

[CAPTION]

**MOTION TO RECONSIDER ORDER QUASHING SUBPOENAS DUCES
TECUM FOR OFFICER PERSONNEL AND K-9 RECORDS**

The Defendant, by counsel, respectfully requests this Court to reconsider its Order quashing subpoenas. In support of the Motion, the Defendant states the following:

1. On [insert date], undersigned counsel served subpoenas duces tecum for the personnel records of investigating officers and K-9.
2. On [insert date], the State of Indiana moved to quash the subpoenas.
3. On [insert date], this Court granted the motion and quashed the subpoenas, without a hearing.
4. The Defendant urges this Court reconsider its Order quashing the subpoenas, as there is United States Supreme Court precedent which allows, at a minimum, this Court to conduct an *in camera* review of the requested documents, which has not been done.
5. The Supreme Court, in Brady v. Maryland, 373 U.S. 83 (1963), held that State suppression of exculpatory evidence that is either material to guilt or to punishment of the accused is a violation of state and federal due process. Disclosure is mandated whether the evidence be substantive or for impeachment. Giglio v. U.S., 405 U.S. 150 (1972). Its impact on the defense case must be examined in the light of the evidence having been put to its best defense use. U.S. v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3381 (1985).
6. In Kyles v. Whitley, 514 U.S. 419, 439-440 (1995), the U.S. Supreme Court reiterated:

Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id. (citation omitted) "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."

U.S. v. Agurs, 427 U.S. 97, 108 (1976).
7. In its motion to quash the subpoenas, the State cited several cases involving requests for

disclosure such as made in this case. See U.S. v. Kiszewski, 877 F.2d 210, 215-216 (2nd Cir. 1989); U.S. v. Henthorn, 931 F.2d 29 (9th Cir.1991); U.S. v. Silkwood, 893 F.2d 245 (9th Cir.1989), *cert. den'd* 496 U.S. 908; U.S. v. Murgas, 967 F.Supp. 695 (N.D.N.Y 1997).

8. U.S. v. Veras, 51 F.3d 1365, 1372-73 (7th Cir. 1995) found a Brady-Giglio violation for non-disclosure of an investigation of a drug dealer's accusation that an officer had lied in search warrant affidavits and stolen money during searches.

9. Undersigned counsel has sought relevant information concerning two police officers and a dog involved in the search and prosecution of the Defendant. Put to the best defense use, this evidence may be used for both formulation of a defense and for impeachment purposes. Whether police officers have had a history of complaints lodged against them, particularly in cases involving pawn shops, whether police have had disciplinary charges or complaints for dishonesty, and whether the dog's alert is reliable, is of paramount importance when a case hinges on credibility.

10. Should this Court determine that an *in camera* inspection of the personnel files and the dog's files is warranted under the law, undersigned counsel requests an opportunity to make an *in camera*, *ex parte* offer of proof based upon privileged work product arising from her investigation into the facts of this case to inform the Court how such information could be put to the best defense use. Undersigned counsel is prepared to bring forward evidence demonstrating the materiality of impeachment evidence to not only the credibility of witnesses but also to the heart of a potential defense. This information would put the documents at issue in context and further assist the Court in making its determination whether to disclose the information contained in the law enforcement personnel files.

11. In *Disclosing Officer Misconduct, a Constitutional Duty*, published in the FBI Law Enforcement Bulletin, (July 1996), Lisa A. Regini, J.D., and FBI legal instructor, advises prosecutors to obtain "relevant portions of documents" containing:

Any finding of misconduct, such as disciplinary letter, that reflects on the officer-witness' truthfulness;

Any finding or misconduct that indicates that the officer-witness may be biased;

Any credible allegation of misconduct, subject of a pending investigation, that reflects on the truthfulness of, or possible bias, of the officer-witness, and;

Any past criminal charge or pending criminal charge brought against the officer-witness. Bulletin, at p. 31. Undersigned counsel requests this Court be guided by Lisa Regini's advice to prosecutors in any in camera examination made. (FBI Law Enforcement Bulletin is available online at <https://www.thefreelibrary.com/Disclosing+officer+misconduct%3A+a+constitutional+duty-a018631849>)

12. Alternatively, undersigned counsel requests that she be allowed to make a sealed *ex parte* offer of proof to be submitted to the Court for the purposes of further appellate review if need be. Undersigned counsel also requests that this Court seal copies of the personnel files of the investigating officers and make them part of the record to preserve the Kyles/Brady/Giglio issue for appellate review.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court reconsider its Order quashing the subpoenas duces tecum served upon [insert officers] and order that the information sought be disclosed; alternatively, hold an *in camera* inspection of the files with undersigned counsel to assist the Court by informing it of the potential defenses and lines of impeachment; alternatively, order a sealed copy of the sought files and undersigned counsel's sealed, *ex parte* offer of proof to be made part of the Record in this cause, and for all other relief just and proper in the premises.

(Signature)

CASE LAW

McKinley v. State, 465 N.E.2d 742 (Ind.Ct.App. 1984) (evidence of excessive force of testifying police officer was admissible; "[b]ias, prejudice or ulterior motive are always relevant because such facts may discredit him or affect the weight of his testimony[;] . . . [d]oubt as to the legitimacy of cross-examination designed to show bias should be resolved in favor of the questioner").

Neuhoff v. State, 708 N.E.2d 889 (Ind.Ct.App. 1999) (the reliability and training of a dog is relevant to a probable cause determination). See also Rios v. State, 762 N.E.2d 153 (Ind.Ct.App. 2002).

United States v. Kiszekski, 877 F.2d 210 (2d Cir. 1989) (district court improperly refused to compel production of testifying FBI agent's personnel file for possible impeachment purposes based only on Government's representations of contents of file, thus remanded to allow district court to conduct in-camera examination of file).

United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) (when confronted with request by Defendant for personnel files of testifying officers, Government has duty to examine those files and must disclose information favorable to Defendant that meets appropriate standard of materiality; information may be submitted to trial court for in camera inspection and evaluation if prosecution is uncertain as to its materiality).

United States v. Veras, 51 F.3d 1365 (7th Cir. 1995) (prosecutor's failure to disclose information that arresting police officer was being investigated for fraud involving money used to pay informants was a Brady violation because allegations would have been valuable for impeachment purposes).