

[CAPTION]

**VERIFIED MOTION TO EXCLUDE TESTIMONY**

The Defendant, by counsel, respectfully moves this Court to exclude from evidence any testimony or statements of the State's witness, [insert name of witness], pursuant to Indiana Rule of Trial Procedure 37(B) (2) (b) and Rule of Criminal Procedure 21. In support of the Motion, the Defendant states the following:

1. On [insert number] of occasions, the State's witness, [insert name], was served with a subpoena requiring his/her attendance at a deposition being taken by defense counsel on behalf of the Defendant.
  - a. On [insert date], the State's witness was served with a subpoena to attend a deposition at [insert location] on [insert date]. On [insert date], the State's witness failed to appear.
  - b. On [insert date], the State's witness was served with a subpoena to attend a deposition at [insert location] on [insert date]. On [insert date], the State's witness again failed to appear.
2. The Defendant has been prejudicially denied the opportunity to depose the witness for the State and the right to ascertain any and all evidence in the possession and control of the State, or its agents which may be favorable to the Defendant and material to the issue of guilt or punishment, or that could reasonably affect any evidence proposed to be offered into evidence against the Defendant, or that may be relevant to the subject matter of this cause of action, or in any manner may aid the Defendant in ascertainment of the truth. Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).
3. The Defendant has a right under the Indiana Code and Rules of Trial Procedure to discovery, including the taking of depositions from those persons listed as State's witnesses. Murphy v. State, 265 Ind. 116, 352 N.E.2d 479 (1976).

4. Failure to permit a deposition of a State's witness cannot be harmless error being that one cannot presume that no exculpatory or mitigating evidence would have arisen from the deposition. Murphy v. State, 265 Ind. 116, 352 N.E.2d 479 (1976); Reed v. State, 748 N.E.2d 381 (Ind. 2001) (holding that, at the very least, the defendant was entitled to access to the witness prior to trial to have the opportunity to develop and pin down the witness's testimony or at least have sworn testimony to impeach any variances).

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to exclude from evidence any testimony or statements of the State's witness, [insert name of witness], pursuant to Indiana Rule of Trial Procedure 37(B) (2) (b) and Rule of Criminal Procedure 21, and for all other relief just and proper in the premises.

(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

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”).

Rule of Criminal Procedure 21 (Indiana rules of trial apply to all criminal proceedings so far as they are not in conflict with any specific criminal rule).

## CASE LAW

Murphy v. State, 264 Ind. 116, 352 N.E.2d 479 (1976) (absent a showing that the Defendant has no legitimate defense interest in support of his petition or that the State has a paramount interest to protect, criminal defendants have a right to discovery, including the taking of depositions from those persons listed as State’s witnesses; Defendant’s motion to depose certain State witnesses was erroneously denied by trial court, irrespective of whether sufficient evidence to convict might be found in the testimony of witnesses whom Defendant did not seek to depose).

Reed v. State, 748 N.E.2d 381 (Ind. 2001) (State’s continued and vigorous opposition to Defendant’s efforts to depose key prosecution witness improperly interfered with Defendant’s case and violated due process; release of State’s taped interview with witness did not cure situation, as inability to depose witness left Defendant with no opportunity to expose several inconsistencies in witness’s various accounts).

Jordan v. State, 485 N.E.2d 896 (Ind. 1985) (where prosecution has blatantly and deliberately refused to comply with discovery order, exclusion of evidence may be required; exclusion of victim’s testimony was not required where Defendant was not surprised by fact that victim would appear as State witness, it was responsibility of Defendant, not prosecutor or court, to obtain deposition of victim, and if Defendant was unable to locate victim, he should have so notified the court in a timely fashion).

Hall v. State, 15 N.E.3d 1107 (Ind.Ct.App. 2014) (trial court abused its discretion when it denied Defendant’s motion to compel a witness to answer a deposition question about an alleged prior false accusation of sexual misconduct made by her daughter, who was the alleged victim; it is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence), *vacated*, 36 N.E.3d 459 (Ind. 2015) (trial court erred in denying Defendant’s motion to compel, but error was harmless). But see Wise v. State, 26 N.E.3d 137 (Ind.Ct.App. 2015) (trial court acted within its discretion in finding that rape shield precluded victim from being required to answer deposition or trial questions from Defendant, who was victim’s husband, regarding any extramarital affairs, in rape prosecution).