

[CAPTION]

**MOTION TO COMPEL PRODUCTION OF SAMPLES OF EVIDENCE
FOR INDEPENDENT CHEMICAL ANALYSIS**

The Defendant, by counsel, respectfully requests, pursuant to T.R. 34(A), Indiana Rules of Trial Procedure, Article 1, §12 of the Indiana Constitution and the 6th and 14th Amendments to the United States Constitution, this Court to order the State and/or the Indiana State Police Crime Laboratory to produce for independent defense examination the following:

- a. Any physical evidence subjected to serological or firearms testing.
- b. Any samples of trace evidence that was carried away from, or deposited at, the crime scene including: broken fingernails, paint chips, glass fragments, soil, wood slivers, et cetera.
- c. Any physical samples of blood, semen, vaginal secretions and other bodily fluids, hair, clothing and fiber taken from the victim and/or Defendant for analysis and/or DNA testing.
- d. Any laboratory notes and other information prepared incidental to testing.
- e. Any other germane, relevant and pertinent evidence which the State of Indiana has in its possession, and/or access to, for inspection and testing.

In support of the Motion, the Defendant states the following:

1. The State has tested and will present expert testimony on the following evidence:
[SPECIFY EVIDENCE AND TESTING].
2. The Defendant, his attorney, or experts of his own selection were not present when these tests and experiments were conducted.
3. The independent test is necessary to protect Defendant's right under the 6th and 14th Amendments to present a defense and to effective assistance of counsel, as well as due process of law.
4. The trial judge may set guidelines where necessary and appropriate to allow Defendant an independent analysis where a sufficient quantity exists. Schwartz v. State, 177 Ind.App. 258, 379

N.E.2d 480 (1978).

5. I.C. 35-37-4-13(a) defines forensic DNA analysis as "an identification process in which the unique genetic code of an individual that is carried by the individual's deoxyribonucleic acid (DNA) is compared to genetic codes carried in DNA found in bodily substance samples obtained by a law enforcement agency in the exercise of the law enforcement agency's investigative function."

6. [Name of lab], an independent laboratory at [address], specializes in forensic DNA analysis. Forensic DNA analysis may be performed on hair and on semen samples which contain spermatozoa.

7. The defense is, apart from the above mentioned situation, entitled to the laboratory notes made by the State's experts as they examine, process and analyze the evidence, access to the lab notes containing raw data and actual test results. The prosecution's experts' notes are clearly a document relating to the subject matter of their testimony which constitutes a substantially verbatim statement by them.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court for an Order requiring the State and its agents to produce that above-mentioned physical evidence to [name of lab and address] for independent testing, produce the lab documents, including, but not limited to notes and results, to Defendant for review, and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK M.2.b.9

Indiana Rules of Trial Procedure, T.R. 34(A) (production of documents and things).

I.C. 35-37-4-13 (forensic DNA analysis; defined, admissibility).

I.C. 35-33-5-5 (law enforcement cannot destroy controlled substances or chemicals associated with the illegal manufacturing of drugs without first preserving a sufficient quantity of the chemicals or controlled substances to demonstrate their association with the unlawful activity).

CASE LAW

Schwartz v. State, 177 Ind.App. 258, 379 N.E.2d 480 (1978) (in dealing with controlled or dangerous substances, a trial judge may set guidelines where necessary and appropriate under attending facts and circumstances of each case to allow defendant an independent analysis where a sufficient quantity of substance exists, and prescribe where and when examination will be allowed; where an insufficient quantity exists, defense will be allowed to use the results of the State's testing and probe veracity of those reports).

Seay v. State, 529 N.E.2d 106 (Ind. 1988) (narcotics Defendant who was informed that the drugs had been exhausted by the State's testing procedures approximately three weeks before trial, but did not request that drugs be produced until first day of trial, and who crossed chemist who had analyzed substances in question about testing procedures used, failed to show that he was unduly prejudiced by the depletion of drugs during testing).

Hicks v. State, 544 N.E.2d 500 (Ind. 1989) (work-product doctrine is not applicable to shield verbatim witness statements from otherwise proper discovery, e.g., police documents that purport to be actual words of witnesses).

State ex rel. Keller v. Criminal Ct., 262 Ind. 420, 317 N.E.2d 433 (1974) (scientific reports, fingerprint records, medical reports and the like, are not protected by the work product privilege and are within the discretion of the trial judge under Indiana law).

Sewell v. State, 592 N.E.2d 705 (Ind.Ct.App. 1992) (in conjunction with post-conviction relief proceedings, due process concerns entitled the Defendant to obtain State's rape kit for laboratory examination and potential subsection to DNA testing in order to ascertain the truth; "Advances in technology may yield potential for exculpation where none previously existed; the primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of the truth.").

Mahrtdt v. State, 629 N.E.2d 244 (Ind.Ct.App. 1994) (Defendant had right to inspect breathalyzer machine, and the State's refusal to allow the Defendant to do so before re-certifying machine, despite Court order, required suppression of the BAC results).

Frias v. State, 547 N.E.2d 809 (Ind. 1989) (court's refusal to allow Defendant to have independent analysis of cocaine introduced by State at trial was not clear error and did not prejudice Defendant; State expert testified about tests performed and gave results, Defendant was able to cross-examine expert and also had access to State's lab reports, there was no indication that Defendant examined lab reports, and only reason given by Defendant for wanting tests was to determine if findings of State's expert were "perhaps maybe incorrect or offbase a little bit").

Meisberger v. State, 640 N.E.2d 716 (Ind.Ct.App. 1994) (Defendant was entitled to examine x-rays for purpose of cross-examination or to enable his own expert witness to offer his opinion, if different from that of State's expert witness).