

[CAPTION]

**MOTION TO COMPEL**

The Defendant, by counsel, respectfully moves this Court for an order compelling the State of Indiana to respond specifically to the Defendant's Motion for Discovery, and other relief as described below, and in support of this motion states as follows:

1. The Defendant filed his Motion for Discovery on [insert date], a copy of which is attached hereto and designated as "Exhibit A".
2. The Court granted Defendant's Motion for Discovery the same day, requiring the State of Indiana to respond by [insert date].
3. Defendant's Motion for Discovery does not request any information which is unusual or out of the ordinary in the criminal context, and undersigned counsel files said motion in almost every criminal case in which he appears. Further, discovery is supposed to be a cooperative and voluntary process, without the intervention of the Court. Ind. Rule of Trial Proc. 26(F); Howard v. Dravet, 813 N.E.2d 1217, 1223 (Ind.Ct.App. 2004). To the extent they are not contradicted by statute, the constitution or otherwise, the Indiana Trial Rules, specifically Trial Rule 26, for purposes of discovery, are applicable to a criminal cause. In Re WTHR, State v. Cline, 693 N.E.2d 1, 5-6 (Ind. 1998); see also Criminal Rule 21. However, the prosecutor and his staff have refused to properly participate in this process and properly answer undersigned counsel's motions for discovery, despite undersigned counsel's letter dated [insert date] regarding discovery responses, a copy of which is attached and designated as "Exhibit B".
4. By entering the Order regarding the Defendant's Motion for Discovery the Court placed the State under an affirmative duty to respond specifically to the enumerated requests.
5. The State has provided a "Discovery Response" dated [insert date]. Said discovery response is incomplete in several ways, thus failing to comply with the Court's Order granting Defendant's

Motion for Discovery in this cause. State ex rel. Keller v. Criminal Court of Marion County, 262 Ind. 420, 423, 317 N.E.2d 433, 435 (Ind. 1974):

[INSERT DEFICIENCIES]

6. By not specifically responding to each paragraph of the Motion for Discovery the State is leaving the Defendant to guess at what material has been or has not been disclosed, or if it even exists. By failing to obey the Court's order of discovery, the State has designated itself as the gatekeeper for what information the defense receives and what it does not.
7. In addition, the State has repeatedly justified their non-disclosure on the fact that they have not received information from the law enforcement agency investigating the causes against defendants. The Prosecutor is charged with knowledge of evidence in the hands of police officers and its agents and is charged with being responsible for providing it to the defense. Goudy v. Basinger, 604 F.3d 394 (7<sup>th</sup> Cir. 2010); Reid v. State, 372 N.E.2d 1149 (Ind. 1978); Bunch v. State, 964 N.E.2d 274 (Ind.Ct.App. 2012) (State was charged with knowledge of ATF expert's file); Penley v. State, 734 N.E.2d 287 (Ind.Ct.App. 2000).

WHEREFORE, the Defendant, by counsel, respectfully requests an order of the Court:

1. Specifically and expressly requiring the State to respond to each and every paragraph of the Defendant's Motion for Discovery;
2. Attributing all time since the filing of the Information herein to the State of Indiana for purposes of Criminal Rule 4(C);
3. Continue this cause unless and until the State of Indiana affirms to the Court that it has properly responded to discovery in this cause;
4. For attorney fees necessitated by the researching, drafting, filing and prosecution of this motion; and
5. For all other proper relief in the premises.

(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).

Biggs v. State, 546 N.E.2d 1271 (Ind.Ct.App. 1989) (the Defendant should not be placed in the untenable position of choosing between his constitutional right to discovery and his right to a speedy trial; the delay caused by a continuance requested by the Defendant due to late discovery by the State does not count against the Defendant). See also Crosby v. State, 597 N.E.2d 984 (Ind.Ct.App. 1992); Marshall v. State, 759 N.E.2d 665 (Ind.Ct.App. 2001); State v. Black, 947 N.E.2d 503 (Ind.Ct.App. 2011).

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).