Discovery, Investigation and Using Experts

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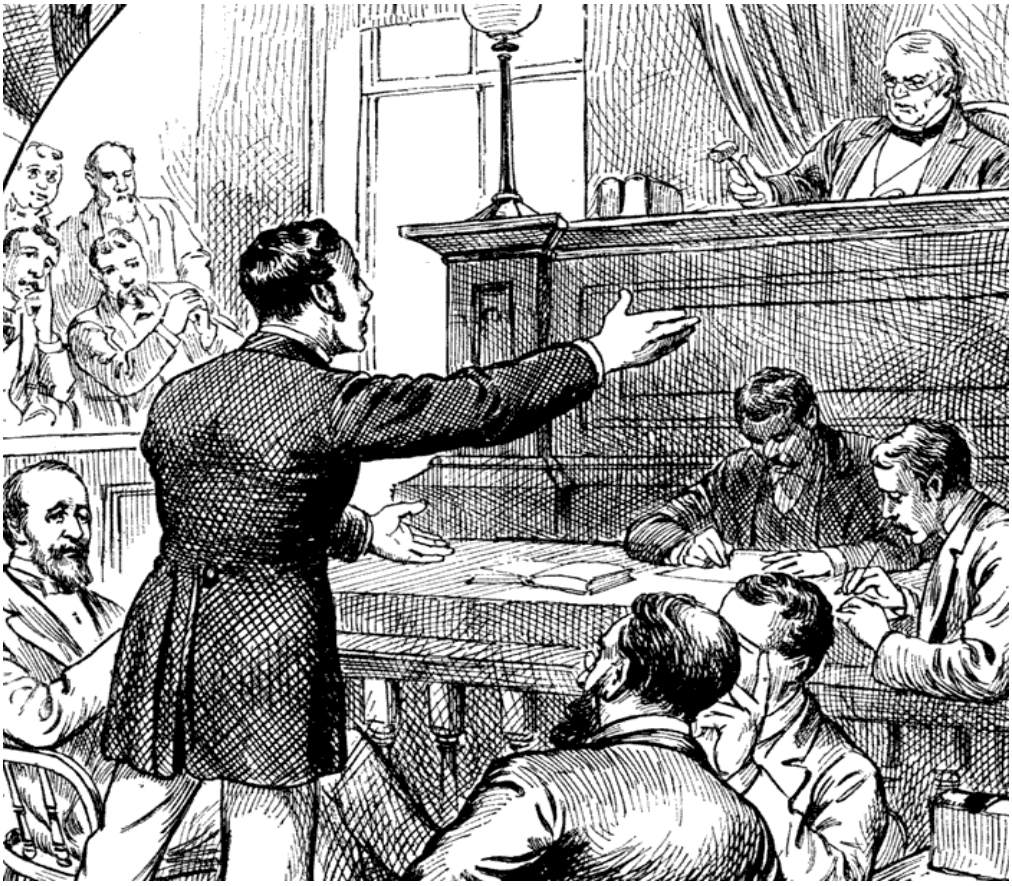

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I. Formal Discovery

A. What is discovery?

Put simply, discovery is the procedure by which the State and the defense in criminal cases grant pretrial access to each other's evidence; and to provide timely notice of the intent to present certain defenses, such as alibi, and of the intent to present expert testimony. Although the due process clause requires the State to turn over exculpatory evidence to the defense- even in the absence of a discovery demand, there is no general constitutional right to discovery in criminal cases. Access to the State's *inculpatory* evidence is strictly a statutory right. Sec. 971.23, Stats., governs what must be turned over, and when. A discovery demand must be served by the defense in every case. However, proper trial preparation usually requires much more than simply serving a discovery demand on the prosecutor.

B. The discovery demand

1. The form

Because the discovery process is largely statutory, it is best to have have the discovery demand mirror the language of the statute. Serving a four page discovery demand that demands every conceivable form of evidence is a waste of time and a waste of paper paper. No prosecutor actually reads these form demands; and, more importantly, no judge will apply a sanction for failing to provide discovery unless the item is listed in the statute. If evidence is exculpatory, the state must turn over the evidence regardless of whether a discovery demand is served. Beyond exculpatory evidence, the State only has the obligation to turn over the materials listed in Sec. 971.23(1), Stats. These items are:

> (a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.
>
> (b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.
>
> (bm) Evidence obtained in the manner described under s. 968.31(2)(b), if the district attorney intends to use the evidence at trial.
>
> (c) A copy of the defendant's criminal record.
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.
>
> (e) Any relevant written or recorded statements of a witness named on a list under par. d, including any audiovisual recording of an oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her

testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

(f) The criminal record of a prosecution witness which is known to the district attorney.

(g) Any physical evidence that the district attorney intends to offer in evidence at the trial.

(h) Any exculpatory evidence.

2. A discovery demand must be served in *every* case

In many counties, the prosecutor turns over the "discovery materials" as a matter of course at the initial appearance or at the pretrial conference. Do not rely on this "open file policy". The discovery statute requires the State to turn over much more than just the police reports. Upon demand, the state must provide (among other items) a witness list, and expert witness reports or summaries. It is imperative, then, that a discovery demand be served in every case. If no discovery demand is served, the court is powerless to exclude evidence or impose other sanctions in the event of surprise evidence.

PRACTICE TIP: You must serve a discovery demand in every case- even if you already have the "discovery materials"- because if no demand is served, the court has no power to impose a sanction if new material is disclosed at trial.

3. How to serve the discovery demand

Sec. 971.23, Stats., provides that the discovery demand must be served upon the *district attorney*. Many counties, including Milwaukee County, have a local rule prohibiting the clerk from accepting discovery demands. There probably is no harm in filing a copy with the court, if the clerk will accept it, but the critical point is that the demand be served on the district attorney. It is best to hand-serve the demand and to then obtain a hand-stamped proof of service (i.e. do not simply hand the demand to the prosecutor in court). Only if the district attorney has been served with demand is he or she subject to the sanctions of the statute for failing to provide discovery.

C. Notice of Alibi

Sec. 91.23(8), Stats., requires that, if the defendant intends to introduce evidence of an alibi at trial, the defendant must serve a notice of alibi on the State at least thirty days before trial. The notice of alibi must contain a description of where the defendant was at the time of the crime and it must provide a list of alibi witnesses. Within twenty days thereafter, the State must serve on the defendant a list of alibi rebuttal witnesses.

NOTE: If the State fails to serve a list of alibi rebuttal witnesses (as it frequently does) this means that witnesses who place the defendant at the scene of the crime are subject to exclusion under Sec. 971.23(7m), Stats. *Tucker v. State*, 84 Wis. 2d 630, 267 N.W.2d 630 (1978).

PRACTICE TIP: A notice of alibi must be served at least thirty days before trial. This is one of the few requirements of the discovery statute that has an actual deadline (as opposed to the "reasonable time before trial" provision)

D. Expert Witnesses

Sec. 971.23(1)(e), Stats., provides that, upon demand, the State must provide, "[A]ny reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial."

This provision, perhaps more than any other, is the reason that a discovery demand must be filed in every case. It is not unusual for the prosecutor to ask questions of a police officer- purportedly a lay witness- that, in fact, call for an expert opinion. For example, any question that begins with, "Based on your training and experience . . ." is likely to call for an expert opinion. *See,* Sec. 907.02, Stats. ("other specialized knowledge . .) Unless that police officer was named in the witness list as an expert- and unless the defense was also provided with either a report or a *summary of the expert's findings*- the court should, upon objection, sustain the objection on the grounds that there has been a discovery violation (i.e. the witness was not named as expert)

PRACTICE TIP: One of the main reasons to file a discovery demand is every case is to avoid "surprise" expert opinions during trial.

E. Demands to Preserve Evidence

There are certain circumstances where it is good practice to serve upon the State a pleading entitled "Demand for Preservation of Evidence." Nowhere in the discovery statute is such a pleading required, or even recognized. However, under the State's constitutional obligation to preserve exculpatory evidence, there are several exceptions. One exception is where the evidence is not in the exclusive possession of the State; and another exception is where the exculpatory value of the evidence is not readily apparent. See, *State v. Hahn*, 132 Wis.2d 351, 392 N.W.2d 464 (1986)

Thus, where the exculpatory value of evidence may not be readily apparent, or where the evidence is not in the exclusive control of the State, serving a written demand for preservation of evidence will blunt any later claims by the State that it had no obligation to preserve the evidence. The most common example of the situation where a demand for preservation should be served is in the event of an automobile crime (e.g. homicide by intoxicated use of a vehicle). Many time, the automobiles involved are searched and photographed but not impounded by the State; or, if the vehicle is impounded, it is stored outside where weather and rust will slowly destroy the evidence. Another example are 9-1-1 recordings and surveillance video. Many police departments destroy these recordings after a set period.

Some prosecutors will take the position that the State has no obligation to collect and to evidence for the defense and, therefore, that no official action will be taken regarding the demand to preserve evidence. If you receive this cynical response, you should immediately file a motion seeking a court order compelling the police to seize and to preserve the evidence in question. The defendant, a private citizen, has no legal authority to seize, and to retain, the private property of another (such as an automobile that was involved in a collision). Only the police may do so. Do not allow the State to dictate what evidence will be seized from the scene and preserved. The defendant has a due process right to prepare his defense without interference by the State. Refusing to assist the defendant in preserving evidence, therefore, violates due process. As is explained below, the court even has the authority to order the State Crime Laboratory to examine and to conduct tests on evidence specified by the

PRACTICE TIP: If there is evidence that is not in exclusive possession of the state, or where the exculpatory value of the evidence is not readily apparent, the defense should serve a written demand to preserve evidence. It may even be necessary to obtain court order to preserve the evidence.

II. Supplementary Discovery Procedures

A. State Crime Laboratory Testing (felony cases only)

In felony cases, the defendant may apply to the court to have the State Crime Laboratory conduct scientific testing on behalf of the defendant. The testing is conducted at the expense of the State. Significantly, the results of the testing are privileged and may not be disclosed to the State unless the defendant consents. Sec. 165.79(1), Stats., provides that:

> Upon request of a defendant in a felony action, approved by the presiding judge, the laboratories shall conduct analyses of evidence on behalf of the defendant. No prosecuting officer is entitled to an inspection of information and evidence submitted to the laboratories by the defendant, or of a laboratory's findings, or to examine laboratory personnel as witnesses concerning the same, prior to trial, except to the extent that the same is used by the accused at a preliminary hearing and except as provided in s. 971.23. Employees who made examinations or analyses of evidence shall attend the criminal trial as witnesses, without subpoena, upon reasonable written notice from either party requesting the attendance.

B. Using subpoenas for discovery

An under-utilized tool for investigation in a criminal case is the subpoena. The defense may serve a subpoena *duces tecum* to obtain various records that might otherwise be confidential- for example, telephone records, medical records, and bank records. In most cases, if you subpoena such records, and if the custodian of the records does not assert any privilege, the custodian will produce the records ahead of time at the attorney's office. If the custodian refuses to do so, simply obtain a motion hearing date in advance of the trial date and return the subpoena to court for that hearing. In that way, you will obtain the records prior to trial.

C. Motion to Identify Confidential Informant

There are two circumstances under which the State may be ordered to either identify the a confidential informant or, in the alternative, to dismiss the case.

Firstly, if the defendant files a motion challenging the existence of a confidential informant that was used to establish probable cause for a search, and if the judge is not satisfied that the informant actually exists, Sec. 905.10(3)(c), Stats., permit the court to order an *in camera* inquiry into the identity of the informant.

Secondly, if the witness is a "transactional witness" (i.e. an eyewitness, or a witness that played a role in the commission of the crime), the informant must be identified. Additionally, if the defendant is able to establish that the testimony of the witness is necessary for a "fair determination of the issue", the court will order an *in camera* inquiry. If the testimony of the witness will, in fact, be helpful to a fair determination of the issue, the court will order the State to identify the informant. Of course, the State may choose, instead, the dismiss the case.

D. "Shiffra Motion" (disclose mental health records)

The defendant has a constitutional right to present a complete defense. Therefore, when the defendant is able to establish that his constitutional right to present a defense is impaired by a witness's claim of physician/patient privilege, the privilege must give way. This principle seems simple; however, the courts have continuously whittled away at it to the point that, now, the law virtually requires that the defendant establish that the mental health records contain evidence that will *prove* he is innocent. This is a daunting task for a defendant who, in most cases, does not know what is contained in the records.

Nonetheless, when the state's case rests on the testimony of a witness who has a significant mental health history, it is worthwhile to file what is commonly known as a "Shiffra Motion."

E. Personnel Records

Your clients will frequently demand that you file an open records request for the disciplinary file for any police officer involved in the case. Personnel records are specifically excepted from the Open Records Law and, therefore, the City will not produce such records in the absence of a court order. You must file a motion and then establish that there is a likelihood that the records contain information that is helpful to the defense.

III. Private Investigation

Occassionally, a private investigator will locate a witness that is helpful for the defense. The real value, though, of a private investigator is to interview and, to *rule out,* witnesses suggested by the defendant. At the beginning of every criminal case, the defendant has an inflated opinion of his or her chances at trial. The best way to make sure that a bad case (for the defense) goes to trial is to fail to properly investigate the defense. This is where the private investigator comes into play.

When you first meet your client, he will have already convinced himself that several witnesses (usually witnesses who do not appear in the police reports) will offer a lock-solid defense. This is almost never true. However, unless the defendant is confronted with a private investigator's interview report of the witnesses, the case is unlikely to be settled. Additionally, an investigator's written report, contained in trial counsel's file, also goes a long way toward avoiding claims of ineffective assistance of counsel for failing to properly investigate a case.

PRACTICE TIP: Whenever your client identifies potential witnessses, it is well worth your while to hire a private investigator to interview these witnesses and to provide a written report.

IV. Sanctions for Failing to Make Discovery

Sec. 971.23(7m)(a), Stats., provides that, "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance." Sec. 971.23(7m)(b), Stats. provides that, in lieu of the exclusion or adjournment, the court may advise the jury of the State's failure to make discovery.

The critical point to understand is that the sanctions statute does not specifically require the moving party to establish prejudice or surprise. The statute states in mandatory terms that the evidence *shall* be excluded. Presumably, the lack of prejudice is considered by the court

in deciding whether to instruct the jury of the State's failure as opposed to excluding the evidence, or a adjourning the case.

On a motion for sanctions, the analysis is as follows:

(1) Did the moving party file a discovery demand?

(2) Did the other party fail to provide the discovery a "reasonable time before trial"?

(3) If so, a sanction shall be imposed, unless the party failing to provide discovery establishes good cause for failing to do so; and, if so, the court may grant a continuance to the aggrieved party.

A. Motion to Exclude Witnesses/Evidence

Rarely will the State fail to turn over the witness statements (police reports). Frequently, though, the State fails to provide a witness list. When this occurs, the defense must file a motion to exclude witnesses. The timing of the motion is important. The considerations are as follows:

(1) When the State completely fails to serve a witness list, it is not a good idea to wait until the prosecutor calls his or her first witness to move to exclude all witnesses. With a jury sitting in the box, the court will be strongly disinclined to impose the sanction of exclusion;

(2) However, a motion to exclude witnesses that is brought well before the start of trial may not be appropriate since the State has not yet failed to serve the witness list "a reasonable time before trial."

(3) A good rule of thumb is to file the motion a week before the start of trial.

PRACTICE TIP: Where the State fails to serve a witness list a reasonable time before trial, the defense should file a motion to exclude all witnesses for the State.

B. Motions for Destruction of, or Failing to Preserve, Exculpatory Evidence

The State has an obligation to preserve exculpatory evidence. When the State fails to do so, this violates the defendant's due process rights. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see *United States v. Agurs*, 427 U.S. at 109-110, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984) Thus, in order to rise to the level of a due process violation warranting dismissal, evidence not preserved, lost, or destroyed by the State, "[M]ust both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." If the destroyed evidence falls below this standard, then the appropriate remedy is suppression. See, *State v. McCrossen*, 29 Wis.2d 277 , 385 N.W.2d 161 (1986).

V. Biography

For over twenty-four years attorney Jeffrey W. Jensen has practiced as a criminal defense lawyer in Milwaukee, Wisconsin. Attorney Jensen has defended in excess of three hundred criminal jury trials and he has handled in excess of one hundred criminal appeals As a Wisconsin criminal appeals lawyer, he has argued before the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the United States Court of Appeals (7th Circuit), and is admitted to practice before the United States Supreme Court. For more information, go to The Jensen Defense website.

VI. Forms, Motions, and Briefs

A. Discovery Demand

B. Motion to Exclude Witnesses with Memorandum of Law

C. Motion to Compel Identification of Confidential Informant

D. "Shiffra" Motion

State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No.

Herman Munster,

Defendant.

Defendant's Discovery Demand

NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to Sec. 971.23, STATS hereby demands that the State serve upon the defendant a reasonable time before trial the following:

1. Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.

2. A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.

3. Evidence obtained in the manner described under s. 968.31 (2) (b), if the district attorney intends to use the evidence at trial.

4. A copy of the defendant's criminal record.

5. A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

6. Any relevant written or recorded statements of a witness named the State’s witness list, including any videotaped oral statement of a child under s. 908.08, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

7. The criminal record of a prosecution witness which is known to the district attorney.

8. Any physical evidence that the district attorney intends to offer in evidence at the trial.

9. Any exculpatory evidence.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

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Twelfth Floor
Milwaukee, WI 53233

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STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY:

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.

HERMAN MUNSTER,

Defendant.

Motion to Exclude Witnesses

NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and pursuant to sec. 971.23(7m)(a), Stats., hereby moves the court to exclude all witnesses on behalf of the State for the reason that, pursuant to sec. 971.23(1)(d), Stats., the defendant served upon the district attorney a demand to exchange witness lists and the State has failed to timely serve a witness list upon the defendant.

This motion is based upon the attached memorandum of law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

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STATE OF WISCONSIN: CIRCUIT COURT: MILWAUKEE COUNTY:

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.

HERMAN MUNSTER,

Defendant.

Memorandum in Support of Motion to Exclude Witnesses

On **** (attached hereto as Exhibit A) the defendant served upon the State a demand for a witness list. To date, the State has failed to serve a witness list upon defense counsel.The defendant now moves to exclude all witnesses on behalf of the State.

§971.23(1), Wis. Stats. (1997), provides,

> (1) What a district attorney must disclose to a defendant. Upon demand, the district attorney ***shall, within a reasonable time before trial***, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> * * *
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

As a sanction for non-compliance with the requirement to provide a witness list, sec. 971.23(7m), Stats. (1997), provides:

> (a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

> (b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3), advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

It is meaningful to point out that §971.23(7m) speaks in mandatory terms, "the court ***shall*** exclude any witness not listed . . unless good cause for failure to comply is shown." The procedure under the statute is clear: (1) If an offer is served the State must comply; (2) If the State fails to comply and fails to show good cause for failing to comply the court ***shall*** exclude the witnesses; (3) If the State shows good cause and the court permits the witness to testify the defendant (opposing party) should be granted a continuance if appropriate.

> As we read this section, it requires two separate determinations by the trial court. First, the court must determine whether the noncomplying party (here, the state) has shown good cause for the failure to comply. If good cause is not shown, the statute is mandatory--the evidence shall be excluded. See ***In re E.B***., 111 Wis.2d 175, 185, 330 N.W.2d 584, 590 (1983). ***State v. Wild***, 146 Wis.2d 18, 429 N.W.2d 105, 108 (Wis.App. 1988)

Whether or not "good cause" exists is a matter of law. In, ***State v. Martinez***, 166 Wis.2d 250, 479 N.W.2d 224, 228 (Wis.App. 1991), the court of appeals made clear,

> Section 971.23(7), Stats., requires the trial court to exclude evidence which is not produced pursuant to a discovery demand unless "good cause is shown for failure to comply." This burden clearly rests with the state. Whether a party has satisfied its burden is a question of law which we review without giving deference to the trial court's conclusion. ***Becker v. State Farm Mut. Auto. Ins. Co***., 141 Wis.2d 804, 811, 416 N.W.2d 906, 909 (Ct.App.1987).

In the words of the Supreme Court,

> This requirement of intention to call the witnesses listed is one of the chief aims of the discovery procedure--to inform the opposing party of evidence to be produced at trial so he can most effectively test its validity. ***Irby v. State***, 60 Wis.2d 311210 N.W.2d 755, 760 (Wis. 1973)

Where the State has failed to provide a witness list or where it has failed to name certain witnesses, it is not "good cause" for failure to comply for the State to argue simply that the defendant has had the discovery materials and the names of the witnesses appear in the police reports . This is inadequate to establish "good cause" for several reasons.

Regarding this very argument, the court of appeal observed, in, ***State v. Fink,*** 195 Wis.2d 330, 536 N.W.2d 401, 404 (Wis.App. 1995)

> [t]he State argues that whether there was actual surprise is questionable at best. It notes that Terri's allegations were, at least in a general way, contained in the police reports which had been provided to the defense more than a month before trial.Thus, use of this evidence could reasonably have been foreseen.We disagree. **What may have been in the police reports regarding "other acts" and what the State intended to produce at trial are two completely different things**. Fink's attorney attempted to find out almost two months in advance of trial whether the State expected to use "other acts" evidence at trial. (emphasis provided)

Secondly, such an argument amounts to an assertion that §971.23(3), Stats., is mere surplusage, a meaningless subsection of the criminal discovery statute. That is, if all the State need do is mention the name of a witness in a letter or to turn over the volumes of police reports (which is required by another section of the statute), subsection (3) has no meaning because the State would never be required to actually turn over a "list" of witnesses. If this were acceptable, in almost every case it would be to the State's advantage to turn over the police reports and to ignore the witness list requirement. By failing to provide the witness list, the defendant's trial preparation is made far more difficult, if not impossible.

For these reasons, no good cause has been shown by the State for failing to timely file a witness list and a list of alibi rebuttal witnesses. Thus, under the statute and the case law the exclusion of witnesses is mandatory.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

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State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No. 2009CF001296

Little Al Stewart,

Defendant.

Motion to Compel Identification of Confidential Informant

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court to compel the state to identify the the confidential informant who allegedly provided government agents with information that on the day in question the defendant would be carrying drugs from Las Vegas to Milwaukee on a commercial airliner.

As grounds, the defendant shows to the court as follows:

1. No information is given about the confidential informant in the police reports provided in response to the defendant's discovery demand. As such, it is impossible to determine whether the informant is reliable. The reliability of the informant, or the lack thereof, is critical to Stewart's motion to suppress evidence. Thus, the identity of the informant is critical to the court's determination of whether the police legally seized evidence.

2. The informant is obviously a "transactional witness" because no person, besides Stewart and *the person who sold the cocaine to him*, knew that Stewart would be taking the drugs to Milwaukee on a commercial airliner. Thus, either the police did not actually have a confidential informant and merely guessed correctly; or the person who sold Stewart the cocaine then contacted the government agents.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53233

414.224.9484

State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No. 2009CF001296

Little Al Stewart,

Defendant.

Memorandum in Support of Motion to Compel Identification of Confidential Informant

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Argument

I. The information received from the informant cannot be determined to be reliable and, therefore, the government must be compelled to identify the informant.

The police reports provided by the state in response to the defendant's discovery demands reflect that the agents arrested Stewart at Mitchell International based on the tip of a "reliable confidential informant" who allegedly told police that on March 10, 2009, Stewart would be traveling from Las Vegas to Milwaukee on a commercial airliner and that he would have cocaine with him. There is, literally, no other information about the informant contained in the the police reports.

Since an arrest was made based solely on this informant tip, the reliability of the informant is critical. The court is not required to merely rely on the agent's characterization of the informant as "reliable". As will be set forth in more detail below, where information from an informant is used to arrest a defendant (or to search the defendant's property), and where the reliability of an informant is called into question, the court should compel the state to identify the information. Otherwise, there is literally no deterrent to police fabricating tips from alleged confidential informants.

Although the government does have a statutory privilege to refuse to disclose the identity of confidential informants, Sec. 905.10(3)(c), STATS, provides:

> (c) **Legality of obtaining evidence**. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall on request of the federal government, state or subdivision thereof, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision

except a disclosure in camera at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the appropriate federal government, state or subdivision thereof.

Here, Stewart has filed a motion challenging his warrantless arrest and the subsequently search of an automobile. The police reports suggest that arrest of Stewart and the search of the vehicle was conducted solely on the basis of information provided by a confidential informant. Thus, the informant's reliability is critical. Based on the materials provided so far by the state there is literally no way to determine whether this informant actually exists and much less whether his information is reliable in this instance.

II. The informant was plainly a transactional witness and, therefore, he must be identified.

Additionally, Sec. 905.10(3)(b), STATS, provides:

(b) **Testimony on merits.** If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

If the informant is a transactional witness the court’s discretion is severely limited. In, *State v. Outlaw* 108 Wis.2d 112, 321 N.W.2d 145, 158 (Wis. 1982) the Supreme Court explained:

> . . . . [T]he failure upon request to produce evidence or witnesses, whether an informer or not, that may be favorable to an accused where the evidence is relevant to guilt or innocence violates due process. Brady v. Maryland, supra 373 U.S. at 86, 83 S.Ct. at 1196. Outlaw, therefore, upon demand, had the right, upon the mere showing that the informer was present at the transaction--especially because identity was the defense--to have a determination of whether or not the informer "may be able to give testimony necessary to a fair determination of the issue of guilt or innocence."

Later, in *State v. Vanmanivong*, 261 Wis.2d 202, 222, 661 N.W.2d 76 (2003) the Supreme Court explained:

> We now reaffirm our holding in Dowe that the concurrence in Outlaw states the test to be applied in determining whether an informant's identity must be disclosed. Based on the language of the concurrence, a defendant must show that an informer's testimony is necessary to the defense before a court may require disclosure. See Outlaw, 108 Wis.2d at 139 (Callow, J., concurring). "Necessary" in this context means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt. See id. at 141-42.

However, it must be emphasized that the defendant need not establish in his initial application that the informant's testimony is necessary to a fair trial. Rather, the initial burden of showing that the informant may be able to give testimony necessary to a fair trial is minimal; if it is met, further inquiry by the trial court is required. *State v. Hargrove*, 159 Wis.2d 69, 75, 464 N.W.2d 14, 17, published as corrected, 469 N.W.2d 181, 184 (Ct.App. 1990). The court must then proceed to take testimony from the informant, *in camera*, to properly make the determination of whether the informant's testimony would, in fact, be necessary to the defense. In other words, the defendant is not required to show in her initial application what the information would say and then persuade the court that this testimony is necessary to the defense. Rather, the defendant need only establish that it is more than a mere fishing expedition.

Conclusion

For these reasons it is respectfully requested that the court order the state to identify

the confidential informant who provided information to the police.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
Attorneys for the Defendant

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State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No.

Herman Munster

Defendant.

Motion to Disclose Mental Health Records

NOW COMES the above-named defendant, and hereby moves the court to order that Jane Doe, or her guardian, to sign a release so that the defendant may gain access to Jane's mental health records; or, in the event consent is refused, to dismiss the case.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

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Attorneys for the Defendant

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State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

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Herman Munster

Defendant.

Motion to Disclose Mental Health Records

Introduction

The complaint in this case alleges that the defendant, Herman Munster ("Munster"), sexually assaulted twelve-year old Jane Doe at least three times during the summer of 2004. The allegations came to light in July, 2006, when Jane was detained for having sexual intercourse with her sixteen year-old boyfriend. Jane was being interrogated by police when she told them that it was not the first time she had sex. She then described having sex with Munster during the summer of 2004.

The police reports in this case allege that the Mockingbird Heights Police, "were aware of Jane's history of suicide." In a tape-recorded conversation between Jane and Munster (recorded in July, 2009), orchestrated by police detectives, Jane told Munster that her counselor advised her to talk to the person with whom she had "sexual contact." Elsewhere in the police reports, it indicates that Jane is presently in counseling and that, following the suicide attempt, she was in the hospital for one week.

Consequently, approximately two months ago, Munster filed an open records request for any police involvement in an attempted suicide by Jane. The Mockingbird Heights Police Department did not respond to the records request until Friday, April 13, 2009, when they provided a narrative report, believed to pertain to Jane, in which she told police detectives that she harmed herself because she was depressed over her mean friends at school. In this interview with police, Jane said nothing about being sexually assaulted by Munster.

For the reasons set forth in more detail below, Jane's records from her hospitalization following her April, 2006, suicide attempt would be material and helpful to the defendant.

Argument

I. The Court should conduct an in-camera inspection of Jane's mental health records.

Munster's theory of defense is that Jane, a troubled young lady, found herself in trouble for having sex with her boyfriend in July, 2009. During the interrogation by police she fabricated a statement that she had had sex with Munster two years earlier during the summer of 2007. Jane immediately noticed that this claim deflected the police attention from her to Munster. Jane's health care records from April, 2008, when she attempted suicide, are certainly material and relevant to Munster's defense. This is true for two reasons: (1) Jane was in significant counseling and therapy for the events in her life that were bothering her; apparently, though, she made no mention of being sexually assault by Munster during this counseling; and, (2) Whether or not the counselor told Jane that she should "speak to the person" who had sex with her, as claimed by Jane during the recorded telephone conversation, is relevant to whether Jane was being truthful with Munster during the telephone call.

To be entitled to an in camera inspection, the defendant must make a preliminary showing that the sought-after evidence is material to his or her defense. *State v. S.H.,* 159 Wis. 2d 730, 738, 465 N.W.2d 238, 241 (Ct. App. 1990); *In re K.K.C*., 143 Wis. 2d 508, 511, 422 N.W.2d 142, 144 (Ct. App. 1988), *State v. Shiffra,* 175 Wis. 2d 600, 605 (Wis. Ct. App. 1993). However, the standard that must be met in order to trigger the in camera inspection was further clarified by the Wisconsin Supreme Court. The court wrote:

> [W]e conclude, consistent with other state standards, that a defendant must show a "reasonable likelihood" that the records will be necessary to a determination of guilt or innocence. See Goldsmith, 651 A.2d 866 ("a defendant must establish a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense"); *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557, 574 (Mich. 1994) (a defendant must show "a good-faith belief, grounded in some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense"); *State v. Pinder*, 678 So. 2d 410, 417 (Fla. Dist. Ct. App. 1996) ("a defendant must first establish a reasonable probability that the privileged matters contain information necessary to his defense"); compare *Commonwealth v. Fuller*, 423 Mass. 216, 667 N.E.2d 847, 855 (Mass. 1997) (a defendant must show "a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt").

State v. Green, 2002 WI 68 (Wis. 2002)

Here, Munster has made a detailed explanation of his theory of defense, he has presented evidence of what is likely to not be in the health care records (i.e. any mention of sex with Munster), and he has explained why that is relevant an important to the defense. Firstly, Munster's theory of defense is that Jane utterly fabricated the claim of sexual assault in July, 2006 when she was under arrest. It is a virtual certainty that Jane's extensive health-care records from only two months before contain no mention of Munster having sex with her. Doctors are mandatory reporters of such claims by children and no such disclosure was reported. Moreover, when the Mockingbird Heights police interviewed her in April, 2003, she made no mention of being sexually assaulted by Munster. This is helpful and material to the defense because the failure to mention an event under circumstances where it would be natural to mention it is very relevant to whether the claim was recently fabricated.

Conclusion

For these reasons, the court should examine Jane's health care records in camera and, if they contain no claim that she was sexually assaulted by Munster, they should be turned over to the defense.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009:

Law Offices of Jeffrey W. Jensen
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