Discovery

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Pretrial discovery is designed to promote justice and prevent unfair surprise by allowing adequate time to prepare. Phillips v. State., 550 N.E.2d 1290 (Ind. 1990); Lay v. State, 428 N.E.2d 779 (Ind. 1983)(purpose of pretrial discovery order it to enhance the accuracy and efficiency of the fact-finding process); Johns v. State , 251 Ind. 172, 179, 240 N.E.2d 60, 64 (1968) ("it is axiomatic that an accused is not justly and fairly tried when his counsel is compelled to maneuver in a factual vacuum.") The discovery rules are the backbone to any litigation and are particularly important in death penalty litigation. In this chapter I have tried to outline some basic principals about discovery and how it can be used in capital litigation.

I. STRATEGY CONSIDERATIONS

Counsel to a death charged defendant is always striving to learn as much information about her case as quickly as possible. Whether counsel should try to learn this information through formal discovery pleadings or informal interviews is a strategic decision.

A. Make a record. . . make a record. . . make a record. . . make a record. No one wants to lose a death penalty case, but unfortunately it happens. Unless you have made a record of the items you tried to discover but did not receive, there is no issue to pursue on appeal.

B. Once discovery is filed, the burden is on the State to respond. If the State does not adequately respond, it creates an issue to be litigated in pre-trial motions. An inadequate response may lay the ground work for a continuance.

C. Although police reports are not discoverable because of the work product exception,[1] a lazy prosecutor, when faced with having to sift through stacks of police reports to answer defense discovery, may determine that providing counsel with copies of all the reports is an easy solution. Verbatim witness statements are discoverable and obviously useful.[2]

D. Discovery may be the opportunity to create an impression on the prosecutor or the judge. A detailed discovery pleading may impress upon a prosecutor the work that is ahead of him and indicate to the judge whom she should turn to for guidance in capital case procedure and matters of law. Strategy considerations may dictate that an investigator should learn about the case through informal interviews with witnesses and officers, and that there should be limited formal written discovery.

E. A discovery motion could be filed at a strategic time before trial in an effort to distract the prosecutor's attention from preparing for trial. There are also dangers in filing discovery motions. One danger is tipping your hand and showing the prosecutor the defense strategy. Likewise, a discovery motion, drafted in such a way as to lead the prosecutor to believe that counsel is preparing defense "A" when really she is informally investigating defense "B", might be fruitful.

II. INFORMAL V. FORMAL DISCOVERY

In many jurisdictions, counsel may find a prosecutor who likes to engage in "informal discovery." Informal discovery may consist of anything from an invitation to "come on over and take a look at my [the prosecutor's] file, to an invitation to "call me up and tell me what you need." Every

[1] *State ex rel. Keaton v. Circuit Court of Rush County,* 475 N.E.2d 1146 (Ind. 1985) (verbatim copies of police reports held nondiscoverable as the State's work product.

[2] Hicks v. State, 544 N.E.2d 500(Ind. 1989); Burns v. State, 511 N.E.2d 1052(Ind. 1987); State ex rel. Crawford v. Superior Court of Lake County, Crim. Div. Rm. II, 549 N.E.2d 374 (Ind. 1990).

defense counsel has dreamed of having the prosecutor's file in her hands at one time or another. Even a file purged of work product can contain a gold nugget of information for the case. But, once that file has been in defense counsel's hands, a good prosecutor is going to take every opportunity to inform and remind the Judge "defense counsel combed through my file. She has everything that I have." What assurances do you have that you have seen everything. What about the contents of the police files? Weigh these pros and cons!

More than likely, the prosecutor only has in his file what his agents, the detectives, have given him. If counsel is going to participate in "informal discovery" by looking through the State's files, that should include the files of the investigating agency and the investigating officers.[3] [3]

Formal written discovery preserves for appeal all the items defense counsel requested from the prosecutor. If an item is not turned over pre-trial, but shows up during post-conviction proceedings, the formal written discovery request may help to create a presumption that the item was intentionally hidden from trial counsel.

Pre-trial, written discovery may be helpful if the prosecutor has a habit of "finding" items close to the trial date. A discovery motion mandates the prosecutor to look for the requested items. Jacobs v. State, 436 N.E.2d 1176(Ind. 1982). The file stamped discovery motion is a record waiting to be used by defense counsel in arguments to the court for sanctions against the State.

III. WHAT MODE OF DISCOVERY TO USE

A. Is the Court's standing discovery order sufficient?

[3] In this writer's experience there are always a number of different files maintained by the police. Often there is a central depository file which is supposed to contain everything any officer ever wrote. Even so, check with the individual officers to see if they also maintained their own files on the case.

According to the United States Supreme Court and the Indiana Supreme Court, death is different. Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); Evans v. State, 563 N.E.2d 1251, 1254 (Ind. 1990) ("This Court has held that more stringent procedural standards are required in a capital sentencing hearing than are required in a non-capital sentencing situation.") That rule must also apply in death penalty discovery situations. Counsel should not feel safe assuming during a death penalty case that the State is going to turn over everything. Counsel should not feel safe filing a stock discovery pleading. If for no other reason, the penalty phase of a death penalty case opens the door to evidence which is not admissible in a standard criminal case. Discovery pleadings should be as specific as possible. Gambill v. State, 479 N.E.2d 523 (Ind. 1985) (No error in failure to turn over impeaching statement of witness in response to defense general request for exculpatory material).

B. Interrogatories

TRIAL RULE 33. INTERROGATORIES TO PARTIES

> **(A) Availability - Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is an organization including a governmental organization, or a partnership, by any officer or agent, who shall furnish such information as is available to the party.
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> **(B) Scope - Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(B), and the answers may be used to the extent permitted by the rules of evidence.
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> An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion, contention, or legal conclusion, but the court may order that such an interrogatory be answered at a later time, or after designated discovery has been completed, or at a pre-trial conference.

Interrogatories must be used with caution in criminal cases. If the information requested can be gained by any means other than interrogatories directed to the prosecutor, the court may find that interrogatories are improper. State ex rel. Grammer v. Tippecanoe Circuit Court ,268 Ind. 650, 377 N.E.2d 1359 (1978).

Further some local court rules put a limit on the number of interrogatories which may be propounded without requesting leave of the court. *See,* Marion County Local Rule 8 (limiting interrogatories to 25 unless good cause is shown to the court).

C. Production\Inspection

TRIAL RULE 34. PRODUCTION OR DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

> **(A) Scope.** Any party may serve on any other party a request:
> (1) to produce and permit the party making the request or someone acting on his behalf, to inspect and copy, any designated documents (including, without limitation, writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which intelligence can be perceived, with or without the use of detection devices) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(B) and which are in the possession, custody or control of the party upon whom the request is served; or
> (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(B).

The defendant has a right to examine all physical evidence in the hands of the prosecutor. Turnpaugh v. State, 521 N.E.2d 690 (Ind. 1988).

There is some Indiana criminal case law which directly conflicts with Trial Rule 34. Specifically, Frias v. State, 547 N.E.2d 809 (Ind. 1989), *cert. denied* 110 S. Ct. 1954, 109 L.Ed.2d 316, holds that a defendant does not have the right to have a defense expert test items which have

already been tested by the police. An "Eighth Amendment heightened reliability because this is a death penalty case" argument, should be made if you are requesting defense expert testing.

D. Depositions

A criminal defendant generally has the right to depose prosecution witnesses. Drollinger v. State, 274 Ind. 5, 408 N.E.2d 1228 (1980). But see Tinnin v. State, 275 Ind. 203, 416 N.E.2d 116 (1981)(denial of defendant's motion to depose state witness was proper exercise of trial court's inherent power to prevent discovery from unjustifiably delaying proceedings.)

E. Third Party Requests

Indiana Criminal Procedure Rule 2 provides for Subpoena Duces Tecum commanding any party to whom it is directed to produce records, documents, etc.

Indiana Trial Rule 34(C) provides for production of documents and things from a non-party. Any motion to a non-party must contain the following items:

1. A list of the items to be inspected, described with reasonable particularity.
2. A statement that the witness or person to whom it is directed is entitled to security against damages or payment of damages resulting from such request and may respond to such request by:

a. submitting to its terms,
b. by proposing different terms,
by objecting specifically or generally to the request by serving a written response to the party making the request within 30 days, or
c. by moving to quash as permitted by Rule 45(B).

IV. THE LAW

A. Generally

Indiana Criminal Procedure Rule 1 provides that "all other rules of procedure and practice applicable to trial courts adopted by statutory enactment . . . shall continue in full force and effect, except as otherwise provided by the rules of this court". *But see,* Hicks v. State, 544 N.E.2d 500 (Ind. 1989)(in criminal cases, trial court discretion rather than the Rules of Civil Procedure govern discovery); Spears v. State, 272 Ind. 647, 403 N.E.2d 828 (1980). The scope of discovery is provided for by court rule as follows:

> **TRIAL RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**
> **(B) Scope of Discovery.** Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:
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> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
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> * * * * *[4]
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> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
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> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not

[4] Subsection 2 addresses Insurance Agreements.

> a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is
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> (a) a written statement signed or otherwise approved by the person making it, or
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> (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

The key element to discovery in criminal cases is reciprocity. State ex rel. Grammer v. Tippecanoe Circuit Court, 268 Ind. 650, 377 N.E.2d 1359 (1978).

There are three major criteria to be considered by a trial court when called upon to decide questions concerning the discovery capabilities of a criminal defendant: 1) there must be a sufficient designation of the items sought to be discovered; 2) the item sought to be discovered must be material to the defense; and 3) if the first two criteria are satisfied, the trial court must grant the discovery motion unless the State makes a showing of paramount interest in non-disclosure. Kindred v. State, 540 N.E.2d 1161 (Ind. 1989).

A court may not compel discovery from the State such that the State is required to "lay bare its case in advance of trial," Bernard v. State, 248 Ind. 688, 692, 230 N.E.2d 536, 540 (1968). Neither should the defendant be allowed a fishing expedition. State ex rel. Grammer v. Tippecanoe Circuit Court, 268 Ind. 650, 377 N.E.2d 1359 (1978). These cases are included in this section to alert counsel to have prepared an explanation why the items requested are not part of a "fishing expedition" or a request to have the state reveal its case.

Indiana Trial Rule 26 is based upon the Federal Rules of Civil Procedure. Therefore, federal authorities are relevant to discovery issues. *See, e.g.*, Coster v. Coster, 452 N.E.2d 397, 400 (Ind.App 1983).

B. Specifically What Can You Get Under the Law[5]

Any matter that is "reasonably calculated to lead to discovery of admissible evidence" is subject to discovery. T.R. 26(B)(1).

1. Witness Statements

Verbatim statements of witnesses are discoverable. Hicks v. State, 544 N.E.2d 500 (Ind. 1989); Burns v. State, 511 N.E.2d 1052 (Ind. 1987); State ex rel. Crawford v. Superior Court of Lake County, Crim. Div. Rm. II, 549 N.E.2d 374 (Ind, 1990)(substantially verbatim witness statements are not protected by work product).

The State is not required to divulge a witness's expected testimony in advance of trial if no written statement was taken or no written report summarizing questions posed to the witness was made. Washington v. State, 402 N.E.2d 1244 (Ind. 1980).

A defendant does not have the right to interview State's witnesses in private; presence of State agent was not error and did not violate defendant's right to work product. Robinett v. State, 563 N.E.2d 97 (Ind. 1990).

2. Police Reports

Police reports are not discoverable just because a police officer testifies that he used it to refresh his recollection before taking the stand. Beckham v. State, 531 N.E.2d 475 (Ind. 1988).

3. All Statements made by Defendant

The state must furnish all statements and confessions made by the defendant absent a

[5] "Under the law" is key here. Just because the case law is against the defendant does not mean that it should not be requested and an argument made as to why the defendant will be convicted unfairly if he doesn't get it.

showing that they have paramount interest in nondisclosure. Lagenour v. State, 268 Ind. 441, 376 N.E.2d 475 (1978).

4. Confidential Informants

The general rule in Indiana prevents the disclosure of the identity of a confidential informant, unless the defense can prove the necessity of such a disclosure. The defense has the burden of proving that disclosure is relevant and helpful to the defense or is necessary to a fair trial. Brafford v. State, 516 N.E.2d 45 (Ind. 1987). This general rule should not apply to statements made by the confidential informant.

A court will not be found to have abused its discretion in denying discovery of police files when the officers testified the files contained no information on informants. Walker v. State, 503 N.E.2d 883 (Ind. 1987). *See below, In Camera inspection by court.* Be prepared to present some evidence which has led you to believe that the officers have information in their files that is discoverable. Is it based on statements in other reports? Attach those reports to your request, or introduce them at the hearing. Make a record!

5. Brady v. Maryland

> In 1963, the U.S. Supreme Court wrote that:
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> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).

Thirty-two years later, in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490

(1995), the Court further elaborated on the prosecutor's obligation under Brady. In Kyles, the Court wrote that the state has the duty to disclose exculpatory or impeachment evidence, even in the absence of a request, if the suppressed evidence, considered **as a whole**, results ina "reasonable probability" that a different result would have been obtained. A defendant need not show that a different result was probable, but only that the suppression of the evidence "undermines conficence in the outcome of the trial." The obligation exists regardless of the good or bad faith of the prosecutor and even if the police have failed to disclose the evidence to him or her. As indicated, the evidence is not considered item by item, but cumulatively, and in evaluating whether the obligation to disclose has been reached, prosecutors should resolve doubful questions in favor of disclosure. In the event of suppression, once the above showing has been made on appeal, there is no further need for harmless error analysis.

The State must disclose any inducements offered in exchange for a witnesses testimony. This remains a continuing duty throughout the course of the trial. Diggs v. State, 429 N.E.2d 933 (Ind. 1981). *See also* Ferguson v. State, 670 N.E.2d 371 (Ind. App. 1996)(Tr.Ct. abused discretion in quashing D's subpoena to obtain deputy prosecutor's testimony regarding any understanding he had with State's witness. Witness was uncharged co- conspirator who testified that she had not entered into any agreement with State in exchange for her testimony against D. However, quantity & quality of circumstantial evidence supporting D's assertion that State & witness had agreement was "most compelling." Truth-seeking process requires that evidence of any consideration felon-witness receives in exchange for testifying on behalf of State be made available to defense & disclosed to jury, because any deal or understanding further undermines credibility of felon-witness. Lewis v. State, 629N.E.2d 934 (Ind.Ct.App. 1994); Giglio v. United States, 405 U.S.150 (1972).)

V. What can the State get from the defendant

A. Expert Witnesses v. Consultants

In capital litigation, there are many issues for which counsel would like to hire experts. However, until such a time as counsel decides that the expert should testify, he or she should be treated as a **consultant**, and need not be listed as a witness or subject to discovery. Pursuant to Indiana Trial Rule 26(B)(4)(b),

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

In *Stevens v. McBride*, 489 F.3d 883, 896-97 (7th Cir. 2007), the 7th Circuit found trial counsel ineffective in part for failing to designate an expert as a consultant and protecting his report from disclosure under TR 26(4)(b)(4).

Once the consultant forms an opinion, if that opinion is beneficial to the defendant, then the consultant should be designated as a witness and disclosed to the State.. *But see* American Bldgs Co. v. Kokomo Grain Co., Inc., 506 N.E.2d 56, 61 (Ind. App. 1987)("A consultant provides advice. One who provides advice does so in order to aid the party he is advising. The two are teamed in an effort to achieve a successful result. In contrast, the primary function of an expert is to provide information. 'An expert is expected to owe his allegiance to his calling and not to the party employing him.'" (quoting Virginia Electric and Power Co., 68 F.R.D.397,406 (E.D.Va. 1975))

If ever in a situation in which the State is arguing for sanctions against the defendant, counsel should have the Seventh Circuit case of United States ex rel. Enoch v. Hartigan, 768 F.2d 161 (1985), close at hand. Enoch can be argued for the proposition that the State's interest in discovery is the prevention of surprise, **not punishment** of the defendant for technical errors.

B. Investigators

Like consultants, unless you plan to call your investigator(s) to testify at trial, their work for you should not be subject to discovery. Prosecutors should not be able to depose your investigators or obtain copies of their written notes and reports. The attorney-client privilege extends to agents of an attorney, such as investigators hired to assist in preparation of the defense, so as to protect communications between your client and your investigator. *See, e.g., Brown v. State*, 448 N.E.2d 10 (Ind. 1983). Likewise, the work-product doctrine extends to protect mental impressions, notes and materials prepared by non-testifying agents of the attorney as well as the attorney him- or herself. *See, e.g., U.S. v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *State ex rel. Keaton v. Circuit Court of Rush County*, 475 N.E.2d 1146 (Ind. 1985). Be aware, however, that either of these privileges can be waived if the investigator is used as a witness. *See, Brown, Nobles, supra.*

Handwriting exemplars

The trial court has discretion to order handwriting exemplars whenever it determines that it will aid a handwriting expert in testifying even when other samples of the defendant's writing are available. Hutchinson v. State, 477 N.E.2d 850 (Ind. 1985). While there are no cases on a defendant requesting handwriting exemplars from a State's witness, the case should certainly be argued if the situation were to arise.

VI. Motions to Compel and Sanctions

A. Generally

If defense counsel feels that the State's delay in responding to discovery is prejudicial to the defense, counsel must request appropriate action or it results in **waiver**. Miller v. State, 273 Ind. 493, 405 N.E.2d 909 (1980). See below for a list of the remedies which have routinely been requested, but do not limit yourself to those. Be creative and request a remedy specific to your case.

For instance, request that the State be barred from presenting evidence on an aggravator for failure to timely respond to a request for production.

The State may not avoid discovery by deliberately or negligently failing to inform itself of its case. Long v. State, 431 N.E.2d 875 (Ind. App. 1982). The State has an obligation to make reasonable efforts to determine the existence of any material subject to discovery and then promptly make it available. Jacobs v. State, 436 N.E.2d 1176 (Ind. App. 1982). When a prosecutor responds by stating that he does not have a particular item that you think he has, consider filing interrogatories asking him where he looked. The response or the failure to respond may lay the grounds for asserting bad faith.

Sanctions for failure to comply with discovery are within the trial court's discretion; however, the primary factors considered are whether the breach was intentional or in bad faith and whether substantial prejudice resulted. Kindred v. State , 540 N.E.2d 1161 (Ind. 1989); Wisehart v. State, 491 N.E.2d 985 (Ind. 1986).

B. In camera inspection

Mere speculation that the government's file may contain Brady material is not sufficient to require *in camera* inspection. U.S. v. Doby, 665 F.Supp. 705 (N.D. Ind. 1987). However, where the defense specifically requests something and the State responds with a general claim that the item contains undiscoverable materials an in camera inspection may be appropriate, so that the trial court can determine what, if any parts of the item should be turned over. For example, when the State claims police reports are undiscoverable, the defense can seek an in camera inspection to determine if they contain verbatim witness statements. State ex rel. Crawford v. Superior Court of Lake County, 549 N.E.2d 374 (Ind. 1990).

C. Continuance

The appropriate remedy for the State's failure to comply with a discovery order is a continuance, unless the State's failure to produce is so misleading or demonstrates such bad faith that exclusion of the evidence is the only way to preserve a defendant's right to a fair trial. Riley v. State, 432 N.E.2d 15 (Ind. 1982).

When evidence which should have been disclosed to the defendant during discovery is revealed for the first time at trial, the defendant has two remedies: Move for a continuance or move for exclusion of the evidence. Averhart v. State, 470 N.E.2d 666 (Ind. 1984).

D. Exclusion

Exclusion is usually only invoked when the State has blatantly and deliberately refused to comply with the Court's discovery order. Murray v. State, 479 N.E.2d 1283 (Ind. 1985). Exclusion is appropriate only when it is the sole remedy which avoids substantial prejudice to the defendants rights. Coppock v. State, 480 N.E.2d 941 (Ind. 1985).

In Glover v. State, 441 N.E.2d 1360 (Ind. 1982), the defendant moved for exclusion of testimony from two of the State's witnesses who did not show up for a scheduled deposition. There was no error in refusing to exclude the testimony because the defendant did not avail himself of available methods to compel the witnesses attendance at the deposition.

Exclusion is not appropriate unless the State has engaged in deliberate or otherwise reprehensible conduct which voided the defendant's right to a fair trial. Green v. State, 542 N.E.2d 977 (Ind,. 1989).

E. Mistrial

Noncompliance with discovery orders may justify exclusion of the State's evidence if noncompliance is grossly misleading or in bad faith. Nettles v. State, 565 N.E.2d 1064 (Ind.

1991). Mistrial is an extreme remedy which should only be used when there is no other remedy which can rectify violation. Braswell v. State, 550 N.E.2d 1280 (Ind. 1990).

F. Be creative!

Be creative in requesting sanctions against an uncooperative prosecutor. While it may not be appropriate for the court to dismiss all charges, a persuasive argument might be made to dismiss the death penalty. If certain items of discovery are omitted pertaining to a certain aggravator, counsel could request that aggravator be omitted.

VII. Constitutionalize

According to our learned courts, there is no constitutional right to discovery in criminal cases. Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1988), *cert. denied* 109 S.Ct. 177, 488 U.S. 869, 102 L.E.2d 146. *See also* Johnson v. State, 255 Ind. 589, 266 N.E.2d 57 (1971)(discovery is not required under the due process clause of the Constitution). But see Wardius v. Oregon, 412 U.S. 470, 93 S. Ct. 2208, 37 L.Ed.2d 82 (1973)(to comport with due process discovery statute must provide for reciprocal discovery rights for the defendant.) In spite of Mauricio in a capital case, it is imperative to constitutionalize all discovery requests.[6] If the defendant is convicted and sentenced to death, an issue couched in federal constitutional terms may be in the only thing to gain the defendant access to the federal courts.[7]

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[6] Certainly an argument can be made that without full discovery the defendant will be deprived his constitutional rights to due process and due course of the law pursuant the United States Constitution, 5th and 14th Amendments and the Indiana Constitution, Article One §13.

[7] The rules governing habeas corpus require an issue of federal constitutionality for the federal court to accept the case.

Because the State also has the right to appeal any appellate reversal of a defendant's conviction or sentence, it also is imperative to use the State constitution in your discovery pleadings. Imagine a case in which the prosecutor hides from defense counsel a vital piece of evidence which either draws into question the defendant's guilt or the appropriateness of the death sentence. Defense counsel specifically requested this piece of evidence in a pre-trial discovery motion. In post-conviction proceedings the vital piece of evidence is discovered along with evidence that the State hid it from counsel.