

[CAPTION]

VERIFIED MOTION TO COMPEL DISCOVERY

The Defendant, by counsel, respectfully requests this Court pursuant to Trial Rule 37(A) to Order the State to disclose to the Defendant the information requested in the *Defendant's Motion For Discovery*. In support of this Motion, the Defendant states the following:

1. On [insert date], the Defendant filed a Motion for Discovery and served the same on the prosecutor.
2. On [insert date], the Court granted the Defendant's Motion For Discovery, and ordered the discovery provided to the Defendant by [insert date of deadline].
3. The complete set of discovery was not provided to the Defendant in a timely manner.
4. On [insert date], the Defendant made a good faith effort to obtain the requested discovery from the State by writing a letter to the prosecutor, again requesting discovery. *See letter herein referenced and incorporated as Exhibit A.*
5. Despite Defendant's effort to obtain discovery, as of the date of this Motion, the State has failed to provide [choose one: any discovery or all discovery requested (specifically listing the discovery requests to which the State has failed to respond)].
6. The State has failed to even provide the Defendant with exculpatory evidence, which the State has a constitutional duty to produce even absent a specific request. U.S. v. Agurs, 427 U.S. 97 (1976); 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), *cert. denied*, 113 S.Ct. 155; Ottinger v. State, 370 N.E.2d 912 (Ind.Ct.App. 1977) (State has a duty to disclose to Defendant any evidence which intends to exculpate him; this duty exists independent of any specific discovery proceedings or court order).
7. Adequate time has elapsed for response by the Prosecuting Attorney.
8. Only a Motion to Compel the State to respond to the previously filed Request for

Discovery, answering each and every paragraph of the Defendant's Request, will provide the Defendant his rights afforded to him under the Due Process clause of the United States Constitution, the Due Course Clause of the Indiana Constitution, Indiana Rules of Criminal Procedure 21, and Indiana Trial Rule 26. U.S. CONST., Amend. XIV; IND. CONST., art. 1, § 12. The State's refusal to comply with discovery orders has created unreasonable delay of these proceedings.

9. The Defendant specifically requests the following:
 - a. _____
 - b. _____
 - c. _____
10. Pursuant to Trial Rule 37(A)(4), the Court shall, after opportunity for a hearing, require the party whose conduct necessitated the motion to pay reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds the opposition to the motion was substantially justified or that other circumstances made an award of expenses unjust. Here, the Defendant has incurred attorney fees due to the State's failure to comply with the Court's Order on discovery.
11. Any delay in trial caused by the State's failure to comply with the discovery Order must be attributable to the State for purposes of Criminal Rule 4. Marshall v. State, 759 N.E.2d 665 (Ind.Ct.App. 2001); Crosby v. State, 597 N.E.2d 984 (Ind.Ct.App. 1992); Biggs v. State, 546 N.E.2d 1271 (Ind.Ct.App. 1989).

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to order the State to respond in good faith to the Defendant's Motion For Discovery within ten (10) days and to pay reasonable attorneys fees for the efforts of undersigned counsel in obtaining discovery, and other such relief as the Court deems right and proper under the circumstances.

(Signature)

VERIFICATION

The undersigned affirms under penalties of perjury that the foregoing representations are true to the best of her knowledge and belief.

(Signature)

REFERENCES

CASEBANK M.6.a

T.R. 37, Indiana Rules of Procedure (failure to make or cooperate in discovery: sanctions; it is proper to file a Motion to Compel prior asking for sanctions; a party may be entitled to attorney's fees after a Motion to Compel is granted and a hearing is had on the fees).

Ind. Criminal Rule 4(C) (no person shall be held to answer a criminal charge for a period in aggregate of more than one year from date charge was filed or date arrested, whichever is later, except where continuance was had on his motion, or the delay was caused by his act, or where delay is due to court congestion).

CASE LAW

Johnson v. State, 446 N.E.2d 1307 (Ind. 1983) (sanctions for failure to comply with discovery order are discretionary with trial court).

Braswell v. State, 550 N.E.2d 1280 (Ind. 1990) (continuance is usually the proper remedy for State's discovery violations, but exclusion of evidence may be appropriate where violations are flagrant and deliberate, or so misleading or in such bad faith as to impair defendant's right to fair trial).

Goodner v. State, 714 N.E.2d 638 (Ind. 1999) (Ind. Professional Conduct Rule 3.8(d) requires prosecutor to make timely disclosure to defense of all evidence or information known to prosecutor that tends to negate guilt of accused or mitigates offense; characterizing recurring scenario of belated disclosures by prosecutors as "highly problematic," the Court indicated that continued abuses of this sort may require prophylactic rule requiring reversal; in meantime, the Court reminded members of the bar and the bench of their obligation under Prof. Cond. R. 8.3(a) to report such misconduct to the appropriate authorities). See also Lowrimore v. State, 728 N.E.2d 860 (Ind. 2000) (noting that recurring scenario of belated disclosure has continued in months since Goodner and reiterating "the importance of the State's timely disclosure of evidence to the defense"); Gardner v. State, 724 N.E.2d 624 (Ind.Ct.App. 2000) ("we want to express the seriousness with which we consider claims of prosecutors failing to supply defendants with discovery and the fact that we find such behavior unacceptable and troublesome").

Johnson v. State, 762 N.E.2d 222 (Ind.Ct.App. 2002) (trial court erred in denying the Defendant's motion to compel production of documents from his former appellate counsel; granting of the motion to compel production of documents which attorney has received for client in course of employment is not discretionary with the trial court. See also Ferguson v. State, 773 N.E.2d 877 (Ind.Ct.App. 2002) (trial court committed reversible error in denying Defendant's motion to compel counsel to deliver over unearned portion of retainer fee and transcript of prior proceedings, in connection with counsel's alleged failure to provide effective assistance).

Mahrtdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (exclusion of evidence may be appropriate for flagrant and deliberate noncompliance with discovery; here, Defendant was not allowed access to material evidence that was crucial to his defense).

State v. Montgomery, 901 N.E.2d 515 (Ind.Ct.App. 2009) (trial court had discretion to issue discharge as a remedy for the State's three-year, five-month delay in responding to the Defendant's discovery request).

State v. Schmitt, 915 N.E.2d 520 (Ind.Ct.App. 2009) (trial court did not abuse its discretion by dismissing OWI charges where State failed to respond to Defendant's Request for Production of Documents regarding the arresting officer's training for the administration of traffic stops and field sobriety tests and the NHTSA manual).