

[CAPTION]

VERIFIED MOTION TO IMPOSE SANCTIONS

The Defendant, by counsel, respectfully requests this Court, pursuant to Trial Rule 37(B), to issue an Order imposing the following sanctions upon the State, through the Prosecuting Attorney's Office, for their failure to comply with this Court's discovery order issued on [insert date]. In support of the Motion, the Defendant states the following:

1. On [insert date], this Court issued an Order requiring the State to disclose the following: [insert specific items] by [insert deadline].

2. The State failed to disclose the [specific items] by [insert deadline].

3. In an effort to resolve the discovery issue without the Court's involvement, undersigned counsel drafted a letter to the State requesting the [specific items] and made multiple phone calls to the prosecutor.

4. On [insert date], pursuant to T.R. 37(A), the Defendant filed a Motion to Compel [specific items]. This Court granted the Motion to Compel and ordered the disclosure of [specific items] by [insert new deadline].

5. As of the date of the Motion for Sanctions, the Defendant still has not received [specific items].

6. It is within the trial court's discretion to order a proper sanction. A proper sanction in this case is [pick one: possible sanctions include dismissal, exclusion of evidence, exclusion of witness, admission of facts, contempt, expenses].

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to issue an Order imposing the above specified sanctions against representatives and agents of the State of Indiana, 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

CASEBANK M.6

T.R. 37(B), Indiana Rules of Procedure (failure to comply with order).

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).

Null v. State, 690 N.E.2d 758 (Ind.Ct.App. 1998) (the trial court is in the best position to determine remedies for violations of discovery).

Martin v. State, 535 N.E.2d 493 (Ind. 1989) (exclusion of evidence as sanction for discovery abuse is not proper unless there is a showing that the prosecution engaged in deliberate or other reprehensible conduct which prohibited the Defendant from receiving fair trial).

Jester v. State, 551 N.E.2d 840 (Ind. 1990) (the trial court did not abuse its discretion in, *sua sponte*, declaring a mistrial, where State discovered, following commencement of trial, that it had failed to turn over written statements of witnesses pursuant to a discovery order, and defense counsel declined to accept offer of a continuance, but instead insisted on either a dismissal or a suppression of the statements).

Mauricio v. Duckworth, 840 F.2d 454 (7th Cir. 1987) (State's knowing failure to disclose identity of alibi rebuttal witness violated due process; the trial court erred in failing to exclude State's undisclosed rebuttal witness).

Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003) (although it was improper for the State to fail to disclose that witness had changed her story, the trial court did not abuse its discretion in failing to grant a mistrial and rather refusing to let the State to rehabilitate the witness after the Defendant crossed her on her inconsistent statement; it is within the trial court's discretion to fashion its own remedy for discovery abuses).

Baughman v. State, 777 N.E.2d 1175 (Ind.Ct.App. 2002) (where neither attorney nor client had opportunity to respond to the State's Motion for Sanctions, Order of attorney's fees could not stand; when a party files petition for imposition of sanctions, the trial court must ordinarily conduct a hearing thereon to determine whether reason for not imposing sanctions exists).

Gossmeier v. State, 482 N.E.2d 239 (Ind. 1985) (holding that instruction calling for an adverse inference to be drawn from the State's failure to produce certain evidence is appropriate only where evidence withheld is material to trial issues and not cumulative), *impliedly overruled on other grounds by* Albaugh v. State, 721 N.E.2d 1233 (Ind. 1999).

Meredith v. State, 679 N.E.2d 1309 (Ind. 1997) (the trial court did not err in denying the Defendant's motion to exclude witnesses pursuant to local criminal discovery rule, which requires State to furnish names and last known addresses of potential witnesses).

Tyson v. State, 619 N.E.2d 276 (Ind.Ct.App. 1983) (good discussion of when exclusion of witnesses is a proper remedy).

Lewis v. State, 700 N.E.2d 485 (Ind.Ct.App. 1998) (State's disclosure, two days before trial, of Defendant's fingerprints at the scene of the burglary warrant either exclusion of the evidence, or in the least, a continuance).

Beauchamp v. State, 788 N.E.2d 881 (Ind.Ct.App. 2003) (experts should not be allowed to testify to newly-formed opinions); see also Camm v. State, 908 N.E.2d 215 (Ind. 2009) (parties must supplement discovery responses with respect to subject-matter and substance of an expert's expected testimony in a timely fashion; State's crime scene reconstruction expert's testimony that went beyond his deposition testimony does not rise to level of a discovery violation).

Alexander v. State, 819 N.E.2d 533 (Ind.Ct.App. 2004) (although it is generally within the court's discretion to remedy discovery abuses with exclusion of evidence, a strong presumption exists to allow testimony for the defense because of the Defendant's constitutional right to compulsory process); see also Wiseheart v. State, 491 N.E.2d 985 (Ind. 1986); D.D.K. v. State, 750 N.E.2d 885 (Ind.Ct.App. 2001).

Washington v. State, 840 N.E.2d 873 (Ind.Ct.App. 2006) (where the Defendant's right to present witnesses on his behalf slightly outweighed the State and public's interest in maintaining the integrity of the adversary process, the trial court violated the Defendant's rights under the Compulsory Process Clause of the Sixth Amendment when it excluded two defense alibi witnesses for discovery violation).

State v. Fridy, 842 N.E.2d 835 (Ind.Ct.App. 2006) (exclusion of evidence, leading to dismissal of case, was improper sanction for State's refusal to disclose the addresses and names of confidential informants pursuant to the Court's Order).

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).

Rohr v. State, 866 N.E.2d 242 (Ind. 2007) (reversible error to exclude defense witnesses added to witness list four days before trial; extreme sanction of witness exclusion should not be employed unless Defendant's breach has been purposeful or intentional or unless substantial or irreparable prejudice would result to the State).

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 in dismissing OWI charges because the State's refusal to respond to Defendant's Request for Production, as trial court ordered, constituted bad faith).

Cain v. State, 955 N.E.2d 714 (Ind. 2011) (trial court did not abuse its discretion by refusing to exclude co-Defendant's testimony when the prosecutor waited until trial had begun to offer him a plea; there was no evidence of bad faith and Defendant was given the opportunity to depose the co-Defendant during trial).

Hurd v. State, 9 N.E.3d 720 (Ind.Ct.App. 2014) (any error in trial court's exclusion of Defendant's mother as a witness because she was not disclosed until the day of trial was harmless at a bench trial for misdemeanor battery).

Townsend v. State, 26 N.E.3d 619 (Ind.Ct.App. 2015) (in light of a Defendant's right to compulsory process under the federal and state constitutions, there is a strong presumption to allow the testimony of even late-disclosed witnesses).