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Presentation to

**Indiana Prosecuting Attorneys Council**

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# Brady and Ethics –

AKA To Turn It Over or Not Turn It Over,  
That Is The Question!

## I. BRADY MATERIAL

- A. **What It Is** – *Brady* material refers to all exculpatory and impeachment evidence relating to a defendant or any witness.

### Examples:

- Police report indicating witness identification of someone other than defendant as having committed the offense. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837.
- Promise to witness by assistant prosecutor that he would not be prosecuted if he cooperated. *Giglio*, supra.
- Blood culture report indicating deceased infant had tested positive for a deadly bacterium. *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292.

“Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or punishment.” *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837; *Brady v. Maryland* (1963), 373 U.S. 83.

“The *Brady* rule applies to evidence that is exculpatory in nature, as well as evidence that a defendant could use at trial to impeach a government witness.” *Bell v. Bell* (6<sup>th</sup> Cir., 2008), 512 F.3d 223, citing *U.S. v. Bagley* (1985), 473 U.S. 667; *Giglio v. U.S.* (1972), 405 U.S. 150.

- *Giglio* and *Bell* held that both express and “tacit” agreements between the State and witnesses as to benefits incurred from the witness’ testimony must be disclosed for impeachment purposes.
- **Note:** If one APA offers or promises anything to a witness or defendant in exchange for testimony, knowledge of said offer or promise is imputed to any subsequent prosecutor on the case. *Giglio v. U.S.* (1972), 405 U.S. 150. Therefore, any offers or promises must be prominently recorded in the case file.

## B. **Standard for Disclosure**

*Brady*, as well as the discovery rules, require disclosure of evidence favorable to the accused and material to either guilt or punishment.

“Materiality” is the touchstone of the prosecutor’s constitutional duty.

- “Evidence is considered material when ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, citing *U.S v. Bagley* (1985), 473 U.S. 667.
- “In determining materiality, the relevant question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Brown*, citing *Kyles v. Whitley* (1995), 514 U.S. 419.

In *Brown*, the Ohio Supreme Court vacated an aggravated murder conviction and death sentence based on a *Brady* violation where the prosecutor had failed to turn over two police reports relating to interviews in which witnesses had identified someone other than the defendant as the shooter.

In discussing “materiality” versus “prejudice,” the Court noted, “Admittedly, the statements contained in these reports are hearsay and might not be admissible. However, they are material, and even if the defense could not directly introduce them at trial, the state’s failure to turn them over was highly prejudicial. The defense was deprived of the opportunity to call the original declarants at trial. They were also deprived of the ability to use the statements to cross-examine a witness when he testified at trial.”

**Note:** Case law has been shifting our duty to disclose away from that evidentiary test of materiality (i.e. Would the evidence have some tendency to undermine proof of guilt?) to a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.

Usually the prosecutor is responsible for gauging the likely net effect of all undisclosed evidence to determine when the point of ‘reasonable probability’ is reached. *Kyles, supra*.

The courts have recognized that this is particularly difficult to do since the best way to know whether it would have changed the outcome of the trial is after the trial is concluded; and yet the prosecutor obviously cannot wait until such time.

Hence, the Supreme Court noted that a prosecutor “anxious about tacking too close to the wind will disclose a favorable piece of evidence.” *Kyles, supra*.

**BOTTOM LINE:** When it comes to what may or may not be “material” or what may or may not constitute *Brady* evidence, if in doubt, “send it out.” The judge will decide issues of admissibility at a later time.

### C. Is it out there?

#### 1. Duty to discover

**General Rule:** The state has no responsibility to obtain and disclose evidence that the defense can obtain on its own (e.g. 911 calls), and similarly has no duty to obtain and disclose evidence from independent agencies not acting on the state’s behalf (e.g. school records).

**Exception:** APAs do have a duty to learn of and disclose any evidence that is *favorable* to the defense and known to others who are *acting on the state’s behalf*. (i.e. police, investigator, victim/witness advocates, etc.) *State v. Sanders*, 92 Ohio St.3d 245, 2001-Ohio-189.

#### 2. How to find it?

Anywhere you can and *should* find evidence as part of diligent trial preparation, you can find *Brady* material as well.

a. Question case detective regarding whether there are any statements, documentary or physical evidence, etc., that may be exculpatory to the accused; including credibility and veracity of witnesses. Have any witnesses made statements contrary to the evidence gathered by the police?

b. Get Reports/Records:

- K-9 reports
- 911 Calls
- Paramedics
- Radio traffic
- Parole/Probation reports
- E-crew reports

c. Know your witnesses:

Is there a CI involved?

- Is CI being paid?
- Is CI working off charges? Or does the CI *think* he is working off charges? (Officers can't bind us to deals, but promises made to witnesses are exculpatory impeachment evidence)

Defendant's statements/admissions to cellmate

- What is/are the informant/cellmate's pending charge(s)? Is that person receiving a benefit in exchange for testimony even if implicitly made by someone other than an APA?

Review victim and witness statements

d. Know your defendant:

Pull old case files, particularly if it's the same kind of crime.

e. Know your officers:

- Ask all potential officers/witnesses whether they have been convicted of any crimes or disciplined by a law enforcement department for lying, dishonesty and/or theft.
- Any Internal Affairs reports/photos? (Use of force? Officer involved shooting? Injured defendants?) This is absolutely necessary if charge is assault on police officer.
- Talk with everyone who dealt with/transported defendant.
- Ask for supplements if anything is not in report(s) already provided.

f. Know your evidence:

- Sexual assault kits – review contents and results of tests.
- Lab Reports – any unexpected, surprising &/or impeaching findings?

**D. Brady material in GJ**

1. There may come a time when a witness says something in GJ or afterwards that could constitute Brady material and thus require disclosure of GJ testimony when normally it would not be, absent a showing of particularized need.

e.g. Witness writes on photospread paperwork at time of identification that he is “sure” of his identification but then gives a percentage in the GJ room that does not equate to certainty.

e.g. Witness says months later that she lied before the GJ.

2. Process for disclosure:
  - a. Pull the GJ disc and copy the GJ testimony of only that witness onto a separate disc.
  - b. Have your secretary send out the witness’ testimony on the disc to be transcribed.
  - c. File a motion asking that the court conduct an in camera inspection of the GJ testimony. You can provide the disc and the transcript or just the transcript.
  - d. The court would then decide whether the transcript should be turned over to the defense.
  - e. If yes, then the judge discloses it per court order and under seal to the defense.

**NOTE:**

- (1) This does not mean that the testimony or any portion thereof will automatically be admissible in any subsequent court proceeding.
- (2) Check your Indiana local rule!

**E. Timing**

Prosecutors must disclose exculpatory material and impeachment evidence no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made. That is, *Brady* material must be disclosed in time for its effective use at trial and before Defendant enters a plea in the case.

**However:** Where *Brady* evidence is unavoidably discovered and disclosed late (i.e. during trial), the trial court may be able to remedy any unfair prejudice through the use of Crim. R. 16(E)(3) (of prior version of Crim. R. 16) at its discretion, such that it may not be the basis for a *Brady* violation. *State v. Wade*, Clark App. No. 06-CA-108, 2007-Ohio-6611; *State v. Wickline* (1990), 50 Ohio St.3d 114.

## F. Uh-Oh! PLED A CASE BOI RIGHT AFTER PRELIM

1. **Good News** *U.S. v. Ruiz* (2002), 536 U.S. 622 Constitution does not require Gov't to disclose material impeachment evidence OR evidence relating to an affirmative defense prior to a plea

2. **Bad News**-Prior inconsistent statement by witness could be exculpatory or impact sentence if damaging enough *Ferrara v. U.S.* 384 Supp. 2d 384; *State v. Carroll* 2007 Ohio 5313

- And really can't a lot of things be argued that way by defense...
  - i.e. In THIS case the CI is the whole case so the fact that he was paid is NOT just impeachment it removes his partiality.
- *Disciplinary Council v. Wrenn* 99 Ohio St.3d 222 – Prosecutor had a GSI case where there was DNA on the victim's shirt. Defense knew the DNA was being tested. Before the plea the prosecutor got a VERBAL ONLY report from the detective that the DNA belonged to the victim. This was not turned over.  
Was not the smoking gun, wasn't evidence that someone else did it...but Court said it would have been crucial CROSS EXAM.  
Prosecutor was disciplined by Ohio Supreme Court – Suspension Stayed for 6 months . Moyer dissented wanted a much more severe sentence.
- Decision discusses the DNA being important tool for defense in cross-exam of victim

**BOTTOM LINE:** Turn over *Brady* material as soon as it is discovered.

## II. ETHICAL CONSIDERATIONS TO DISCLOSURE

The Ohio Supreme Court recently held that the Ohio Rules of Professional Conduct do not expand Crim. R. 16 or *Brady*. That is, if an APA is in compliance with the discovery rules, he or she is in compliance with the ethical rules with regard to discovery. However, APAs should still be aware of that case because it emphasizes the potentially catastrophic implications of a failure to disclose as well as the growing movement among Ohio lawyers and judges to attempt to discipline prosecutors ethically for failures to disclose.

**The case: *Disciplinary Counsel v. Kellogg-Martin*, 124 Ohio St.3d 415, 2010-Ohio-282**

An Ohio Assistant Prosecutor in Logan County was disciplined for failure to disclose contradictory police and social services reports before accepting the Defendant's guilty plea.

- In 2002 prosecution of a defendant for multiple counts of rape of a girl under the age of 13, Kellogg-Martin failed to provide discovery of a Children's Services report and Sheriff's Office narrative which indicated that the victim had been inconsistent with regard to the dates of the rapes, resulting in a discrepancy as to whether she was 12 or 13 at the time of the rapes.
- Additional investigation revealed that the discrepancy with regard to dates/ages was not warranted and confirmed that victim was 12yoa at time of rapes.
- Defendant was indicted with multiple counts of rape <13, eventually plead to lesser charge of sexual conduct with minor. Years later, when the withheld reports were discovered, Defendant moved to withdraw his guilty plea, but that motion was denied. Defendant's attorney filed a grievance against Kellogg-Martin.
- Grievances Board found that Kellogg-Martin violated the Code of Professional Conduct in (1) failing to disclose the reports, (2) making statements in Bill of Particulars indicating that victim had reported that rapes occurred when she was 12yoa, and (3) making statements at the plea hearing that victim had reported that rapes occurred when she was 12 yoa.

**Violated Code Sections**

- DR1-102(A)(4) [superseded by R. 8.4(c)] – “a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation”
- DR1-102(A)(5) [superseded by R. 8.4(d)] – “a lawyer shall not engage in conduct that is prejudicial to the administration of justice”
- DR7-102(A)(3) [superseded by R.4.1(b)] – “a lawyer shall not conceal or knowingly fail to disclose that which he or she is required by law to reveal”
- DR7-103(B) [superseded by R. 3.8(d)] – “a public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment”

- SANCTION: 12 month suspension, with 6 months stayed.

Although the trial court (in denying defendant’s motion to withdraw plea) failed to find a violation of the applicable discovery rules or *Brady*, the Grievances Board found that “materiality” did not apply to the Rules of Professional Conduct requiring disclosure of all evidence *favorable* to a defendant. In other words, it broadened the standard for disclosure, stating that a defendant is denied a fair trial when the State withholds exculpatory evidence that is “relevant” to guilt or punishment, and it found that the information in that case was, in fact, “material” to the preparation of Defendant’s defense.

Although the Ohio Supreme Court ultimately disagreed and dismissed the complaint against Kellogg-Martin, APAs should take heed from that case and from the implications of a failure to disclose.

- **Relevant Sections of Ohio Rules of Professional Conduct**

- R. 3.4(a) – “unlawfully obstruct another party’s access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act”
- R. 3.4(d) – “in pretrial procedure...fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party”
- R. 3.8(d) – “a public prosecutor \*\*\* in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor\*\*\*that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment”
- R. 4.1(a) – “a lawyer shall not make a false statement of material fact or law to a third person”
- R. 4.1(b) – “a lawyer shall not conceal or knowingly fail to disclose that which she is required by law to reveal”
- R. 8.4(c) – “ a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation”
- R. 8.4(d) – “a lawyer shall not engage in conduct that is prejudicial to the administration of justice”

- **BOTTOM LINE:** Don’t forget your ethical obligations under Ohio Rules of Professional Conduct 3.4(d) and 3.8(d). Don’t risk the conviction in the case OR your law license. Turn over all reports. Err on the side of caution by turning over more, not less. And most of all, do it BEFORE plea negotiations in the case.

### III. HOW TO DOCUMENT DISCLOSURES

Documented proof of disclosure of discovery is crucial because it is your proof that you provided defense counsel with evidence that he or she later claims you did not provide.

If discovery is provided electronically, ONBASE will have a record of exactly what is provided in discovery.

If discovery is not provided electronically:

#### **Prepare Discovery Letter**

Itemize the discovery enclosed such that it can be identified sufficiently upon review.

**Bad example:** "Police Report (5 pp.)." - because there may be more than one 5-page report and the defense could deny receipt of any of them.

**Good example:** "Trotwood Police Department Police Report, incident no. 08-0007, investigative no. 001, date of report 8/5/08, by Det. Pigman, and beginning with narrative, "On 8-2-08, I was contacted at home reference the above complaint," etc. (10 pp.)

#### **Include Discovery Receipt**

Accompanies letter, identifies date of the letter and/or piece of evidence directly on it such that it can be signed by defense counsel and later filed to prove receipt of the enclosed evidence.

#### **Your Discovery File**

Keep a copy of the discovery letter and the attached discovery in a file entitled "Discovery."

Once the receipt is filed, obtain a copy and keep that filed discovery receipt in your discovery file.

- It proves what accompanied each discovery letter and receipt.
- And if the first defense attorney withdraws from the case, you can easily send out discovery to the second lawyer on the case by simply resending all of the discovery letters and accompanying discovery.

#### **Facsimile**

If you have to fax discovery (say, due to short notice in receiving it, close to trial), identify the discovery on the fax cover sheet with a sufficiently detailed description to be able to identify it (just like you would in a discovery letter).

In your discovery file, keep a copy of that fax cover sheet, the discovery, and the confirmation sheet showing the fax went through successfully.

When you next see defense counsel, you can obtain their signature on a discovery receipt which referenced the date of the fax, and keep a filed copy of that receipt as proof of having provided it to the defense.

#### **IV. KNOWLEDGE ATTRIBUTED TO PROSECUTORS**

*Giglio v. U.S.* (1972), 405 U.S. 150 – “A promise made by one attorney must be attributed \* \* \* to the Government.” So if one prosecutor offers something to a co-defendant or witness in exchange for their testimony, knowledge of that offer is imputed to any subsequent prosecutor taking over the case. Procedures and regulations can be established to carry the burden of information sharing and to insure communication of all relevant information on each case to every lawyer who deals with it.

##### **THE LESSON FROM *GIGLIO*:**

Any and all offers and/or promises to witnesses, co-defendants, etc., must be documented in writing in the case file so that any APA can and will be made aware of it simply by reading the file.

#### **V. I'd Really Like to Try the Case Just One Time.....And I Like My Law License**

- A.** Don't rush a plea  
If pleading without knowing anything about case how can you be making a good offer?
- B.** Document  
Discovery letters and copies of discovery  
Other disclosures- in writing/ on record
  - note when and where placed on records so it can be found
- C.** Rocks to look under
  - If there is a K9 Get report
  - Get all 911 calls
  - CI involved? CIs are not “generally in the business of altruism”
    - Been paid?
    - Working off charges? Police can't bind us but if they make a promise it is exculpatory
    - Think they are working off charges?
  - Paramedics write run reports
  - Radio Traffic is recorded

- Internal Affairs interviews witnesses, including involved officers and defendants
- Ask if everything that is in the officer/Det. Notes is in the report
- Review Detectives file yourself
- Call in ALL officer that dealt with or transported “dude it wasn’t my pants”
- E-crew reports - often on crime lab submission sheets
- Pull old case files of Defendant- Particularly if same kind of crime
- Internal Affairs reports, done as matter of course on use of force, officer involved shootings, or injured defendants. They interview witnesses, take photos of Injuries etc
- Parole officer reports
- Sexual assault kits- open them up!
- Video statements of victim and witnesses

**D. Be careful NOT to become the collector of Brady material**

- Witness that could change story? – Pretrial with Det. or Inv.
- Do NOT let Detective leave at Prelim or GJ
- Stop the interview and GET someone who can write a report
- Don’t interview over phone
- “If you are saying we have it wrong you have to tell the Det. that”

**E. TURN IT OVER, TURN IT OVER, TURN IT OVER**

- Even if you get it during trial
  - State v. McKinney* 2007 Ohio 1842
  - 10<sup>th</sup> District case- generally not a *Brady* violation if turned over during trial.. but could be due process problem if timing is such Defendant doesn’t have time to effectively use it
- Even if you get it AFTER the Plea

REMEMBER:

WHEN IN DOUBT,  
SEND IT OUT



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West's Annotated Indiana Code  
Title 34 Appendix Court Rules (Civil)  
Wayne County Rules of Criminal Procedure

**Wayne County Criminal Rules Rule 009**

LR89-CR00 Rule 009. CRIMINAL DISCOVERY

Currentness

The Wayne County Courts shall have Discovery consistent with applicable law. Neither the State nor the defense shall be required to file any Discovery documents or pleadings with the Court, but the parties are permitted to do so.

Neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having properly discoverable information (except the accused) to refrain from discussing the case with opposing counsel, nor shall they otherwise impede opposing counsel's investigation of the case.

**Credits**

Adopted effective Jan. 1, 2008.

Wayne County Criminal Rules Rule 009, IN ST WAYNE CR Rule 009  
Current with amendments received through March 1, 2013

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West's Annotated Indiana Code  
Title 34 Appendix Court Rules (Civil)  
Marion Superior Court Criminal Rules

**Marion County Superior Court Criminal Rule 107**

LR49-CR00 Rule 107. DISCOVERY

Currentness

**1. General.**

(a) The court at initial hearing will automatically order the State to disclose and furnish all relevant items and information under this Rule to the defendant (s) within 20 days from the date of the initial hearing, subject to Constitutional limitations and protective orders, and the defendant (s) to provide the State with discovery within 45 days of the initial hearing.

(b) No written motion is required, except:

(1) To compel compliance under this Rule

(2) For additional discovery not covered under this Rule

(3) For a protective order

(4) For an extension of time

(c) All discovery shall be completed by the omnibus date unless extended for good cause shown.

(d) Although each side has a right to full discovery under this Rule, each side has a corresponding duty to seek out the discovery. Motions for original discovery and compliance with Indiana Rule of Evidence 404B are unnecessary and disfavored. Motions for specific discovery are permitted. Failure to file a Motion to Compel may result in the waiver of this right; failure to comply with providing discovery may result in sanctions, including the exclusion of evidence.

**2. State Disclosure.**

(a) The State shall disclose the following material and information within its possession or control:

(1) The names and last known addresses of persons whom the State intends to call as witnesses, with their relevant written or recorded statements. The State may refrain from providing a witness' address under this rule if the State in good faith believes the disclosure of the witness' address may jeopardize the safety of the witness or the witness' immediate family. If the State does not disclose the witness' address for the reason stated under this rule then the State shall make the witness available for deposition or interview by defense counsel upon reasonable notice.

Should there be a dispute among the parties concerning the disclosure of a witness' address, counsel shall meet and make a reasonable effort to resolve this dispute before seeking intervention from the court. The party seeking disclosure or a protective order under this rule shall include in the party's motion or request a statement showing that the attorney making the motion or request has made a reasonable effort to reach agreement with opposing counsel concerning the matter 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 telephone and the names of all parties and attorneys participation therein. If an attorney for any party advises the court in writing that an opposing attorney has refused or delayed meeting and discussing the issue of witness address disclosure, the court may take such action as appropriate.

The Court may deny a discovery motion filed by a party who has failed to comply with the requirements of this subsection.

(2) Any written, oral or recorded statements made by the accused or by a co-defendant, and a list of witnesses to the making and acknowledgement of such statements.

(3) A transcript of those portions of grand jury minutes containing testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(4) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

(5) Any books, papers, documents, photographs, or tangible objects that the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused.

(6) Any record of prior criminal convictions that may be used for impeachment of the persons whom the State intends to call as witnesses at the hearing or trial.

(7) All evidence required by Indiana Rules of Evidence 404(B), at least 30 days prior to trial, or within two weeks following the request for trial, whichever is later.

(b) The State shall disclose to defense counsel any material or information within its possession or control that tends to negate the guilt of the accused as to the offense charged or would tend to reduce the punishment therefore.

(c) The State may perform these obligations in any manner mutually agreeable to the prosecutor and defense counsel.

### 3. Defendant Disclosure.

(a) Defendant's counsel shall furnish the State with the following material and information within his/her possession or control.

(1) Any defense that he/she intends to make at a hearing or trial.

(2) The names and last know addresses of persons whom the defense intends to call as witnesses, with their relevant written or recorded statements and any record of prior criminal convictions known to him/her. The defense may refrain from providing a witness' address under this rule if the defense in good faith believes the disclosure of the witness' address may jeopardize the safety of the witness or the witness' immediate family. If the defense does not disclose the witness' address for the reason stated under this rule then the defense shall make the witness available for deposition or interview by counsel for the State upon reasonable notice. Should there be a dispute among the parties concerning the disclosure of a witness' address, counsel shall meet and make a reasonable effort to resolve this dispute before seeking intervention from the court. The party seeking disclosure or a protective order under this rule shall include in the party's motion or request a statement showing that the attorney making the motion or request has made a reasonable effort to reach agreement with opposing counsel concerning the matter 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 telephone and the names of all parties and attorneys participation therein. If an attorney for any party advises the court in writing that an opposing attorney has refused or delayed meeting and discussing the issue of witness address disclosure, 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 the requirements of this subsection.

(3) Any books, papers, documents, photographs, or tangible objects he/she intends to use as evidence.

(4) Medical, scientific, or expert witness evaluations, statements, reports, or testimony that may be used at a hearing or trial.

(5) All Evidence required by Indiana Rules of Evidence 404(B), at least 30 days prior to trial, or within two weeks following the request for trial, whichever is later.

(b) After the formal charge has been filed, upon written motion by the State, the Court may require the accused, among other things, to:

(1) Appear in a line-up.

(2) Speak for identification by witnesses to an offense.

(3) Be fingerprinted.

(4) Pose for photographs not involving re-enactment of a scene.

(5) Try on articles of clothing.

(6) Allow the taking of specimens of material from under his/her fingernails.

(7) Allow the taking of samples of his/her blood, hair, and other materials of his/her body that involve no unreasonable intrusion.

(8) Provide a sample of his/her handwriting.

(9) Submit to a reasonable physical or medical inspection of he/her body.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the State to the accused and his/her counsel, who shall have the right to be present. Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for his/her release.

#### 4. Additions, Limitations, and Protective Order.

(a) *Discretionary Disclosures.* Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court, in its discretion, may require disclosure to defense counsel of relevant material and information not covered by this Rule.

(b) *Denial of Disclosure.* The court may deny disclosure authorized by this Rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure to counsel.

(c) *Matters Not Subject to Disclosure.*

(1) Work product. Disclosure hereunder shall not be required of legal research or records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his/her staff.

(2) Informants. Disclosure of an informant's identity shall not be required where there is a paramount interest in non-disclosure and a failure to disclose will not infringe the Constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

(b)<sup>1</sup> Either side may apply for a protective order for non-disclosure of requested discovery.

**5. Depositions.** Any sworn tape-recorded interview in which the prosecutor, the defense attorney and the witnesses are present shall be considered a deposition under the Indiana Trial Rules. Deputy prosecutors and public defenders shall cooperate in using such recorded statements instead of formal depositions under any circumstance that will expedite case preparation.

#### Credits

Adopted as Criminal Division Rule 7, effective April 8, 1996. Amended effective May 25, 1999; amended effective Nov. 3, 2003; renumbered as Criminal Rule 107, and amended effective Oct. 2, 2006; Jan. 1, 2008; May 15, 2009.

Notes of Decisions (3)

## STATE OF OHIO - RULES OF CRIMINAL PROCEDURE

### **RULE 16. Discovery and Inspection**

**(A) Purpose, Scope and Reciprocity.** This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

**(B) Discovery: Right to Copy or Photograph.** Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;
- (7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

**(C) Prosecuting Attorney’s Designation of “Counsel Only” Materials.** The prosecuting attorney may designate any material subject to disclosure under this rule as “counsel only” by stamping a prominent notice on each page or thing so designated. “Counsel only” material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, “counsel only” material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the “counsel only” material to the defendant.

**(D) Prosecuting Attorney’s Certification of Nondisclosure.** If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney’s certification shall identify the nondisclosed material.

**(E) Right of Inspection in Cases of Sexual Assault.**

- (1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the

information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

**(F) Review of Prosecuting Attorney's Certification of Non-Disclosure.** Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

**(G) Perpetuation of Testimony.** Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in

which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

**(H) Discovery: Right to Copy or Photograph.** If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

- (1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
- (2) Results of physical or mental examinations, experiments or scientific tests;
- (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
- (4) All investigative reports, except as provided in division (J) of this rule;
- (5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

**(I) Witness List.** Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

**(J) Information Not Subject to Disclosure.** The following items are not subject to disclosure under this rule:

- (1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
- (2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

**(K) Expert Witnesses; Reports.** An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

**(L) Regulation of discovery.**

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

**(M) Time of motions.** A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

[Effective: July 1, 1973; amended effective July 1, 2010.]