CHAPTER SIX
Discovery
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CHAPTER SIX

DISCOVERY

For a discussion of general principles and strategy considerations, see *Section V.*

I. WHAT YOU CAN GET FROM THE STATE

A. SCOPE OF DISCOVERY

"The scope of discovery is governed by Trial Rule 26(B): Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party. . . . 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." In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5-6 (Ind. 1998).

The right to discovery in criminal cases in Indiana comes from the Indiana and U.S. Constitutions, statutes, Criminal Rule 21 and the Indiana Trial Rules, and the Indiana Rules of Professional Conduct. Indiana Criminal Rule 21 provides that the Trial Rules are generally applicable to all criminal proceedings. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998).

Under Indiana law, a defendant generally has the right to depose potential prosecution witnesses, unless the State makes a showing of a paramount interest in non-discovery. Tinnin v. State, 416 N.E.2d 116, 118 (Ind. 1981).

PRACTICE POINTER: Beware of outdated case law saying that discovery in Indiana criminal cases is governed entirely by trial court discretion rather than by the Trial Rules. These cases have been superseded by the 1997 amendment to Indiana Criminal Rule 21. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998).

B. DEFENDANT'S DUTY

Defense counsel has a duty to seek out discovery, even when told it does not exist.

> Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005) ("[We] cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.").

"Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." ABA Standards for Criminal Justice, Defense Function 4-4.1, (3d ed. 1993), *cited with approval in* Rompilla v. Beard, 125 S.Ct. 2456, 2466, n.6 (2005).

C. MATERIAL, EXCULPATORY EVIDENCE, OR "BRADY" MATERIAL

Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), due process requires the prosecution to disclose evidence material to issue of guilt or punishment in its possession or control. The Brady rule is applicable to trials in state courts by action of the 14th Amendment. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

The prosecutor's responsibility under Brady extends to evidence known to police investigators but not disclosed to the prosecutor. Even though police investigators sometimes fail to inform a prosecutor of all they know, "procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant [Brady] information on each case to every lawyer who deals with it." Kyles v. Whitley, 514 U.S. 442, 115 S.Ct. 1555, 1568 (1995).

Indiana recognized the Brady rule in Fair v. State, 252 Ind. 494, 250 N.E.2d 744 (1969).

The State has a duty to disclose to defendant any evidence which tends to exculpate him. This duty exists independent of any specific discovery proceedings or court order. Ottinger v. State, 370 N.E.2d 912 (Ind. Ct. App. 1977).

> Johnson v. State, 584 N.E.2d 1092 (Ind. 1992) (due process requires the prosecution to turn over exculpatory evidence in its possession throughout preparation for trial and trial itself).

When defense counsel makes an appropriate request for discovery or disclosure of exculpatory evidence, prosecution must respond by turning over material at issue, either directly to defendant's counsel or trial judge via in-camera mechanism. United States v. Bocra, 623 F.2d 281, 285-86 (3d Cir. 1980). See also, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

"The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation..." Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995).

The Indiana Rules of Professional Conduct require a prosecutor to make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. Goodner v. State, 714 N.E.2d 638 (Ind. 1999); Ind. R. Prof. Conduct 3.8(d).

1. *In-Camera* Review

When defense counsel makes an appropriate request for discovery or disclosure of exculpatory evidence, prosecution must respond by turning over material at issue, either directly to defendant's counsel or to trial judge via *in-camera* mechanism. United States v. Bocra, 623 F.2d 281, 285-86 (3d Cir. 1980). See also, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

When the State claims the defendant is requesting "criminal intelligence information," it may request the trial court to conduct an *in-camera* review to determine whether the "criminal intelligence information" is material to the defendant's defense. Rubalcada v. State, 731 N.E.2d 1015 (Ind. 2000). "'Criminal intelligence information' means information on identifiable individuals complied in an effort to anticipate, prevent or monitor possible

criminal activity. 'Criminal intelligence information' does not include criminal investigative information which is information on identifiable individuals complied in the course of the investigation of specific criminal acts." Id. at 1017, n.4 (quoting Ind. Code § 5-2-4-1. "Criminal intelligence information is hereby declared confidential and may be disseminated only to another criminal justice agency, and only if the agency making the dissemination is satisfied that the need to know and intended uses of the information are reasonable and that the confidentiality of the information will be maintained." Id. at 107, n.5 (quoting Ind. Code § 5-2-4-6).

2. Test: Material Evidence

Favorable evidence is material, and 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. Evidence useful to the defense for impeachment purposes falls within the Brady rule just as exculpatory evidence does. U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985).

3. Examples of Material Evidence

a. Guilt of Another

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) (accomplice's statement admitting to being principal actor should have been disclosed even though it also implicated defendant as an accessory; information bore on issue of punishment).

Kyles v. Whitley, 514 U.S. 419, 446, 115 S.Ct. 1555, 1572 (1995) (if the State had disclosed incriminating statements by an informant, Beanie, the defense could have called Beanie as an adverse witness, or examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating - if not countenancing - serious possibilities that incriminating evidence had been planted).

Turner, et al. v. United States, 137 S.Ct. 1885 (2017) (withheld evidence was "too little, too weak" to undermine government's theory that the victim was killed in a group attack, so the withheld evidence was not "material").

Wearry v. Cain, 136 S.Ct. 1002 (2016) (in capital murder trial, State violated defendant's right to due process by failing to disclose evidence that would further undermine the already dubious credibility of the State's star witness).

Wetzel v. Lambert, 132 S.Ct. 1195 (2012) (Third Circuit failed to address state court finding that notations on police report that purportedly indicated possible involvement of another person in the crime were too ambiguous to be material).

Turney v. State, 759 N.E.2d 671 (Ind. Ct. App. 2001) (in child molesting prosecution, the State committed a Brady violation where it did not disclose complaining witness's prior sexual misconduct after introducing evidence of child sexual abuse accommodation syndrome, which made the disclosure mandatory; the prior sexual conduct provides an alternative source for the witness's behavior).

b. Identification Issues

Penley v. State, 734 N.E.2d 287 (Ind. Ct. App. 2000) (in pointing a firearm prosecution, State's failure to disclose the names of two eyewitnesses who would have testified that the defendant with affidavit indicating that they had observed incident and did not see a weapon was a Brady violation that required reversal).

Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562 (1972) (failure to reveal that a witness previously misstated perpetrator's name will not result in reversal where at trial witness in question, and other additional witnesses, successfully identified defendant as perpetrator).

McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (prior misidentification of defendant).

c. Impeachment Evidence of State Witnesses

Any evidence which would affect credibility of a government witness could be construed as Brady material. This includes any information which shows bias of witness, motive for witness to lie or exaggerate testimony, credibility concerns of a government witness (i.e., prior bad acts of dishonesty, felony convictions), and lack of memory by witness. The prosecution's failure to disclose impeachment evidence to defendant upon request requires reversal only if there is a reasonable probability that the result of the trial would have been different if evidence had been made known to defendant. Tyson v. State, 626 N.E.2d 482 (Ind. Ct. App. 1993).

Wearry v. Cain, 136 S.Ct. 1002 (2016) (in capital murder trial, State violated defendant's right to due process by failing to disclose evidence that would further undermine the already dubious credibility of the State's star witness).

United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985) (impeachment evidence can often make difference between acquittal and conviction).

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972) (promises of immunity to government witness).

Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793 (1967) (prior contrary statements of rape victim).

Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959) (interest in testifying falsely).

Rowe v. State, 704 N.E.2d 1104 (Ind. Ct. App. 1999) (failure to disclose that State's witness has prior criminal history, including burglary and theft, required reversal).

Sims v. Hyatte, 914 F.3d 1078 (7th Cir. 2019) (due process violated because prosecution withheld evidence that the victim identified defendant as the shooter at trial after being hypnotized "to enhance his recollection of the shooting").

PRACTICE POINTER: Request production of personnel files of government witnesses so defense may review those files for impeachment materials (i.e., Brady material). See page 6.

Evidence which impeaches a State's witness testimony at trial falls under Brady. But the request must be specific. A general request "for any information tending to impeach the prosecution witness" constitutes a general request, which would be treated as if no request had been made because it is insufficient notice on what to produce. U.S. v. Washington, 669 F.Supp. 1447 (N.D. Ind. 1987).

d. Mitigation of Punishment Evidence

The suppression by prosecutors of evidence favorable to an accused, upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936 (1999).

Defense counsel has a duty to seek out mitigating evidence in discovery, even when told it does not exist. Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005) ("[We] cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.")

e. Plea Bargain with Witness

A prosecutor must disclose express plea agreements or understandings between the State and witnesses, even when such agreements or understandings are not reduced to writing. Goodner v. State, 714 N.E.2d 638, 642 (Ind. 1999); Wright v. State, 690 N.E.2d 1098, 1113 (Ind. 1997); Ferguson v. State, 670 N.E.2d 371 (Ind. Ct. App. 1996).

> Bowens v. State, 722 N.E.2d 368 (Ind. Ct. App. 2000) (PCR properly granted where prosecution suppressed evidence of agreement between prosecution and State's key witness).

Where a witness testifying for prosecution falsely denies being offered a plea bargain for his/her testimony, that witness must be corrected by prosecution. Giglio v. U. S., 405 U.S. 150, 92 S.Ct. 763 (1971); Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959).

> Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App. 1994) (failure to disclose deal with State's witness required reversal where witness denied any agreements or promises to induce her testimony).

But see:

> Donnegan v. State, 889 N.E.2d 886 (Ind. Ct. App. 2008) (because State did not enter into an express agreement with co-defendant or witness to modify their sentences in return for their testimony, prosecutor did not commit misconduct by failing to disclose such). See also McCord v. State, 622 N.E.2d 504 (Ind. 1993); Rubalcada v. State, 731 N.E.2d 1015 (Ind. 2000).

f. False Impressions

Deliberate deception on direct examination regarding defendant's involvement in crime charged violates due process. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935).

Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785 (1967) (paint, not blood, on shorts).

Failure to correct "false impressions" on material issues of fact on direct or cross violates due process, even when the falsehood only goes to the credibility of the witness.

Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103 (1957) (failure of prosecutor in murder case to correct "false impression" in wife's testimony that wife and victim, her lover, were only casual friends violated due process where defendant-husband set up "heat of passion" defense).

g. Evidence BAC Datamaster Working Properly

Every BAC Datamaster is required to be recertified every 180 days. 260 I.A.C. 1.1-2-2. Recalibration and recertification destroy all evidence of whether the machine was working properly. [260 I.A.C. 1.1-2-2 Repealed]

Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (defendant showed prejudice; accuracy of test result was crucial to charge of operating vehicle with blood alcohol level of at least .10% and material to charge of operating while intoxicated; latest certification of machine used to test defendant was in April 1992 when it had experienced voltage problems. Defendant promptly filed request to inspect BAC Datamaster and run test sample. Court conducted expedited hearing and ordered Indiana Dept. of Toxicology (IDT) to be present during inspection. IDT recertified Datamaster on same day its inspector had refused to cooperate with defendant's inspection).

h. Policy Manual Requested During Discovery

Hickingbottom v. State, 121 N.E.3d 648, 653 (Ind. Ct. App. 2019) (in prosecution for battery resulting in bodily injury to public safety officer, trial court abused its discretion in denying defendant's motion for mistrial based on State's failure to produce Department of Correction manual of policies and procedures on use of force, "the most important piece of evidence," which was material to defendant's guilt because he claimed self-defense).

i. Disclosure of Evidence During Trial

Bates v. State, 77 N.E.3d 1223 (Ind. Ct. App. 2017) (State's failure to disclose before trial the existence of wallet found in area of burglary did not violate Brady v. Maryland because: (1) Brady does not generally require pretrial disclosure; (2) defendant failed to show wallet was material; and (3) to extent late disclosure prevented defendant from showing wallet was material, defendant failed to request continuance to help him make such showing); see also Davis-Martin v. State, 116 N.E.3d 1178 (Ind. Ct. App. 2019).

4. How to Get Exculpatory Evidence

a. Motions Practice

Fels, *Brady Motions: A Sword and a Shield for Alert Defense Counsel,* (LEI/BNA 1992) offers the following advice:

- Always make *specific* requests. Relying on a general request for "exculpatory evidence" is manifest incompetence. Defendant must show pre-trial request gave prosecutor notice of exactly what defense desired including that defense wants originals of documents or things. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

  Hiner v. State, 470 N.E.2d 363, 372-73 (Ind. Ct. App. 1984) (court refused to admit photocopies of mug shot of defendant offered into evidence by defendant for reason that photocopy was of poor quality and defendant failed to request original of mug shot - he simply requested a "mug shot." Defendant made no request for continuance; evidence cumulative, did not affect outcome).

- Begin by filing a general "specific" request.
- If you do not receive a written response, go see the prosecutor and go over each item in your first request point by point. Then write him a letter summarizing his statements and file the letter with the clerk.
- Then make a series of specific enumerated requests.
- Break each of these requests down into individual items. They will receive more attention in this fashion and will increase the pressure on the prosecutor to respond.
- Do not permit the prosecutor to evade these specific requests by general, oral responses. **Always reduce the prosecutor's comments to writing, send him a copy and file a copy with the clerk.**
- Continue to file Brady requests on the eve of trial and during trial. They continue to force the prosecution to review the information available to it.

  Lyons v. State, 600 N.E.2d 560 (Ind. Ct. App. 1992) (State's failure to produce photograph of defendant taken at time of his arrest for robbery, which allegedly did not match description of defendant given by victim and police investigator did not violate Brady; defendant made no request on record for photograph prior to or during trial).

  Wetzel v. Lambert, 132 S.Ct. 1195 (2012) (Third Circuit failed to address state court finding that notations on police report that purportedly indicated possible involvement of another person in the crime were too ambiguous to be material).

  Baddelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001) (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 defendant's due process rights).

  Farris v. State, 732 N.E.2d 230 (Ind. Ct. App. 2000) (where evidence came out at trial and there were three other witnesses testifying against defendant, fact that State suppressed recanted testimony was not material).

Boyd v. State, 650 N.E.2d 745 (Ind. Ct. App. 1995) (even assuming undisclosed fingerprint evidence could be considered exculpatory, it was not material enough to create reasonable doubt that did not otherwise exist).

b. Timing of Disclosure - Earliest Opportunity

Generally, exculpatory material must be provided in time for effective use at trial.

ABA Standards Relating to Discovery and Procedure Before Trial, 11-2.1 (disclosure of Brady material "within a specified and reasonable time prior to trial ").

ABA Standards Relating to the Prosecution Function, 3-3.11(a) (disclosure at "earliest feasible opportunity").

c. Waiving Brady/Bagley in plea agreement

The Federal Constitution requires the government to provide impeachment evidence to a defendant before trial but not before a plea agreement. U.S. v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450 (2002).

d. If Prosecutor Unsure, Then Must Retain It

Prosecutor should consider:

- seriousness of the charge
- whether evidence is relevant either to defendant's guilt or punishment
- potential usefulness to defendant of evidence for rebuttal or impeachment of the State's case.

After considering all these factors, if prosecutor has any doubts concerning potential materiality of the evidence, he must retain it. See Birkla v. State, 263 Ind. 37, 323 N.E.2d 645, 649 (1975).

Dennis v. United States, 384 U.S. 855, 875, 86 S.Ct. 1840 (1966) (generally improper for prosecutor to decide what is useful for defense: "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."). United States v. Hibler, 463 F.2d 455 (9th Cir. 1972).

e. *In Camera* Review

In camera review means review by the trial court, in private. It is appropriate when the evidence sought to be discovered is confidential or privileged and there is a dispute over its relevance. If there is any doubt as to the exculpatory nature of any evidence or information in the government's possession, it should be submitted to the court for an *in-camera* inspection. The court, in conducting the inspection, will balance the government's need for confidentiality against the defendant's constitutional right to obtain evidence vital to a fair defense.

In camera review to determine materiality or the validity of and objections to production is generally within the trial court's discretion. Canfield v. Sandock, 563 N.E.2d 526, 531 (Ind. 1990).

In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (Ind. 1998) (party seeking *in camera* review of evidence in the possession of a third party, where materiality is challenged or is unknown, will be required to make a showing of at least "potential materiality" to obtain *in camera* review of the disputed items).

Hulett v. State, 552 N.E.2d 47, 50 (Ind. Ct. App. 1990) (error in not conducting *in-camera* inspection - allowing defendant discovery of information relevant to preparation of defense).

United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974) (describing the balancing method and analysis for *in camera* inspection).

Mere speculation government's file may contain Brady material is not sufficient to require *in camera* inspection. U.S. v. Doby, 665 F.Supp. 705 (N.D.Ind. 1987). However, where the defense specifically requests something and the State responds with a general claim that the item contains undiscoverable materials, an *in camera* inspection may be appropriate.

PRACTICE POINTER: If court orders *in camera* inspection, seek limited participation under a protective order. If this request is denied, ask the court to compel the prosecutor to submit for inspection any material related to subject of inquiry and that material be sealed for appellate review of trial judge's decision. See ABA Standards, Discovery and Procedure Before Trial, 11-6.7, National Prosecution Standards 13.5(D).

f. Prosecutor Responsible for Knowledge Held by Police

The prosecutor is responsible for knowledge held by State's investigators. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1568 (1995).

Reid v. State, 267 Ind. 555, 372 N.E.2d 1149, 1154 (1978) ("only by charging the prosecution with knowledge held by the State's investigators can we be assured that the prosecutor, rather than the police, will be in control of the State's case").

Bunch v. State, 964 N.E.2d 274, 301 (Ind. Ct. App. 2012) (fact that Federal Bureau of Alcohol, Tobacco, and Firearm agents kept complete file on ATF's premises did not mitigate State's obligation to disclose exculpatory evidence in that file).

Penley v. State, 734 N.E.2d 287 (Ind. Ct. App. 2000) (State was charged with knowledge of information eyewitness provided to investigating police officer who interviewed her at the scene, despite its assertion after trial that State never had any information from eyewitness).

Goolsby v. State, 517 N.E.2d 54 (Ind. 1987) (because work product of the State includes police reports, defense can argue that knowledge of investigating police officers is imputable to prosecutor).

Carey v. State, 275 Ind. 321, 416 N.E.2d 1252, 1257 (1981) (when police officer and DEA special agent are aware of and cause arrangement for person who has committed crime to become an informant, their failure to inform prosecutor of such act does not obviate State's obligation to make those facts available to jury).

See also

Giglio v. U. S., 405 U.S. 150, 92 S.Ct. 763 (1972) (prosecutor responsible for knowledge of those within prosecutor's office).

g. Make Record

It is vitally important to make a record for appeal on issues of failure to turn over evidence. Unless an appellant can demonstrate that the exculpatory evidence exists, he cannot succeed with an argument that he was denied access to the evidence. Hunt v. State, 455 N.E.2d 307 (Ind. 1983); Swan v. State, 268 Ind. 317, 375 N.E.2d 198 (1978).

h. State's Duty to Disclose

See Counsel's Obligations, Section V.B.

5. Summary Denial of Post-Conviction Brady Claim Inappropriate

Tyson v. State, 626 N.E.2d 482 (Ind. Ct. App. 1993) (summary denial of post-conviction was inappropriate; in his PCR petition, defendant alleged State was knew about relationship of complaining witness and her family with their lawyer, including contemplation of civil action against defendant and failed to provide information to defense).

D. STATEMENTS OF DEFENDANT AND PROPERTY

Statements of defendant are discoverable unless State demonstrates paramount interest in nondisclosure. Failure to specify that both oral and written statements are sought may act as waiver, or at least as a basis for avoiding finding specific request by trial court. Drummond v. State, 467 N.E.2d 742 (Ind. 1984).

Lagenour v. State, 268 Ind. 441, 376 N.E.2d 475 (1978) (State must furnish all statements and confessions made by the defendant absent a showing that they have paramount interest in nondisclosure).

Sexton v. State, 257 Ind. 556, 276 N.E.2d 836 (1972) (reversible error not to order discovery of defendant's statement to police one hour after death of victim in murder case where defendant's only defense was insanity).

The defendant may also obtain his statements made to third party media.

In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (Ind. 1998) (videotape of defendant's post-arrest interview with reporter was material, and therefore discoverable because third party television station did not demonstrate a paramount interest in non-production).

Items belonging to or obtained from defendant are also discoverable. State ex rel. Keller v. Criminal Court of Marion County, 262 Ind. 420, 317 N.E.2d 433 (1974).

E. WITNESS LIST

1. Material Witness

State cannot withhold name of material witnesses, nor contrive to place witnesses beyond reach of process. Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970).

Ortez v. State, 165 Ind. App. 678, 333 N.E.2d 838 (1975) (convictions reversed; evidence undisputed that State encouraged and provided informant with means to travel to California to make him unavailable to defense).

Gossmeyer v. State, 482 N.E.2d 239 (Ind. 1985) (no showing that State colluded with informant to have him concealed so that he would not be available for trial or that content of informant's testimony would be unavailable to defendant).

Reed v. State, 748 N.E.2d 381 (Ind. 2001) (State's failure to offer immunity to witness until trial deprived defendant of his right to depose witness, and thus his Sixth Amendment right to cross-examination).

a. Notice Given if Names on Indictment or Information

Defense is put on notice that witnesses whose names are endorsed on indictment or information are State's witnesses, even if excluded from witness list. Morgan v. State, 440 N.E.2d 1087 (Ind. 1982).

Staggers v. State, 477 N.E.2d 539 (Ind. 1985) (supplement to witness list on second day of trial didn't prejudice defendant where defendant was aware of witness, as his name appeared on back of property receipt, and defendant failed to object at trial).

Greer v. State, 543 N.E.2d 1124 (Ind. 1989) (State's failure to list names of its witnesses in its amended information did not require dismissal of charges against defendant, where defendant was able to obtain the names, and State had difficulty in locating some of the witnesses).

If a witness is not on information or indictment, the prosecution is generally not entitled to continuance should witness be absent. Ind. Code § 35-34-1-2(d).

b. Not on Witness List

Johnson v. State, 580 N.E.2d 670 (Ind. 1991) (allowing State to amend witness list in prosecution for criminal deviate behavior to admit testimony of nurse for purpose of establishing chain of custody of rape kit did not result in prejudice to defendant,

particularly where defendant was given opportunity to interview nurse prior to cross-examination).

Kennedy v. State, 578 N.E.2d 633 (Ind. 1991) (defendant was not prejudiced by fact that State was allowed to amend witness list during trial even though defendant claimed to have lacked adequate time to prepare for cross-examination; defense counsel spoke with witness for short period before his testimony, and record revealed that counsel did adequate job of cross-examining witness and eliciting information pertinent to defense).

Patel v. State, 533 N.E.2d 580 (Ind. 1989) (trial court was not shown to have abused its discretion by admitting police officer's testimony at homicide trial, although State failed to specifically mention officer's name in its witness list, where it also informed that anyone mentioned in police reports might testify and officer's name was in the reports).

Agee v. State, 544 N.E.2d 157 (Ind. 1989) (defendant was not denied fair trial when witness, who was not included on State's witness list, was allowed to testify concerning a conversation in which defendant stated she was going to get a gun and shoot her husband, where State had furnished defendant's counsel with copy of witness's statement on very day they learned of it).

c. Too Many Names on Witness List

Wallace v. State, 474 N.E.2d 1006 (Ind. 1985) (in prosecution for murder, defendant's alleged inability to anticipate testimony of witness from cumulative list of 125 witnesses State intended to call, of which only 13 were actually called, did not result in reversible error, since defendant took no action to compel a more tenable witness list).

2. State's Rebuttal Witnesses

The nondisclosure of a rebuttal witness is excused only when that witness was unknown and unanticipated; known and anticipated witnesses, even if presented in rebuttal, must be identified pursuant to proper discovery request. McCullough v. Archbold Ladder Co., 605 N.E.2d 175, 179 (Ind. 1993); Sobolewski v. State, 889 N.E.2d 849 (Ind. Ct. App. 2008).

Note: McCullough is not retroactive. Jenkins v. State, 627 N.E.2d 789 (Ind. 1993).

Beauchamp v. State, 788 N.E.2d 881 (Ind. Ct. App. 2003) (trial court should have excluded State's expert's rebuttal testimony because it substantially differed from opinions expert offered when deposed yet State did not advise defendant regarding expert's changed opinions; State violated standing discovery order and Trial Rule 26(E)(1), which requires parties to supplement the substance of their expert's testimony in a timely manner).

Where record of request for such witnesses is made and failure to disclose is shown, nondisclosure violates due process. Reid v. State, 267 Ind. 555, 372 N.E.2d 1149 (1978).

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973) (where the defense requests discovery of witnesses and rebuttal witnesses were well known to State, the State has a duty to provide them).

Jenkins v. State, 627 N.E.2d 789 (Ind. 1993) (court rejected defendant's argument that rebuttal expert witness should not have been allowed to testify because witness was not disclosed until 45 minutes before his testimony; defendant did not move for continuance and waived any alleged error regarding discovery noncompliance).

Cf.

Thompkins v. Cohen, 965 F.2d 330 (7th Cir. 1992) (prosecutor's failure to disclose the names of his rebuttal witnesses in advance to defendant, who was required to disclose the names of his witnesses to the prosecutor in advance, was harmless error in light of evidence powerfully corroborating testimony of defendant's accomplice indicating that defendant was gunman who killed customer during course of restaurant robbery).

Failure of State to disclose rebuttal witnesses violates reciprocity principles, in violation of the 14th Amendment. Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988).

3. Expert Witness - Facts Known and Opinions Held

Within certain limits, the State and defendant may obtain discovery of each other's testifying expert witnesses. The State has an obligation under Brady to disclose exculpatory evidence to the defendant, including expert opinions that would tend to lessen the likelihood of guilt or mitigate the severity of punishment. The defendant has a privilege against disclosure of incriminating evidence, but in the context of dealing with expert witnesses it can be difficult for defense counsel to safeguard this privilege.

An expert witness who is examined as to his or her professional opinions and impressions is entitled to be compensated accordingly. State v. Bailey, 714 N.E.2d 1144 (Ind. Ct. App. 1999); Buchman v. State, 59 Ind. 1 (1877); Ind. Const., Article 1 § 21.

a. Getting Discovery from State's Experts

A defendant in a criminal case is entitled to depose potential prosecution witnesses. State v. Bailey, 714 N.E.2d 1144 (Ind. Ct. App. 1999); Tinnin v. State, 416 N.E.2d 116, 118 (Ind. 1981).

Where a State's expert witness also has personal knowledge of relevant facts, the witness may be required to give testimony as to the facts just as any other witness. "In respect to facts, [an expert witness] stands upon an equality with all other witnesses, and the law, as well as his duty to the public, requires him to attend and testify[.]" State v. Bailey, 714 N.E.2d 1144, 1149-50 (Ind. Ct. App. 1999) (quoting Buchman v. State, 59 Ind. 1 (1877)).

b. Change in Expert's Opinion

Trial Rule 26(E)(1), and often standing discovery orders, require that parties supplement the substance of their expert's testimony in timely fashion. Beauchamp v. State, 788 N.E.2d 881 (Ind. Ct. App. 2003).

Beauchamp v. State, 788 N.E.2d 881 (Ind. Ct. App. 2003) (where doctor was anticipated rebuttal witness for State and State was aware that doctor prepared to

offer new opinions, State committed misconduct by failing to disclose changed opinion; reversal required).

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (the State did not comply with trial court's standing discovery order or Trial Rule 26(E) (1) where it failed to disclose expert's augmented opinion given in his earlier disclosed report).

c. Defense Experts and Consultants

Sometimes the defense will obtain the services of an expert who will not testify as a witness but will only assist in the preparation of the defense. The State may discover the facts known or opinions held by such a consultant expert only as provided in Trial Rule 35(B) or upon a showing that it is impracticable for the State to obtain facts or opinions on the same subject by any other means. See Trial Rule 26(B)(4)(b).

A non-testifying consultant expert, like other agents of the attorney, is covered by the attorney-client privilege. See, e.g., Brown v. State, 448 N.E.2d 10 (Ind. 1983).

The work-product doctrine extends to protect notes and materials prepared by non-testifying agents of the attorney. See, e.g., U.S. v. Nobles, 422 U.S. 225, 95 S.Ct. 2160 (1975).

If the defense later decides to name the consulting expert as a testifying expert, both the attorney-client privilege and the work product doctrine can be waived. See, Brown v. State, 448 N.E.2d 10 (Ind. 1983); U.S. v. Nobles, 422 U.S. 225, 95 S. Ct. 2160 (1975).

The Indiana Court of Appeals has held that even after an expert has been listed as a testifying expert witness, a party may later choose to label the expert a consulting expert and thereby afford him the protection of Trial Rule 26(B)(4)(b). Reeves v. Boyd & Sons, Inc., 654 N.E.2d 864, 874-75 (Ind. Ct. App. 1995); Donnelley & Sons Co. v. North Texas Steel, 752 N.E.2d 112, 131-32 (Ind. Ct. App. 2001).

PRACTICE POINTER: When an indigent client needs the assistance of an expert, including testimony, first make an *ex parte* application for funds to hire the expert as a consultant. A consulting expert need not be disclosed to the State. The decision to list the expert as a witness or not can be made later. An impartial expert may reach conclusions which are not helpful to the client. By hiring an expert as a consultant initially, counsel can avoid the breach of the privilege against self-incrimination, work-product and other privileges that could result from listing the expert as a witness right away. The 7th Circuit has found trial counsel ineffective in part because they disclosed the report of an unfavorable expert, and failed to take advantage of the protections for consulting experts in T.R. 26(B)(4)(b). Stevens v. McBride, 489 F.3d 883, 896-97 (7th Cir. 2007).

The State's interest in discovery is the prevention of surprise, not punishment of the defendant for technical errors. U.S. ex rel. Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985).

4. Avoiding Waiver

Defendant must be diligent in asking for relief and in stating his interest in such relief. Gilliam v. State, 270 Ind. 71, 383 N.E.2d 297 (1978).

5. Relief Available

The relief available to defendant is:

(1) a continuance,

Beauchamp v. State, 788 N.E.2d 881 (Ind. Ct. App. 2003) (where State failed to disclose rebuttal doctor's changed opinion, a continuance during trial would have been a futile remedy because the defendant had already relied on the doctor's original opinion by calling his own doctor).

> **NOTE**: Delay from a defendant's motion for continuance will not be attributed to the defendant for Criminal Rule 4 purposes if the reason for the continuance is the State's failure to provide timely discovery. Dillard v. State, 102 N.E.3d 310 (Ind. Ct. App. 2018).

(2) an order that State produce the witness; Ortez v. State, 165 Ind.App. 678, 333 N.E.2d 838 (1975); Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970); Gilliam v. State, 270 Ind. 71, 383 N.E.2d 297 (1978).

(3) dismissal, if the State's collusion in his absence can be shown and witness is not produced. Ortez v. State, *supra*; Gossmeyer v. State, 482 N.E.2d 239 (Ind. 1985); Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970). But see State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (outright dismissal not appropriate remedy for pattern of pretrial government misconduct).

State v. Montgomery, 901 N.E.2d 515 (Ind. Ct. App. 2009) (trial court did not abuse its discretion by dismissing case where State delayed over three years in producing 200 photos to be used in arson case; on rehearing at 907 N.E.2d 1057, Court *clarified* that even if State provided some of the photos to defendant within a timely manner, it did not provide the allegedly exculpatory photos until twelve days before trial).

State v. Schmitt, 915 N.E.2d 520 (Ind. Ct. App. 2009) (trial court did not abuse discretion in dismissing OWI charges because State's refusal to respond to defendant's Request for Production constituted bad faith; defendant sought information and documentation about officer's training for administration of traffic stops and field sobriety tests; defendant also requested NHTSA manual arresting officer used and was trained under).

Burst v. State, 499 N.E.2d 1140 (Ind. Ct. App. 1986) (State's failure to make paid confidential informant available to defendant deprived defendant of fair trial, where informant had been significantly involved in transactions from which criminal charges arose, and State had aided informant in relocating out of state).

F. CONFIDENTIAL INFORMANT

1. Identity Privilege

The informant's identity privilege allows the government to refuse to disclose an informant's identity in some circumstances. Where disclosure of an informer's identity or the contents of

his communication is relevant and helpful to the defense to an accused, or is essential to a fair trial, the government's privilege to withhold disclosure of the informer's identity must give way. Roviaro v. U.S., 353 U.S. 53, 60-62, 77 S.Ct. 623 (1957).

State v. Jones, 169 N.E.3d 397 (Ind. 2021) (defense counsel's request for face-to-face interview triggered confidential informant privilege because interview would reveal physical appearance of informant).

a. Defendant's Burden: Disclosure is "Relevant and Helpful"

The defendant must demonstrate that disclosure of the informant's identity is relevant and helpful or is necessary for fair trial. The burden is on the defendant seeking disclosure to demonstrate exception. Schlomer v. State, 580 N.E.2d 950 (Ind. 1991); State v. Cook, 582 N.E.2d 444 (Ind. Ct. App. 1991).

Beville v. State, 71 N.E.3d 13 (Ind. 2017) (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, where he demonstrated that the recording was relevant and helpful his defense. The State's claim that the informer's privilege entitled it to withhold disclosing the recording and that defense counsel could review it in the prosecutor's office was unavailing because the State failed to meet its burden of establishing the essential elements of the privilege).

State v. Jones, 169 N.E.3d 397 (Ind. 2021) (remanding for more findings when trial court's statement that it had known defense counsel for long time and trusted counsel was "looking for something real" was insufficient to show establish disclosure was relevant and helpful).

Sheckles v. State, 24 N.E.3d 978 (Ind. Ct. App. 2015) (court rejected defendant's claim he was entitled to disclosure of confidential informant because there was discrepancy in amount of cocaine sold).

Smith v. State, 829 N.E.2d 64 (Ind. Ct. App. 2005) (trial court did not err in refusing to compel State to disclose identity of confidential informants where they were not sole material witnesses and defendant apparently knew identity of informants).

Heyen v. State, 936 N.E.2d 294 (Ind. Ct. App. 2010) (any refusal by trial court to disclose identify of confidential informant was harmless error because defendant already knew CI's identity).

Brock v. State, 540 N.E.2d 1236 (Ind. 1989) (defendant presented insufficient evidence to support his argument that confidential informant could not have seen controlled substances in defendant's home within 72 hours of defendant's arrest, as stated in probable cause affidavit in support of request for search warrant; thus, defendant was not entitled to disclosure of informant's identity).

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (defendant in prosecution for forgery and theft was not entitled to discover confidential informant's letter relating conversation with inmate about defendant's disclosure of efforts by defendant and

victim to escape from jail and was not deprived of due process or right to confront witnesses; defendant sought letter in order to impeach victim).

Lewandowski v. State, 271 Ind. 4, 389 N.E.2d 706 (1979) (mere fact that informer was present during a conversation was not enough to show evidence was relevant and helpful).

Beverly v. State, 543 N.E.2d 1111 (Ind. 1989) (defendant did not show basis for disclosure of identity of informant whose only connection with the case was initial tip to police, despite defendant's claim that informant gave false information).

See IPDC *Evidence Manual*, 2020, ed., chapter 5, Section I.H.

b. State's Burden: Paramount Interest or Risk of Life of Informant

Where disclosure of informant's identity and contents of the communications is relevant and helpful to defense of accused, or essential to a fair trial, defendant is entitled to disclosure unless the State can show a paramount interest in nondisclosure or an unwarranted risk to the life of informant. Randall v. State, 474 N.E.2d 76 (Ind. 1985); Furman v. State, 496 N.E.2d 811 (Ind. Ct. App. 1986). To prevent disclosure of a confidential informant's identity, it is not enough to show that the CI's identity might be revealed. Rather, it is the State's burden to prove that the CI's identity would be revealed as a result of a face-to-face interview.

Pigg v. State, 591 N.E.2d 582 (Ind. Ct. App. 1992), (trial court committed reversible error by precluding drug defendant from asking confidential informant who was prosecution's key witness to divulge his home address), *adopted in part*, 603 N.E.2d 154.

Williams v. State, 529 N.E.2d 323 (Ind. 1988) (defendant was not entitled to *in camera* interview of confidential informants, who provided police with information which led to defendant's arrest for possession of heroin with intent to deal and conspiracy to deal heroin, as police detective testified that revealing identity of informants would threaten their lives and render them useless to police in future, and defendant did not show more compelling interest in interviewing informants).

c. Where Informant Has Ongoing Relationship with State

Burst v. State, 499 N.E. 2d 1140 (Ind. Ct. App. 1986) (where informant has ongoing relationship with State and is paid for their work, this special employee status makes their identity discoverable if defendant shows activity and presence in transactions that form basis of charges).

G. WITNESS STATEMENTS

1. Pre-trial Production

Trial court may require pre-trial production of witnesses' statements.

Lowrimore v. State, 728 N.E.2d 860 (Ind. 2000) (State had made plea agreement with co-defendant witness to testify at trial. Three and a half months before trial, co-defendant filed petition for post-conviction relief, alleging that his guilty plea was not voluntary and was "induced by fraud, fear, force and ignorance." In violation of trial court's discovery order, the State did not disclose existence of this pleading to defendant until after witness had testified and been extensively cross-examined by defense counsel. Court expressed concern at this misconduct by prosecutor and suggested that in future case, "a [State law] prophylactic rule requiring reversal may be required if recurring abuses occur.")

State is not required to divulge witness's expected testimony in advance of trial if no written statement was taken or no written report summarizing questions posed to witness was made. Washington v. State, 273 Ind. 156, 402 N.E.2d 1244 (1980).

Dillard v. State, 257 Ind. 282, 274 N.E.2d 387 (1971) ("Any and all interoffice memos, notes, and reports . . . concerning the robberies" was too general and unspecific).

Nuckles v. State, 250 Ind. 399, 236 N.E.2d 818 (1968) (right to obtain evidence concerning defendant's pre-trial confession).

a. Test

In determining right of defendant to obtain pre-trial discovery, court asks:

(1) is there sufficient designation of items sought to be discovered? (Describe with "reasonable particularity" so State can locate documents sought and trial court determine if state complied). **NOTE:** This requirement must not be construed strictly against defendant, by having to describe items with degree of particularity only attainable as result of inspection sought. Dillard v. State, 274 N.E.2d 387 (Ind. 1971); In re WTHR-TV, State v. Cline, 693 N.E.2d 1(Ind. 1998).

(2) Is the item sought to be discovered material to the defense? **NOTE:** Materiality of some categories of information is self-evident, e.g., witnesses' lists, deposition of witnesses, pre-trial statements of the defendant, results of medical and scientific examinations, inspection of items of real evidence, etc. Dillard v. State, 274 N.E.2d 387 (Ind. 1971) and In re WTHR-TV, State v. Cline, 693 N.E.2d 1(Ind. 1998).

(3) Has the State, or non-party opposing discovery, made a sufficient showing of its paramount interest, if any, in non-disclosure? See In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (Ind. 1998).

b. Appears on List of Anticipated Trial Witnesses

State ex rel. Crawford v. Superior Court of Lake County, 549 N.E.2d 374, 375-76 (Ind. 1990) (defendants may be able to discover statements before trial if person making statement appears on State's list of anticipated trial witnesses; court has discretion to presume foundation required in Antrobus v. State, 254 N.E.2d 873 (Ind. 1970), has been established).

c. Statements Made to Police or Grand Jury

Trial court has power to permit pre-trial production of statements made to police or grand jury. Statements need not have been signed by witness nor used by prosecutor in order to be discoverable. Defendant must lay Antrobus-type foundation tailored to fit pre-trial situation. Dillard v. State, 257 Ind. 282, 274 N.E.2d 387, 393 (1971).

See 2.a. below for discussion of Antrobus foundation.

2. After Direct Examination

During the course of the trial, defendant has right to obtain statements of witnesses made prior to trial to the grand jury or the police. Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970). Work product protection does not extend to statements of prosecution witnesses relating to their testimony after direct examination by prosecution at trial.

State ex rel. Meyers v. Tippecanoe Superior Ct., 438 N.E.2d 989 (Ind. 1982) (DeBruler, J., dissenting) (cannot compel prosecution to produce each witness's expected testimony with respect to each essential element of each offense charged).

Witness statements are discoverable once a proper foundation is laid, absent a showing of confidentiality or irrelevancy to the court, during *in camera* review of the statement.

Burns v. State, 511 N.E.2d 1052 (Ind. 1987) (work product exception does not prevent discovery of verbatim witness statements once they've testified at trial; confidential or irrelevant material should be excised).

Where State objects to production of such statements as pertinent to ongoing investigations, the court must conduct *in camera* review of the statements and the prosecution's claim. Failure to review the statements is per se error. Courts have discretion as to whether to deny defendant's request after such review, or to redact extraneous portions of the statements. Burns v. State, 511 N.E.2d 1052 (Ind. 1987).

a. Antrobus Foundation

Statements of witnesses taken in advance of trial may be obtained by criminal defendant for possible use in cross-examination after witness testifies. The trial court also has authority to order the discovery of witness statements in advance of trial. See Lowrimore v. State, 728 N.E.2d 860, 866-67 (Ind. 2000).

The foundation necessary to discover such statements:

- the witness whose statement is sought testified on direct;
- a substantially verbatim record of pre-trial statement is within control of prosecution;
- the statements relate to matters covered in direct testimony.

See Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873, 876-77 (1970).

b. Verbatim Witness Statements

The work-product doctrine is not applicable to shield verbatim witness statements from otherwise proper discovery. Hicks v. State, 544 N.E.2d 500, 504 (Ind. 1989).

In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998) (court granted defendant protective order preventing State from discovering witness statements and summaries).

c. Rule of Evidence 612: Refreshing memory

If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying. Indiana Rule of Evidence 612(a). The same is true for a writing or object used by a witness before testifying if interests of justice so requires. Indiana Rule of Evidence 612(b).

Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (defendant was entitled to inspect report that officer used to refresh his memory during trial; the fact that the refreshing of testimony occurred during defendant's cross-examination of officer does not change the fact that defendant was the party who could be harmed from the police officer's testimony and therefore was the adverse party; the State waived any work product privilege it might have had in the report when it failed to object to the handing over of the report to defense counsel for the police officer's use).

3. Oral Statements Without Written Record

The State is not required as a matter of state law to disclose contents of an oral statement that has not been recorded or memorialized in any form. Such an oral statement may be Brady material, however. See the beginning of this chapter.

Vance v. State, 640 N.E.2d 51 (Ind. 1994) (pursuant to a discovery order, State required to produce "oral statements of persons whom the Prosecuting Attorney intends to call as witnesses;" State failed to inform defendant of contents of telephone conversation defendant's grandfather had with defendant before trial; Defendant's grandfather reported defendant's telephone confession to a deputy prosecutor during a telephone conversation; deputy prosecutor made no notes concerning conversation. State identified grandfather as a witness, but did not produce any material relating to confession because none existed; the record shows that defense counsel was already aware of the content of the conversation between the defendant and his grandfather).

Witness's oral changes to prior written statement need not be disclosed if no written notes of changes were made. Merritte v. State, 438 N.E.2d 754, 758 (Ind. 1982). However, in Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003), the Court held that the State should have disclosed the fact that the defendant's wife changed her story prior to trial.

4. Child Witness Statements

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987) (where statute provides for nondisclosure, defendant is still entitled to access to material and exculpatory evidence, but only when judge finds such evidence after *in camera* review).

Norton v. State, 137 N.E.3d 974 (Ind. Ct. App. 2019) (trial court did not err in declining to release C.W.'s mental health records after reviewing them *in camera*).

Hulett v. State, 552 N.E.2d 47 (Ind. Ct. App. 1990) (State failed to show that its interest in fostering counseling services for those in need was paramount to defendant's interest in obtaining discovery of counselor's file to prepare defense in child molesting prosecution).

Statute attempting to limit discovery of exculpatory material is unconstitutional. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); Davis v. Alaska, 415 U.S. 308 (1974).

Sturgill v. State, 497 N.E.2d 1070 (Ind. Ct. App. 1986) (Ind. Code § 31-6-11-18, regulating disclosure of statements made by minors to Welfare Department was unconstitutional as applied; alleged victim testified at trial, thus destroying anonymity and State did not show its interest would be adversely affected if defendant had access to information; reversible error in refusal to grant defendant's motion to compel disclosure of victim's statements to welfare department that could have contradicted victim's testimony at trial).

Friend v. State, 134 N.E.3d 441 (Ind. Ct. App. 2019) (defendant's request for documents, which were compiled during the victim's one-on-one sessions with a social worker, were privileged under Ind. Code § 25-23.6-6-1, and they did not fall under any exceptions; thus, they could not be disclosed).

Rogers v. State, 60 N.E.3d 256 (Ind. Ct. App. 2016) (statutory counselor/client privilege did not apply to communication between unlicensed social worker and family of child molest victim and thus trial court erred in denying defendant's motion to compel).

5. Witness Statements in Police Reports

See section I.N., below.

H. DISCOVERY OF GRAND JURY TESTIMONY

1. Witnesses' Grand Jury Testimony

Court order is required to see transcripts of witnesses' testimony. Ind. Code § 35-34-2-10(b)(2). Witness not entitled to transcript of his own testimony, except in instances where particularized need is shown. Ind. Code § 35-34-2-10(b). See also Dinning v. State, 256 Ind. 399, 269 N.E.2d 371 (1971).

Defendant might argue that transcript is required to determine whether advisements as to Fifth Amendment and Art. 1, §14 privilege were given. Garner v. U.S., 424 U.S. 648, 96 S.Ct. 1178 (1976). Cf. Roberts v. U.S., 445 U.S. 552, 100 S.Ct. 1358 (1980).

2. Target May Examine Testimony of Others

Accused may examine grand jury testimony of witnesses against him.

Dennis v. U.S., 384 U.S. 855, 86 S.Ct. 1840 (1966) (grand jurors may be called as witnesses to verify the accuracy of testimony).

State ex rel. Keller v. Criminal Ct., 262 Ind. 420, 317 N.E.2d 433 (1974) (despite State's claim as to enormity of expense involved, trial court had discretion to order State to produce those portions of grand jury minutes containing testimony of persons whom State intended to call as witnesses at trial).

Jorgensen v. State, 567 N.E.2d 113 (Ind.Ct.App. 1991) (Keller was based on statutes no longer in effect; defendant not entitled to inspect grand jury minutes, as minutes were not shown to be relevant to defendant's murder trial), *adopted on transfer*, 574 N.E.2d 915 (Ind.).

I. RECORDS AND REPORTS

1. Police Reports

Factual information in a police report is discoverable.

Smith v. Cain, 132 S.Ct. 627 (2012) (Brady v. Maryland required prosecutor to give defendant notes taken by lead detective interviewing sole witness at trial to identify defendant as perpetrator; the notes contradicted witness's in-court identification because notes indicated that witness could not identify perpetrators of alleged crime).

Mahla v. State, 496 N.E.2d 568 (Ind. 1986) (no error where police memo of conversation with child molest victim and victim's family was excluded, after court admonished prosecution to disclose any exculpatory material in them; also, defendant had access to videotaped statement of victim and deposed victim and victim's mother; their trial testimony was generally consistent with pretrial statements).

McGowan v. State, 671 N.E.2d 872 (Ind. Ct. App. 1996) *trans. denied* (defendant failed to show any prejudice from trial court's ruling that state police undercover officer's policy manual was not discoverable).

Verbatim copies of police reports are discoverable unless the State proves that the report contains protectible work product under Trial Rule 26(B)(3). Minges v. State, 192 N.E.3d 893 (Ind. 2022) (*overruling* State ex rel. Keaton v. Circuit Court of Rush Cnty., 475 N.E.2d 1146 (Ind. 1985); Johnson v. State, 584 N.E.2d 1092 (Ind. 1992); Goolsby v. State, 517 N.E.2d 54 (Ind. 1987); Beckham v. State, 531 N.E.2d 475 (Ind. 1988); State ex rel. Crawford v. Super. Ct. of Lake Cnty., Crim. Div., Room II, 549 N.E.2d 374 (Ind. 1990), Robinson v. State, 693 N.E.2d 548 (Ind. 1998), Gault v. State, 878 N.E.2d 1260 (Ind. 2008)). See also, section P.

PRACTICE POINTER: A prosecutor, faced with having to sift through stacks of police reports to answer defense discovery, may decide that it is easier to give defense counsel copies of all the reports.

a. Police Reports Used to Refresh Recollection During/Before Trial

An adverse party is entitled to production of a writing or object used by a witness to refresh the witness's memory while testifying. Indiana Rule of Evidence 612(a). The trial court has discretion to require the production of a writing or object used by a witness to refresh the witness's memory before testifying, if the interests of justice so require. See Indiana Rule of Evidence 612(b).

2. Police Officer's Personnel and Medical Records

The defendant must show that he will be harmed by lack of access to the officer's personnel and service records in order to obtain access to them.

McKinley v. State, 465 N.E.2d 742 (Ind. Ct. App. 1984) (defendant not harmed by refusal of access to police officer's personnel and service records to support self-defense theory to charge of attempted battery on police officer).

Mengon v. State, 505 N.E.2d 788, 791 (Ind. 1987) (trial court denied defendant's motion for production of officer's medical records; defendant waived any alleged error by not presenting any argument or citations of authority in support of production).

3. Probation Reports

Fordyce v. State, 425 N.E.2d 108 (Ind. 1981) (summary of reports made by probation officer are not discoverable where not part of pre-sentence investigation report).

4. Confidential Files\Privileged Information

See section I.N., below

J. LAW ENFORCEMENT VIDEO RECORDINGS

1. Police Must Allow Inspection of Person Depicted in Law Enforcement Recording

Ind. Code § 5-14-3-5.1 provides:

(a) As used in this section, "requestor" means the following:

(1) An individual who is depicted in a law enforcement recording.

(2) If the individual described in subdivision (1) is deceased:

(A) the surviving spouse, father, mother, brother, sister, son, or daughter of the individual; or

(B) the personal representative (as defined in Ind. Code § 6-4.1-1-9) of or an attorney representing the deceased individual's estate.

(3) If the individual described in subdivision (1) is an incapacitated person (as defined in Ind. Code § 29-3-1-7.5), the legal guardian, attorney, or attorney in fact of the incapacitated person.

(4) A person that is an owner, tenant, lessee, or occupant of real property, if the interior of the real property is depicted in the recording.

(5) A person who:

(A) is the victim of a crime; or

(B) suffers a loss due to personal injury or property damage;

if the events depicted in the law enforcement recording are relevant to the person's loss or to the crime committed against the person.

(b) A public agency shall allow a requestor to inspect a law enforcement recording at least twice, if:

(1) the requestor submits a written request under section 3 [Ind. Code § 5-14-3-3] of this chapter for inspection of the recording; and

(2) if section 4(b)(19) [Ind. Code § 5-14-3-4(b)(19)] of this chapter applies, the public agency that owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

The public agency shall allow the requestor to inspect the recording in the company of the requestor's attorney. A law enforcement recording may not be copied or recorded by the requestor or the requestor's attorney during an inspection.

(c) Before an inspection under subsection (b), the public agency:

(1) shall obscure in the recording information described in section 4(a) [Ind. Code § 5-14-3-4(a)] of this chapter; and

(2) may obscure any information identifying:

(A) a law enforcement officer operating in an undercover capacity; or

(B) a confidential informant.

(d) Before an inspection under subsection (b), only the information in the recording described in subsection (c) may be obscured by the public agency.

(e) If a person is denied access to inspect a recording under this section, the person may appeal the denial under section 9 [Ind. Code § 5-14-3-9] of this chapter.

a. Exceptions to the Disclosure Requirement

Ind. Code § 5-14-3-5.2(a) provides:

(a) A public agency shall permit any person to inspect or copy a law enforcement recording unless one (1) or more of the following circumstances apply:

(1) Section 4(b)(19) [Ind. Code § 5-14-3-4(b)(19)] of this chapter applies and the person has not demonstrated that the public agency that owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

(2) The public agency finds, after due consideration of the facts of the particular case, that access to or dissemination of the recording:

(A) creates a significant risk of substantial harm to any person or to the general public;

(B) is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by the person;

(C) may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency as defined in section 2 [Ind. Code § 5-14-3-2] of this chapter and notwithstanding its exclusion under section 4(b)(1) [Ind. Code § 5-14-3-4(b)(1)] of this chapter; or

(D) would not serve the public interest.

However, before permitting a person to inspect or copy the recording, the public agency must comply with the obscuring provisions of subsection (e), if applicable

2. If Police Deny Access to Recording, Person May Petition Trial Court

Ind. Code § 5-14-3-5.2(b) provides:

(a) If a public agency denies a person the opportunity to inspect or copy a law enforcement recording under subsection (a), the person may petition the circuit or superior court of the county in which the law enforcement recording was made for an order permitting inspection or copying of a law enforcement recording. The court shall review the decision of the public agency de novo and grant the order unless one (1) or more of the following apply:

(1) If section 4(b)(19) of this chapter applies, the petitioner fails to establish by a preponderance of the evidence that the public agency that owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

(2) The public agency establishes by a preponderance of the evidence in light of the facts of the particular case, that access to or dissemination of the recording:

(A) creates a significant risk of substantial harm to any person or to the general public;

(B) is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by the person;

(C) may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency, as defined in section 2 of this chapter, notwithstanding its exclusion under section 4 [Ind. Code 5-14-3-4] of this chapter; or

(D) would not serve the public interest.

Compare Beville v. State, 71 N.E.3d 13 (Ind. 2017) (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, even though 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, because the State failed to meet its burden of establishing the essential elements of the privilege).

3. Redaction of Recording

Ind. Code 5-14-3-5.2(d),(e) provides:

> **(b)** If the court grants a petition for inspection of or to copy the law enforcement recording, the public agency shall disclose the recording. However, before disclosing the recording, the public agency must comply with the obscuring provisions of subsection (e), if applicable.
>
> **(c)** A public agency that discloses a law enforcement recording under this section:
>
> **(1)** shall obscure:
>
> **(A)** any information that is required to be obscured under section 4(a) of this chapter; and
>
> **(B)** depictions of:
>
> **(i)** an individual's death or a dead body;
>
> **(ii)** acts of severe violence that are against any individual who is clearly visible and that result in serious bodily injury (as defined in Ind. Code § 35-31.5-2-292);
>
> **(iii)** serious bodily injury (as defined in Ind. Code § 35-31.5-2-292);
>
> **(iv)** nudity (as defined in Ind. Code § 35-49-1-5);
>
> **(v)** an individual whom the public agency reasonably believes is less than eighteen (18) years of age;
>
> **(vi)** personal medical information;
>
> **(vii)** a victim of a crime, or any information identifying the victim of a crime, if the public agency finds that obscuring this information is necessary for the victim's safety; and
>
> **(viii)** a witness to a crime or an individual who reports a crime, or any information identifying a witness to a crime or an individual who reports a crime, if the public agency finds that obscuring this information is necessary for the safety of the witness or individual who reports a crime; and
>
> **(2)** may obscure:
>
> **(A)** any information identifying:
>
> **(i)** a law enforcement officer operating in an undercover capacity; or
>
> **(ii)** a confidential informant; and
>
> **(B)** any information that the public agency may withhold from disclosure under section 4(b)(2) through 4(b)(26) of this chapter.

4. Expedited Proceedings

A court shall expedite a proceeding filed under this section. Unless prevented by extraordinary circumstances, the court shall conduct a hearing (if required) and rule on a petition filed under this section not later than thirty (30) days after the date the petition is filed. Ind. Code § 5-14-3.5.2(f).

5. Retention of Recording

Ind. Code § 5-14-3-5.3 provides:

(a) Except as provided in subsection (c), a public agency that is not the state or a state agency shall retain an unaltered, unobscured law enforcement recording for at least one hundred ninety (190) days after the date of the recording.

(b) Except as provided in subsection (c), a public agency that is the state or a state agency shall retain an unaltered, unobscured law enforcement recording for at least two hundred eighty (280) days after the date of the recording.

(c) A public agency shall retain an unaltered, unobscured law enforcement recording for a period longer than the period described in subsections (a) and (b) if the following conditions are met:

(1) Except as provided in subdivision (3), if a person defined as a requestor as set forth in section 5.1(a) [Ind. Code § 5-14-3-5.1(a)] of this chapter notifies the public agency in writing not more than:

(A) one hundred eighty (180) days (if the public agency is not the state or a state agency); or

(B) two hundred seventy (270) days (if the public agency is the state or a state agency);

after the date of the recording that the recording is to be retained, the recording shall be retained for at least two (2) years after the date of the recording. The public agency may not request or require the person to provide a reason for the retention.

(2) Except as provided in subdivision (3), if a formal or informal complaint is filed with the public agency regarding a law enforcement activity depicted in the recording less than:

(A) one hundred eighty (180) days (if the public agency is not the state or a state agency); or

(B) two hundred seventy (270) days (if the public agency is the state or a state agency);

after the date of the recording, the public agency shall automatically retain the recording for at least two (2) years after the date of the recording.

(3) If a recording is used in a criminal, civil, or administrative proceeding, the public agency shall retain the recording until final disposition of all appeals and order from the court.

(d) The public agency may retain a recording for training purposes for any length of time.

K. DEALS/PROMISES

1. Must Disclose Agreements

Indiana Professional Conduct Rule 3.8(d) requires the prosecutor to make timely disclosure to defense of all evidence or information known to the prosecutor that tends to negate guilt of accused or mitigates offense, including the existence of a plea agreement between the State and a witness. Goodner v. State, 714 N.E.2d 638 (Ind. 1999).

Any beneficial agreement between an accomplice and the State must be revealed to the jury. McCorker v. State, 797 N.E.2d 257, 266 (2003).

Lopez v. State, 527 N.E.2d 1119, 1128, 1129 (Ind. 1988) (disclosure is only required for express, confirmed agreements for testimony).

Bland v. State, 468 N.E.2d 1032 (Ind. 1984) (defendant has right to make initial inquiry as to existence of any agreement).

Carey v. State, 275 Ind. 321, 416 N.E.2d 1252 (1981) (deals include promises, grants of immunity, or rewards in exchange for testimony).

Deatrick v. State, 392 N.E.2d 498 (Ind. Ct. App. 1979) (promise by the prosecuting attorney to submit a parole recommendation on behalf of the witness is proper evidence for impeachment).

Although some Indiana cases have held that the duty to disclose arises only when confirmed promise exists and preliminary discussions are not subject to disclosure, McBroom v. State, 530 N.E.2d 725, 729 (Ind. 1988) and Newman v. State, 334 N.E.2d 684 (Ind. 1975), the U.S. Supreme Court has held that due process requires that any understanding regarding consideration for testimony be disclosed. Giglio v. United States, 405 U.S. 150, 155, 92 S.Ct. 763 (1972); accord, Birkla v. State, 263 Ind. 37, 323 N.E.2d 645, 648 (1975).

Similarly, some Indiana cases have noted that in order to fully protect the due process rights of the criminally accused, evidence of **any understanding** should be disclosed, not just express agreements. Ferguson v. State, 670 N.E.2d 371, 374 n.1 (Ind. Ct. App. 1996) and Lewis v. State, 629 N.E.2d 934, 938 n.6 (Ind. Ct. App. 1994). To hold otherwise, "gives prosecutors an opportunity to circumvent the due process rights of the criminally accused by discussing possible leniency with State's witnesses but delaying the final arrangements for plea bargains or refusing to make final express agreements with felon-witnesses until after those witnesses testify." Sigler v. State, 700 N.E.2d 809, 814 (Ind. Ct. App. 1998) (Mattingly, J., dissenting).

2. Cases

a. Duty to Disclose

Diggs v. State, 429 N.E.2d 933 (Ind. 1981) (prosecution's error in failing to disclose benefits given in exchange for testimony was not reversible, where evidence of guilt was sufficient without resort to testimony of witness who had agreement with State; jury was also aware of bargain with State).

Lewis v. State, 629 N.E.2d 934 (Ind. Ct. App. 1994) (prosecutor's failure to disclose agreement with felon-witness given in exchange for her testimony, as well as subornation of perjurious testimony that she had no such agreement, violated due process and required reversal of conviction).

Cf.

Burris v. Farley, 845 F.Supp. 636 (N.D. Ind. 1994) (prosecutor's failure, in murder prosecution, to disclose **all** facts surrounding agreement reached between State and jail informant pursuant to which informant agreed to testify against defendant was not prosecutorial misconduct; prosecution voluntarily disclosed that informant's 15-year sentence was reduced to 10 years pursuant to agreement, and habitual offender charge against informant was dropped before he agreed to testify).

b. No Duty to Disclose

Burris v. State, 465 N.E.2d 171 (Ind. 1984) (cell mate witness was offered plea prior to agreement to testify - not used as inducement and no duty of state to disclose).

McCord v. State, 622 N.E.2d 504 (Ind. 1993) (when witness hopes for leniency in exchange for favorable testimony and State neither confirms nor denies that hope, there is no express agreement which must be disclosed).

St. John v. State, 523 N.E.2d 1353 (Ind. 1988) (implied threat to charge State's witness as co-conspirator if she did not appear at trial was not "inducement" that prosecutor was required to reveal, absent concrete evidence of agreement or understanding between prosecution and witness).

Tibbs v. State, 59 N.E.3d 1005 (Ind. Ct. App. 2016) (evidence supported trial court's findings that no offer or agreement for leniency in exchange for felon witness's testimony existed).

L. PRIOR CONVICTIONS AND JUVENILE ADJUDICATION

1. Adult Convictions

Adult conviction record of a potential witness discoverable. Hovis v. State, 455 N.E.2d 577 (Ind. 1983).

Rowe v. State, 704 N.E.2d 1104 (Ind. Ct. App. 1999) (failure to disclose that State's witness has prior criminal history, including burglary and theft, required reversal).

The usual remedy for nondisclosure after a valid request is a continuance, especially where State has made reasonable effort to discover prior convictions of witness without success.

Marshall v. State, 621 N.E.2d 308 (Ind. 1993) (defendant was not deprived of ability to impeach State's witness with criminal record by prosecution's failure to disclose record before witness' deposition; defendant could have read witness' criminal record into trial record but chose not to do so).

Coates v. State, 518 N.E.2d 1086 (Ind. 1988) (any failure by State to fully respond to discovery order for criminal record of State's witness did not prejudice defendant where witness's entire record was disclosed to jury by combination of direct and cross-examination).

2. Juvenile Adjudications

Davis v. Alaska, 415 U.S. 308 (1974) (right to confrontation may be denied where defendant is prohibited from cross-examining witness regarding juvenile offense).

a. Not Considered a Conviction of a Crime

Ind. Code § 31-32-2-6 provides: "A child may not be considered a criminal as the result of an adjudication in a juvenile court, nor may an adjudication in juvenile court be considered a conviction of a crime. An adjudication in juvenile court does not impose any civil disability imposed by conviction of a crime."

> Engle v. State, 506 N.E.2d 3 (Ind. 1987) (conviction for a felony and waiver from juvenile court to criminal court "is very different than a finding of juvenile delinquency").

The trial court may allow evidence of juvenile adjudication of a witness other than the accused. See Evid.R. 609(d). Davis v. Alaska, 415 U.S. 308 (1974).

b. Discoverable

Information may be sought that is inadmissible at trial, if the information sought appears reasonably calculated to lead to discovery of admissible evidence. T.R. 26(B)(1).

> Hall v. State, 36 N.E.3d 459 (Ind. 2015) (defendant's deposition question to mother of alleged victim about a prior, similar allegation alleged victim made was reasonably calculated to lead to discovery of admissible evidence, specifically, evidence of possible prior false allegation).
>
> Lineback v. State, 260 Ind. 503, 296 N.E.2d 788 (1973) (where a character witness is presented by the defendant, the prosecution may question the character witness as to the juvenile adjudications), *reh'g granted*, 301 N.E.2d 636, 637.
>
> Boyko v. State, 566 N.E.2d 1060, 1063 (Ind. Ct. App. 1991) (evidence of juvenile records not introduced for impeachment purposes, but for admission regarding killing).
>
> Terrell v. State, 507 N.E.2d 633 (Ind. Ct. App. 1987) (defendant's attorney opened door to evidence of defendant's juvenile adjudication for nine acts of burglary by stating in his opening statement that defendant had no criminal record).

See Ind. Code § 31-39-4-10 (law enforcement shall grant access to a person's juvenile records to parties in criminal or juvenile delinquency proceedings if the information may be used to impeach the person as a witness in accordance with the law of evidence).

M. SCIENTIFIC, MEDICAL REPORTS AND OTHER DOCUMENTARY EVIDENCE

Scientific reports, fingerprint records, and medical reports, to extent relevant to the case at issue, are not protected by work product privilege. State must also produce items it intends to introduce at trial. State ex rel. Keller v. Criminal Ct., 262 Ind. 420, 317 N.E.2d 433 (1974).

Bunch v. State, 964 N.E.2d 274 (Ind. Ct. App. 2012) (even though defendant did not request entire ATF investigatory file regarding fire allegedly caused by arson, State was still obligated to produce entire fire, including the initial draft report, which exculpated defendant).

State v. Montgomery, 901 N.E.2d 515 (Ind. Ct. App. 2009) (trial court did not abuse its discretion by dismissing case where State delayed over three years in producing 200 photos to be used in arson case).

Moore v. State, 569 N.E.2d 695 (Ind. Ct. App. 1991) (State gave defendant police and lab reports instead of itemized list of prospective exhibits, expecting defense to infer existence of tangible objects from documents; defendant sought to have 22 exhibits excluded; held, issue waived by defendant's failure to request continuance or an order compelling production of exhibit list).

Helton v. State, 539 N.E.2d 956 (Ind. 1989) (even assuming State had been lax in its discovery response regarding State's exhibit of floor plan diagram of burglarized premises drawn by witness, appropriate remedy for nonproduction of documentary evidence was continuance or recess to afford surprised party opportunity to examine exhibit and because defendant asked for neither and failed to demonstrate any surprise or inability to defend, defendant was not entitled to reversal).

1. Discovery of Documents, Things in Connection with Deposition

If a subpoena *duces tecum* is to be served on the party to be examined, a designation of the materials to be produced shall be attached to or included in the notice. T.R. 30(B)(1). See also Criminal Rule 2 - Subpoena *Duces Tecum*, the court can quash or modify an unreasonable or oppressive subpoena.

In re Thompson, 479 N.E.2d 1344 (Ind. Ct. App. 1985) (subpoena power limited by Constitution; Fourth Amendment applies to bank records only to extent prosecutor acts arbitrarily, or in excess of statutory authority; no error in denying defendant bank's motion to quash).

Notice to a deponent may be accompanied by a request made in compliance with T.R. 34 for the production of documents and tangible things at taking of deposition. See T.R. 30(B)(5).

2. Criminal Rule 4 implications

The failure to timely provide discovery of scientific evidence may result in a Criminal Rule 4 violation. Marshall v. State, 759 N.E.2d 665 (Ind. Ct. App. 2001).

N. PHOTOGRAPHIC ARRAYS

Photo arrays shown to prosecution witnesses for identification purposes are discoverable unless State demonstrates paramount interest in nondisclosure.

Rowe v. State, 262 Ind. 250, 314 N.E.2d 745 (1974) (error to deny defendant's request for copy of photo array shown to witness before trial).

Auer v. State, 154 Ind.App. 164, 289 N.E.2d 321, 331 (1972) (if motion for disclosure of item is denied or if defendant is not satisfied with State's response for nondisclosure, defendant must make request for separate hearing; failure to request hearing waives any error).

O. PRIVILEGED INFORMATION

Because privileges may exclude reliable and relevant evidence, they are frequently, but not always, disfavored and strictly construed. 12 Indiana Evidence 559 § 505.101 (2d ed.). See also Branzburg v. Hayes, 408 U.S. 665, 690 n.29, 92 S.Ct. 2646, 2661 (1972).

Where defendant shows that privileged evidence "is relevant and helpful to the defense... or is essential to a fair determination of a cause, the privilege must give way." Roviaro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 628 (1957); Crull v. State, 540 N.E.2d 1195 (Ind. 1989); Mengon v. State, 505 N.E.2d 788, 790 (Ind. 1987). See Imwinkelried, Edward J., *Exculpatory Evidence* § 10-5 (1990).

1. Pre-trial Discovery

Where defendant seeks pretrial discovery of information that might be privileged, due process may compel judge to grant defendant access, if standing alone, the information would probably alter outcome of case.

Pennsylvania v. Ritchie, 480 U.S. 39, 58, 107 S.Ct. 989 (1987) (defendant was charged with raping his daughter; trial judge refused to allow defendant to inspect child protective service agency file about his daughter's case; held, defendant is entitled to know whether file contains information that might have changed outcome of his trial if it had been disclosed; trial court instructed to conduct *in camera* review).

Lundy v. State, 26 N.E.3d 656 (Ind. Ct. App. 2015) (trial court abused its discretion in granting Board of Pharmacy's motion to quash defendant's non-party subpoena for her own pharmaceutical records).

Williams v. State, 819 N.E.2d 381 (Ind. Ct. App. 2004) (defendant made sufficient showing of particularity and materiality regarding CW's prescription records to provide insight on medication CW may have ingested night of alleged offense; medication may have affected CW's ability to accurately perceive and recount events).

State v. Fromme (In Re Subpoena to Crisis Connection, Inc.), 949 N.E.2d 789 (Ind. 2011) (victim-counselor privilege absolute – no right to *in camera* inspection; defendant had no constitutional right to inspect records of a nongovernmental counseling agency where General Assembly shielded the records from discovery; three-step process from Cline (below) to determine whether records are discoverable does not apply to privileged information; defendant's right to present complete defense was not violated by nondisclosure because interests advanced by Indiana's victim-advocate privilege outweigh interest in fair administration of criminal justice).

Friend v. State, 134 N.E.3d 441 (Ind. Ct. App. 2019) (no error in denying discovery request for records from one-on-one sessions C.W. had with a social worker, because this information is privileged and could not be disclosed).

WTHR-TV v. Cline, 693 N.E.2d 1 (Ind. 1998) (there was no reporter's privilege to bar defendant from obtaining unaired portions of media interview with defendant; defendant made sufficient showing of materiality for discovery under Indiana Trial Rules and media failed to show sufficient paramount interest to deny defendant copy of full interview).

WTHR-TV v. Milam, 690 N.E.2d 1174 (Ind. 1998) (defendant's discovery request failed entirely due to non-compliance with Trial Rules' requirement of reasonable particularity and materiality).

Crawford v. State, 948 N.E.2d 1165 (Ind. 2011) (the three-step test from Cline applies only to requests for non-privileged materials; here, some of defendant's requests for footage from police show regarding this case were not sufficiently specific; trial court properly granted the show's motion to quash those requests).

Jorgensen v. State, 574 N.E.2d 915 (Ind. 1991) (trial court should have allowed some discovery in order to determine whether psychologist and social worker had unprivileged information material to defendant's defense in murder trial; trial court could not conclude that whatever information psychologist and social worker possessed was privileged without a factual basis for that conclusion; it was error to deny discovery because of the defendant's failure to first show that the information was material, where the defendant could only have made the materiality showing with the information denied to her).

Hulett v. State, 552 N.E.2d 47 (Ind. Ct. App. 1990) (psychologist-client privilege does not shield counselor's file from discovery in a child molest case).

Sturgill v. State, 497 N.E.2d 1070 (Ind. Ct. App. 1986) (reversible error to deny defendant's motion to compel disclosure of alleged victim's statements to welfare department that could have contradicted victim's trial testimony; alleged victim was not anonymous, and State did not show that its interest would be adversely affected by defendant's access to information).

Norton v. State, 137 N.E.3d 974, (Ind. Ct. App. 2019) (no error in declining to release complaining witness's (C.W.'s) mental health records after trial court reviewed them *in camera*; defendant argued the records were material to his defense but because he 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).

See Imwinkelried, Edward J., *Exculpatory Evidence* § 2-4(b) (1990).

2. Timing of privilege

The statutory privilege in effect at the time of the disclosure applies. Pelley v. State, 828 N.E.2d 915 (Ind. 2005).

P. PROSECUTOR'S WORK PRODUCT

The prosecutor may no longer assert blanket privilege over police reports. Minges v. State, 192 N.E.3d 893 (Ind. 2022) (**overruling** State ex rel. Keaton v. Circuit Court of Rush County, 475 N.E.2d 1146 (Ind. 1985) and Johnson v. State, 584 N.E.2d 1092, 1103 (Ind. 1992)).

If in documentary form, mental impressions, opinions and legal theories of attorney or other representative of a party concerning litigation appear to be absolutely protected under T.R. 26(B)(3). See Upjohn Co., Inc. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981); Duplan Corporation v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973); FTC et al v. Grolier Inc., 462 U.S. 19, 103 S. Ct. 2209 (1983).

1. Overriding Privilege

A party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only if not privileged and relevant, and only upon a showing of need or hardship. "Hardship" means a showing that party seeking discovery has substantial need of materials in the preparation of his case, and that he is unable without undue hardship to obtain substantial equivalent by other means. T.R. 26(B) (3). See also Hickman v. Taylor, 329 U.S. 495 (1947).

Newton v. Yates, 170 Ind.App. 486, 353 N.E.2d 485 (1976) (work product of attorney not absolute bar and "good cause" will override that privilege).

2. Facts, Identities of Persons, or Existence of Documents Not Protected

Work product rule immunizes documents from discovery. It does not immunize facts, or the identities of persons having knowledge of facts, or the existence of documents. *McCormick on Evidence* (5th Ed. 1999) §96 at 391.

a. Opinions Not in Documentary Form

T.R. 26(B)(3) speaks only of documents and tangible things. Intangible work product may be protected under Hickman v. Taylor, 329 U.S. 495 (1947) (superseded in part by Fed.Rule.Civ.Proc. 26(b)(3), as recognized by Hawkins v. Dist. Court of Fourth Judicial Dist., 638 P.2d 1372, 1376 (Colo. 1982)). "In Hickman, the Court implicitly applied to intangibles standards similar to those accorded tangible work product under the rules. The Court segregated unprotected facts from the content of a witness's oral statement and would allow discovery of such statements only in unidentified rare situations. The Hickman decision continues to govern the standards for unrecorded work product protection." Special Project, *The Work Product Doctrine*, 68 Cornell L.Rev. 760, 841 (1983).

b. List of Witnesses with Expected Testimony of Elements of Offense - Protected

Prosecutor's work product, in form of list of witnesses, with expected testimony as to elements of offense, is not discoverable. State ex. rel. Myers v. Tippecanoe Superior Court, 438 N.E.2d 989 (Ind. 1982).

Q. POLICE REPORTS

Overruling its previous decision in State ex rel. Keaton v. Cir. Ct. of Rush Cnty., 475 N.E.2d 1146 (1985), the Indiana Supreme Court held that the defendant is entitled to a verbatim copy of a police report unless the prosecutor establishes the report is protected by work product privilege under Trial Rule 26(B)(3). Minges v. State, 192 N.E.3d 893 (Ind. 2022).

1. Police Diagrams

Sexton v. State, 257 Ind. 556, 276 N.E.2d 836 (1972) (police diagram of scene of killing was discoverable where defendant requested material with reasonable particularity and diagram was material to defense).

2. Police Reports Used to Refresh Recollection Before Testifying

Indiana Rule of Evidence 612(b) entitles the adverse party to production of documents used by a witness to refresh her memory before testifying if the interests of justice so require. See also Gault v. State, 878 N.E.2d 1260 (Ind. 2008), *overruled on other grounds by* Minges v. State, 192 N.E.3d 893 (Ind. 2022).

If a witness uses a document to refresh her memory while testifying, the adverse party is entitled to production of the document. A witness who uses a privileged document to refresh her memory while testifying will generally be held to have waived the privilege by disclosing the contents of the document. Saltzburg et al., 2 *Federal Rules of Evidence Manual* 1120 (7th Ed.).

See Rule 612, IPDC Evidence Manual, 2020 ed.

3. Police Impressions and Verbatim Witness Statements Intermingled

The work product doctrine does not shield verbatim witness statements from discovery. Verbatim witness statements contained within police reports are not work product. Police documents that purport to be actual words of witness, reduced to writing as the witness spoke or shortly thereafter, or transcribed from recording, are discoverable. Hicks v. State, 544 N.E.2d 500 (Ind. 1989) and Robinson v. State, 693 N.E.2d 548 (Ind. 1998).

Where witness statements and officer's impressions, opinions, and theories are intermingled, *in camera* inspection by trial court is appropriate to determine whether the document is essentially a discoverable verbatim witness statement, or a privileged police report containing occasional witness quotations. State ex rel. Crawford v. Superior Ct. of Lake Co., Crim. Div., Rm. II, 549 N.E.2d 374 (Ind. 1990).

4. Waiver

The work product privilege can be waived.

> Gault v. State, 878 N.E.2d 1260 (Ind. 2008) (State waived any work product privilege it might have had in the report when it failed to object and handed over of the report to

defense counsel for the police officer's use), *overruled on other grounds by* Minges v. State, 192 N.E.3d 893 (Ind. 2022).

But see:

Jenkins v. State, 627 N.E.2d 789 (Ind. 1993) (FBI's inadvertence in giving to defense counsel letter from prosecutor did not result in waiver of work-product privilege).

R. REQUEST TO NON-PARTY FOR INSPECTION OF LAND

T.R. 34 permits a party to inspect land of non-party.

Perdue v. State, 398 N.E.2d 1290 (Ind. Ct. App. 1979) (prosecutor should encourage third party to allow defendant's representative upon land as soon as possible; sanctions may be appropriate if the prosecutor discourages a non-party from permitting the defendant's representative on land for no good reason).

S. TESTING EVIDENCE

1. Testing Controlled or Dangerous Substances

T.R. 34 permits party to test, or sample, tangible things.

In dealing with controlled or dangerous substances the trial judge:

- may set guidelines where necessary and appropriate under the attending facts and circumstances of each case;
- allow defendant an independent analysis where a sufficient quantity of the substance exists and prescribe where and when the examination will be allowed.

2. Underlying Data, Notes from Tests

Schwartz v. State, 177 Ind.App. 258, 379 N.E.2d 480, 487 (1978) (where insufficient quantity exists, defense will be allowed to use the results of State's testing and probe veracity of those reports).

Under Indiana Rule of Evidence 705, adopted after Schwartz, where the State's expert witnesses have performed tests on physical evidence and arrived at opinions based on the resulting data, the defendant is entitled to access to the data on which the opinions are based, and not just to the conclusory opinions.

PRACTICE POINTER: Many forensic tests, including drug and DNA testing, involve an automated process for collecting data, followed by subjective interpretation of that data by the State's expert. The data will be stored electronically and can usually be easily copied in digital format. Even in cases where the original sample is no longer available (having been used up in the testing process, misplaced, or otherwise destroyed) the data underlying the expert's conclusion should still be available and discoverable, and may be nearly as useful (or more useful) to the defense expert as the original samples would have been. See Indiana Rule of Evidence 705.

3. Items Tested by Police

Defendant has right to examine all physical evidence in the hands of the prosecutor. Turnpaugh v. State, 521 N.E.2d 690 (Ind. 1988). See "Use of Reports When Evidence Destroyed" on page 6-40.

> Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (fact that State prevented defendant from testing breathalyzer numerous times in defiance of court orders and destroyed any possible exculpatory evidence by recertifying breathalyzer before the defendant could inspect it required suppression of the breath test results).

However, the defendant does not have an absolute right to have defense expert test items which have already been tested by police. Frias v. State, 547 N.E.2d 809 (Ind. 1989).

T. PRESERVATION/DESTRUCTION OF EVIDENCE

1. Practice Tips

a. Send Letter

Send letters to the possessors of all physical evidence, putting them on notice of the impending litigation and advising them to take all necessary steps to preserve the evidence. In instances where the possessor may desire to repair or alter the evidence, or perhaps return it to some productive use, it may be necessary to seek protection of the court if such conduct would prejudice a party's case.

b. Release of Evidence for Testing

If physical evidence is released to an expert or to any opposing party for inspection or testing, its current condition should be documented, and the receiving party should be required to sign a receipt agreement. Destructive testing, a sometimes-necessary evil, should be limited to those situations where all parties agree to the testing in writing. Judicial intervention may be required where the parties cannot agree.

c. If Destruction Suspected

If destruction is suspected, make the destruction or alteration of evidence part of the written record of proceedings. Spoliation may be the basis for a discovery sanction, or for a motion to dismiss.

d. Pre-trial Ruling

Pre-trial ruling on how the court intends to treat the alleged spoliation may avoid potential built-in error in *voir dire* and jury arguments.

2. Material Exculpatory Evidence - Duty to Preserve

The State has the duty to preserve material exculpatory evidence, meaning evidence which:

(1) possesses exculpatory value that is apparent before the evidence is destroyed; and

(2) is of such nature that defendant could not obtain comparable evidence by any other reasonably available means.

Noojin v. State, 730 N.E.2d 672 (Ind. 2000); Holder v. State, 571 N.E.2d 1250 (Ind. 1991). See also California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984).

Roberson v. State, 766 N.E.2d 1185 (Ind. Ct. App. 2002) (State's failure to preserve alleged dangerous device violated defendant's due process rights where defendant was charged with possessing material capable of causing bodily injury; nature of alleged dangerous device was critical; 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).

Pimentel v. State, 181 N.E.3d 474 (Ind. Ct. App. 2022) (State's failure to preserve syringe in prosecution for unlawful possession of syringe not due process violation because though police officer should have photographed syringe while uncapped to show needle, failure to do so did not make syringe materially exculpatory).

Jones v. State, 957 N.E.2d 1033 (Ind. Ct. App. 2011) (although law enforcement failed to take photos of all destroyed items found in meth lab and failed to create chemical inventory report as required by Ind. Code § 35-33-5-5(e), these deficiencies could be rectified by looking at other records).

Nettles v. State, 565 N.E.2d 1064 (Ind. 1991) (State's failure to preserve blood samples did not render test results inadmissible, and did not violate defendant's due process rights, absent indication that tests were conducted improperly, where test results were made available immediately, and where defendant only later moved to obtain samples).

Serano v. State, 555 N.E.2d 487 (Ind. Ct. App. 1990) (narcotics defendant 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 v. State, 515 N.E.2d 882 (Ind. Ct. App.1987) (defendant offered no argument as to nature of exculpatory evidence allegedly contained in videotape of breathalyzer test that was lost or destroyed by State).

Hopkins v. State, 579 N.E.2d 1297 (Ind. 1991) (when defendant is seeking reversal based on bad-faith loss of potentially material exculpatory evidence by police, court must evaluate potential of evidence to exculpate defendant in context of entire record, and

where other evidence of guilt at trial was so overwhelming that likelihood of exculpation becomes highly improbable, no due process violation results from loss of evidence).

PRACTICE POINTER: Note that Larry Youngblood, the defendant in Arizona v. Youngblood, claimed that the evidence the police had destroyed - semen samples which were not refrigerated - would have proven his innocence, an argument that the U.S. Supreme Court rejected because the police were not shown to have acted in 'bad faith' by failing to preserve the samples. On August 11, 2000, the New York Times reported that after Mr. Youngblood had served 17 years in prison for this conviction, the results of more sophisticated DNA testing on the samples proved that Mr. Youngblood was innocent. See InnocenceProject.org. Remind the court of this history when the State argues 'good faith' or 'lack of bad faith' after failing to preserve potentially exculpatory evidence.

3. Potentially Useful Evidence - Bad Faith Destruction

Destruction of potentially useful evidence that is not clearly exculpatory violates the 14th Amendment only when the defendant can show bad faith on the part of the police. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). If police destroy potentially useful evidence so that it is impossible to determine whether it was exculpatory, the defendant must establish that destruction was undertaken in "bad faith" in order to show a due process violation. Analysis of these sorts of cases "must necessarily turn on the police's knowledge of the exculpatory value of evidence at the time it was lost or destroyed." Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333 (1988).

NOTE: If defendant makes a timely request to preserve the evidence, the reasoning in Arizona v. Youngblood arguably should not control because the defendant in Youngblood had not requested the evidence before the State destroyed it.

a. Materiality; prejudice

Materiality and prejudice must be shown to prevail on claim of negligently misplaced or destroyed evidence. Smith v. State, 586 N.E.2d 890 (Ind. Ct. App. 1992). If the destroyed evidence was not exculpatory, the defendant will have difficulty showing prejudice from its destruction.

Seay v. State, 529 N.E.2d 106 (Ind. 1988) (narcotics defendant 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).

Smith v. State, 586 N.E.2d 890 (Ind. Ct. App. 1992) (defendant failed to establish materiality or prejudice from State's discovery of previously misplaced tape recording of alleged drug transaction; although defendant claimed that his case had been prepared based upon theory of police negligence and that discovery of tape after close of State's case in chief deprived him of such theory and violated his due process rights, parties were allowed to hear tape when it was discovered, and defendant successfully objected to reopening of State's case and admission of tape because much of it was inaudible and parts of it were irrelevant).

Gibson v. State, 514 N.E.2d 318 (Ind. Ct. App. 1987) (State's 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 trial testimony of witnesses were negligible, and defendant had opportunity to impeach witnesses with other available discovery materials).

Land v. State, 802 N.E.2d 45 (Ind. Ct. App. 2004) (evidence of accelerant on arson victim's shoes not materially exculpatory because it was not sole basis of defense and fire investigator determined that fire was not set by using accelerants).

Seal v. State, 38 N.E.3d 717 (Ind. Ct. App. 2015) (no due process violation from failure to preserve recordings of two interviews with two children where police prepared written summaries of the interviews because defendant failed to show that the interviews were materially exculpatory or that the State's failure to preserve the recordings was a product of bad faith).

Pimentel v. State, 181 N.E.3d 474 (Ind. Ct. App. 2022) (no due process violation from failure to preserve syringe in prosecution for unlawful possession of syringe because although police officer should have photographed syringe while uncapped to show needle, failure to do so did not make syringe materially exculpatory).

b. Bad Faith

"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, grounds for reversal may exist." Turnpaugh v. State, 521 N.E.2d 690, 692-93 (Ind. 1988).

Courts inquire into whether:

- evidence was lost or destroyed while in government's custody,
- prosecution acted in disregard of interests of accused,
- established and reasonable standards of care for police and prosecutorial functions were not followed,
- if destruction was deliberate, there was reasonable justification for the act.

See U.S. v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979) *overruled in part on other grounds by* United States v. Grace, 526 F.3d 499, 502 (9th Cir. 2008).

Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (where State violated discovery order by interfering with defendant's inspection "monitor" of blood alcohol measurement device, exclusion of evidence should have been forthright upon a showing of prejudice; in fact, such misconduct may require reversal).

Terry v. State, 857 N.E.2d 396 (Ind. Ct. App. 2006) (even if Youngblood applies to State's destruction of evidence **after** defendant was convicted; destruction of

potentially helpful pager in this case was not done in bad faith, but pursuant to police department procedures).

Seal v. State, 38 N.E.3d 717 (Ind. Ct. App. 2015) (no due process violation from failure to preserve recordings of two interviews with two children where police did make written summaries of the interviews because defendant failed to show that the interviews were materially exculpatory or that the State's failure to preserve the recordings was a product of bad faith).

However, where other evidence of guilt at trial is so overwhelming, a showing of arguably bad-faith destruction, absent some material likelihood of exculpation, does not result in a denial of due process. Hopkins v. State, 579 N.E.2d 1297, 1301 (Ind. 1999).

See also State v. Durrett, 923 N.E.2d 449 (Ind. Ct. App. 2010) (dismissal of charges was an abuse of discretion where State did not act in bad faith in failing to preserve van involved in accident that formed basis of charges; there was no duty to preserve van because there was comparable evidence, including photographs of van that showed damage to the van).

4. Indiana Constitution and Common Law May Provide More Relief

Indiana case law, before to Arizona v. Youngblood, held that the **negligent** or intentional destruction of evidence by the police can provide grounds for dismissal. See Braswell v. State, 550 N.E.2d 1280, 1283 (Ind. 1990); Rowan v. State, 431 N.E.2d 805 (Ind. 1982); Hale v. State, 230 N.E.2d 432 (Ind. 1967).

Birkla v. State, 323 N.E.2d 645 (Ind. 1975) (**negligent** or intentional destruction of evidence by the police can provide grounds for dismissal).

Moreover, the Indiana Court of Appeals has suggested that the Indiana Constitution may, in some circumstances, provide greater protection against destroyed evidence.

Stoker v. State, 692 N.E.2d 1386 (Ind. Ct. App. 1998) (although the court held that Indiana constitutional analysis is analogous to U.S. Constitutional analysis, in some instances, destruction or failure to preserve evidence may be so prejudicial to defendant as to warrant reversal even absent bad faith; although sound policy, neither constitution requires taping of interrogations in all situations). See also Gasper v. State, 833 N.E.2d 1036 (Ind. Ct. App. 2005).

Rita v. State, 663 N.E.2d 1201 (Ind. Ct. App. 1996) (where no evidence that destruction was motivated by bad faith, there was no due process violation; 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).

Lee v. State, 545 N.E.2d 1085 (Ind. 1989) (with no mention of Youngblood, the Court found that negligent destruction or withholding of material evidence by police or prosecution may present grounds for reversal where defendant establishes materiality of lost evidence or where materiality is self-evident).

Under Indiana law, the burden of proof on the issue of prejudice is arguably still on the prosecution.

> Madison v. State, 534 N.E.2d 702 (Ind. 1989) (Justice DeBruler's concurring opinion argues that Indiana law differs from federal law on the issue of where burden of proof on question of prejudice should lie in cases of destruction of exculpatory evidence, arguing that Johnson v. State, infra, leaves question open because decided by a 2-2 vote).
>
> Johnson v. State, 507 N.E.2d 980 (Ind. 1987) (destruction of tape of booking process, where cocaine was allegedly planted on defendant, does not require reversal. Court divided 2-2; dissent argued "duty to disclose" is "duty to preserve" prior to discovery request, *citing* U.S. v. Bryant, 439 F.2d 642 (D.C. Cir. 1971)).

The State must retain the evidence if any doubt exists about its relevancy, including for rebuttal or impeachment of the State's case. However, in Holder v. State, 571 N.E.2d 1250 (Ind. 1991), the court emphasized that this duty is limited to that evidence which would be expected to play a significant role in the suspect's defense.

> Birkla v. State, 263 Ind. 37, 323 N.E.2d 645, 649 (1975) (when the prosecution determines evidence to be nonmaterial, and further decides not to advise defense counsel of such evidence prior to its destruction, a heavy burden rests upon the prosecution to demonstrate that the destruction of such evidence did not prejudice the defendant).

NOTE: Some states have rejected the Arizona v. Youngblood test in favor of a three-part test to determine due process violations:

(1) Whether evidence was material to either guilt or sentence phase,
(2) Whether defendant was prejudiced by destruction,
(3) Whether state was acting in good faith.

See California v. Trombetta, 467 U.S. 479 (1984); U.S. v. Arra, 630 F.2d 836, 849 (1st Cir. 1980).

5. Use of Reports When Evidence Destroyed

When the State's testing destroys the evidence, the defense is allowed to use the State's testing reports and probe the veracity of those reports. Seay v. State, 529 N.E.2d 106 (Ind. 1988); Schwartz v. State, 177 Ind.App. 258, 379 N.E.2d 480 (1978).

Under Indiana Rule of Evidence 705, the defense should be allowed access to the State's testing reports and raw data, and to cross-examine the experts about the data whether the physical evidence has been consumed by testing or not.

> California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984) (destruction of breath ampoules in DWI cases held not to violate due process; defendant had adequate means to prepare his defense without an independent test of BAC in breath).

6. Jury Instruction

If the case goes to trial, seek jury instructions reflecting the applicable case law in this area in order to preserve any possible errors for appeal. For example, in some cases, defendants have requested instructions to the jury that it might infer from the State's destruction of evidence that the missing evidence would have been unfavorable to the State's case. Gossmeyer v. State, 482 N.E.2d 239 (Ind. 1985); Hedrick v. State, 430 N.E.2d 1150 (Ind. 1982).

II. EVIDENCE DISCOVERABLE FROM DEFENSE

A. "NON-TESTIMONIAL" EVIDENCE FROM DEFENDANT

Prosecutorial discovery directly from defendant is expressly limited to non-testimonial evidence. Fifth Amendment privilege against self-incrimination protects against compelled disclosure of "testimonial" (communicative act or writing, or testimony) evidence, but not against compelled disclosure of "non-testimonial" evidence. Gilbert v. California, 388 U.S. 263,87 S.Ct. 1951 (1967); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966).

The Fifth Amendment protects a person from being compelled, in any criminal case, to be a witness against himself. Only compelled “testimonial” communications are privileged. The act of producing subpoenaed documents may have a compelled testimonial aspect. U.S. v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000).

South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916 (1983) (defendant’s refusal to take blood test may be used in evidence without violating the Fifth Amendment privilege against self-incrimination).

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) (compulsory administration of blood test for alcohol content over defendant's objection does not implicate Fifth Amendment; it is not testimonial evidence).

Smith v. State, 496 N.E.2d 778 (Ind. Ct. App. 1986) (privilege against self-incrimination not violated by field sobriety or breathalyzer test of suspected drunk driver).

Murray v. State, 182 N.E.3d 270 (Ind. Ct. App. 2022) (privilege against self-incrimination not violated by order that defendant show his teeth after video evidence showed perpetrator had distinctive teeth).

1. Cell Phones

The compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection - unless the State demonstrates the foregone conclusion exception applies. A suspect surrendering an unlocked smartphone implicitly communicates that the suspect knows the password, the files on the device exist, and the suspect possessed those files. And, unless the State can show it already knows this information, the communicative aspects of the production fall within the Fifth Amendment’s protection.

Seo v. State, 148 N.E.3d 952 (Ind. 2020) (trial court's order compelling defendant to unlock her iPhone violated her Fifth Amendment right against self-incrimination; Court

noted that extending the foregone conclusion exception to the compelled production of an unlocked smartphone is concerning because such an expansion fails to account for the unique ubiquity and capacity of smartphones, may prove unworkable, and runs counter to U.S. Supreme Court precedent).

2. Fingerprints, Photos, Handwriting, and Voice Exemplars - Fifth Amendment

Fingerprints, photographs, handwriting exemplars, and voice exemplars are well-established and acceptable methods which do not involve personal intrusions.

Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000 (1973) (fingernail scrapings).

U.S. v. Dionisio, 410 U.S. 1, 93 S.Ct. 764 (1973) (these discovery procedures seek physical characteristics which are exposed to the public and do not involve interests protected by 4th Amendment; voice exemplars).

Turner v. State, 508 N.E.2d 541 (Ind. 1987) (Fifth Amendment does not shield defendant from compulsory submission to physical tests).

Hutchinson v. State, 477 N.E.2d 850 (Ind. 1985) (fingerprint exemplars may be taken before or during trial).

Kalady v. State, 462 N.E.2d 1299 (Ind. 1984) (handwriting exemplar).

3. Slurred Speech

Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990) (slurred nature of speech in answering questions on video tape not testimonial and without more does not implicate Miranda).

4. Routine Booking Questions

Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990) (answers to questions while suspect in custody - asking name, address, weight, eye color, date of birth and current age - may be testimonial but fall under a routine booking exception because the questions were not intended to elicit information for investigatory purposes (plurality opinion)).

5. Standing, Walking, Making Gestures, Imitating Actions

Privilege against self-incrimination does not protect against compulsion to appear in court, to stand, to walk, or to make particular gestures; it does not protect against compelling accused to be source of real or physical evidence. Davis v. State, 529 N.E.2d 112 (Ind. Ct. App. 1988).

Holt v. United States, 218 U.S. 245, 31 S.Ct. 2 (1910) (requiring defendant to put on garment to see if it fits is not testimonial and not a violation of the privilege).

Partlow v. State, 453 N.E.2d 259 (Ind. 1983) (donning clothing and imitative actions).

Springer v. State, 175 Ind.App. 400, 372 N.E.2d 466 (1978) (displaying defendant's hands to jury).

Murray v. State, 182 N.E.3d 270 (Ind. Ct. App. 2022) (requiring defendant to show his teeth to jury).

Sippress v. State, 562 N.E.2d 758 (Ind. Ct. App. 1990) (after defendant testified on direct examination that he had accidentally scalded his infant daughter with hot water, it was not error for court to grant State's motion that he demonstrate on cross-examination how he had done so; demonstration went to defendant's credibility).

Dooley v. State, 428 N.E.2d 1 (Ind. 1981) (State allowed to weigh defendant after discovery was closed, where defendant's build and weight at time of rape were relevant).

6. Bodily Invasion of Accused - Fourth Amendment

Fourth Amendment constrains against bodily intrusions which are not justified in the circumstances, or which are made in an improper manner. Schmerber v. California, 384 U.S. 757, 768, 86 S.Ct. 1826, 1834 (1966).

See also Article 1, § 11 of the Indiana Constitution.

Grier v. State, 868 N.E.2d 443 (Ind. 2007) (police officer's application of physical force to the defendant's throat to prevent him from swallowing suspected bag of drugs was unreasonable under Ind. Const. art. 1, § 11).

a. Search Warrant Required

Search warrants are required, absent an emergency, where intrusions into the human body are concerned. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966).

(1) Threshold Requirements

- probable cause
- search warrant, unless an emergency exists
- search not more intrusive than reasonably necessary

See Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611 (1985).

Other factors determining "reasonableness" of intrusion:

- extent to which procedure threatens safety or health of individual
- extent of intrusion upon individual's dignitary interests in personal privacy and bodily integrity
- community's interest in fairly and accurately determining guilt or innocence

See Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 1835 (1966); Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611 (1985).

An intrusive search of a person's body may also violate due process. See Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952) (police officers broke into suspect's room, attempted to extract narcotics capsules he had put in his mouth, took him to hospital, and directed that emetic be administered to induce vomiting; Court recognized individual's interest in human dignity and held that the search and seizure violated the Due Process Clause).

b. Minor Intrusion Under Stringently Limited Conditions

Constitution does not forbid the State's minor intrusion into individual's body under stringently limited conditions. More substantial intrusions, or intrusions under other conditions may violate Fourth Amendment.

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) (Inevitable dissipation of alcohol in the blood created exigent circumstances; search was not more intrusive than reasonably necessary to accomplish its goals. The defendant had been arrested at hospital while receiving treatment for injuries suffered when automobile he was driving struck a tree. Police officer at hospital directed physician to take blood sample; held, authorities had probable cause to believe he had been driving while intoxicated, and to believe that a blood test would provide evidence that was exceptionally probative in confirming this belief).

NOTE: The defendant in Schmerber was involved in an accident requiring treatment. Absent an auto accident, dissipation of alcohol in blood does not alone create exigent circumstances. Justice v. State, 552 N.E.2d 844, 847 (Ind. Ct. App. 1990).

c. Implied Consent Laws

(1) Police Ordered Tests

Blood tests are significantly more intrusive and their reasonableness must be measured in light of the availability of the less invasive breath test. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016). In Birchfield, the Court held that the Fourth Amendment requires a warrant to take a blood draw from an OWI arrestee but not for a breath test. But a warrantless blood draw may be permissible in some exigent circumstances. Thus, police may draw person's blood without consent only if: (1) there is probable cause to believe the person operated a vehicle while intoxicated; (2) police obtain a search warrant, or dissipation of alcohol creates exigent circumstances; (3) the test chosen to measure person's blood alcohol concentration is a reasonable one; and (4) the test is performed in a reasonable manner. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); see also Missouri v. McNeely, 133 S.Ct. 1552 (2013).

Birchfield also held that states may not charge and convict a person for refusing to take a blood test, though they may impose administrative sanctions such as license suspensions.

When police encounter an unconscious driver suspected of driving under the influence of alcohol or drugs, the exigent circumstances doctrine will "almost always" permit a blood test without a warrant. Mitchell v. Wisconsin, 139 S. Ct.

2525 (2019). To determine whether an exigency exists where a suspected drunk driver is unconscious, the Court considers whether the BAC evidence is dissipating, and when some "other factors creates pressing health, safety, or law enforcement needs which would take priority over an application for a warrant." Thus, when a driver is unconscious, the Court imposed the general rule that a warrant is not needed. The Court declined to answer whether Wisconsin's implied consent law alone justifies a warrantless blood draw on unconscious individuals.

Indiana's implied consent statute has been interpreted to require officers to first offer a chemical test to a defendant before requesting medical personnel perform a blood draw. Hannoy v. State, 789 N.E.2d 977 (Ind. Ct. App. 2003). In addition, the State must show that the defendant gave actual, knowing, and voluntary consent to drawing and testing blood. Id. (Marion County Sheriff's Department had standard policy assuming that in any accident resulting in serious injury or death, implied consent of Ind. Code § 9-30-7 automatically authorized obtaining blood of driver of each vehicle, by force if necessary. No special needs exception to probable cause prerequisite for government search because this exception does not apply to law enforcement-related searches).

On rehearing in Hannoy, the court would not consider new argument that inevitable discovery doctrine should apply to admit first blood tests; court also reiterated that there is a clear and substantial difference between allowing police to force person to submit to having blood drawn to look for evidence and police receiving blood test results after the fact pursuant to Ind. Code § 9-30-6-6(a). Hannoy v. State, 793 N.E.2d 1109 (Ind. Ct. App. 2003), *op. on reh'g*.

Consent to a blood test is governed by the Fourth Amendment and Article 1 § 11 of the Indiana Constitution. Gutenstein v. State, 59 N.E.3d 984 (Ind. Ct. App. 2016) (trial court properly denied motion to suppress where, although defendant was handcuffed and placed in police car, he was given both Miranda advisements and implied consent warnings, defendant acknowledged he understood his rights and consented to blood draw).

Failure by the police to make the appropriate certification in writing under Ind. Code § 9-30-6-6 is not grounds to suppress the results of a blood test. Spriggs v. State, 671 N.E.2d 470, 472 (Ind. Ct. App. 1996) (disapproved in part on other grounds by Abney v. State, 821 N.E.2d 375 (Ind. 2005).

Ind. Code § 9-30-6-1 provides that a person operating a vehicle impliedly consents to chemical test for intoxication. Ind. Code § 9-30-6-2(c) provides test must be administered within three hours after officer had probable cause to believe person committed an offense.

Ind. Code § 35-46-9-9 provides that a law enforcement officer who has probable cause to believe that a person has operated a watercraft while intoxicated shall offer the person the opportunity to submit to a chemical test. It is not necessary for the law enforcement officer to offer a chemical test to an unconscious person. A law enforcement officer may offer a person more than one (1) chemical test under this chapter. However, all tests must be administered within three (3) hours after the officer had probable cause to believe the person violated this chapter.

(2) Diagnostic Tests

Where the hospital or doctor performed a blood alcohol test on its own, the police may obtain the results through a subpoena absent any probable cause. Eichhorst v. State, 879 N.E.2d 1144 (Ind. Ct. App. 2008).

(3) Foundation: Required Protocol

Blood samples collected at the request of a law enforcement officer as part of a criminal investigation must be obtained by a "physician or a person trained in obtaining bodily substance samples and acting under the direction of or under a protocol prepared by a physician." Ind. Code § 9-30-6-6(a).

State v. Bisard, 973 N.E.2d 1229 (Ind. Ct. App. 2012) (violation of blood draw statute, specifically fact that drawer was not on list in Ind. Code § 9-30-6-6(j), did not require suppression; defendant made no credible suggestion that any deviation compromised the reliability of the samples).

Combs v. State, 895 N.E.2d 1252 (Ind. Ct. App. 2008) (trial court abused its discretion in admitting blood test results where State failed to lay a proper foundation that the medical technologist who drew the blood was acting under the direction of or under a protocol prepared by a physician).

State v. Hunter, 898 N.E.2d 455 (Ind. Ct. App. 2008) (inadequacy of foundation is even more pronounced because State failed to present any evidence that nurse was "a person trained in obtaining bodily samples"; existence of search warrant directing hospital personnel to obtain a bodily substance sample should not trump and/or negate statutory requirements for obtaining blood samples).

Pedigo v. State, 146 N.E.3d 1002 (Ind. Ct. App. 2020) (blood draw evidence properly admitted when evidence most favorable to ruling showed phlebotomist followed protocol approved by pathologist); see also Martin v. State, 154 N.E.3d 850 (Ind. Ct. App. 2020).

See *IPDC, Operating While Intoxicated*, 2019 ed.

d. Constitutional Violations

Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611 (1985) (surgical intrusion into attempted robbery suspect's left chest area to recover bullet fired by victim was unreasonable under the 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, and where there was no compelling need to recover bullet in light of other available evidence).

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952) (police officers broke into a suspect's room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting. Court recognizes the individual's interest in human dignity, held the search and seizure unconstitutional under the Due Process Clause).

e. State Threatens Intrusion to Obtain Confession

Schmerber v. State of California, 384 U.S. 757 n.9, 86 S.Ct. 1826 (1966) (Court disapproved of State threatening use of intrusive test in order to extract confession: "Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case.").

7. Sibling of Alleged Sexual Assault Victim Available to DCS

Trial court may order parent to make his or her child available for an interview requested by DCS to assess the child's condition, where child's sibling made and then recanted allegations of sexual abuse against a family member who lives in the children's home. Matter of G.W., 977 N.E.2d 381 (Ind. Ct. App. 2012).

8. Discovery of Body Requires Court Order

Most discovery of defendant's person requires a court order. See T.R. 35 (Physical and Mental Exam of Persons) and Criminal Rule 21 (trial rules apply to all criminal proceedings).

Court's function is to:

(1) make impartial evaluation of circumstances of particular case and of application for discovery; and
(2) grant the application only if the applicable requirements have been met.

Court authorized to order defendant to provide non-testimonial disclosures when prosecutor is able to satisfy court that:

(1) good cause exists for believing requested disclosures are relevant and material to merits of the charge:
(2) request for disclosures is reasonable;
(3) contemplated procedure for obtaining disclosures involve neither unreasonable intrusion of defendant's body nor unreasonable affront to defendant's dignity.

See ABA *Standards for Criminal Justice: Discovery and Procedure Before Trial*. Commentary, Standard 11-3.1(b).

Thompkins v. State, 270 Ind. 163, 383 N.E.2d 347 (1978) (where blood test was performed in a proper manner pursuant to a discovery order and required no unreasonable intrusion into defendant's person, there was no error in the admission of defendant's blood test results).

NOTE: Thompkins did not discuss probable cause, and to the extent it was not considered a requirement, it may not be good law in light of Schmerber.

Gillie v. State, 465 N.E.2d 1380 (Ind. 1984) (hair samples).

Clark v. State, 436 N.E.2d 779 (Ind. 1982) (defense consented to State's request for an order requiring defendant to submit to neurological exam; on appeal defendant argued he would not have consented had he known nasopharyngeal electrodes would be inserted; there was no evidence that defendant actually protested procedure; therefore, court did not decide if there was due process violation or impermissible intrusion).

Ewing v. State, 160 Ind.App. 138, 310 N.E.2d 571 (1974) (urinalysis).

Allen v. State, 428 N.E.2d 1237 (Ind. 1981) (ordering defendant to speak in open court words similar to those uttered by perpetrator of crime).

Wade v. State, 490 N.E.2d 1097 (Ind. 1986) (order of oral examination and impression of defendant's mouth was supported by police report of apparent bite marks during autopsy, together with massive injury to victim while in defendant's care).

9. Juveniles - Fingerprints or Photographs

Under Ind. Code § 31-39-5-1, a law enforcement agency may take and file fingerprints or photographs of a child if:

- child taken into custody for an act that would be a felony if committed by an adult, and
- child was at least 14 years old when the act was allegedly committed.

If latent fingerprints are found during investigation, and if officer has probable cause to believe they belong to certain child, the officer may fingerprint that child for comparison with latent prints. Written notice of destruction procedure shall be given to child and his parent. See Ind. Code § 31-39-5-3 through Ind. Code § 31-38-5-5.

Turner v. State, 508 N.E.2d 541 (Ind. 1987) (prosecutor obtained search warrant from superior court to obtain blood, saliva, and fingerprint samples from defendant; once search warrant for physical tests has been obtained, it wasn't necessary that the child "consent" or waive any rights).

For a helpful overview of the juvenile fingerprint statutes, see K.K. v. State, 98 N.E.3d 648 (Ind. Ct. App. 2018).

10. Testimonial Evidence - Express or Implied Assertion of Fact

"Testimonial evidence" within the scope of privilege against self-incrimination encompasses all responses to questions that, if asked of a sworn suspect during a criminal trial, could place suspect in the "cruel trilemma" of self-accusation, perjury or contempt, and suspect confronts that trilemma whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief. Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990).

a. Compulsory Polygraph Examinations Are Testimonial

McDonald v. State, 164 Ind.App. 285, 328 N.E.2d 436 (1975) (compulsory polygraph examinations are testimonial, rather than merely physical, and subject to protection against compulsory self-incrimination).

b. Questioning Prior to Miranda Warning

Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990) (trial court violated drunk driving suspect's constitutional right to avoid self-incrimination by admitting his statement, made in response to police question prior to receiving Miranda warning, that he did not know date of his sixth birthday; response was testimonial in nature because he was required to communicate express or implied assertion of fact and belief; State had argued that question designed to elicit physical evidence regarding physiological function of defendant's brain).

B. DEFENSE WITNESSES

A defendant may be required to file discovery response *citing* potential witnesses, physical evidence, and affirmative defenses. Alibi and insanity defenses must be pled by omnibus date. Ind. Code § 35-36-2-1 and Ind. Code § 35-36-4-1.

1. Summary of Testimony

It is an abuse of discretion for the trial court to force disclosure of attorney work product by requiring each party in a criminal case to provide a summary of the testimony of each of its witnesses. State ex rel. Meyers v. Tippecanoe Superior Court, 438 N.E.2d 989 (Ind. 1982).

Hickman v. Taylor, 329 U.S. 495 (1947) (attorney work product is not discoverable).

The work-product doctrine does not apply to shield verbatim witness statements from otherwise proper discovery. Hicks v. State, 544 N.E.2d 500 (Ind. 1989).

Partlow v. State, 453 N.E.2d 259 (Ind. 1983) (where the defendant had moved for discovery of summary of expected testimony of State's witnesses, which had been granted, it was not error to order defendant to give State summary of testimony of his witnesses).

See generally, Feldman, *The Work Product Rule in Criminal Practice and Procedure,* 50 Cin.L.Rev. 495 (1981).

2. Expert Witness - Facts Known and Opinions Held

The primary function of an expert is to provide information. An expert is expected to owe his allegiance to his calling and not to the party employing him. American Bldgs. Co. v. Kokomo Grain Co., Inc., 506 N.E.2d 56, 61 (Ind. Ct. App. 1987).

T.R. 26(B)(4) governs discovery of facts known and opinions held by expert witnesses.

a. Expert Consultant Not Testifying at Trial

A consultant provides advice, not just information, to aid party he is advising. American Bldgs. Co. v. Kokomo Grain Co., Inc., 506 N.E.2d 56, 61 (Ind. Ct. App. 1987).

Under T.R. 26(B)(4)(b) a party may discover facts known or opinions held of non-testifying experts specially employed or retained in anticipation of litigation only after a

showing of "exceptional circumstances" making it impracticable to obtain facts and opinions on same subject by other means. See State Highway Commission v. Jones, 173 Ind.App. 243, 363 N.E.2d 1018 (1977).

Hergenrother v. State, 425 N.E.2d 225 (Ind. Ct. App. 1981) (court erred in ordering defendant to produce accident report compiled by defendant's insurance company; report was prepared in preparation for civil litigation arising from reckless homicide case; held the report should not have been subject to discovery, however, defendant was not prejudiced by production of report).

Dickens v. State. 997 N.E.2d 56 (Ind. Ct. App. 2013) (because national experts' misgivings about reliability of bullet comparative analysis would not likely have changed result of first trial, failure to disclose information did not constitute a Brady violation entitling defendant to new trial).

If discovery is granted party shall pay expert reasonable fee for time spent responding to discovery. T.R. 26(B)(4)(c). See also Evans v. Huss, 415 N.E.2d 783 (Ind. Ct. App. 1981).

PRACTICE POINTER: Hire expert consultants early in the litigation. If the defendant is indigent, seek permission to make the funds application *ex parte*. Do not reveal the name or opinions of the consultants to the prosecutor unless the expert's testimony will benefit the defendant. Once consultant forms an opinion, if the decision is made to have the expert testify at trial, disclose the consultant as an expert witness. Even after an expert has been listed as a testifying expert witness, a party may later choose to label the expert a consulting expert and thereby afford him the protection of Trial Rule 26(B)(4)(b). Reeves v. Boyd & Sons, Inc., 654 N.E.2d 864, 874-75 (Ind. Ct. App. 1995); Donnelley & Sons Co. v. North Texas Steel, 752 N.E.2d 112, 131-132 (Ind. Ct. App. 2001). The Seventh Circuit has found an attorney ineffective in part because they disclosed the report of an unfavorable expert, and failed to take advantage of the protections for consulting experts in T.R. 26(B)(4)(b). Stevens v. McBride, 489 F.3d 883, 896-97 (7th Cir. 2007).

b. Examining Physicians

Examining physicians are controlled under T.R. 35. See IV.F.

C. ATTORNEY'S MENTAL IMPRESSIONS, OPINIONS AND THEORIES

Work product exception to discoverability protects from disclosure an attorney's mental impressions, conclusions, opinions, or legal theories. Hicks v. State, 544 N.E.2d 500 (Ind. 1989).

Work product includes interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs. Hickman v. Taylor, 329 U.S. 495 (1947).

There is a distinction between ordinary work product materials, which may be discoverable with a special showing, and mental impressions, opinions, or legal theories of an attorney regarding the litigation, which are never discoverable. National Eng. Co. v. C & P Eng. Co., 676 N.E.2d 372 (Ind. Ct. App. 1997).

1. Must be in Documentary Form

If in documentary form, mental impressions, conclusions, opinions and legal theories of attorney or other representative of a party concerning litigation appear to be absolutely protected under T.R. 26(B)(3). See Upjohn Co., Inc. v. United States, 449 U.S. 383 (1981) and Duplan Corporation v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973).

2. Applicability to Other Proceedings

In Re Grand Jury Subpoena, 524 F.Supp. 357 (D.Md. 1981) (in a subsequent criminal investigation or case, work product privilege not lost because the case in which the material developed has ended).

D. DISCOVERY OF MATERIALS IN LAWYER'S FILES

A party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only if not privileged and relevant, and only upon a showing of need or hardship. "Hardship" means a showing that party seeking discovery has substantial need of materials in the preparation of his case, and that he is unable without undue hardship to obtain substantial equivalent by other means. T.R. 26(B)(3). See also Hickman v. Taylor, 329 U.S. 495 (1947).

III. VIOLATIONS AND SANCTIONS, T.R. 37

A. GENERALLY

1. Discretion in Trial Court

Trial court has wide discretion in ruling on violations of discovery order, and Supreme Court will not reverse that determination absent abuse of discretion. Jenkins v. State, 627 N.E.2d 789 (Ind. 1993).

Rivers v. Methodist Hospitals, Inc., 654 N.E.2d 811 (Ind. Ct. App. 1995) (discovery is designed to be self-executing. It is usually a cooperative effort. When it breaks down penalties are provided by the rules. Imposition of such penalties are within discretion of trial judge).

State v. Hollin, 970 N.E.2d 147 (Ind. 2012) (trial court did not commit clear error in granting defendant's PCR petition because State failed to turn over Brady material, i.e., accomplice's pending criminal matters and his pre-trial statement in which he changed his story).

State v. Lyons, 189 N.E.3d 605 (Ind. Ct. App. 2022) (trial court did not abuse discretion excluding all evidence related to polygraph examination as sanction for State's untimely disclosure that examination had changed from stipulated polygraph to non-stipulated), *trans. pending*.

Trial court should seek to apply sanctions which have minimal effect on evidence presented at trial and merits of case. Defendant and prosecution should be treated evenhandedly under the law in matters of discovery sanctions. Wiseheart v. State, 491 N.E.2d 985 (Ind. 1986).

2. Primary Factors in Court's Consideration

a. Sanctions for Both Prosecution and Defense Discovery Violations

In deciding whether to permit testimony of witness whose identity was not disclosed to opposing counsel until after completion of discovery, trial court may consider:

- date on which witness first became known to opposing counsel;
- how vital witness's testimony is to case of proponent;
- nature of prejudice to opposing party if witness is permitted to testify;
- whether less stringent alternatives are appropriate and effective to protect parties' interests; and
- whether opponent will be unduly surprised and prejudiced despite available and reasonable alternatives.

See Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993).

b. Sanctions Against Defense

Courts consider whether the breach was intentional or in bad faith and whether substantial prejudice resulted. Kindred v. State, 540 N.E.2d 1161 (Ind. 1989). The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State. Because of the defendant's right to compulsory process under the federal and state constitutions, there is a strong presumption to allow the testimony of even late-disclosed witnesses. Rohr v. State, 866 N.E.2d 242 (Ind. 2007).

> Borst v. State, 459 N.E.2d 751 (Ind. Ct. App. 1984) (even if bad faith on defendant's part would justify infringement of his right to call witnesses in his favor, evidence did not establish that defendant's failure to provide State with address of defense witness until two days before trial demonstrated bad faith, and State made no showing of substantial prejudice to its case if continuance were granted).

Counter State's argument for sanctions against defendant with United States ex rel. Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985) (State's interest in discovery is prevention of surprise, not punishment of the defendant for technical errors).

3. Steps to Follow When Seeking Discovery Sanction

If State fails to comply with discovery prior to trial:

- Make reasonable effort to reach agreement with opposing party. See T.R. 26(F).
- File motion for order to compel discovery. See T.R. 37(A).

- Include specific statement showing you made reasonable effort to reach agreement. (T.R. 26(F) details what must be in included in statement.)
- Make sure you have complied with State's discovery requests. Wiseheart v. State, 491 N.E.2d 985 (Ind. 1986). See also Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988).
- Ask for a mistrial, for exclusion of evidence, and if those are denied, a continuance. Object to admission of evidence on grounds of surprise or unpreparedness for evidence at trial.

  Staggers v. State, 477 N.E.2d 539 (Ind. 1985) (undisclosed State witnesses may testify when there is no showing of surprise or prejudice to defendant).

- Request continuance immediately upon being informed of noncompliance.

  Staggers v. State, 477 N.E.2d 539 (Ind. 1985) (supplement to witness list on second day of trial did not prejudice defendant where defendant neither requested a continuance nor objected to the additions at trial).

  Collins v. State, 549 N.E.2d 89 (Ind.Ct.App. 1990) (assuming that discovery order was violated by failure of the State to produce evidence of defendant's admissions to the police, defendant waived objection when he did not seek continuance, despite his asserted surprise at testimony given by deputy regarding admissions).

- If court grants only a recess - argue not enough time was given.
- Explain on the record how it is necessary to alter defense strategy, and, if applicable, how the surprise witness or evidence undercuts that strategy. Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988).

  Crosson v. State, 268 Ind. 511, 376 N.E.2d 1136 (1978) (defendant failed to show how evidence necessitated any trial preparation beyond what he already knew he had to do).

4. Types of Sanctions

Failure to obey trial court's order to permit or provide discovery includes the following sanctions:

a. Facts Taken as Established

Designated facts shall be taken as established, or matters regarding which a court order, directing certain discovery response, was made shall be taken as established for all purposes. T.R. 37(B)(2)(a).

State v. Kuespert, 425 N.E.2d 229, 233 (Ind. Ct. App. 1981) (trial court did not err as a matter of law in invoking a sanction under T.R. 37(B) when it ordered State to present evidence within 60 days, thereby shifting burden of proof to the State).

b. Cannot Introduce Evidence

A trial court may sanction a disobedient party by issuing an order that refuses to allow a disobedient party to support or oppose designated claims or defenses or prohibits the party from introducing designated matters in evidence. T.R. 37(B) (2) (b).

State v. Kuespert, 425 N.E.2d 229, 235 (Ind. Ct. App. 1981) (as sanction for bad faith and abusively resisting discovery, trial court ordered burden of proof reversed and struck affidavit on issue of which class members were sworn).

Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003) (where State violated discovery order by failing to provide State witness's changed story to defense, trial court did not abuse its discretion by fashioning own remedy; instead of declaring a mistrial, it barred the State from rehabilitating the witness after the defendant impeached her testimony with her prior inconsistent statements).

c. Strike Pleadings, Stay or Dismiss Action

A trial might sanction a party by issuing an order that strikes pleadings, or stays further proceedings, or dismisses the action or proceeding, or renders judgment by default. T.R. 37(B)(2)(c).

Noble v. Moistner, 180 Ind.App. 414, 388 N.E.2d 620 (1979) (trial court can dismiss complaint if party acted in bad faith in obstructing discovery, and that action was to detriment of other party), *superseded by rule in part stated in* Pfaffenberger v. Jackson Cnty. Reg'l Sewer Dist., 785 N.E.2d 1180 (Ind. Ct. App. 2003).

State v. Montgomery, 901 N.E.2d 515 (Ind. Ct. App. 2009) (trial court did not abuse its discretion by dismissing case where State delayed over three years in producing 200 photos to be used in arson case).

State v. Schmitt, 915 N.E.2d 520 (Ind. Ct. App. 2009) (unusual remedy of dismissal of OWI prosecution not an abuse of discretion where State's refusal to respond to D's Request of Production regarding officer's training for administration of traffic stops and field sobriety tests constituted bad faith).

State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (outright dismissal was not appropriate remedy for pattern of pretrial government misconduct; remedy is not outright dismissal, but suppression of tainted evidence for which State cannot rebut presumption of prejudice pursuant to State v. Taylor, 49 N.E.3d 1019 (Ind. 2016)).

d. Contempt of Court

The trial court may issue an order treating as contempt of court the failure to obey any orders except an order under T.R. 35 (Physical and Mental Examination of Persons). T.R. 37(B) (2) (d).

e. Award Attorneys' Fees

T.R. 37(B)(2)(e) permits award of reasonable expenses and attorneys' fees.

Finley v. Finley, 174 Ind.App. 362, 367 N.E.2d 1126 (1977) (leading case on power of trial court to award attorney fees to enforce discovery orders and to order a party to pay).

f. Expert's Fee and Expenses

Evans v. Huss, 415 N.E.2d 783 (Ind. Ct. App. 1981) (trial court may order payment of an expert's fees and expenses without existence of prior court order, or a motion to compel, when discovery was first being conducted amicably among the parties).

g. Where a Party Did Not Comply with T.R. 35(A)

T.R. 37(B)(2)(e) provides that:

> Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of T.R. 37(B)(2), unless the party failing to comply shows that he is unable to produce such person for examination.

h. Discovery Sanction Orders are Interlocutory

Discovery orders are generally considered to be interlocutory in nature; appeals lie only when expressly authorized. State v. Kuespert, 425 N.E.2d 229, 231 (Ind. Ct. App. 1981) (interlocutory orders for payment of money are appealable as a matter of right).

B. PRESERVING ERROR

1. Requesting a recess or continuance

a. Preferred Remedy

Where remedial measures are warranted due to failure to comply with discovery procedures, continuance of criminal trial is usually proper remedy. Vanway v. State, 541 N.E.2d 523 (Ind. 1989).

See T.R. 53.5 (Continuances).

b. Failure to Seek Continuance

Failure to request continuance as alternative to exclusion of evidence constitutes waiver of any alleged error pertaining to noncompliance with court's discovery order where continuance is appropriate remedy. Van Martin v. State, 535 N.E.2d 493 (Ind. 1989).

> Woodcox v. State, 591 N.E.2d 1019, 1025 (Ind. 1992) (no abuse of discretion in allowing testimony of DNA expert, despite fact that he was given copies of expert's reports at trial; defendant first knew of expert approximately three weeks before trial but did not attempt to interview or depose him or request continuance for such purpose; expert's testimony was not crucial, and had defendant truly contested DNA testing results, he should have asked for continuance in order to depose expert and

take additional measures to prepare to meet DNA evidence presented by State), *superseded on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).1

Stark v. State, 489 N.E.2d 43 (Ind. 1986) (defendant, who did not seek continuance to remedy violation of discovery order, failed to show that continuance would have been ineffectual).

c. Mid-Trial Depositions

Trial court may defuse harm from mid-trial revelation of an expert's theory, and surprise of expert testimony on central issue in the case, by offering defendant opportunity for mid-trial deposition of the expert. Komyatti v. State, 490 N.E.2d 279 (Ind. 1986).

d. Continuance Ineffective

Long v. State, 431 N.E.2d 875 (Ind. Ct. App. 1982) (where State failed to give defendant a copy of the statement he made to police until after he testified at trial and where prosecutor knew of existence of statement on day prior to trial, defendant was denied right to fair trial, due process, and effective assistance of counsel. Continuance was not effective remedy and misconduct was so flagrant that continuance would not serve as adequate deterrent).

Where mid-trial disclosure is made, after the defense has committed itself as to the strategy to be pursued, granting a continuance is a hollow remedy; defense does not waive due process rights by failing to request same, and mistrial may be the only adequate remedy.

Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988) (failure of State to disclose rebuttal witnesses violates reciprocity principles of Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973) on grounds the court's ruling supported discredited "poker game secrecy" as discovery principle).

Beauchamp v. State, 788 N.E.2d 881 (Ind. Ct. App. 2003) (where State failed to disclose rebuttal doctor's changed opinion, a continuance during trial would have been a futile remedy because the defendant had already relied on the doctor's original opinion by calling his own doctor).

PRACTICE POINTER: If forced to ask for a continuance in order to remedy the State's violation of a discovery order, be mindful of Criminal Rule 4 deadlines. Be sure to make a record that the delay caused by the continuance is attributable to the State. See, e.g., Crosby v. State, (Ind. Ct. App. 1992); Biggs v. State, 546 N.E.2d 1271 (Ind. Ct. App. 1989); Marshall v. State, 759 N.E.2d 665 (Ind. Ct. App. 2001).

2. Offer of proof

Bartruff v. State, 528 N.E.2d 110 (Ind. Ct. App. 1988) (when a defendant seeks to call a previously undisclosed witness, he must make an offer of proof on the nature of the proffered testimony; if he does not make such an offer, he has not adequately preserved the issue for appellate review; defendant had knowledge of potential testimony of witness more than six

months prior to date of trial, yet he waited until middle of the State's case to inform the court and the State of his desire to call the witness; thus, his breach was intentional).

C. EXCLUSION OF EVIDENCE

1. State's Evidence

Exclusion of evidence may be appropriate where discovery noncompliance has been flagrant and deliberate, or so misleading or in such bad faith as to impair right of fair trial. Vanway v. State, 541 N.E.2d 523 (Ind. 1989). See Indiana Rule of Trial Procedure 37(B)(2)(b) ("[i]f a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others[,] . . . [a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence").

The Court's discretion in striking testimony of witnesses for prosecution is limited.

Cain v. State, 955 N.E.2d 714 (Ind. 2011) (trial court did not abuse its discretion by refusing to exclude co-defendant's testimony when prosecutor waited until trial had begun to offer him a plea; there was no evidence of bad faith or that defendant was prejudiced and denied a fair trial).

Liddell v. State, 948 N.E.2d 367 (Ind. Ct. App. 2011) (because there was no evidence of bad faith in State calling a late-discovered surprise witness, trial court did not abuse its discretion in denying defendant's request to exclude witness's testimony; denial of motion for continuance was also not an abuse of discretion because trial court allowed defendant to depose witness at end of fourth day of trial and because defendant did not identify any responsive measures he was unable to pursue absent a continuance).

Phillips v. State, 550 N.E.2d 1290 (Ind. 1990) (for the trial court to exclude or strike testimony would have been an abuse of discretion, unless the defendant could show that the prosecution had engaged in deliberate or other reprehensible conduct, such as attempting to hide the witness or block access to him).

Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1987) (State's knowing failure to disclose identity of alibi rebuttal witness violated due process; the trial court erred in failing to exclude State's undisclosed rebuttal witness).

Tyson v. State, 619 N.E.2d 276 (Ind.Ct.App. 1993) (good discussion of when exclusion of witnesses is a proper remedy).

Lewis v. State, 700 N.E.2d 485 (Ind.Ct.App. 1998) (State's disclosure, two days before trial, of Defendant's fingerprints at the scene of the burglary warrant either exclusion of the evidence, or in the least, a continuance).

Beavers v. State, 465 N.E.2d 1388 (Ind. 1984) (criminal record of co-defendant not produced; motion to strike testimony was inappropriate where prosecutor's failure was excusable).

Robinson v. State, 450 N.E.2d 51 (Ind. 1983) (trial court did not err in denying defendant's motion to exclude confessions where evidence of non-compliance by prosecution was not clear & disclosure may have been made to earlier defense counsel; fifteen-minute recess to permit counsel to discuss confessions with defendant was adequate under the circumstances).

Childress v. State, 938 N.E.2d 1265 (Ind. Ct. App. 2010) *trans. denied* (trial court did not abuse discretion by refusing to exclude evidence which was disclosed to defendant the second day of trial; belated disclosure was not made in bad faith, and continuance would have been adequate remedy).

> Cf. Bates v. State, 77 N.E.3d 1223 (Ind.Ct.App. 2017) (State's failure to disclose before trial the existence of a wallet found in area of a burglary did not violate Brady v. Maryland because (1) Brady does not generally require pretrial disclosure; (2) defendant failed to show that wallet was material; and (3) to extent the late disclosure prevented defendant from showing that wallet was material, defendant failed to request continuance to help him make such showing).

Taylor v. State, 468 N.E.2d 1378 (Ind. 1984) (no error in denial of motion to continue; noon recess adequate time to review/compare photos of crime scene).

Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App.1994) (State violated discovery order where court ordered Department of Toxicology inspector to "monitor" defendant's inspection of blood alcohol measurement device, but inspector did not provide access code and key so that tests could be conducted; held, State's evidence of test results must be excluded).

Van Martin v. State, 535 N.E.2d 493 (Ind. 1989)(exclusion of evidence as sanction for discovery abuse is not proper unless there is showing that prosecution engaged in deliberate or other reprehensible conduct which prevented a fair trial; no evidence that discovery violation was in bad faith).

Welch v. State, 564 N.E.2d 525 (Ind. Ct. App. 1990) (exhibits were properly admitted into evidence, despite defendant's claim that State deliberately withheld items until date of supplemental discovery response; defendant failed to show he was prejudiced by State's tardy discovery, and there was no evidence that State deliberately withheld items).

Gibson v. State, 514 N.E.2d 318 (Ind. Ct. App. 1987) (prosecution's deliberate violation of discovery orders by failing to turn over audio tapes of witnesses' statements prior to trial did not deny fair trial to defendant charged with promoting prostitution because such statements were not material; inconsistencies between audio statements and trial testimony of prostitute witnesses were negligible, and defendant had opportunity to impeach witnesses with other available materials).

State v. Fridy, 842 N.E.2d 835 (Ind. Ct. App. 2006) (State's refusal to divulge names and addresses of informants was not valid basis upon which to grant defendant's motion to suppress evidence seized pursuant to search warrant; by using motion to suppress as sanction for State's blatant non-compliance with its order to compel, trial court committed error that prejudiced State; had trial court 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 - trial court could have both sanctioned the State for its noncompliance and found sufficient corroborating evidence of probable cause to support search warrant).

2. Defendant's Evidence

The guidelines applicable to the prosecution's attempt to exclude evidence/witnesses for the defense are set out in Wiseheart v. State, 491 N.E.2d 985 (Ind. 1986), and include the following:

(1) the severity of the violation;
(2) the degree to which the witness' testimony is vital to the defense;
(3) the nature of the prejudice to State;
(4) whether less stringent sanctions can protect the common interest in a fair trial, and the defendant's Sixth Amendment rights;
(5) whether a recess or continuance would mitigate any undue surprise to the State.

a. Double Standard When Excluding Defense Witnesses

Wilson v. State, 635 N.E.2d 1109, 1112 (Ind. Ct. App. 1994) (defendant argued that courts use double standard when excluding defense witnesses versus State witnesses, yet court rejected argument, *citing* Wiseheart v. State), *affirmed in part, reversed in part,* 644 N.E.2d 555.

NOTE: Wilson can be used with Tyson, 619 N.E.2d 276, and other cases excluding defense witnesses for proposition that same standard should apply.

Frink v. State, 568 N.E.2d 535 (Ind. 1991) (exclusion of defendant's witnesses and exhibits from evidence was warranted for failure to comply with discovery order which required completion of discovery days after trial began and after State rested its case).

Shumaker v. State, 523 N.E.2d 1381 (Ind. 1988) (trial court could impose extreme sanction of witness exclusion for murder defendant's failure to disclose to State name of witness, who was allegedly discovered for first time during voir dire; violation of discovery order began and continued during first three days of trial and was not corrected until after the State had concluded its case-in-chief, and proffered testimony of witness was largely cumulative of evidence offered by other defense witnesses regarding defendant's propensity for nonviolence toward victim).

Williams v. State, 714 N.E.2d 644 (Ind. 1999) (trial court erred in excluding belatedly disclosed defense witness; in light of defendant's right to compulsory process under federal and state constitutions, there is strong presumption to allow testimony of even late-disclosed witnesses).

Hurd v. State, 9 N.E.3d 720 (Ind. Ct. App. 2014) (even if trial court abused its discretion in excluding mother as witness, error was harmless).

Farris v. State, 818 N.E.2d 63 (Ind. Ct. App. 2004) (even if witness's testimony had prejudiced State, a continuance, not exclusion, would have been appropriate).

D.D.K. v. State, 750 N.E.2d 885 (Ind. Ct. App. 2001) (trial court erred in excluding testimony of defense witnesses whom defense had not disclosed ten days prior to trial as local rule required; trial court should have allowed witnesses to testify after giving State a recess, or if needed, a continuance).

Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993) (three-day delay between time that defense counsel learned of existence of potential witnesses and time that defense counsel notified State was "excessive," and supported trial court's decision to bar witnesses' testimony, though both sides had allegedly received numerous crank calls from parties claiming to have information about case, and though defense counsel used time in interim to follow up on his telephone conversations with witnesses and to interview them face-to-face; delay was unwarranted in light of the fact that State had already begun to present its case and could have used information to better prepare for witnesses' anticipated testimony).

State v. Shepherd, 569 N.E.2d 683 (Ind. Ct. App. 1991) (defendant's testimony at prior trial was not subject to per se exclusion at retrial when offered by the State in its case in chief where the record failed to establish that defendant was advised on the record and before testifying of her right against self-incrimination).

b. Sixth Amendment Right to Present Witnesses

To the degree that Sixth Amendment right to present witnesses is impacted by an exclusion of evidence, the interests of the parties are arguably not symmetrical when judging the appropriateness of severe sanctions, despite Wiseheart's holding to the contrary. The Sixth Amendment right to present witnesses on one's behalf further limits discretion in imposing sanctions against defendant. Wiseheart v. State, 491 N.E.2d 985 (1986) (*citing* Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967)).

The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State. Because of the defendant's right to compulsory process under the federal and state constitutions, there is a strong presumption to allow the testimony of even late-disclosed witnesses. Rohr v. State, 866 N.E.2d 242 (Ind. 2007).

Vasquez v. State, 868 N.E.2d 473 (Ind. 2007) (an accused citizen's rights to present evidence and to have a fair trial "are of immense importance"; trial court abused its discretion by excluding testimony of defense witness in violation of defendant's right to compulsory process under Sixth Amendment and Art. I, § 13 of Indiana Constitution; defense counsel first knew of the witness on the first day of trial and immediately informed State, though counsel did not formally ask to modify its list of witnesses until close of State's case in chief the next day; "there is a strong presumption to allow the testimony of even late-disclosed witnesses.").

Rohr v. State, 866 N.E.2d 242 (Ind. 2007) (trial court committed reversible error by excluding defendant'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 defendant's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State).

Alexander v. State, 819 N.E.2d 533 (Ind. Ct. App. 2004) (where the defendant's disclosure of his expert witness was two weeks before trial and not due to bad faith, the State was not substantially prejudiced by the late disclosure because the State had time to depose the expert; the trial court abused its discretion in excluding the expert who would have testified the defendant was insane at the time of the murder).

Escobedo v. State, 987 N.E.2d 103 (Ind. Ct. App. 2013) (no error in letting defendant's late-disclosed expert testify while limiting the subject area of his testimony, which balanced interests of both parties).

Vasquez v. State, 868 N.E.2d 473 (Ind. 2007) (an accused citizen's rights to present evidence and have a fair trial "are of immense importance" so trial court improperly excluded testimony of late-disclosed defense witness), *summarily affirm'd in relevant part*, 989 N.E.2d 1248 (2013).

Taylor v. Illinois, 484 U.S. 400 (1988) (where discovery violation is willful and motivated by desire to secure tactical advantage, court may order exclusion of witnesses' testimony as sanction; court may not ignore "fundamental character" of defendant's right to offer testimony on own behalf).

c. Defense Witnesses Other than Accused

Ind. Code § 35-36-4-3(b) allows exclusion of alibi evidence from witnesses other than the accused, where the defendant has failed to comply with the alibi notice requirements of Ind. Code § 35-36-4-1.

But see, Campbell v. State, 622 N.E.2d 495 (Ind. 1993) (exclusion of defendant's own alibi testimony under alibi notice statute impermissibly infringed upon his right to testify, Ind. Const., art. 1, §13), *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

Edwards v. State, 930 N.E.2d 48 (Ind. Ct. App. 2010) (trial court erred in excluding purported alibi witness where D failed to file Notice of Alibi; because witness would have merely testified that D was not at the scene of the crime, witness was a rebuttal witness, not an alibi witness, so no Notice of Alibi was required).

D. MISTRIAL

Jester v. State, 551 N.E.2d 840 (Ind. 1990) (trial court did not abuse its discretion by declaring a mistrial *sua sponte* where State discovered, during trial, that it had failed to turn over written statements of witnesses pursuant to discovery order, and defense counsel declined to accept offer of a continuance, but instead insisted on either a dismissal or a suppression of the statements).

Phillips v. State, 550 N.E.2d 1290 (Ind. 1990) (even if State's failure to disclose a particular witness had been in violation of court's discovery order, defendant would not have been entitled to a mistrial where the content of the witness' testimony was accessible to defendant before trial).

Braswell v. State, 550 N.E.2d 1280 (Ind. 1990) (defendant 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 defendant refused alternative remedies of recalling witness or granting continuance).

Starks v. State, 620 N.E.2d 747 (Ind. Ct. App. 1993) (mistrial was not warranted by prosecution's failure to disclose in pre-trial discovery statements defendant made to police officer while being transported to hospital in violation of discovery order; pursuant to defendant's request evidence was not admitted at trial, and defendant was given opportunity to use statements at trial if he chose).

Long v. State, 431 N.E.2d 875 (Ind. Ct. App. 1982) (continuance was not effective remedy and misconduct was flagrant where defendant filed pre-trial discovery request for any written or recorded statement made by himself or a co-defendant, the State affirmatively responded that all such statements had been provided, prosecutor was apparently advised on day prior to trial of existence of a written and signed statement made shortly after arrest and did not inform defendant or his counsel of existence thereof but waited until after defendant testified on direct and then used a portion of the statement to lay a foundation for impeachment; defendant denied right to fair trial, due process, and effective assistance of counsel; reversed and remanded for new trial).

E. STATE'S FAILURE TO TURN OVER EXCULPATORY EVIDENCE - BRADY VIOLATIONS

Every defense attorney should be familiar with the U.S. Supreme Court cases of Brady v. Maryland, U.S. v. Agurs, U.S. v. Bagley, and Kyles v. Whitley.

Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the State has an obligation to disclose evidence favorable to the accused, where the evidence is material either to the question of guilt or to punishment. It is a violation of due process for the State to suppress such evidence. Brady, 83 S.Ct. at 1196-97.

Undisclosed evidence is material if it would create a reasonable doubt of guilt that would not otherwise exist. Some material evidence is of such value to the defense that the prosecutor must disclose it even without a specific request. U. S. v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

> U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985) (regardless of nature of request by defendant, favorable evidence is material, and 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").

Brady violation is not subject to harmless error analysis. Prosecution properly bears burden of determining whether evidence, including that in possession of police, is material and must be disclosed to defense.

> Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995) (four aspects of materiality under Bagley: First, reasonable probability of different outcome does not require showing that, more likely than not, defendant would have received different result had evidence been disclosed, but rather that, governmental suppression undermines confidence in the outcome. Second, defendant 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. Fourth, and finally, effect of suppressed evidence must be considered collectively, not item-by-item).

1. Determining a Brady Rule Violation

Under federal law, undisclosed evidence must have been "material" in order to constitute a violation. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985).

a. Defendant Must Show Materiality

Prosecution's obligation to disclose Brady material is contingent upon a showing that the prosecution suppressed or withheld evidence that was exculpatory and material. Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562 (1972).

> Goudy v. Basinger, 604 F.3d 394 (7th Cir. 2010) (even though Indiana Court of Appeals recited the proper standard for materiality, it unreasonably applied that standard by essentially ruling that the potential Brady evidence was not material because it would not have conclusively establish D's innocence, thus inappropriately increasing D's burden on collateral review).

Defendant relieved of burden of proving materiality where materiality is self-evident, or showing prevented by destruction of evidence itself. Lee v. State, 545 N.E.2d 1085, 1089 (Ind. 1989).

> Turpin v. State, 272 Ind. 629, 400 N.E.2d 1119 (1980) (loss of exculpatory statement made by defendant did not preclude defendant from showing its materiality).
>
> Williams v. State, 455 N.E.2d 299 (Ind. 1983) (defendant failed to show that if State had disclosed lineup of defendant this would have revealed exculpatory evidence).

Evidence that may "undermine" a conviction depends upon the facts of any particular case, and nature of the request for information. The key is whether "the prosecutor's response to [defendant's] discovery motion misleadingly induced defense counsel to believe...the evidence did not exist, possibly causing counsel to abandon independent investigation, defenses, or trial strategies . . . ." Bagley, 473 U.S. at 683. Specific discovery requests would probably meet this standard best. See Pennsylvania v. Ritchie, 480 U.S. 39, 58 n.15 (1987).

> Prewitt v. State, 819 N.E.2d 393 (Ind. Ct. App. 2004) (the following suppressed evidence was material: evidence that the defendant'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 and another person had moved victim's body; and evidence that Hunter had previously offered money and drugs to another individual to beat up victim).

b. Agurs Tests

Prosecutor's failure to disclose "material" evidence may result in reversal of conviction in three different situations. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

(1) Knowing Use of Perjured Testimony - Likelihood of Affecting Jury's Judgment

Where prosecution presents testimony it knew or should have known was perjured, reversal is required if "there is any reasonable likelihood [the testimony] could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976); Gordy v. State, 270 Ind. 379, 385 N.E.2d 1145 (1979); Biggerstaff v. State, 266 Ind. 148, 361 N.E.2d 895 (1977).

(2) Specific Defense Request - Might Have Affected Outcome

If the defense makes specific request for material that is later shown to be exculpatory (i.e. Brady material), reversal is required if exculpatory evidence "might have affected the outcome of the trial." Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); United States v. Agurs, 427 U.S. 97, at 104, 96 S.Ct. 2392 (1976).

See also Richard v. State, 269 Ind. 607, 382 N.E.2d 899 (1978); Carey v. State, 275 Ind. 321, 416 N.E.2d 1252 (1981); Talley v. State, 442 N.E.2d 721 (Ind. Ct. App. 1982).

NOTE: The Indiana Supreme Court has concluded that the language "might have affected the outcome of the trial" in U.S. v. Bagley merely explains the meaning of the term materiality, and does not set a new standard of materiality. House v. State, 535 N.E.2d 103 (Ind. 1989).

(3) General Request or No Request - "Creates Reasonable Doubt" That Did Not Otherwise Exist

The omitted evidence, as evaluated in the context of the entire record, must create a reasonable doubt that did not otherwise exist. United States v. Agurs, 427 U.S. 97, 104 (1976).

Where defendant's request is phrased in general terms, or where there is no request, prosecutor's duty to disclose is determined by whether the evidence in his possession is so obviously exculpatory that the failure to provide the evidence to defendant denies defendant a fair trial. Hunt v. State, 455 N.E.2d 307 (Ind. 1983).

United States v. Agurs, 427 U.S. 97, 112-113 (1976) (evidence that prosecutrix was drinking alcohol a day after rape and before she made statement to police is not "obviously exculpatory"). Accord White v. State, 263 Ind. 302, 330 N.E.2d 84 (1975).

Whittle v. State, 542 N.E.2d 981 (Ind. 1989) (defendant was not deprived of fair trial by State's failure to disclose that detective thought it was strong possibility that victim fired gun first; information represented speculative opinion that did not rise to exculpatory evidence, and there was no indication that information was available to State before trial).

House v. State, 535 N.E.2d 103 (Ind. 1989) (defendant not denied fair trial where prosecutor failed to disclose possibly exculpatory evidence concerning another

suspect; defense was aware, prior to trial, that second suspect had been questioned by police but counsel only made general discovery request).

Bunch v. State, 964 N.E.2d 274 (Ind. Ct. App. 2012) (defendant denied fair trial by prosecutorial failure to disclose exculpatory evidence in ATF file even in absence of specific request by defendant).

c. Indiana Law

(1) Use of Federal Tests to Determine "Materiality"

Indiana has applied both Bagley and Agurs on basis of federal constitution.

Evidence is material only if there is a reasonable probability that in the event of disclosure the result of the proceeding would have been different. Bellmore v. State, 602 N.E.2d 111, 119 (Ind. 1992).

(2) Separate Standard Under State Constitution?

Ind. Const. Art. 1, §12 may provide a standard separate and independent from the federal standard for non-disclosure violations. The Indiana Supreme Court has not ruled on whether the Agurs or Bagley test or some other standard is applicable under the Indiana Constitution due course of law provision.

St. John v. State, 523 N.E.2d 1353, 1355 (Ind. 1988) (State constitutional issue waived because counsel provided no authority or argument).

2. Disclosure During Trial May Cure Brady Violation

Brady involves the discovery, **after trial**, of favorable information which had been known to prosecution, but unknown to the defense. Prosecutor may turn over the evidence during trial without running afoul of the mandates of Brady. U.S. v. Holloway, 740 F.2d 1373 (6th Cir. 1984); U.S. v. Behrens, 689 F.2d 154 (10th Cir. 1982).

But see Lowrimore v. State, 728 N.E.2d 860, 867 (Ind. 2000) (although prosecutor's deliberate withholding of impeachment evidence until after State's witness had testified and been cross-examined was not a Brady violation; the trial court found that it was 'highly improper' and the Indiana Supreme Court found it 'disturbing,' and suggested that a prophylactic rule may be called for in the future).

a. Continuance

Where evidence is disclosed at trial, the usual remedy is a continuance to review the evidence and conduct investigation, or an order striking testimony or evidence. Stonebraker v. State, 505 N.E.2d 55 (Ind. 1987); Murray v. State, 442 N.E.2d 1012 (Ind. 1982).

Wells v. State, 441 N.E.2d 458 (Ind. 1982) (if exculpatory evidence is presented to jury during trial, defendant has no complaint, even if it prejudiced the preparation of his defense by affecting strategy choices; prosecutor suppressed evidence that

witness would recant prior testimony incriminating defendant. Held, no due process violation).

Carey v. State, 275 Ind. 321, 416 N.E.2d 1252, 1257-58 (1981) (federal agents had offered State's witness a favorable arrangement in exchange for his agreeing to act as an informant; defense counsel not aware of these facts until disclosed at mid-trial hearing; defendant not denied fair trial because the evidence was presented to jury and defense counsel had ample opportunity to cross-examine law enforcement officials; defendant did not argue on appeal that trial court erred in refusing to grant a continuance).

Lock v. State, 567 N.E.2d 1155, 1160 (Ind. 1991) (waiver where defendant did not object on grounds that evidence not provided pursuant to discovery order nor request continuance or exclusion of evidence).

b. May Require Mistrial

Where mid-trial disclosure is made, after the defense has committed itself as to the strategy to be pursued, making a continuance is a hollow remedy, defense does not waive due process rights by failing to request same, and mistrial may be only adequate remedy.

Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988) (failure of State to disclose State's rebuttal witnesses violates reciprocity principles of Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973) on grounds the court's ruling supported discredited "poker game secrecy" as discovery principle).

c. Disclosure at Sentencing

Van Cleave v. State, 517 N.E.2d 356, 364 (Ind. 1987) (State violated discovery order when it did not notify defendant and counsel that defendant's "clean-up" confession might be used to impeach him in penalty hearing; no prejudicial error where State had already proven to satisfaction of trial court other aggravating factors, intentional killing during an attempted robbery, and there was other evidence of defendant's criminal history).

3. No Duty to Disclose Inculpatory Statements if Not Requested in Discovery

Booker v. State, 903 N.E.2d 502 (Ind. Ct. App. 2009) (State was not required to disclose defendant's inculpatory statement - "I just sell a little [cocaine] here to make ends meet" – because defendant did not request disclosure of all statements; Ind. Trial Rule 26 does not require mandatory disclosure; nevertheless, Court did not condone State's conduct and said disclosure would have promoted the goals of discovery; ABA Standards for Criminal Justice require disclosure of "**all** written and oral statements of the defendant." Standard 11-2.1 of ABA Criminal Justice Standards).

4. Plea Agreements

The Federal Constitution requires the government to provide impeachment evidence to a defendant before trial, but not before a plea agreement. U.S. v. Ruiz, 536 U.S. 622 (2002).

IV. TYPES OF DISCOVERY REQUESTS

A. ORAL DEPOSITIONS, T.R. 30

1. Use and Effect in Criminal Cases

Ind. Code § 35-37-4-3 provides: "The State and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure."

Criminal Rule 21 provides: “The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by the court for the conduct of criminal proceedings.”

Brewer v. State, 173 Ind.App. 161, 362 N.E.2d 1175 (1977) (Trial Rules 30 and 31 are the basic law governing taking of depositions in criminal cases).

Drake v. State, 467 N.E.2d 686 (Ind. 1984) (State may take deposition even if defendant does not).

a. Making Deponent Your Witness

A party does not make a person his own witness for any purpose by taking his deposition. However, introducing in evidence the deposition, or any part, for any purpose other than impeaching the deponent makes the deponent the witness of the party introducing the deposition. T.R. 32(C).

b. Strategies and Tactics

It is important to at least depose all occurrence witnesses. Generally, deposition dates are coordinated with the State. Once a date has been chosen, counsel must issue a Notice to Take Depositions and subpoena intended deponents.

See Suplee, "Depositions: Objectives, Strategies, Tactics, Mechanics and Problems," 2 *The Review of Litigation* 257 (Fall 1982).

c. Child Witnesses

Ind. Code § 35-40-5-11.5, enacted in 2020, specifies that a child victim has the right to confer with a representative of the prosecuting attorney's office before being deposed. The new statute provides that a defendant may only depose a child victim if the prosecuting attorney agrees to the deposition or if a court authorizes the deposition. The statute also establishes a procedure for a court to use to determine whether to authorize the deposition of a child victim.

See Church v. State, 189 N.E.3d 580 (Ind. 2022) (upholding constitutionality of IC 35-40-5-11.5).

2. Indigent's Right to Depose at Public Expense

Indigent has right to depose at public expense. Basis for motion for funds for deposition is that defendant is indigent, deposition procedure will not be unduly burdensome, and witness' testimony is not subject to protective order. Murphy v. State, 265 Ind. 116, 352 N.E.2d 479, 482 (1976); Hale v. State, 54 N.E.3d 355 (Ind. 2016) (affirms this right but finds that defendant waived issue by failing to raise it at trial).

Owen v. State, 406 N.E.2d 1249 (Ind. Ct. App. 1980) (conviction reversed on count as to which witness not deposed would have testified).

But see:

Tinnin v. State, 416 N.E.2d 116 (Ind. 1981) (motion to take key witness's deposition denied due to defendant's lack of diligence).

Haskett v. State, 386 N.E.2d 1012, 1014 (Ind. Ct. App. 1979) (in light of high cost to the State for defendant's attorney to take depositions in Florida, written depositions (T.R. 31) were sufficient).

Majors v. State, 773 N.E.2d 231 (Ind. 2002) (trial court did not err in denying defendant's post-verdict request to depose jurors, alternates and bailiffs to explore further his allegations of juror misconduct).

Thompson v. State, 702 N.E.2d 1129 (Ind. Ct. App. 1998) (where defendant failed to specify persons he wished to depose and information he hoped to obtain, trial court did not abuse its discretion in denying defendant's request for discovery at public expense).

Haskett v. State, 386 N.E.2d 1012 (Ind. Ct. App. 1979) (trial court did not err by denying defendant's request to take depositions in Florida at state expense because defendant could use less expensive written deposition).

However, professional persons have a right to be free from compelled professional service in form of answers to questions that call for professional opinion and analysis without being reasonably compensated for that service. State v. Bailey, 714 N.E.2d 1144 (Ind. Ct. App. 1999).

State v. Bailey, 714 N.E.2d 1144 (Ind. Ct. App. 1999) (professionals can be made witnesses in deposition as to facts learned while engaged in that profession upon tender of statutory witness fee and without compensation on professional fee basis; because witnesses answered only questions that they believed to be factual and that did not require expert opinion or testimony, defense counsel did not exceed intended scope of depositions).

3. Defendant's Right to be Present at Deposition

a. In General - No Right

Criminal defendants generally have no constitutional right to attend discovery depositions. Jones v. State, 445 N.E.2d 98, 99 (Ind. 1983).

State v. McKinney, 82 N.E.3d 290 (Ind. Ct. App. 2017) (defendant had no constitutional right to attend deposition of alleged child molesting victim, and trial court abused its discretion in denying State's request to bar defendant from attending deposition where uncontroverted testimony established that alleged victim would be traumatized by defendant's presence at deposition).

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (trial court's recognition of pro se defendant's repeated escape attempts and its refusal to permit defendant to be transported from reformatory to jail in order to depose witnesses did not evince imbalance in discovery process and did not violate due process; trial court permitted defendant's standby counsel to depose State witnesses).

Jones v. State, 445 N.E.2d 98 (Ind. 1983) (no denial of right to confrontation where court denied defendant's petition requesting his presence at depositions of victim and witnesses; victim and witnesses were present and testified at trial, but were excluded from deposition; defendant must be allowed a chance to confront witness at trial if deposition is to be admitted, unless he waives that right).

Miller v. State, 517 N.E.2d 64 (Ind. 1987) (deposition of child victim witness inadmissible when defendant was denied right to be present or to cross-examine at deposition and at trial, under Indiana Constitution).

b. Where Deposition Testimony is Used at Trial - Right to Confrontation

"[A]dmission at trial of a deposition which defendant was not permitted to attend, taken by the State and given by a witness unavailable for trial, results in the defendant never having the opportunity to confront that witness. Such a procedure may violate the defendant's right to confrontation." State v. Owings, 622 N.E.2d 948 (Ind. 1993). See also Mathews v. State, 26 N.E.3d 130 (Ind. Ct. App. 2015).

c. Waiver of Confrontation Right

Where there is no showing in the record that a defendant is unable to attend a deposition and he makes no objection to it proceeding, the defendant waives his right to confrontation even if the witness is unable to testify at trial. State v. Owings, 622 N.E.2d 948 (Ind. 1993).

Where defense counsel takes the deposition and actively participates in it, defendant is deemed to have waived his right of confrontation at trial. See, e.g., Ingram v. State, 547 N.E.2d 823, 826 (Ind. 1989).

PRACTICE POINTER: If your client is being excluded from a deposition, object on the record to any future use of the deposition in lieu of testimony on Sixth Amendment grounds. Also, establish on the record that your participation in the deposition is not waiving your client's right to confrontation. Requiring the defendant to forgo his right to confrontation in order to depose a witness prior to trial is an impermissible restriction on the defendant's right to take a deposition, which, in turn, violates the defendant's right to confrontation at trial. See, e.g., Reed v. State, 748 N.E.2d 381 (Ind. 2001) (State's refusal to grant immunity to the witness until day of trial prevented the defendant from deposing the witness and violated the defendant's right of confrontation); cf. Cain v. State, 955 N.E.2d 714 (Ind. 2011) (where State waited until first day of trial to offer plea to co-defendant, trial court did not abuse its discretion by refusing to exclude co-defendant's testimony; defendant was given opportunity to depose co-defendant before he testified).

4. Interviewing State's Witness in Private

Robinett v. State, 563 N.E.2d 97 (Ind. 1990) (defendant does not have right to interview State's witness in private; presence of State agent not error and did not violate defendant's right to work product).

5. Time of Taking

After commencement of the action, any party may take the deposition of any person, including a party, by deposition upon oral examination. T.R. 30(A).

a. Leave of Court

Must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of twenty [20] days after service of summons and complaint upon any defendant. T.R. 30(A).

Leave not required:

(1) if a defendant has served a notice or taking deposition or otherwise sought discovery, or,
(2) if special notice is given as provided in T.R. 30(B)(2).

b. Oral Deposition of Inmate

T.R. 30(A) provides in pertinent part: "The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes."

6. Deposition Shall be Taken Before Authorized Officer

Deposition must be held before officer authorized to administer oaths. T.R. 28(A).

No deposition shall be taken before a person who is a relative or employee of such attorney or counsel or is financially interested in the action. T.R. 28(C).

7. Notice for Oral Deposition - T.R. 30(B)

A party desiring to take an oral deposition of any person shall give reasonable notice in writing of the time and place for taking the deposition and the name and address of each person to be examined. Gallagher v. State, 466 N.E.2d 1382 (Ind. Ct. App. 1984).

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon party giving notice. T.R. 32(D)(1).

8. Recording and Preserving the Deposition

a. By Recording Machines

T.R. 74 and C.R. 5 specify usual manner of recording testimony. Court may require stenographic taking or make any other order to assure accuracy. T.R. 30 (B)(4).

b. By Other Means

If party taking a deposition wishes testimony recorded in a manner not provided in T.R. 74, then notice of examination shall specify the manner of recording and preserving the deposition. T.R. 30(B)(4).

Unless court orders otherwise, parties may agree by written stipulation that depositions be taken before any person at any time or place, upon any notice, and in any manner. T.R. 29.

9. Using Subpoenas to Compel Attendance of Witnesses

T.R.30(A) provides in pertinent part: "The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45."

To preserve rights, defendant must move for subpoena to compel attendance of a witness at a deposition under T.R. 45, and to enforce the subpoena under T.R. 45(F).

Glover v. State, 441 N.E.2d 1360 (Ind. 1982) (since defendant failed to avail himself of subpoena power, defendant could not complain that witness's failure to attend deposition was sufficient ground to exclude testimony).

Collins v. State, 14 N.E.3d 80 (Ind. Ct. App. 2014) (it was within trial court's discretion to conclude prosecutor and judge would not provide relevant and probative testimony and to deny defendant's subpoena request; similarly, it was within trial court's discretion to deny subpoena request 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)

10. Deposing Party's Failure to Attend or Serve Subpoena

a. Failure to Attend

If deposing party fails to attend and another party attends in person or by attorney pursuant to the notice, court may order payment of reasonable expenses incurred by the other party and his attorney, including reasonable attorney fees. T.R. 30(G)(1).

b. Failure to Serve on Non-Party Witness

If deposing party fails to serve subpoena upon a non-party witness, and because of such failure the witness does not attend, and if the other party attends in person or by attorney because he expects the deposition will proceed, court may order payment of reasonable expenses incurred, including reasonable attorney fees. T.R. 30(G)(2).

11. Examination, Objections

Under T.R. 30(C), examination and cross-examination of witnesses may proceed as permitted at trial under T.R. 43(B).

When there is an objection to a question, the objection and reason therefore shall be noted, and the question shall be answered unless the attorney instructs the deponent not to answer, or the deponent refuses to answer, in which case either party may certify the question to the court pursuant to T.R. 37(A).

12. Deposition Conducted in Bad Faith

Under T.R. 30(D), at any time during taking of deposition on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease forthwith from taking a deposition or may limit the scope and manner of the taking of the deposition as provided in T.R. 26(C).

Motion to terminate or limit an examination is subject to award of expenses under T.R. 37(A)(4).

13. Right to Examine, Read, and Make Changes

Under T.R. 30(E) witness has right to examine, read, and make changes in his deposition.

a. Submission to Witness for Reading and Signing

When testimony is fully transcribed, the deposition shall be submitted to witness for reading and signing and shall be read to or by him, unless such reading and signing have been waived by witness and by each party. T.R. 30(E)(1).

Drummond v. State, 467 N.E.2d 742 (Ind. 1984) (where deponent had opportunity to read/sign and defense counsel was at deposition, safeguards of publication were met).

Unless the reading and signing have been waived by witness and each party, the deposition shall be signed by witness and returned to the officer within 30 days after it is submitted to the witness. T.R. 30(E)(3).

b. Changing Answer

Witness may change any answer in deposition submitted to him, on a form provided by the officer, which change shall contain a statement of the reason for the change. T.R. 30(E)(2).

c. Failure to Sign Deposition

If deposition is returned but not signed by witness, the officer shall execute a certificate of that fact and attach it to original deposition. In such event, deposition may be used by any party with same force and effect as though it had been signed by witness. T.R. 30(E)(3).

Gallagher v. State, 466 N.E.2d 1382 (Ind. Ct. App. 1984) (trial court did not err in admitting deposition of prosecution witness, who was unavailable at trial, despite absence of signature, since witness could not be located despite diligent efforts, and since witness disappeared within four or five days after his deposition, giving State only very short time within which to get deposition transcribed, reviewed and signed by witness).

d. Failure to Return Deposition

If deposition is not returned by witness in 30 days, the reporter shall execute a certificate of that fact. Any party may use a copy of the deposition with same force and effect as though original had been signed by the witness. T.R. 30(E)(4).

14. Errors and Irregularities

a. Disqualification of Officer

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. T.R. 32 (D)(2).

b. Competency, Relevancy, Materiality

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during taking of deposition, unless the ground of the objection is one which might have been obviated if presented at that time. T.R. 32(D)(3)(a).

Osborne v. Wegner, 572 N.E.2d 1343 (Ind. Ct. App. 1991) (medical expert's deposition testimony, asserting that personal injury plaintiff was essentially uninsurable and therefore unemployable, was properly excluded on ground of lack of competency to give such opinion, though no objection was raised at time question

was asked during deposition, absent showing that party eliciting testimony could have established foundation if challenged at deposition).

c. Taking of, Form of Questions, Conduct of Parties

Errors and irregularities occurring at the oral examination in form of questions or answers; oath or affirmation; conduct of parties; and errors which might be obviated or cured if promptly presented, are waived unless objection is made at taking of depositions. T.R. 32(D)(3)(b).

d. Completion and Return of Deposition

T.R. 32(D)(4) provides:

> Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

15. Publication

The filing of any deposition shall constitute publication. T.R. 5(E)(5). See T.R. 30(F)(4).

16. Use of Deposition in Court Proceedings

At the trial or upon the hearing of a motion or an interlocutory proceeding any part or all of a deposition of a party may be used by an adverse party for any purpose, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, regardless of the presence or absence of the person deposed. T.R. 32(A).

a. Deponent's Failure to Appear for Deposition - Effect at Trial

Butler v. State, 547 N.E.2d 270 (Ind. 1989) (trial court did not abuse its discretion in permitting State's witness to testify after he twice failed to appear for depositions; defendant failed to indicate any specific unfairness and merely claimed that a pre-trial examination "could" have led to preservation of impeachment evidence).

b. In Lieu of In-Court Testimony

Deposition may be used in lieu of in-court testimony, where it is shown that:

(1) witness is unavailable. When witness refuses to testify he is unavailable. Lowery v. State, 478 N.E.2d 1214, 1223 (Ind. 1985).
(2) testimony shows adequate indicia of reliability.

See Indiana Rule of Evidence 804(b)(1).

> State v. Owings, 622 N.E.2d 948 (Ind. 1993) (admission of depositions into evidence is within the sound discretion of trial court).

c. Impeaching Deponent

Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness. T.R. 32(A)(1).

Prior inconsistent statement of a deponent witness may be used as substantive evidence. See Indiana Rule of Evidence 801(d)(1).

d. Unavailability

(1) State's Burden: Sixth Amendment concerns

Before deposition is admissible, the State must demonstrate it made a "good faith effort" to procure witness's attendance so he could testify in person, which includes issuance of subpoena and continuing reasonable attempts to procure witness's attendance at trial. Bartruff v. State, 528 N.E.2d 110, 115 (Ind. Ct. App. 1988). See, IPDC Evidence Manual, Chapter 804.

(2) Death

T.R. 32(A) (3) (a) provides that deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is dead. See Roberts v. State, 268 Ind. 348, 375 N.E.2d 215, 220 (1978).

In Driver v. State, 594 N.E.2d 488, 489-90 (Ind. Ct. App. 1992), a defendant who had not waived his right to be present at his first trial had not waived the right to a face-to-face confrontation with a witness against him and, therefore, testimony of that witness who had since died could not be used on retrial.

(3) Witness Outside the State

T.R. 32(A)(3)(b) provides that deposition of witness, whether or not a party, may be used by any party for any purpose, if the court finds that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition.

The fact that a witness is out-of-state may not render that witness unavailable in light of the reciprocity among states for the enforcement of subpoenas from other states. Under Ind. Code 35-37-5-5 (for out of state witness) and Ind. Code 35-37-5-6 (for out of state prisoner), court may issue certificate under seal to material witness specifying number of days witness will be required.

Where the state in which the witness is located has not adopted the Uniform Act to Secure the Attendance of Witnesses, the unavailability may be established by other means.

Cherry v. State, 275 Ind. 14, 414 N.E.2d 301, 307 (1981) (in rape prosecution, examining physician was unavailable where there was testimony she was working at time of trial in Alabama, and that Alabama had not enacted Uniform

Act to Secure the Attendance of Witness; even though there was nothing to indicate State had contacted her to ask her if she would appear).

Jackson v. State, 735 N.E.2d 1146 (Ind. 2000) (where officer was out of town at a secret service training session, but State made no effort to obtain officer's attendance, good faith or otherwise, the State did not show he was unavailable for purposes of the Sixth Amendment).

Garner v. State, 777 N.E.2d 721 (Ind. 2002) (mere vacation is not sufficient to circumvent the defendant's right to confrontation).

Turner v. State, 183 N.E.3d 346 (Ind. Ct. App. 2022) (trial court did not abuse discretion in denying defendant's motion to secure attendance of witness incarcerated in Ohio when motion did not follow statutory requirements of IC 35-37-5-6).

(4) Age, Sickness, Infirmity, or Imprisonment

T.R. 32(A) (3) (c) provides that deposition of a witness may be used for any purpose by any party if the trial court finds witness unable to attend or testify because of age, sickness, infirmity, or imprisonment.

Evidence can be presented on the matter and can be made a part of the deposition and need not be extrinsic to it. Cooper v. Indiana Gas and Water Company, 173 Ind. App. 47, 362 N.E.2d 191 (1977); Wells v. Gibson Coal Co., 170 Ind. App. 445, 352 N.E.2d 838 (1976).

Price v. State, 591 N.E.2d 1027, 1030-31 (Ind. 1992) (victim unavailable due to PTSD and amnesia as result of shooting).

Jackson v. State, 575 N.E.2d 617, 620 (Ind. 1991) (no abuse of discretion in admitting videotaped deposition of witness on grounds of medical unavailability; during deposition, witness testified that due to physical ailments and limitations she was unable to attend trial in order to testify).

(5) Unable to Procure Witness by Subpoena

T.R. 32(A) (3) (d) provides that deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the party offering the deposition has been unable to procure attendance of the witness by subpoena.

Ingram v. State, 547 N.E.2d 823 (Ind. 1989) (State sufficiently demonstrated that witness was unavailable for purposes of admission of witness's deposition, where State showed that witness had not responded to subpoena and that diligent efforts were made to locate her, that detective had tried unsuccessfully to locate witness through her last known address and her place of employment, the foster home where her children lived, her parents, her aunt and uncle, and the welfare department in another city in response to a lead).

(6) Refusal to Testify - Exceptional Circumstances

T.R. 32(A)(3)(e) provides that deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Abner v. State, 479 N.E.2d 1254, 1262 (Ind. 1985) (whether exceptional circumstances exist so as to justify admitting deposition under T.R. 32(A)(3)(e) is left to discretion of trial court).

PRACTICE POINTER: Be aware that the Indiana Supreme Court has switched the burden to the defendant to prove unavailability when the State is the proponent of the deposition, although this likely violates U.S. Supreme Court precedent. Fowler v. State, 829 N.E.2d 459 (Ind. 2005) (State witness who is present and takes the stand, but then refuses to testify with no valid claim of privilege, is not unavailable if the defense does not make an effort to compel the State's witness's testimony; the witness does not become unavailable until the court orders the witness to answer and the refusal persists). Arguably, this holding violates the sixth amendment and contravenes Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318 (1968). It seems even clearer that Fowler is inconsistent with Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 2539-40 (2009); "Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shift the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." Melendez-Diaz, 129 S.Ct. at 2540.

(7) Fifth Amendment

Deposition is admissible if deponent invokes his Fifth Amendment privilege to remain silent when called as witness. Diggs v. State, 531 N.E.2d 461 (Ind. 1988) (before defendant's case-in-chief, the prosecutor told defense witness that he would be charged if he testified to same statements he did in his deposition; when the defense witness then invoked Fifth Amendment and refused to testify, his deposition was admissible).

e. Videotapes

Jackson v. State, 575 N.E.2d 617 (Ind. 1991) (trial court did not abuse its discretion in allowing admission of videotaped deposition of prosecution witness on grounds of medical unavailability of witness; during deposition, witness testified about her inability, because of her physical ailments and limitations, to attend trial in order to testify).

Freeman v. State, 541 N.E.2d 533 (Ind. 1989) (trial court did not abuse its discretion in admitting videotaped deposition of State's witness, where it was necessary for witness to be out of state during trial and witness suffered from cancer and effects of chemotherapy treatment, and where defense counsel participated in deposition with full opportunity to object and cross-examine witness).

f. Objections to Admissibility, Rule of Completeness, Rebuttal

Objections may be made at trial or hearing to receiving in evidence any depositions or parts thereof for any reason that would require exclusion of the evidence if the witness were present and testifying. T.R. 32(B).

If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in context to be considered with the part introduced, and any party may introduce any other parts. T.R. 32(A)(4).

At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. T.R. 32(C).

B. DEPOSITIONS UPON WRITTEN QUESTIONS - T.R. 31

1. Right to Depose

Criminal defendants have right to take depositions from persons listed as State's witnesses. Murphy v. State, 265 Ind. 116, 352 N.E.2d 479 (1976).

Haskett v. State, 179 Ind.App. 655, 386 N.E.2d 1012 (1979) (court did not abuse discretion in denying defendant's request to take oral depositions in Florida at state expense, where T.R. 31 is available).

2. Objections to Form of Questions

Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five [5] days after service of the last questions authorized. T.R.32(D)(3)(c).

C. DEPOSITION TO PERPETUATE TESTIMONY - T.R. 27

1. Appropriate to Memorialize Known Evidence

Perpetuation of testimony is appropriate when, as a result of time, a witness's testimony might become unavailable.

Sowers v. Laporte Superior Court, No. II, 577 N.E.2d 250 (Ind. Ct. App. 1991) (rule authorizing motion to perpetuate testimony in advance of litigation was intended to memorialize evidence already known, rather than to be used as pre-trial discovery device when there was no impediment to bringing the suit).

2. Discretionary

A 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 trial court, whose ruling will not be disturbed on appeal absent a showing of abuse of discretion. Sowers v. Laporte Superior Court, No. II, 577 N.E.2d 250 (Ind. Ct. App. 1991).

State v. Jablonski, 590 N.E.2d 598 (Ind. Ct. App. 1992) (attorney was not entitled to take pre-suit deposition of judge to preserve evidence for criminal contempt case arising out of attorney's failure to perform duties required as an appointed criminal defense attorney; there was insufficient likelihood that attorney would be charged because prosecuting attorney had indicated that he would not proceed).

3. Use in Subsequent Actions

Trial Rule 27(A)(4) provides:

> Use of deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the court of the state in which it is taken, it may be used in any action involving the same subject-matter subsequently brought in a court of this state in accordance with the provision of Rule 32.

D. PRODUCTION OF DOCUMENTS AND THINGS, TEST AND SAMPLE TANGIBLE THINGS - T.R. 34

1. Party May Request Documents and Tangible Things without Leave of Court

A party may serve a request on another party, a witness, or person other than a party, without leave of court, to inspect and copy any designated documents or to inspect and copy, test, or sample, tangible things in possession, custody or control of the recipient of the request. T.R. 34(A) and (C).

2. Failure to Respond

If party's request is not granted, or is objected to, or there is no response, move under Rule 37(A) for an order of enforcement. See T.R. 34(B).

3. Motion to Non-Party

Motion to a non-party must contain the following items:

(1) A list of the items to be inspected, described with reasonable particularity.

(2) A statement that the witness or person to whom it is directed is entitled to security against damages or payment of damages resulting from such request and may respond to such request by:

  (a) submitting to its terms,

  (b) by proposing different terms,

  (c) by objecting specifically or generally to the request by serving a written response to the party making the requesting within 30 days, or

  (d) by moving to quash as permitted by Rule 45(B).

Williams v. State, 959 N.E.2d 360 (Ind. Ct. App. 2012) (trial court abused its discretion by granting Board of Pharmacy's motion to quash defendant's request for his own pharmaceutical records; D's request for his records was sufficiently particular and the records were material to D's defense).

4. Exception to Best Evidence Rule

The best evidence rule does not apply when a party in control of document fails or refuses to produce it for inspection and copying, pursuant to T.R. 34(D). Smith v. City of South Bend, 399 N.E.2d 846, 851 (Ind. Ct. App. 1980).

See Ind. Evid.R. 1004, IPDC Evidence Manual Chapter 10.

E. SUBPOENA DUCES TECUM

1. Criminal Rule 2

A subpoena *duces tecum* compels production of documents, records, or other physical evidence. C.R. 2 provides:

> A subpoena may command the person to whom it is directed to produce the books, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:
>
> (1) quash or modify the subpoena if it is unreasonable and oppressive;
>
> (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, documents, or tangible things; or
>
> (3) quash a Grand Jury subpoena on the ground of privilege against self-incrimination on the motion of a Grand Jury Target Witness.

PRACTICE POINTER: Because of the significant differences between the function of a grand jury investigation versus the trial resolution of guilt, there are significant differences between application of the "unreasonableness" standard to subpoenas issued for grand jury investigation or for trial evidence.

a. Attorney May Sign on Behalf of Court

Trial Rule 45(A)(2) provides:

> The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it or his or her attorney, who shall fill it in before service. An attorney admitted to practice law in this state, as an officer of the court, may also issue and sign such subpoena on behalf of (a) a court in which the attorney has appeared for a party; or (b) a court in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court where the attorney has appeared for a party in that case.

b. *Ex Parte* Pre-trial Proceeding

Prosecutor may not obtain investigatory subpoena after the defendant is charged. Rita v. State, 674 N.E.2d 968 (Ind. 1996) (trial court erred in allowing State to use subpoenas to take *ex parte* statements from witnesses after defendant was charged with crime; the trial

court relied upon Ind. Code § 33-14-1-3 (now Ind. Code § 33-39-1-4) in granting State's request to issue investigatory subpoenas to two witnesses who had refused to speak to prosecution; 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).

"A prosecutor acting without a grand jury must first seek leave of court before issuing a subpoena *duces tecum* to a third party for the production of documentary evidence." Oman v. State, 737 N.E.2d 1131 (Ind. 2000).

Baugh v. State, 719 N.E.2d 848 (Ind. Ct. App. 1999) (reasoning in Rita is equally applicable to issuance of post-indictment *ex parte* subpoena *duces tecum* for defendant's bank records).

S.H. v. State, 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).

State v. Eichhorst, 879 N.E.2d 1144 (Ind. Ct. App. 2008), *trans. denied* (investigatory subpoena for medical records, including blood alcohol test, of driver involved in an accident was reasonable; accident was proper basis for investigation).

F. PHYSICAL AND MENTAL EXAMINATION OF PERSONS - T.R. 35

1. Court Order

Court in which action is pending may order party to submit to physical or mental examination by a physician or to produce for examination the person in his custody or legal control:

(1) when mental or physical condition (including the blood group) of a party, or person in custody or under legal control of a party, is in controversy;
(2) only on motion for "good cause" shown;
(3) upon notice to person to be examined and to all parties;
(4) order shall specify time, place, manner, conditions, and scope of examination and person or persons by whom it is to be made.

See T.R. 35(A).

2. Civil Cases: No Presumptive Right to Have Counsel Present at/or Record Exam

In civil cases, party does not have presumptive right to presence of attorney, either directly or by use of recording device or court reporter, during court-ordered physical examination. What, if any, conditions should be placed on court-ordered physical examination best left to sound discretion of trial court.

Jacob v. Chaplin, 639 N.E.2d 1010 (Ind. 1994) (trial court order permitting the examinee to make an electronic recording of a T.R. 35 medical examination was a proper exercise of discretion; Court "fail[s] to see any reason why electronic recording of the examination would in and of itself impede an examiner's ability to conduct a fair and complete examination").

3. Bodily Intrusions

See discussion under II.A.6.

For discussion of 4th Amendment issues see II.A.5.

4. Warning of Right Against Self-Incrimination

a. Competency Determination

Information gathered by physicians to evaluate competency is not admissible against defendant as substantive evidence unless defendant was advised of right to remain silent prior to the interview and voluntarily and knowingly waived that right. Dickson v. State, 533 N.E.2d 586, 587 (Ind. 1989).

> Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981) (admission of doctor's testimony on dangerousness of defendant on death penalty issue violated defendant's Fifth Amendment rights when he had not been advised of his right to remain silent before the trial judge, who *sua sponte* ordered a pre-trial psychiatric examination; Fifth Amendment applies to both guilt and penalty phases of the trial).

b. Insanity Plea

When the defendant initiates and approves an examination, there is no need to advise him of his right to remain silent. Dickson v. State, 533 N.E.2d 586, 588 (Ind. 1989). See also Ind. Code § 35-36-2-2.

5. Waiver of Physician-Patient Privilege

a. TR 35(B) (2)

T.R. 35(B) (2) provides:

> By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.
>
> Canfield v. Sandock, 563 N.E.2d 526, 529 (Ind. 1990) (waiver of privilege, by filing lawsuit, or otherwise placing physical or mental condition in issue does not open door to entire medical record. Waiver operates only as to those matters causally and historically related to the condition put in issue and which have a direct medical relevance to the defense made).

b. Waiver by Plea of Insanity

The defendant waives his physician-patient privilege concerning his mental condition whenever he makes his mental condition an issue in a criminal proceeding by a plea of insanity. James v. State, 274 Ind. 304, 411 N.E.2d 618, 622 (1980); Lockridge v. State,

263 Ind. 678, 338 N.E.2d 275, 281 (1975); Summerlin v. State, 256 Ind. 652, 271 N.E.2d 411, 413 (1971).

The waiver of the physician-patient privilege is not limited to those physicians appointed as a consequence of the plea but extends to all physicians who might testify at trial upon the defendant's mental condition. Lockridge v. State, 338 N.E.2d 275, 281 (Ind. 1975).

6. "Trading" Reports

Upon request, the party causing the examination to be made shall deliver a copy of a detailed written report of the examining physician. After delivery, the party causing the examination shall be entitled to a like report of any examination. T.R. 35(B)(1).

G. PRE-TRIAL LINEUP

A trial court has discretion to grant a defendant's request for a pre-trial lineup in the best interests of justice. Such petitions should not be granted routinely or in a perfunctory manner. Relevant considerations include the proximity in time to the trial, any changed appearance of the accused, the likelihood of misidentification, and the cost of conducting a lineup in all reasonable terms. Morris v. State, 471 N.E.2d 288 (Ind. 1984).

H. INTERROGATORIES, T.R. 33

1. Used Only Under "Exigent Circumstances"

A criminal case starts with a charge of information, which must be very specific and which is required to state "nature and elements of the crime charged in plain and concise language," it is not necessary in most instances to use overbroad device of interrogatories to narrow issues.

Interrogatories are not proper in criminal cases when their function can be served by another previously recognized discovery technique. State ex rel. Grammer v. Tippecanoe Circuit Court, 268 Ind. 650, 377 N.E.2d 1359 (1978) (not appropriate where information requested is already available to the defendant as a matter of public record).

In criminal cases, "[i]nterrogatories may either be unnecessary in view of the criminal pretrial procedures, or if directed to a defendant produce nothing but objections grounded on constitutional rights." In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998).

However, in the proper criminal case, discovery by written interrogatories served on non-parties (i.e., a complaining witness) may be appropriate as a less cumbersome and less expensive technique than discovery by deposition. Gutowski v. State, 354 N.E.2d 293 (Ind. 1976).

NOTE: Some local court rules put a limit on the number of interrogatories which may be propounded without requesting leave of the court.

2. Guidelines

T.R. 33 allows written interrogatories to be served only on parties.

Marcovich Land Corp. v. J.J. Newberry Co., 413 N.E.2d 935 (Ind. Ct. App. 1980) (interrogatory not appropriate for obtaining documents, but is appropriate for determining existence of documents).

Interrogatory may call for opinion, contention, or legal conclusion, but court may postpone answer pending completion of designated discovery or at a pre-trial conference. T.R. 33(D).

I. T.R. 36 REQUEST FOR ADMISSIONS UNNECESSARY

A request for admissions is unnecessary in a criminal case because Ind. Code § 35-36-8-3 provides for a pre-trial hearing and pre-trial conference to serve the same purpose. State ex rel. Grammer v. Tippecanoe Circuit Court, 377 N.E.2d 1359, 1365 (Ind. 1978); In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998).

J. NON-TRADITIONAL DISCOVERY DEVICES

The following methods and proceedings, although not designed for the purpose of allowing discovery, may often be used to obtain it.

1. Discuss Case with Prosecutor and Police

Obtain a judicial order compelling the police to speak with counsel. Also consider the discovery potential of plea negotiation with prosecutor.

2. Challenge Legality of Arrest

File *habeas corpus* motion immediately following arrest to challenge the legality of the arrest or to challenge the finding of probable cause.

3. Apply for Bail or for Bail Reduction

4. Arrange Transcription of Grand Jury Proceedings

If defendant is indicted by grand jury, file motion to quash the indictment on grounds of procedural or evidentiary defects before the grand jury.

5. Double Jeopardy Plea

Where defendant has been previously tried for related matters.

6. File Motion to Suppress Illegally Obtained Evidence

7. Pre-trial Conference

8. Freedom of Information Laws

Ind. Code § 5-14-3-1 et seq. (access to public records)
Ind. Code § 5-14-1.5-1 et seq. (open door law)
Ind. Code § 4-1-6-1 (fair information practices; privacy of personal information).

V. PRINCIPLES

A. PRACTICE TIPS

1. Strategy Considerations

a. Make Record

Unless you have made a record of items you tried to discover but did not receive, there is no issue to pursue on appeal.

b. Inadequate Response from State

Once discovery is filed, burden is on State to respond. If State does not adequately respond, it creates an issue to be litigated in pre-trial motions. An inadequate response may lay groundwork for continuance.

c. Impress Judge and Prosecutor

Discovery may be opportunity to create impression on prosecutor or judge. Detailed discovery pleading may impress upon a prosecutor the work that is ahead of him and indicate to judge whom she should turn to for guidance in procedure and matters of law.

d. Utilizing Investigator

Strategy considerations may dictate that an investigator should learn about the case through informal interviews with witnesses and officers, and that there should be limited formal written discovery.

e. Revealing Theory of Defense

One danger in filing discovery motions is tipping your hand and showing prosecutor defense strategy.

2. Informal v. Formal Discovery

a. Informal

Informal discovery may consist of anything from an invitation to "come on over and take a look at my [the prosecutor's] file," to an invitation to "call me up and tell me what you need." Even a file purged of work product can contain a gold nugget of information for the case. But, once that file has been in defense counsel's hands, a good prosecutor is going to take every opportunity to inform and remind the judge "defense counsel combed through my file."

What assurances do you have that you have seen everything? What about the contents of the police files? Weigh these pros and cons! More than likely, the prosecutor only has in his file what the detectives have given him.

If counsel is going to participate in "informal discovery" by looking through the State's files, that should include the files of the investigating agency and the investigating officers. There are always a number of different files maintained by the police. Often there is a central depository file which is supposed to contain everything any officer ever wrote. Even so, check the individual officers to see if they also maintained their own files on the case. (Be prepared to present some evidence that has led you to believe the officers have information in their files that is discoverable. Is it based on statements in other reports? Attach those reports to your request or introduce them at the hearing. **Make a record!**) In Marion County, not all the forensic reports are in the prosecutor's file, the central file, or the officers' file. However, all the forensic reports are in the Crime Lab's file.

b. Formal

Formal written discovery preserves for appeal all the items defense counsel requested from the prosecutor. If an item is not turned over pre-trial, but shows up during post-conviction proceedings, the formal written discovery request may help to create a presumption that the item was intentionally hidden from trial counsel.

Pre-trial, written discovery may be helpful if the prosecutor has a habit of "finding" items close to the trial date. A discovery motion mandates the prosecutor to look for the requested items. See Jacobs v. State, 436 N.E.2d 1176 (Ind. Ct. App. 1982). The file stamped discovery motion is a record waiting to be used by defense counsel in arguments to the court for sanctions against the State.

3. May Seek Inadmissible, Relevant Evidence

Information that appears reasonably calculated to lead to the discovery of admissible evidence is discoverable, even though it may not itself be admissible. T.R. 26(B)(1).

Ind. & Mich. Electric Co. v. Pounds, 426 N.E.2d 45, 47 (Ind. Ct. App. 1981) (discovery may reach any unprivileged material which is relevant to the subject matter of litigation or that the information will lead to admissible evidence).

4. Make Request Specific and Describe its Relevance and Importance to Defense

Have prepared an explanation why the items requested are not part of a "fishing expedition" or a request to have the State reveal its case. Items sought by criminal discovery must be specifically requested of and authorized by the court. To avoid accusation of conducting a fishing expedition, draft discovery request so that specific items known to exist and to be in State's possession are named, followed by a phrase that generalizes upon that initial request, e.g. "Statements of John Smith, and all other recorded statements by witnesses relating to the defendant, or to the alleged offense..."

Make sure to include in request a statement seeking "all like matter that hereafter comes into the possession of, or becomes known to, the attorney for the prosecution."

5. Make Effort to Reach Agreement Before Moving to Compel Discovery

Counsel should always ask the prosecutor for what is desired before moving for court order. If counsel first asks prosecutor, it is the latter's fault when the court is bothered by a discovery motion.

Before filing motion or request to compel discovery parties must make reasonable effort to reach agreement on matter which is subject of motion or request. See TR 26(F).

6. Test for Granting Request

Trial court has inherent power to grant various types of discovery in criminal cases. George v. State, 397 N.E.2d 1027 (Ind. Ct. App. 1979).

Criminal discovery in Indiana is governed by the Trial Rules. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998).

Under T.R. 26(B) two factors govern scope of discovery:

(1) there must be sufficient designation of items sought to be discovered, and
(2) items must be material to defense.

If both factors are met, trial court must grant defendant's request for discovery unless State makes a showing of paramount interest in nondisclosure. Jorgensen v. State, 574 N.E.2d 915 (Ind. 1991).

General issues governing the review of a discovery request are:

- Is the information (item) sought material?
- Is it sufficiently identified?
- Are there countervailing interests supporting nondisclosure?

  Hulett v. State, 552 N.E.2d 47 (Ind. Ct. App. 1990) (State failed to show that its interest in fostering counseling services for those in need was paramount to defendant's interest in obtaining discovery of counselor's file to prepare defense in child molesting prosecution).

7. Protective Orders

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. T.R. 26(C).

Richardson v. State, 270 Ind. 566, 388 N.E.2d 488 (1979) (protective order available when party fails to make discovery according to other party's demand, and that order, if there is adequate showing by the party who seeks it, can include suppression of evidence).

a. Requirements

Before filing motion for protection from discovery, TR 26(F) requires informal resolution by:

(1) making reasonable efforts to reach agreement with opposing party concerning matter which is subject of motion, and
(2) including in the motion or request a statement showing that the attorney making the motion or request has made a reasonable effort to reach agreement with the opposing attorney(s) concerning the matter(s) set forth in the motion or request.

This statement shall recite, in addition, the date, time and place of this effort to reach agreement, whether in person or by phone, and the names of all parties and attorneys participating therein.

If an attorney for any party advises the court in writing that an opposing attorney has refused or delayed meeting and discussing the issues covered in this subsection (F), the court may take such action as is appropriate.

The court may deny a discovery motion filed by a party who has failed to comply with these requirements.

b. Denial of Order

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Trial Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

B. COUNSEL'S OBLIGATIONS

1. Prosecutor's Duty to Disclose Exculpatory and Mitigation Evidence

Indiana Rule of Professional Conduct 3.8 provides in pertinent part:

> The prosecutor in a criminal case shall: (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Knowing disregard of those obligations or a systematic abuse of the prosecutorial discretion could constitute a violation of Ind. R. Prof. Conduct 8.4.

White v. State, 263 Ind. 302, 330 N.E.2d 84 (1975) (defendant requested court grant its general motion for production of exculpatory evidence, arguing State could then affirm it had no exculpatory evidence; court held to do so would be redundant because State has duty to reveal *sua sponte* any exculpatory evidence).

a. May Not Avoid Discovery: Lack of Knowledge of Agents

The prosecutor is responsible for knowledge held by State's investigators. Procedures and regulations can be established to carry the prosecutor's burden and to ensure communication of all relevant information on each case to every lawyer who deals with it. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1568 (1995). The State may not avoid the obligation to provide discovery by deliberately or negligently failing to inform itself of its case. Long v. State, 431 N.E.2d 875 (Ind. Ct. App. 1982).

Jacobs v. State, 436 N.E.2d 1176 (Ind. Ct. App. 1982) (State has an obligation to make reasonable efforts to determine the existence of any material subject to discovery and then promptly make it available).

Penley v. State, 734 N.E.2d 287 (Ind. Ct. App. 2000) (State was 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; reversal).

Bunch v. State, 964 N.E.2d (Ind. Ct. App. 2012) (State charged with knowledge of information not just in its physical possession but also obtainable from ATF agents that were acting at State's behest in testing samples and providing report in arson prosecution).

Sloppy police work alone not sufficient to show state negligently failed to inform itself of its case. Johnson v. State, 472 N.E.2d 892 (Ind. 1985).

Madison v. State, 534 N.E.2d 702 (Ind. 1989) (failure of police officers investigating homicide to test victim's knife for fingerprints did not deny defendant fair trial, where evidence would not have proven that victim was holding it when defendant stabbed him and evidence thus would not have been exculpatory).

2. Responding to Discovery Request

a. Prosecution's Duty

State has obligation to make reasonable effort to determine existence of discoverable material, then to promptly make it available to defense. Jacobs v. State, 436 N.E.2d 1176 (Ind. Ct. App. 1982).2

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1568 (1995) (prosecutor is responsible for knowledge held by State's investigators).

Crabtree v. State, 479 N.E.2d 70, 73 (Ind. Ct. App. 1985) (two-month delay in revealing discoverable material pursuant to court order did not so prejudice

defendants as to require dismissal, as defendants learned of evidence six months prior to trial).

PRACTICE POINTER: When prosecutor responds that he does not have particular item you think he has, consider filing interrogatories asking him where he looked. Response or failure to respond may lay grounds for asserting bad faith. Ask the prosecutor for the material, and get a response on the record, in open court.

b. Defendant's Duty to Compel

If delay in State's response to discovery request is prejudicial to defense, defendant must request appropriate action, or any error will be waived. Miller v. State, 405 N.E.2d 909 (Ind. 1980).

Hunt v. State, 455 N.E.2d 307 (Ind. 1983) (defense motion *in limine* to strike testimony of State's witness because of delay in delivery of witness' written plea agreement denied where defendant did not seek continuance to examine plea agreement).

3. Continuing Duty to Disclose and Supplement

a. Promptly Notify Opposing Counsel of Additions

If party discovers additional material or information that is subject to disclosure, parties shall promptly notify opposing counsel. This applies during and after trial. ABA Standards, *Discovery and Procedure Before Trial,* 11-4.1.

Butler v. State, 175 Ind.App. 409, 372 N.E.2d 190 (1978) (accused not justly and fairly tried when his counsel compelled to maneuver in a factual vacuum. Nor is justice and fairness supported when convictions are obtained through surprise or by prosecution misleading defense).

Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65 (Ind. 2006) (there is no continuing duty to supplement discovery responses that were "complete when made"; however, Ind. R. Trial P. 26(E)(2)(a) and (b) provide, respectively, that a party has a duty to supplement a prior discovery response if he obtains information upon the basis of which he knows that response was incorrect when made and a duty to supplement response that was correct when made but is no longer true if, under circumstances, failure to amend the response is in substance knowing concealment).

b. When to Supplement Responses

Trial Rule 26(E) provides:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

(a) the identity and location of persons having knowledge of discoverable matters; and

(b) the identity of each person expected to be called as an expert witness at trial, the subject-matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which

(a) he knows that the response was incorrect when made, or

(b) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

4. Custody of Materials

Any materials furnished to the attorney shall remain in attorney's exclusive custody and shall be used only for purpose of conducting the case. ABA Standards, *Discovery and Procedure Before Trial*, 11-6.4.

5. Impeding Other Party's Efforts

Neither counsel for the parties nor their agents shall advise persons (other than the accused) who have relevant information to refrain from discussing the case with opposing counsel, nor otherwise impede opposing counsel's investigation. ABA Standards, *Discovery and Procedure Before Trial*, 11-6.3.

See also Ind.R.Prof.Conduct, Rule 3.4(a), on restrictions upon impeding access to evidence.

6. Excision

When parts of material or information are discoverable and others not, the discoverable parts are to be disclosed. The disclosing party must give notice that non-disclosed parts have been withheld and they shall be sealed, preserved in records of court, and made available to appellate court. ABA Standards, *Discovery and Procedure Before Trial*, 11-6.6.

C. IN GENERAL

1. Purpose/Right to Discovery

Purpose of pre-trial discovery is to prevent unfair surprise, allowing defendant sufficient time to prepare his case. Smith v. State, 609 N.E.2d 1088 (Ind. 1993).

a. Indiana's Right

Criminal defendants have a right under our statutes and rules of procedure to discovery, unless the State can show that the defendant has no legitimate defense interest in the items sought that the State has a paramount interest in non-disclosure. Murphy v. State, 265 Ind. 116, 352 N.E.2d 479, 481-82 (1976).

b. No General U.S. Constitutional Right

Although the due process clause prohibits the government from concealing information favorable to the accused, there is no general federal constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837 (1977); Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967).

But see Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973) (for a state to require a defendant to comply with an alibi notice requirement, without providing reciprocal discovery to the defendant, violates the 14th Amendment).

District Attorney's Office for Third Judicial District v. Osborne, 129 S.Ct. 2308 (2009) (there is no constitutional due process right to gain access to evidence for post-conviction DNA testing).

Cf. Skinner v. Switzer, 131 S.Ct. 1289 (2011) (civil rights action pursuant to 42 U.S.C § 1983 is appropriate vehicle for prisoner to seek DNA testing of evidence).

PRACTICE POINTER: Some Indiana cases have said that reciprocity is the key element of criminal discovery in Indiana. Generally this notion predates the amendment to Criminal Rule 21, which now expressly states that discovery in criminal cases is governed by the Trial Rules. See In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998). Additionally note that many constitutional provisions that affect discovery and the criminal trial process are not reciprocal. For example, the State's obligation under Brady and the due process clause to disclose exculpatory evidence is not reciprocal, nor is the defendant's privilege against self-incrimination.

c. Criteria

Criteria considered by trial court when deciding discovery capabilities of a criminal defendant:

(1) there must be sufficient designation of items sought to be discovered;
(2) items sought to be discovered must be material to defense; and
(3) if first two criteria are satisfied, trial court must grant discovery motion unless State makes showing of paramount interest in non-disclosure.

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) and In re WTHR-TV, State v. Cline, 693 N.E.2d 1 (Ind. 1998).

d. Limitations on Trial Court's Authority

(1) Criminal Discovery is Governed by the Trial Rules

Indiana Criminal Rule 21 provides that the Trial Rules are generally applicable to all criminal proceedings, but some civil discovery procedures, such as interrogatories, are either unnecessary in light of specific criminal discovery procedures or, if directed to a defendant, would produce nothing but objections founded on constitutional rights. In re WTHR-TV, State v. Cline, 693 N.E.2d 1, 5 n.3 (Ind. 1998).

> Antrobus v. State, 254 N.E.2d 873, 874 (Ind. 1970) (techniques of discovery embodied in those rules will often be applicable in criminal proceedings).

Courts may *sua sponte* order broad discovery to promote justice. State ex rel. Keller v. Criminal Court, 317 N.E.2d 433 (Ind. 1974).

Limitations on trial court's authority include:

- constitutional rules requiring that certain discovery be given to a defendant in criminal case (Brady v. Maryland, 373 U.S. 83 (1963));
- the work product privilege and other privileges;
- the burdensomeness of the proposed discovery order, State ex rel. Meyers v. Tippecanoe Superior Court, 438 N.E.2d 989 (Ind. 1982) (order directing prosecutor to disclose names of witnesses and to summarize expected testimony on each element of charged offense impermissibly burdened prosecution);
- general rule holding that court cannot deny routine discovery requests without apparent justification. Howard v. State, 244 N.E. 2d 127 (Ind. 1969) (abuse of discretion for trial court to deny defendant's motion for discovery of matters properly discoverable where prosecution fails to show state's paramount interest in nondisclosure); and
- reciprocity. Wardius v. Oregon, 412 U.S. 470 (1973).

2. Discovery Devices

Trial court has inherent power, within certain limitations, to order various types of discovery.

> State ex rel. Grammer v. Tippecanoe Circuit Court, 377 N.E.2d 1359 (Ind. 1978) (in considering use of any discovery device trial court must keep in mind facilitating the administration of criminal justice and promoting orderly ascertainment of truth).

a. Stipulate to Other Methods

T.R. 29(2) provides: "Unless the court orders otherwise, the parties may by written stipulation: [...] modify the procedures provided by these rules for other methods of discovery."

b. Sequence and Timing

T.R. 26(D) provides:

Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Hurley v. State, 446 N.E.2d 1326 (Ind. 1983) (motion for discovery not timely made where counsel raised issue on the morning of trial when everything was ready to proceed).

c. Use Civil Cases to Justify New Discovery Techniques

Use civil cases as authority when arguing for discovery. See Ind. Code § 35-35-2-2 and Criminal Rule 21.

State ex rel. Keller v. Criminal Court, 262 Ind. 420, 317 N.E.2d 433 (1974) (court has broad discretionary authority to grant requests).

3. Waiver Issues

Discovery may not be required under due process clause of the U.S. Constitution. The defendant may waive pre-trial discovery rights by failing to exercise them, and thereby be precluded from obtaining such discovery in post-conviction proceeding. Sewell v. State, 592 N.E.2d 705 (Ind. Ct. App. 1992).

Court has discretion to determine whether defendant waived their right to discovery.

Mason v. State, 511 N.E.2d 487 (Ind. Ct. App. 1987) (late request to depose three State's witnesses after trial began was untimely; their testimony was subject of order *in limine* was no excuse; court had discretion to deny relief).

Williamson v. State, 436 N.E.2d 90 (Ind. 1982) (State responded in writing to defendant's request for discovery, informing him that entire prosecutor's file would be available to defendant; where defendant did not avail himself of the 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 defendant's motion for suppression of items).

When a defendant in a criminal case obtains a favorable ruling from a trial court on a discovery motion and the defendant thinks the state has not complied with the order, the defendant must call this to the attention of the trial court in some manner and attempt to compel the prosecution to comply with the order, and failing to take such action results in waiver of any error resulting from noncompliance. Dillard v. State, 257 Ind. 282, 274 N.E.2d 387 (1971).

Games v. State, 535 N.E.2d 530 (Ind. 1989) (issue of police noncompliance with discovery order in murder case permitting defendant access to three years of homicide

reports was waived by defendant's failure to bring police department's alleged noncompliance to attention of trial court).

4. Appellate Review

Absent clear violation of broad discretion concerning discovery and absent showing of prejudice, trial court's decisions will not be disturbed. Jenkins v. State, 627 N.E.2d 789 (Ind. 1993).

Wagner v. State, 474 N.E.2d 476 (Ind. 1985) (where defendant did not specifically disclose which items of evidence were not produced by State pursuant to discovery orders, he failed to affirmatively show prejudicial error to his substantial rights).

5. Discovery in Extradition Proceeding

Holland v. Harger, 274 Ind. 156, 409 N.E.2d 604 (1980) (in extradition proceeding, trial court did not err by refusing to require full discovery or continuance which might have been necessary in criminal prosecution).