if misconduct can justify reversal, it should also merit exclusion of evidence on interlocutory appeal. Because D showed sufficient prejudice from State's violation, Tr. Ct. abused discretion in failing to suppress test result. Held, affirmed in part, reversed in part.

TITLE: Meredith v. State
INDEX NO.: M.6.b.
CITE: (5-6-97), Ind., 679 N.E.2d 1309
SUBJECT: Violation of local discovery rule did not require exclusion of evidence
HOLDING: Tr. Ct. did not err in denying D's motion to exclude witnesses pursuant to local criminal discovery rule, which requires State to furnish names & last known addresses of potential witnesses. Before Tr. Ct. may set aside its own rule, Tr. Ct. must assure itself that it is in interests of justice to do so, that substantive rights of parties are not prejudiced, & that rule is not mandatory rule. American States Ins. Co. v. State, 258 Ind. 637, 283 N.E.2d 529 (1972). Here, Tr. Ct.'s waiver of local discovery rule did not require reversal because: 1) D was not prejudiced by waiver, nor did he argue that he was prejudiced; 2) justice was advanced, not hindered, by waiver, as D was able to fully present defense; & 3) rule is not mandatory rule requiring strict compliance. Tr. Ct. properly considered both rule & its reason in deciding to waive compliance. Held, no error.

RELATED CASES: S.T., 764 N.E.2d 632 (D received IAC based on counsel's failure to object to State's motion to exclude belatedly disclosed defense witnesses).

TITLE: Null v. State
INDEX NO.: M.6.b.
CITE: (2nd Dist., 1-27-98), Ind. App., 690 N.E.2d 758
SUBJECT: Discovery sanctions/remedies - exclusion of demonstrative evidence
HOLDING: Tr. Ct. did not err by excluding tape of small scale burn test conducted by D's expert & written synopsis of test offered as demonstrative evidence. Tr. Ct. is usually in best position to determine what remedial measures are appropriate when there has been failure to provide discovery. Here, defense counsel did not acknowledge existence of these exhibits until State had completed its case in chief, & thus, State did not have opportunity to view exhibits. Because these exhibits did not comply with discovery guidelines, Tr. Ct. properly excluded them. Third exhibit consisted of two videotapes containing demonstrations of fires. Tr. Ct. properly excluded exhibit due to numerous differences in material displayed on videotape & conditions present at crime scene. Held, judgment affirmed.

TITLE: Patel v. State
INDEX NO.: M.6.b.
CITE: (1/30/89), Ind., 533 N.E.2d 580
SUBJECT: Discovery sanctions - surprise witness & surprise exhibit
HOLDING: Admission of sketch of crime scene, with bullet trajectories drawn, while police officer was on stand, was properly allowed. State first became aware of exhibit on morning of trial, & police officer was "one of those mentioned in police reports," as specified by State in reply to defense discovery of witness list. Exclusion of evidence is proper remedy for discovery violation only when non-compliance with discovery order is blatant & deliberate; no such showing made here. Boyd (1985), 485 N.E.2d 126. Affirmed.

TITLE: Rohr v. State
INDEX NO.: M.6.b.
CITE: (05-15-07), Ind., 866 N.E.2d 242
SUBJECT: Discovery violation- exclusion of D's evidence requires reversal
HOLDING: Tr. Ct. committed reversible error by excluding D's two witnesses who were added to the witness list four days before trial. The most extreme sanction of witness exclusion should not be employed unless the D's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State. Because of D's right to compulsory process under the federal & state constitutions, there is a strong presumption to allow the testimony of even late-disclosed witnesses. Williams v. State, 714 N.E.2d 644, 651 (Ind. 1999).

Here, D was charged with multiple offenses, including murder, for the death of his girlfriend's four-year-old son. One day prior to the Tr. Ct.'s discovery deadline, the State filed 853 pages of discovery, 30 photographs, 2 video tapes, 3 CDs & 1 audio tape. The discovery included a 2002 Job & Family Services Report that concerned the girlfriend/mother's abuse of the victim. Approximately one month after the discovery deadline & four days before trial, D filed an Amended Witness list including two witnesses mentioned in the Job & Family Services Report & who could testify concerning the prior abuse of the victim by the mother.

D's delay in adding the witnesses to the witness list was neither purposeful nor intentional being there is no evidence D even knew of the witnesses prior to State's disclosure two days before the discovery deadline. Further, the State suffered no prejudice from the amended witnesses. The witnesses' names originated from information provided by the State to D, & there is no evidence that the State had been unable to locate & speak with the witnesses either after their names were added to the list or during or before the one-month interval between the State's disclosure of the witnesses to the D & D's amended witness list. Although the victim's mother was crossed on the fact that she was investigated for abuse, she never admitted the abuse at trial. The State admitted into evidence testimony concerning approximately seventy-seven bruises beyond the head injury that caused the death of the victim & which showed a pattern of abuse. Thus, D was prejudiced because he was unable to show the abuse was caused by the mother. Held, judgment reversed & remanded for new trial.

TITLE: State v. Fridy
INDEX NO.: M.6.b.
CITE: (1st Dist., 02-20-06), Ind. Ct. App, 842 N.E.2d 835
SUBJECT: Suppression as remedy for State's failure to reveal informant's identities
HOLDING: State's refusal to divulge names & addresses of informants was not a valid basis upon which to grant D's motion to suppress evidence seized pursuant to search warrant. D's motion to compel disclosure of informants' identities argued that in order for the defense to determine whether hearsay declarants are credible, State must show how their statements are against their penal interests. However, police provided sufficient corroboration of informants' statements that D possessed marijuana so as to overcome hearsay hurdle & establish probable cause to issue search warrant. Because sufficient police work corroborated informant's statements, there was not a need to establish whether statements were against the informants' penal interests.

By using the motion to suppress as a sanction for State's blatant noncompliance with its order to compel, Tr. Ct. committed error that prejudiced State. Had Tr. Ct. omitted from probable cause consideration all evidence that arose solely from informants' uncorroborated hearsay -- an appropriate remedy where State deliberately fails to comply with a discovery order -- Tr. Ct. could have both sanctioned the State for its noncompliance & found sufficient corroborating evidence of probable cause to support search warrant. Held, judgment reversed & remanded.

Sullivan, J., dissenting, argued that officers did not corroborate that D had delivered marijuana pursuant to a controlled transaction until after car was stopped & consent search was made. If there was insufficient basis for traffic stop, it seems that there was not cause to search D's house. Further, statements by informants that they could obtain more marijuana from D did not subject informants to any additional criminal liability & thus was not against their penal interests. Newby v. State, 701 N.E.2d 593 (Ind. Ct. App 1998).

TITLE: State v. Lyons

INDEX NO.: M.6.b.

CITE: (5/11/2022), Ind. Ct. App., 189 N.E.3d 605

SUBJECT: Exclusion of evidence as sanction for "serious discovery violation" by State upheld on appeal

HOLDING: The Court of Appeals affirmed the trial court's exclusion of incriminating evidence against Defendant in a child molest case due to "serious discovery violation" by the State. In the middle of a stipulated polygraph of Defendant, police determined he was not a suitable candidate for an evidentiary polygraph due to his mental health issues. They changed it to a non-stipulatory, investigatory polygraph, which is inadmissible in court. But the officer conducting the polygraph forgot to change the stipulated notation to non-stipulated on his handwritten notes. In a post-polygraph interview, Defendant made incriminating statements. Despite being told not to, a detective delivered the stipulation to the Lawrence County prosecutor. In a motion to suppress hearing challenging the advisement of the right to counsel advisement on the stipulation, neither the detective nor the officer who performed the polygraph testified that the polygraph had been changed to non-stipulated. After the prosecutor's late disclosure of the non-stipulated polygraph just days before the jury trial was set to begin, the trial court granted a motion to exclude any and all evidence in reference to the polygraph, including the post-polygraph interview. The Court of Appeals found no abuse of discretion in the decision to impose that sanction for a violation of Brady v. Maryland and Kyles v. Whitley, and a material breach of Trial Rule 37(B)(2). "We are unconvinced by the State's argument that the discovery violation resulted in no significant prejudice to Lyons's defense because the argument fails to acknowledge the broader implications that pretrial discovery violations may have on a case. It is easy to imagine a scenario in which Lyons entered into a plea agreement with the State before ever finding out that the polygraph results would not have been admissible in a trial." Judge Crone dissented, finding that the evidence supporting the jury's verdicts and the reasonable inferences drawn from it were more than sufficient to affirm the convictions. Held: affirmed and remanded.

TITLE: Tyson v. State
INDEX NO.: M.6.b.
CITE: (2nd Dist., 08-06-93), Ind. App., 619 N.E.2d 276
SUBJECT: Exclusion of witnesses not improper
HOLDING: Tr.Ct's exclusion of three defense witnesses' testimony was not abuse of discretion, because defense was not diligent in informing State of witnesses as soon as they were discovered, & testimony was not crucial to defense, was of marginal relevance, & would have caused disruption in trial. Witnesses were first discovered 3 or 4 days into trial, & discovery deadline had closed over month before. When witnesses were made known to defense, they interviewed them, checked out their stories, & notified prosecutor on Sunday, 3 days after discovery, giving names & information. Monday, defense moved for permission to call witnesses, which was denied. Offer of proof indicated witnesses would testify about seeing persons who were apparently D & complaining witness (CW) in limousine outside of hotel they entered. Witnesses would have variously testified to D & CW hugging & kissing & holding hands before entering hotel, in contradiction of CW's testimony that such activity did not occur & consistent with D's testimony about what happened in car.

Because discovery deadline had passed, defense had to promptly notify Ct. & prosecution of any new information covered by discovery order. According to Wiseheart, 491 N.E.2d 985, whether duty is met is determined by: when witnesses first became known to opposing counsel; how vital testimony is to proponent of witness; nature of prejudice to opponent; whether alternatives other than exclusion of testimony exist; & whether opponent will be unduly surprised & prejudiced by allowing testimony despite available reasonable alternatives. While finding no bad faith or misconduct in delay in notification, Ct. still found State should have been notified 2 days earlier. Ct. rejected argument that 3 day delay was necessary for defense to be able to interview witnesses, determine credibility, & assess whether testimony was necessary; finding this could have been done more quickly than it was.

Ct. also found proffered testimony was not crucial to defense nor highly relevant. Although it might have bolstered D's asserted belief that CW would consent to sex in future, only consent that mattered was that immediately preceding sexual conduct. Because evidence supporting D's belief that CW might consent to sex in the future was already amply in record, testimony was found largely cumulative. Although it would also have contradicted CW's testimony, thus impeaching her, Ct. found it was cumulative as impeaching evidence because CW was impeached on other points, including details of rape.

Ct. also found because witnesses were disclosed near end of State's case, State's witnesses who could possibly confirm or deny new testimony had already testified & been dismissed. When D cross-examined CW, only he was aware of anticipated testimony, & could question more closely without State's awareness of significance of testimony. Ct. also found it was possible jury would not have accorded testimony of State's witnesses recalled on rebuttal same weight as other testimony. Also, although testimony might have had limited significance, State would likely have brought in new witnesses, causing trial delay of several days or weeks. Because jury was sequestered, effect of continuance was more significant. Ct. concluded that Tr. Ct. did not abuse its discretion in excluding proffered testimony, Sullivan, J., dissenting on this issue, with significant argument. Trans. denied.

Note: Dismissal of other alternatives & finding of delay might be useful to argue in cases where State attempts to bring in last minute witnesses.

RELATED CASES: Frink, 568 N.E.2d 535 (exclusion of D's witnesses and exhibits from evidence for failure to comply with discovery order which required completion of discovery days after trial began and after State rested its case was warranted).

TITLE: U.S. v. Davis
INDEX NO.: M.6.b.
CITE: 244 F.3d 666 (8th Cir. 2001)
SUBJECT: Exclusion of DNA Evidence as Sanction for Government's Delay in Testing
HOLDING: Where government failed to inquire into status of DNA testing until nearly the eve of trial, so that D's only recourse once test results were turned over was to seek continuance, Tr. Ct. did not abuse its discretion in excluding DNA evidence. Although D did not seek a continuance, Tr. Ct. had very crowded docket and had made clear that continuance would be rejected.

TITLE: Williams v. State
INDEX NO.: M.6.b.
CITE: (7-23-99), Ind., 714 N.E.2d 644
SUBJECT: Erroneous exclusion of defense witness - harmless error
HOLDING: Tr. Ct. erred in excluding testimony of belatedly disclosed defense witness. During trial, witness told defense investigator that she was with man who took D to hospital after alleged carjacking. In light of D's right to compulsory process under federal & state constitutions, there is strong presumption to allow testimony of even late-disclosed witnesses. Ct. found that, given lack of substantial prejudice to State & absence of bad faith by defense counsel, extreme sanction of witness's exclusion was abuse of discretion in this case. Tr. Ct. should have allowed witness to testify, either on final day of trial or after giving State brief continuance to investigate her & details of her story. Nonetheless, witness's testimony was unlikely to have weighed appreciably in Ds' favor in light of DNA & other evidence that connected him to crime. Held, judgment affirmed.

RELATED CASES: Hurd, 9 N.E.3d 720 (Ind. Ct. App 2014) (even if Tr. Ct. abused its discretion in excluding mother as witness, the error was harmless); Farris, App., 818 N.E.2d 63 (even if witness's testimony had prejudiced State in some way, a continuance, rather than exclusion, would have been the appropriate remedy); D.D.K., App., 750 N.E.2d 885 (Tr. Ct. erred in excluding testimony of defense witnesses whom defense had not disclosed to State ten days prior to trial as required by local rule. Tr. Ct. should have allowed two witnesses to testify after giving State a recess, or if necessary, a continuance, to obtain records on witnesses & speak with them).

TITLE: Wilson v. State
INDEX NO.: M.6.b.
CITE: (5th Dist., 06-13-94), Ind. App., 635 N.E.2d 1109, *sum. aff'd*, 644 N.E.2d 555
SUBJECT: Exclusion of witnesses not required
HOLDING: It was not error for Tr. Ct. to refuse to exclude State's witnesses. One witness had twice failed to appear for defense deposition, & apparently State was also trying to find him. After Tr. Ct. issued bench warrant for witness who did not appear for trial, he did appear & D moved to exclude testimony. Ct. found it was proper to deny D's motion because he was given opportunity to talk to witness before he testified, & he already had witness's prior statement.

Second witness came forward to police week & half prior to trial & told them he had information. Officer was to interview witness before he went on vacation but failed to do so. Witness was finally interviewed on Thursday before trial, statement was transcribed & copy was given to defense on Friday before Monday trial. Defense spoke to witness same night, was aware of what testimony would be, & had jail records to impeach witness. Defense was also given opportunity for continuance to depose witness but declined. Ct. found D was given adequate access to witness to ensure fair trial. Held, Tr. Ct. affirmed.

Note: D argued that Cts. use double standard when excluding defense witnesses versus State witnesses, & Ct. rejected argument, citing to Wiseheart, 491 N.E.2d 985, but Tyson, App., 619 N.E.2d 276, trans. denied, would seem to indicate otherwise.

RELATED CASES: Richardson, 388 N.E.2d 488 (where State witness twice failed to appear for scheduled deposition and D waited until morning of trial to request exclusion of witness' testimony, one day continuance to take deposition and not exclusion was proper remedy).

TITLE: Wiseheart v. State
INDEX NO.: M.6.b.
CITE: (4/28/86), Ind., 491 N.E.2d 985
SUBJECT: Discovery remedies - exclusion of evidence [witnesses]
HOLDING: Tr. Ct.'s decision to prohibit testimony by several of D's witnesses was an abuse of discretion because based solely upon violation of pretrial discovery order. Here, on morning of trial, D requested permission to call 4 individuals not previously listed as witnesses during discovery. State objected. State's interest in application of discovery rule must be balanced against D's 6th Amend right to a fair trial/present witnesses on his/her behalf. US ex rel. Enoch v. Hartigan (CA7 1985), 768 F.2d 161. Tr. Ct. should examine whether breach was intentional or in bad faith & whether substantial prejudice has resulted. Glover 441 N.E.2d 1360; Dudley 480 N.E.2d 881. Ct. sets forth 5 questions on p. 991 to aid Tr. Ct.'s in reaching just decision. Ct. examines cases in which defense has been precluded from calling witnesses in violation of discovery order: Borst, App., 459 N.E.2d 751 (Tr. Ct.'s decision to exclude testimony of defense witness rather than grant state continuance reversed because of lack of bad faith or showing of prejudice); Crocker, App., 378 N.E.2d 645 (testimony of defense witness properly precluded where counsel knew of his existence for 6 months); Ottinger, App., 270 N.E.2d 912 (preclusion proper where D had knowledge of witnesses for 8 months prior to trial). State's interest in application of discovery rules is prevention of surprise, not punishment of D for mere technical errors/admissions. Enoch. Ct. notes D is required to make offer of proof on nature of proferred testimony. Failure to do so inadequately preserves issue for appellate review. Chatman 334 N.E.2d 672. Held, conviction reversed; cause remanded for retrial.

RELATED CASES: Herrera, 679 N.E.2d 1322 (D waived issue because he did not make offer of proof about nature of excluded alibi witness's testimony).

M. DISCOVERY

M.6. Sanctions/remedies

M.6.c. Continuance

TITLE: Crenshaw v. State
INDEX NO.: M.6.c.
CITE: (9/14/82), Ind., 439 N.E.2d 620
SUBJECT: Discovery remedies - continuance
HOLDING: Discovery sanctions are discretionary. A continuance to provide opportunity to depose witness is proper remedy unless state's action is so misleading/demonstrates such bad faith that only way to protect D's fair trial rights is to exclude testimony. Chandler 419 N.E.2d 142; O'Conner 399 N.E.2d 364; Reid 372 N.E.2d 1149. Here, there was no evidence state was responsible for witness' failure to appear for deposition. Judge granted noon recess so counsel could depose witness. Following recess, counsel renewed objection to witness' testimony, but elected to proceed after telling Ct. continued investigation would not be beneficial. Held, no error.

TITLE: Liddell v. State
INDEX NO.: M.6.c.
CITE: (05-11-11), 948 N.E.2d 367 (Ind. Ct. App 2011)
SUBJECT: State's surprise witness - no need for exclusion or continuance
HOLDING: Tr. Ct. did not abuse its discretion by denying Ds request to exclude the State's surprise witness or, in the alternative, to continue the trial so he could prepare for the witness's testimony. Exclusion of a late-discovered witness's testimony is necessary only if the State has blatantly and deliberately failed to comply with discovery. Ordinarily an adjournment or continuance of the trial for a deposition is sufficient to place the party in as good a position as he would have been had the surprise witness been named earlier.

Here, D was accused of sexually assaulting two girls. His defense at trial was mistaken identity. On the fourth day of trial, the State called a late-discovered witness who testified that D was with the victims on the night in question and drove away with them right before the alleged assault. D moved to exclude the late-disclosed witness or for a continuance to depose and investigate. Tr. Ct. gave D the opportunity to depose the witness at the end of the day but denied the motion to exclude or continue. At closing, D abandoned his mistaken identity theory and rather argued that the girls fabricated the assault. It was within Tr. Ct.'s discretion to refuse to exclude the witness because it is difficult to conclude that the State's delay in finding the witness was in bad faith. Although the witness could have been located earlier, no one knew that the witness would be accessible or have any knowledge of the events. Further, it was within Tr. Ct.'s discretion to deny D's request for continuance. D is unable to identify any specific, responsive measures that he was unable to complete and that he would have pursued if allowed a more substantial continuance. Although counsel was placed in an untenable situation, having to alter his course midtrial and present inconsistent theories in opening and closing, thereby compromising his credibility with the jury, counsel could have chosen to attack the witness=s credibility rather than change theories. Held, judgment affirmed.

TITLE: Robinson v. State
INDEX NO.: M.6.c.
CITE: (6/24/83), Ind., 450 N.E.2d 51
SUBJECT: Discovery remedies - continuance; adequacy
HOLDING: Tr. Ct. did not err in overruling D's motion to exclude confessions where evidence of non-compliance by prosecution was not clear & disclosure may have been made to earlier defense counsel; 15-minute recess to permit counsel to discuss confessions with D was adequate under the circumstances. Here, on 4/8/80, earlier counsel withdrew motion to dismiss charges for state's failure to comply with discovery order noting that compliance had occurred. Trial occurred on 6/30-7/1/81. Ct. notes prosecution's case was strong, indicating lack of motive to impede disclosure. Further, Tr. Ct. conducted voluntariness hearing & redacted impermissible matter from confession. Held, no error.

RELATED CASES: Childress, 938 N.E.2d 1265 (Ind. Ct. App) (Tr. Ct. did not abuse discretion by refusing to exclude evidence which was disclosed to D the second day of trial; belated disclosure was not made in bad faith, and continuance would have been adequate remedy); Wallace, 474 N.E.2d 1006 (recess adequate to allow D opportunity to interview witness; D had argued state's witness list of 125 witnesses made it impossible for her to adequately prepare to examine witness actually produced for trial); Taylor 468 N.E.2d 1378 (no error in denial of motion to continue; noon recess adequate time to review/compare photos of crime scene).

TITLE: Smith v. State
INDEX NO.: M.6.c.
CITE: (5/12/23), Ind. Ct. App., 210 N.E.3d 312
SUBJECT: Speedy trial and discovery violation claims waived on appeal
HOLDING: In burglary prosecution, trial court did not abuse its discretion in admitting testimony of a hotel manager and a video recording of Defendant entering a room and leaving with two Glock cases containing handguns tucked under his shirt. Defendant argued that the evidence was inadmissible because the State had not disclosed it to Defendant until the week before trial and that this alleged discovery violation entitled him to the exclusion of the evidence at trial or a mistrial. But where, as here, a continuance would have cured the harm that arose by the discovery violation, failure to request one results in waiver of this argument on appeal. See Fleming v. State, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005). Distinguishing Dillard v. State, 102 N.E.3d 310 (Ind. Ct. App. 2018), Court noted that Defendant never moved for discharge, never moved for a continuance, and still had nearly a month before the expiration of his speedy trial request. Citing Trial Rule 37 and caselaw, Court also noted that "trial courts have the discretion to impose sanctions for the untimely provision of discovery, including the suppression or exclusion of evidence or the dismissal of charges.... Thus, the cost of failing to carefully examine the facts of the case can be high, and parties should diligently work to avoid them." Held, judgment affirmed.

M.6. Sanctions/remedies
M.6.d. Mistrial/discharge

TITLE: Jester v. State
INDEX NO.: M.6.d.
CITE: (3/21/90), Ind., 551 N.E.2d 840
SUBJECT: Mistrial as discovery sanction
HOLDING: On appeal, D claimed that Tr. Ct. erred in declaring mistrial on its own motion and giving him second trial, thereby subjecting him to double jeopardy. Court held that Tr. Ct. did not abuse its discretion in declaring mistrial, sua sponte, where State discovered, following commencement of trial, that it had failed to turn over written statements of witnesses pursuant to discovery order, and defense counsel declined to accept offer of continuance, but instead insisted on either dismissal or suppression of statements. Held, judgment affirmed.

RELATED CASES: Mauricio, 840 F.2d 454 (7th Cir.) (failure to deny mistrial to D whose entire defense strategy was undermined by prosecution's poker game secrecy as to critical rebuttal witness denied D's due process); Phillips, 550 N.E.2d 1290 (even if State's actions with respect to disclosure of particular witness would have violated Tr. Ct.'s discovery order, D would not have been entitled to mistrial where content of witness' testimony was accessible to D during pre-trial period); Braswell, 550 N.E.2d 1280 (D was not entitled to mistrial, based on State's failure to disclose recorded telephone conversation between State witness and detective until after witness had testified, where defense counsel accepted prosecutor's statement that he did not have knowledge of existence of recording until after witness' testimony, and D refused alternative remedies offered by Tr. Ct. of recalling witness or granting continuance); Starks, 620 N.E.2d 747 (mistrial was not warranted by prosecution's failure to disclose statements D made to police officer; pursuant to D's request, evidence was not admitted at trial, and D was given opportunity to use statements at trial if he chose); Long, 431 N.E.2d 875 (continuance was not effective remedy where D filed pre-trial discovery request for any written or recorded statement made by himself or co-D, State affirmatively responded that all such statements had been provided, prosecutor was apparently advised on day prior to trial of existence of written and signed statement made shortly after arrest and did not inform D or his counsel of existence thereof but waited until after D testified on direct and then used portion of statement to lay foundation for impeachment; D denied right to fair trial, due process, and effective assistance of counsel).

TITLE: State v. Larkin
INDEX NO.: B.10.n
CITE: (6/27/2018), 100 N.E.3d 700 (Ind. 2018)
SUBJECT: Outright dismissal is not appropriate remedy for State's misconduct
HOLDING: Trial court abused its discretion by granting D's Motion to Dismiss for a pattern of pretrial government misconduct. After being charged with voluntary manslaughter, D submitted to questioning by police regarding his wife's death. During a break in questioning, police recorded privileged communications between D and his attorney. The recording was transcribed and distributed to the prosecutor and others. There was also evidence in the record reflecting potential evidence tampering. Although the State committed misconduct, the remedy is not outright dismissal, but suppression of tainted evidence for which the State cannot rebut the presumption of prejudice pursuant to State v. Taylor, 49 N.E.3d 1019 (Ind. 2016). Under Taylor, the State is entitled to a hearing to look at each piece of evidence and determine what, if any, evidence was tainted by the State's misconduct, and if so, whether the State can rebut prejudice beyond a reasonable doubt. Dismissal is an extreme remedy. As the U.S. Supreme Court has held, for constitutional violations committed by the government, "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence' gained from the violation." U.S. v. Morrison, 449 U.S. 361, 365 (1981). Held, transfer granted, Court of Appeals' opinion at 77 N.E.3d 237 vacated, judgment reversed and remanded to hold a hearing or proceed to trial pursuant to Taylor.

TITLE: State v. Montgomery

INDEX NO.: M.6.d.

CITE: (1st Dist., 02-26-09), 901 N.E.2d 515 (Ind. Ct. App. 2009)

SUBJECT: Belated discovery - no speedy trial violation, but discharge proper remedy for discovery violation

HOLDING: Tr. Ct. did not clearly err by granting D's motion for discharge for State's failure to comply with discovery order but did err in granting motion based on speedy trial violation. Criminal Rule 4(c) does not apply on retrial. Instead, a D must rely on his constitutional speedy trial rights, which requires that a D be tried within a reasonable time. Also, dismissal of charges is a sanction within the arsenal of the trial judge in dealing with the failure of the prosecution to afford the defense access to evidentiary materials as ordered. The primary elements for a court's consideration are whether the breach was intentional or in bad faith and whether substantial prejudice resulted.

Here, D's convictions for arson and fraud were reversed in a Court of Appeals opinion certified September 16, 2004. After many continuances by D and the State, D's re-trial was scheduled for May 13, 2008. Although on November 22, 2004, D asked for discovery of all photographs the State intended on using in trial, on May 1, 2008, the State provided D with 200 photos it intended on introducing. D filed a motion for discharge and claimed that he had never seen some of the photos, that his expert believed some of them were exculpatory and that he was unable to prepare his defense in time for trial. Tr. Ct.'s order addressed both speedy trial and discovery issues interchangeably and concluded that the motion for discharge should be granted.

Because Criminal Rule 4 does not apply on retrial, Court of Appeals determined the speedy trial issue under the Sixth Amendment, considering the length of delay, reason for delay, assertion of speedy trial right and prejudice, and determining that there was no speedy trial violation. However, because State took three years and five months to comply with the discovery request, discharge was a proper sanction. Held, case remanded for court to clarify its basis for discharge.

RELATED CASES: Montgomery, 907 N.E.2d 1057 (Ind. Ct. App 2009) (reh'g granted to clarify that even if the State provided some of the photos to the D within a timely manner, it did not provide the allegedly exculpatory photos until twelve days prior to jury); State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (outright dismissal not appropriate remedy for pattern of pretrial government misconduct; see full review, this section).

TITLE: State v. Schmitt
INDEX NO.: M.6.d.
CITE: (4th Dist., 10-28-09), Ind. App., 915 N.E.2d 520 (Ind. Ct. App 2009)
SUBJECT: Dismissal of OWI charges for discovery violation affirmed
HOLDING: Tr. Ct. did not abuse its discretion in dismissing OWI charges because the State's refusal to respond to D's Request for Production, as the Tr. Ct. ordered, constituted bad faith. The usual remedy for a discovery violation is a continuance. Lindsey v. State, 877 N.E.2d 190, 195 (Ind. Ct. App. 2007). Dismissal of charges is an appropriate sanction, however, where a prosecutor's failure to provide discovery was intentional or in bad faith and resulted in substantial prejudice. Robinson v. State, 450 N.E.2d 51, 52 (Ind. 1983).

Here, D filed Interrogatories and a Request for Production of Documents on November 25, 2008. The Request for Production sought information and documentation regarding the arresting officer's training for the administration of traffic stops and field sobriety tests. The RFP also sought the NHTSA manual the arresting officer used and was trained under. The State filed a protective order, and D filed a motion to compel. On January 16, 2009, Tr. Ct. granted the State's protective order as to the Interrogatories but ordered the State to respond to D's Request for Production of Documents no later than January 23, 2009. Tr. Ct. warned the State that it would consider a failure to respond as bad faith. A few days later, because of bad weather, the trial was rescheduled from January 30, 2009, to February 27, 2009. On February 3, 2009, D asked Tr. Ct. to strike the arresting officer's testimony or to dismiss the charges because the State had yet to produce the documents as ordered by Tr. Ct. on January 16, 2009.

Court of Appeals found that Tr. Ct. did not abuse its discretion in dismissing the charges. It agreed with the Tr. Ct. that the State "was less than diligent in complying with the Court's January 16, 2009 order" and that the State failed to comply despite the Tr. Ct.'s warning that the failure to respond would constitute bad faith. Court also observed that the misdemeanor charges had been pending against D for nearly one year. Held, dismissal of charges affirmed.

RELATED CASES: State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (outright dismissal not appropriate remedy for pattern of pretrial government misconduct; see full review, this section).

M. DISCOVERY

M.6. Sanctions/remedies

M.6.e. Other

TITLE: Beauchamp v. State
INDEX NO.: M.6.e.
CITE: (5th Dist., 5-21-03), Ind. App., 788 N.E.2d 881
SUBJECT: Discovery violation - State's rebuttal witness; testimony differed from pretrial deposition
HOLDING: In prosecution for Battery Resulting in Serious Bodily Injury, Tr. Ct. committed reversible error when it allowed expert witness (doctor) to testify as rebuttal witness for State. Record showed that opinions & substance of doctor's testimony were known to State before trial & had not been supplied to D. Moreover, doctor's opinions regarding victim's injuries differed remarkably from those presented during pretrial deposition, thereby undermining D's defense & resulting in substantial prejudice to him. D had deposed doctor eleven months prior to trial with anticipation that he would elicit certain opinions with respect to injuries victim sustained. At that deposition, doctor testified that he was unable to form opinion as to victim's injuries. When doctor was called as rebuttal witness for State, he offered opinions that substantially differed from those previously provided in deposition. In review of record, it was apparent that doctor was known & anticipated rebuttal witness for State & State was aware that doctor prepared to offer new opinions even though they had not been provided to D. State's conduct violated both Tr. Ct.'s standing discovery order & requirement under T.R.26(E)(1) that parties supplement substance of their expert's testimony in timely fashion. State's argument that D could have sought continuance as remedy would have been futile because D had already offered testimony of doctor establishing that he had not formed any opinion with respect to victim's injuries. There was no plausible way for D to extricate himself from dilemma. State lied in wait as D offered defense & then went on offensive with undisclosed, damaging testimony of doctor. Given prejudicial impact of testimony as result of violations, Tr. Ct.'s decision to allow doctor to offer new opinions amounted to reversible error. Held, judgment reversed.

RELATED CASES: McKinney, App., 873 N.E.2d 630 (prosecutor did not commit misconduct by failing to notify defense of changes in testimony of certain witnesses from first trial to second trial); Camm, App., 812 N.E.2d 1127 (neither Tr. Ct.'s standing discovery order nor TR 26(E)(1) was complied with here; although expert did not change his opinion, he augmented opinion given in his earlier disclosed report); Shanabarger, App., 798 N.E.2d 210 (while not condoning the State's “twelfth hour disclosure” of testing on plastic wrap, Ct. did not find D suffered the kind of prejudice that existed in Beauchamp).

TITLE: Gambill v. State
INDEX NO.: M.6.e.
CITE: (6/26/85), Ind., 479 N.E.2d 523
SUBJECT: Post-trial remedy for discovery violation
HOLDING: D was not deprived of fair trial by state's failure to provide copy of one of a series of statements police took from witness. Here, D sought & was granted general discovery order. State complied with order & produced wide variety of documents. One month after trial, D became aware that state had not revealed one witness' statement. State does not dispute D's allegation of failure to provide statement, but contends such failure is not grounds for reversal. Reversal is required only if omitted evidence creates reasonable doubt that did not otherwise exist. US v. Agurs (1976), 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342. Ct. finds omitted statement in nature of impeaching statement & not one which was obviously exculpatory. Held, conviction affirmed.

TITLE: Komyatti v. State
INDEX NO.: M.6.e.
CITE: (3/25/86), Ind., 490 N.E.2d 279
SUBJECT: Discovery remedies - mid-trial deposition
HOLDING: Tr. Ct. did not err in failing to grant Ds continuance to procure expert to rebut state's expert's testimony where record does not show motion for continuance & Tr. Ct. ruled that defense could have time to depose state's expert before he testified. Burgess 461 N.E.2d 1094; see also Sidener 446 N.E.2d 965. Here, analyst for Great Lakes Forensic Laboratories testified re autopsy of victim & stated he detected no traces of poison in victim's liver. Dr. Michael Kaplis (not originally listed as witness) was then called & testified that chances of finding poison in decomposing liver were very poor. Ct. finds D was provided with alternative remedy & failed to show prejudice. Randall 455 N.E.2d 916; Hardin 414 N.E.2d 570. Ds thoroughly cross-examined Kaplis & make no showing that given opportunity they could have refuted or discredited his testimony to extent demonstrating reversible error. Held, conviction affirmed.

TITLE: Richardson v. State
INDEX NO.: M.6.e.
CITE: (4/17/79), Ind., 388 N.E.2d 488
SUBJECT: Discovery remedy -- protective orders
HOLDING: On morning of first day of trial for armed robbery, D filed motion for protective order requesting that testimony of prosecuting witness be excluded because he had twice failed to appear for scheduled deposition. Instead, Tr. Ct. ordered one day continuance to give D opportunity to depose witness. D was convicted of armed robbery and he appealed claiming that Tr. Ct. erred by ordering one day continuance instead of granting D's motion. Court held that sanctions for failure to comply with discovery request are discretionary, not mandatory, Lund, 345 N.E.2d 826, and that usual, but not sole, remedy for failure to comply with discovery request is order compelling compliance. Chustak, 288 N.E.2d 149. Here, D did not seek Tr. Ct.'s aid until first morning of trial, and under these circumstances, Tr. Ct. acted within its discretion in ordering one day continuance. Held, judgment affirmed.

M. DISCOVERY

M.7. Destruction/ preservation of evidence

TITLE: Alexander v. State

INDEX NO.: M.7.

CITE: 197 N.E.3d 367 (Ind. Ct. App. 2022) 10/24/2022

SUBJECT: Failure to preserve crime scene video -- no showing it was materially exculpatory and not merely potentially useful

HOLDING: Defendant was charged with assaulting the mother of his children at a liquor store. After viewing video footage from the store, police decided not to preserve the video after determining it did not show the altercation. On direct appeal, Defendant argued his due process rights were violated because the State failed to preserve the videotape that would have been materially exculpatory evidence given discrepancies between the store clerk's testimony and the complaining witness's testimony as to her actions in the store prior to Defendant's attack on her. Defendant also claimed that the video would discount the testimony of C.W. This issue was not raised at trial and therefore Defendant argued fundamental error on direct appeal. The Court of Appeals held Defendant failed to demonstrate the surveillance video was materially exculpatory, but merely showed it was potentially useful and he also failed to show the police acted in bad faith in failing to preserve the video. Held, judgment affirmed.

TITLE: Bennett v. State

INDEX NO.: M.7.

CITE: 175 N.E.3d 331 (Ind. Ct. App. 2021) 8/23/2021

SUBJECT: Due process claim from destruction of evidence rejected and no error in excluding voluntary intoxication evidence to support self-defense claim

HOLDING: Defendant called 911 after fatally shooting girlfriend with a muzzleloader and then shooting himself in the face with a different firearm. He was convicted of murder and sentenced to 65 years in prison. At trial, Defendant argued he was denied Due Process as a result of the State's destruction of exculpatory evidence from cleaning the muzzle loader in the course of performing tests on it, thereby removing the corrosion and residue that could have shown the gun was unsafe and prone to misfire. This would imply Defendant did not have the requisite intent to commit murder when he shot his girlfriend. The Court of Appeals disagreed, finding Defendant failed to show that examining the gun before it was cleaned could have provided evidence that Defendant did not act knowingly or intentionally when he pulled the trigger and Defendant also failed to show the State acted in bad faith by cleaning the gun.

Defendant also argued evidence of his voluntary intoxication should have been admitted as evidence to support his subjective belief that force was necessary in support of his self-defense claim. The Court found that Sanchez v. State, 749 N.E.2d 509 (Ind. 2001) prohibits consideration of voluntary intoxication evidence to negate the *mens rea* requirement in criminal cases and that permitting voluntary intoxication even to support the subjective belief that force was necessary when arguing self-defense would impermissibly resurrect the voluntary intoxication defense, which is not permitted by Sanchez or I.C. 35-41-2-5. Held, judgment affirmed.

TITLE: Illinois v. Fisher
INDEX NO.: M.7.
CITE: 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004)
SUBJECT: Due Process, Bad Faith, Destruction of Evidence
HOLDING: Fisher was arrested for possession of cocaine in 1988. Lab tests done at the time confirmed that the powder in his possession was cocaine. Defense counsel filed a motion for discovery, seeking all the physical evidence the State intended to use at trial. The State agreed to comply with discovery in a reasonable time. Meanwhile, Fisher was released on bond, failed to appear in court, and remained a fugitive for over 10 years. In September 1999, the police routinely destroyed the physical evidence in Fisher's case. In November 1999, the arrest warrant was served when Fisher was detained on another matter, and charges against him were reinstated; he was later convicted at trial.

On appeal from his conviction, Fisher argued that his due process rights were violated when the State destroyed the physical evidence against him, despite his pending discovery request. The Appellate Court of Illinois reversed the conviction, holding that the State was on notice to preserve the evidence and that the defense was not required to show bad faith by the State, or to make a showing that the evidence had exculpatory value in order to establish a federal due process violation.

The U.S. Supreme Court reversed. The substance seized from Fisher was not "material exculpatory evidence" under Brady v. Maryland, 373 U.S. 83(1963) but was "potentially useful evidence" under Arizona v. Youngblood, 488 U.S. 51(1988). Although the destruction of "material exculpatory evidence" violates federal due process regardless of the good or bad faith of the State, the failure to preserve "potentially useful evidence" does not violate federal due process unless the D can prove bad faith by the State. The existence of a pending discovery request did not eliminate the need for a showing of bad faith by the police in this case.

TITLE: State v. Ferguson
INDEX NO.: M.7.
CITE: 2 S.W.3d 912 (Tenn. 1999)
SUBJECT: Loss or Destruction of Evidence -- Tennessee Due Process Test
HOLDING: Tennessee Supreme Court rejects U.S. Supreme Court holding in Arizona v. Youngblood, 488 U.S. 51 (1988), and holds that proof that state acted in bad faith in losing or destroying allegedly exculpatory evidence is not an absolute prerequisite to finding violation of Tennessee constitution's due process clause. Court rejected Youngblood because of the extreme difficulty of proving bad faith on the part of the government, and because it allows no consideration of the materiality of the missing evidence. In light of these problems, and the broader due process principles contained in the Tennessee constitution, the Court set out appropriate analysis for determining whether trial conducted without missing evidence would be fundamentally unfair in violation of the state constitution. First, Tr. Ct. must determine whether state had duty to preserve evidence at issue, using standard set out in California v. Trombetta, 467 U.S. 479 (1984), that duty to preserve evidence arises only if the evidence has an exculpatory value that was apparent before the evidence was destroyed and comparable evidence cannot be obtained by the D through reasonably available means. If the court determines that the state had and breached a duty to preserve the evidence, the court must consider three factors: (1) the degree of negligence involved in the loss or destruction of evidence; (2) the significance of the evidence, "considered in light of the probative value and reliability of secondary or substitute evidence that remains available;" and (3) the sufficiency of the other evidence supporting the conviction. If this analysis leads to conclusion that trial without the evidence would be fundamentally unfair, Tr. Ct. may fashion an appropriate remedy, up to and including dismissal.

TITLE: Jones v. State

INDEX NO.: M.7.

CITE: (12-05-11), 957 N.E.2d 1033 (Ind. Ct. App 2011)

SUBJECT: Destruction of evidence - substantial compliance with statutory requirements for destruction of lab

HOLDING: Tr. Ct. did not abuse its discretion by admitting testimony and photographs depicting evidence that had been destroyed by law enforcement before trial. A law enforcement agency may destroy or cause to be destroyed chemicals, controlled substances, or chemically-contaminated equipment associated with the illegal manufacture of drugs without a court order if all the following conditions are met: 1) the agency collects and preserves a sufficient quantity to demonstrate that the seized evidence was associated with the illegal manufacture of drugs; 2) the agency takes photographs that accurately depict the presence and quantity of the seized evidence; and 3) the agency completes a chemical inventory report that describes the chemicals, controlled substances and contaminated equipment present at the site. The photographs and description of the property shall be admissible into evidence in place of the actual physical evidence. Ind. Code 35-33-5-5(e).

Here, D was charged with dealing in methamphetamine and visiting a common nuisance. D was present in the home where police found a methamphetamine lab in the garage. A Hazmat team destroyed some of the chemicals and chemically contaminated materials found in the garage. Over objection, the State presented testimony describing and photographs of the destroyed evidence. Although failure to comply with requirements of Ind. Code 35-33-5-5(e) is a basis for excluding the evidence, here the officers' compliance was substantial enough to uphold the Tr. Ct.'s decision to admit the evidence. Although law enforcement did not take photos of all destroyed items and failed to create a chemical inventory report, these deficiencies could be rectified by examining other records, such as the case report or photographs of the manufacture site. D never claimed that these failures deprived him of a fair opportunity to be heard in court. Held, judgment affirmed; Friedlander, J., concurring in result without opinion.

M. DISCOVERY

M.7. Destruction/ preservation of evidence

M.7.a. DISCOVERY

TITLE: Arizona v. Youngblood
INDEX NO.: M.7.a.
CITE: 488 U.S. 51, 109 S. Ct. 333 (1988)
SUBJECT: Destruction of evidence - bad faith requirement
HOLDING: Unless D demonstrates that police acted in bad faith, destruction of potentially exculpatory evidence is not denial of due process. Although good or bad faith is irrelevant where State fails to reveal material, exculpatory evidence to defense, showing of bad faith is necessary where State fails to preserve evidence that could have been subject to tests, the results of which could have exonerated D. Fundamental fairness does not impose on police absolute duty to retain & preserve all material that might be of conceivable evidentiary significance. Here, police investigating sexual assault of child failed to refrigerate child's clothing & perform tests on semen samples. Although State did not attempt to make use of semen samples & clothing in its case in chief, expert witnesses for defense testified that timely testing of semen-stained clothing could have completely exonerated D. Arizona Ct. App. reversed D's conviction on ground that State breached constitutional duty to preserve samples despite no finding of bad faith on part of police. S. Ct. reversed Ct. App., finding that requirement of "bad faith" reasonably limits extent of police obligation to preserve evidence & confines obligation to class of cases where conduct of police indicates that evidence could exonerate D. Failure of police to refrigerate clothing & test semen samples did not constitute bad faith. Held, judgment of Ct. App. reversed, case remanded for further proceedings consistent with opinion; Stevens, J. concurring & Blackmun, J., Brennan, J. & Marshall, J., dissenting.

RELATED CASES: Lee, 545 N.E.2d 1085 (With no mention of Youngblood, Ct. found that negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal where D establishes materiality of lost evidence or where materiality is self-evident.); Bivins, 642 N.E.2d 928 (D must establish materiality of lost or destroyed evidence before Ct. will consider whether loss or destruction was done in bad faith.); Nettles, 565 N.E.2d 1064 (Tr. Ct. did not err in denying D's motion to suppress blood & hair identification test results, samples of which were either destroyed in testing process or not preserved by State. Intentional destruction was explained as necessary to conduct testing, & no bad faith was shown.); Hopkins, 579 N.E.2d 1297 (Showing of bad-faith destruction of evidence by State, absent material likelihood that evidence would have exculpated D, does not result in denial of due process.)

TITLE: Birkla v. State
INDEX NO.: M.7.a.
CITE: (2/26/75), Ind., 323 N.E.2d 645
SUBJECT: Destruction of evidence --materiality
HOLDING: Intentional suppression by prosecution of evidence favorable to accused upon request violates due process when evidence is material either to guilt or punishment, irrespective of bona fides of prosecution. Brady, 373 U.S. 83. Prior to any request for discovery by D, negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal. Hale, 230 N.E.2d 432. Here, D claimed that he was denied fair trial by alleged prosecutorial misconduct in destruction of videotape recording by State moving to suppress recording. Court held that because (1) prosecutor's affidavit stated that videotape contained no exculpatory information of any kind which would either directly or indirectly exonerate D or coD and (2) videotape did not furnish any evidence which was admissible by either party, Tr. Ct. did not err. Held, judgment affirmed; DeBruler, J., dissenting.

RELATED CASES: Gibson, 514 N.E.2d 318 (State's deliberate violation of discovery orders by failing to turn over audio tapes of witnesses' statements prior to trial did not deny fair trial, as statements were not material; inconsistencies between audio statements and testimony of witnesses were negligible, and D had opportunity to impeach witnesses with other available discovery materials); Hopkins, 579 N.E.2d 1297 (where other evidence of guilt at trial is so overwhelming, showing of arguably bad faith destruction, absent some material likelihood of exculpation, does not result in denial of due process).

TITLE: Holder v. State
INDEX NO.: M.7.a.
CITE: (5-30-91), Ind., 571 N.E.2d 1250
SUBJECT: State's failure to preserve evidence - D's independent access
HOLDING: In voluntary manslaughter case, State was not required to collect and preserve evidence, including clothing D was wearing during incident, hair that victim allegedly pulled from D's head, photos of D on night of shooting and information about lighting at crime scene. State's constitutional duty to preserve evidence is limited to evidence expected to play significant role in defense. Evidence must both possess exculpatory value apparent before evidence was destroyed and be of nature that D would be unable to obtain comparable evidence by other reasonably available means. Kindred, 524 N.E.2d 279. Here, D argued that police failed to photograph D at scene of crime and that State failed to seize and preserve nightgown D was wearing on night of crime, hair allegedly pulled from D's head and information about lighting at scene of crime. Ct. found that D could have introduced nightgown as her exhibit and could have obtained photograph and information about lighting through reasonably available means. Ct. further found that D's hair, procured on day after crime, would have been only marginal addition to evidence presented by defense. Held, judgment of Ct. App. vacated, decision of Tr. Ct. affirmed.

RELATED CASES: Nettles, 565 N.E.2d 1064 (State's failure to preserve blood samples did not render test results inadmissible and did not violate D's due process rights, absent indication that tests were conducted improperly, where test results were made available immediately and D only later moved to obtain samples).

TITLE: Johnson v. State
INDEX NO.: M.7.a.
CITE: (5/21/87), Ind., 507 N.E.2d 980
SUBJECT: State's duty to preserve evidence
HOLDING: In a 2-2 opinion affirming D's conviction pursuant to AR 15(F), Pivarnik, joined by Givan, argues that state's failure to preserve videotape of booking process does not constitute destruction of evidence warranting reversal. D alleged that officer planted cocaine found in D's pocket during booking process. Officer's supervisor told D that videotape would be reviewed by internal affairs committee. However, tape was reused without being viewed. Pivarnik contends there is no direct evidence that videotape recorded search & discovery. State has duty to preserve evidence expected to play significant role in D's defense. CA v. Trombetta (1984), 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413. See also US v. Bagley (1985), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 841. DeBruler, joined by Dickson, contends destruction of videotape violated D's due process rights & requires reversal of his conviction. Heavy burden rests upon prosecution to demonstrate that destruction of evidence did not prejudice D. Birkla 323 N.E.2d 645. Birkla establishes guidelines for use by state in weighing materiality of evidence. Intentional inaction cannot be used to justify destruction of evidence. Requiring D to demonstrate that evidence was exculpatory becomes an absurdity in instances where evidence was destroyed by prosecution & D had no responsibility for such destruction. People v. Harmes (Colo.App. 1976), 560 P.2d 470. Before request for discovery has been made, duty of disclosure is operative as duty of preservation. US v. Bryant (DC Cir. 1971), 439 F.2d 642. Shepard did not participate in case arising from Vanderburgh County Superior Ct.

RELATED CASES: Seay, 529 N.E.2d 106 (narcotics D who was informed that drugs had been exhausted by State's testing procedures approximately three weeks before trial, but did not request production of drugs until first day of trial, and who cross-examined chemist who had analyzed substances, failed to show he was unduly prejudiced by depletion of drugs during testing); Serano, App., 555 N.E.2d 487 (narcotics D failed to indicate how buy money that was "destroyed" by police would have been exculpatory, and thus was not entitled to reversal on basis of destruction of material evidence); Jarrett, App., 515 N.E.2d 882 (D offered no argument as to nature of exculpatory evidence allegedly contained in videotape of breathalyser test that was lost or destroyed by State).

TITLE: Lahrman v. State
INDEX NO.: M.7.a.
CITE: (4th Dist. 7/17/84), Ind. App., 465 N.E.2d 1162
SUBJECT: Destruction of evidence -- must point to specific evidence
HOLDING: If D cannot point to specific evidence actually destroyed or lost by police or prosecution, reversal is not required. Rowan 431 N.E.2d 805. Here, D contends exculpatory evidence was lost when building's floor was cleared of debris & washed down day after explosion & fire. Ct. finds D fails to demonstrate significant possibility exculpatory evidence existed & was lost. Expert witness testified samples he studied were not affected by cleanup operations. Held, no error.

RELATED CASES: Glasscock, App., 576 N.E.2d 600 (where police and prosecution never possessed blood samples which D was claiming were negligently destroyed, no reversal was required).

TITLE: Madison v. State
INDEX NO.: M.7.a.
CITE: (2/28/89), Ind., 534 N.E.2d 702
SUBJECT: Negligent destruction of evidence
HOLDING: Negligent destruction of evidence was not error, because it had no exculpatory impact. D was charged with murder in stabbing incident & raised self-defense claim. Police found knife belonging to victim on freezer in kitchen where stabbing occurred but neglected to test it for fingerprints. D alleges that in doing so they negligently destroyed possibly exculpatory evidence, denying him due process of law. However, Ind. S. Ct. determines that fingerprints would have had no exculpatory value, because even had victim's prints been found on knife, it would not have proved he was holding knife at time D stabbed him. Although Ct. appears to determine that destroyed evidence had no potential exculpatory value, it quotes, with approval, language from AZ v. Youngblood (1988), 109 S.Ct. 333 (card at M.7.a), in which U.S.S.Ct. held that, unless D can show bad faith, destruction of potentially exculpatory evidence is not denial of due process. DeBruler, J., separately CONCURS, rejecting AZ v. Youngblood.

RELATED CASES: Smith, App., 586 N.E.2d 890 (materiality and prejudice must be shown to prevail on claim of negligently misplaced or destroyed evidence); Myers, 510 N.E.2d 1360 (Tr. Ct. did not err in denying D's motion to dismiss where vial of blood from victim was negligently broken by police but was not material to case, and D made no attempt to test blood samples.)

TITLE: Pimentel v. State
INDEX NO.: M.7.a.
CITE: (02/18/2022), 181 N.E.3d 474 (Ind. Ct. App.)
SUBJECT: Dismissal not warranted for State's failure to preserve syringe
HOLDING: When the State fails to preserve materially exculpatory evidence, a due process violation occurs regardless of whether the State acted in bad faith. Here, the Court of Appeals found no due process violation from State's destruction of the syringe Defendant was charged with unlawfully possessing, because the syringe was not materially exculpatory evidence. Defendant presented no evidence that an examination of the syringe would have revealed there was no needle attached to it. The Court noted that although the police officer "should have photographed the syringe while it was uncapped so that the needle would have been visible, the officer's failure to do so does not render the syringe materially exculpatory." The syringe fell in the category of potentially useful evidence, which required Defendant to demonstrate bad faith on the part of the State in destroying the evidence. But the record showed the police department disposed of the syringe pursuant to its policy. Therefore, the trial court did not err in denying the defendant's motion to dismiss the charge. Further, the Court held the evidence was sufficient to support the convictions for possessing fentanyl and the syringe. The contraband was found in the front seat of the car where Defendant had been sitting. The car contained his personal belongings and he appeared to be intoxicated. Based on that, the jury could reasonably find Defendant constructively possessed the incriminating items.

TITLE: Rita v. State
INDEX NO.: M.7.a.
CITE: (3rd Dist., 4-18-96), Ind. App., 663 N.E.2d 1201, affirmed 674 N.E.2d 968
SUBJECT: State's destruction of evidence - no due process violation
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss, &, alternatively, in refusing to exclude State's evidence regarding broken windshield & in refusing to give jury instruction. At trial for failure to stop at scene of fatal accident & driving with B.A.C. in excess of .10% resulting in death, key issue was visibility of fracture to windshield. Three days after accident, prosecutor had windshield removed from vehicle without notice to D or Tr. Ct. Consequently, D lost opportunity to conduct various tests on vehicle. Over D's objections, State was permitted to introduce windshield itself & several photographs taken before & after its removal.

Because there was no evidence that prosecution's decision to remove windshield was motivated by bad faith, Ct. found that State's failure to preserve this evidence in same condition as at time of accident did not constitute denial of due process. There was no indication that, at time windshield was removed, State understood type of testing which D wanted to perform. Showing of bad faith by police or prosecution is required to support due process claims involving failure to preserve evidence or negligent destruction of evidence. Bivins, 642 N.E.2d 928. Tr. Ct. correctly ruled that State's removal of D's windshield did not require giving instruction tendered by him. Instruction told jurors that they must accept, as fact, that windshield fracture had been invisible to D & his passengers until they first noticed it. Held, no error; Sullivan, J., concurring in result, disagreed with implication that prior case law creates absolute "bad faith" proof requirement with respect to withheld or destroyed evidence.

RELATED CASES: Stoker, App., 692 N.E.2d 1386 (in some instances, destruction or failure to preserve evidence may be so prejudicial to D as to warrant reversal even absent bad faith); Gossmeyer, 482 N.E.2d 239 (conviction may be reversed on constitutional grounds when police destroy or withhold material evidence); Schwartz, App., 379 N.E.2d 480 (D's due process rights were not violated by State's exhaustion of evidence during chemical testing even though quantity possessed by State was small).

TITLE: Roberson v. State
INDEX NO.: M.7.a.
CITE: (4-26-02), Ind. App., 766 N.E.2d 1185
SUBJECT: Destruction of materially exculpatory evidence - due process violation
HOLDING: Tr. Ct. erred in denying D's motion to dismiss charge of possessing material capable of causing bodily injury by inmate, because State's failure to preserve alleged dangerous device violated D's due process rights. Alleged dangerous item, as described by State's witnesses, was two wooden peanut butter spreaders, sold in commissary, that had rough, sharp edges on one end & had toilet paper wrapped around other end. State discarded device D had never been given opportunity to examine it & photograph of device was blurry & not helpful. In determining whether D's due process rights have been violated, Ct. must determine whether evidence in question was potentially useful evidence or materially exculpatory evidence. Chissell v. State, 705 N.E.2d 501 (Ind. Ct. App. 1999). If evidence was only useful, D must establish bad faith on part of State. Albrecht v. State, 737 N.E.2d 719 (Ind. 2000).

Because condition of device was critical to both sides in this case & was D's sole basis of defense, Ct. concluded that device was materially exculpatory evidence & that D could not secure comparable evidence by other reasonably available means. Exculpatory value of device should have been obvious to State before its destruction despite subjective opinions of State's witnesses that device was fashioned to be weapon. Held, denial of motion to dismiss reversed; Barnes, J., dissenting.

RELATED CASES: Land, App., 802 N.E.2d 45 (because shoes were only potentially useful to the defense, D had to show bad faith on the part of the State as to its destruction; Ct. found no bad faith in investigator returning shoes to homeowner).

TITLE: Stoker v. State
INDEX NO.: M.7.a.
CITE: (1st Dist., 4-6-98), Ind. App., 692 N.E.2d 1386
SUBJECT: Preservation of evidence - police not required to record interrogations
HOLDING: Due Course of Law requirement of Article 1, Section 12 of Ind. Constitution does not require law enforcement officers to record custodial interrogations in places of detention. Due Process Clause of United States Constitution requires preservation of evidence only if evidence possesses exculpatory value that was apparent before evidence was destroyed & is of such nature that D would be unable to obtain comparable evidence by other reasonably available means. Failure to preserve potentially useful evidence is not constitutional denial of due process unless D can show bad faith on part of police. Arizona v. Youngblood, 488 U.S. 51 (1988). In Rita, App., 663 N.E.2d 1201, aff'd in part, vacated in part (1996) Ind., 674 N.E.2d 968, this Ct. held that Ind. constitutional analysis is analogous to federal constitutional analysis when dealing with preservation issues. Thus, Ct. followed Youngblood standard & held that officers are not required to preserve Ds' statements by taping interrogations.

Nevertheless, in light of slight inconvenience & expense associated with recording of custodial interrogations in their entirety, Ct. strongly recommended, as matter of sound policy, that law enforcement officers adopt this procedure. In footnotes 8 & 11, Ct. noted consequences of failing to tape interrogation. For instance, failure to tape interrogation could be so prejudicial to D as to warrant reversal, even in absence of bad faith, & D may offer evidence at trial that police had means of taping available but failed to do so. Held, judgment affirmed.

Note: See also Gibson, App., 694 N.E.2d 748 (absent showing of bad faith, failure to tape D's statement did not bar its admission).

RELATED CASES: Lewis, App., 898 N.E.2d 429 (court declined to adopt New Jersey's rule that identification procedures must be recorded); Gasper, App., 833 N.E.2d 1036 (Ct. reiterated holding in Stoker, & strongly encouraged law enforcement officers, as a matter of sound policy & fairness of proceedings, to record all custodial interrogations).

M. DISCOVERY

M.7. Destruction/ preservation of evidence

M.7.b. Motion to dismiss (see B.10.m)

TITLE: Samek v. State
INDEX NO.: M.7.b.
CITE: (3rd Dist., 12-10-97), Ind. App., 688 N.E.2d 1286
SUBJECT: Destruction of evidence - no bad faith
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss based on State's failure to preserve audio tape of D's confession given to defense counsel by D's wife. D's due process rights are violated when State fails to preserve material exculpatory evidence or fails to preserve potentially useful evidence while acting in bad faith. Arizona v. Youngblood, 488 U.S. 51 (1988). Potentially useful evidence is material of which no more can be said than that it could have been subjected to tests, results of which might have exonerated D. In contrast, material exculpatory evidence is evidence that possesses exculpatory value that is apparent before evidence was destroyed & is of such nature that D is unable to obtain comparable evidence by other reasonably available means. Here, tape consisted of male voice confessing to burglary for which D was convicted; however, male voice on tape was never positively identified, tape did not preclude possibility that D helped in burglary & circumstances surrounding making of tape were never discovered. Although prosecutor told defense counsel not to place tape into evidence, prosecutor did not tell counsel to destroy tape & both prosecutor & defense counsel testified that tape was misplaced & not purposefully destroyed. Thus, tape was potentially useful evidence which was destroyed due to negligence & not bad faith. Held, judgment affirmed.

RELATED CASES: Terry, App., 857 N.E.2d 396 (even if Youngblood applies to State's destruction of evidence after D was convicted, destruction of potentially helpful pager in their case was not done in bad faith, but pursuant to IPD procedures); Blanchard, App., 802 N.E.2d 14 (27 lost photographs showing twins as happy & healthy infants were potentially useful evidence at best & did not rise to level of materially exculpatory evidence, because baby was chronically malnourished & anemic at time of D's arrest; no bad faith shown); Albrecht, 737 N.E.2d 719 (at most, FBI agent's interview notes which were destroyed before trial may have been potentially helpful to D's case as additional evidence); Wade, App., 718 N.E.2d 1162 (D's due process rights were not violated by State's failure to preserve his vehicle as evidence; at best this evidence was "potentially useful evidence" that would only discredit witness' description, but it would not clear D from guilt); Chissell, App., 705 N.E.2d 501 (State's failure to preserve police videotapes of D performing sobriety tests both at scene & at jail did not impair D's rights to fair trial & due process).

TITLE: State v. Durrett
INDEX NO.: M.7.b.
CITE: (03-12-10), 923 N.E.2d 449 (Ind. Ct. App 2010)
SUBJECT: Destruction of evidence - no bad faith
HOLDING: Granting motion to dismiss charges for criminal recklessness resulting in serious bodily injury and failure to return to scene of accident resulting in serious bodily injury was abuse of discretion. Here, D allegedly drove a van that struck Whitney Uphold. One eyewitness said no one approached van when D veered van toward Uphold, struck Uphold, and drove off. The witness also said he beat on van before D drove off because Uphold was pinned underneath van. Conversely, D said the witness ran toward van with a shovel. She swerved to avoid the witness and struck a fence, and then the witness began striking the van with shovel. After van was photographed, it was released. Because van was unclaimed, it was eventually sold for scrap parts. At some point, D asked the Tr. Ct. to order the state to provide addresses for witnesses, including Uphold and investigating officer.

State's failure to preserve van, which was only potentially exculpatory, did not violate D's due process rights because there was no evidence State acted in bad faith. State did not have duty to preserve van because there was comparable evidence, photographs of van, showing damage to van. State's failure to preserve shovel was not problematic because shovel had no exculpatory value. Likewise, State's failure to provide Uphold's address, photographs of van in timely manner, and investigating officer's address did not support dismissal because D cited no evidence of bad faith. Uphold's failure to attend deposition did not implicate D's 6th Amendment right of confrontation because State is not using Uphold as witness. Held, judgment reversed; Riley, J., dissenting on basis that we cannot be certain that D would have developed exculpatory evidence from the van, the alleged victim, or Officer Pulfer, but for the same reason, we can only speculate that she would not; therefore, "I cannot agree that the Tr. Ct.'s dismissal was against the logic and effects of the facts and circumstances."

RELATED CASES: Seal, 38 N.E.3d 717 (Ind. Ct. App 2015) (no due process violation from failure to preserve recordings of 2 interviews with 2 child molesting victims (where police did make written summaries of the interviews) because D failed to show that interviews were materially exculpatory or that State's failure to preserve them was product of bad faith).