DISCOVERY AND RECIPROCAL DISCOVERY

New Attorney Training – 8/25/16

Presented by Evan Weitz

Where does information come from?

Statutory Discovery - Wis. Stat. § 971.23

Constitutional Duty to Disclose – *Brady v. Maryland*, 373 U.S. 83 (1963)

Other Sources of Information / Investigation

Statutory Discovery Wis. Stat. § 971.23

"(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:"

KEY WORDS: Upon demand

**Important to file Motion/Demand for Discovery at onset of every case.


Stu's Views
© Stu All Rights Reserved www.STUS.com
I cannot see the answer to your question. You'll need to file that discovery request after all.

Discovery Wis. Stat. § 971.23(1)

District Attorney Must Disclose:

- Any written/recorded statement made by the defendant
- Written summary of all oral statements of the defendant that the D/A plans to use and names of witnesses to those statements
- Wiretaps – Wis. Stat. § 968.31(2)(b)
  - *Wisconsin is a one party consent state.*
- Defendant's criminal record
- Witness list
  - *Doesn't apply to rebuttal or impeachment witnesses*
- Written / recorded statements of witness on list
- Witness' criminal record
- Any physical evidence the D/A intends to introduce
- Any exculpatory evidence

Reciprocal Discovery Wis. Stat. § 971.23(2m)

Defense Must Disclose:

- List of all witnesses
  - *Does not apply to rebuttal or impeachment*
- Written / recorded statements of witnesses on list
- Criminal record of a witness if known to the defense attorney
  - *Does not apply to defendant*
- Physical evidence the defense intends to offer at trial

Experts

§§ 971.23(1)(e) and 971.23(2m)(am) require either party to turn over:

"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."

Ch. 907 governs expert testimony generally

**Consider challenging the admissibility of expert testimony under *Daubert* v. *Merril Dow Pharm., Inc.,* 509 U.S. 579, 592 (1993).

Courts should consider (1) "whether it can be (and has been) tested" (2) "whether the theory or technique has been subjected to peer review and publication" (3) "the known or potential rate of error" and (4) the degree of acceptance within the relevant scientific community.

Witness Statement / Investigator Reports

Ordinarily no requirement to disclose notes of interviews or investigator reports:

State v. Hereford, 195 Wis.2d 1054, 537 N.W.2d 62 (Ct. App. 1995), the court ruled that under former section 971.24, statements required to be produced must be "written or phonographically recorded." Therefore, the statute did not apply to notes of defense counsel of interviews with witnesses or to lengthy and detailed reports by a defense investigator summarizing what witnesses told him in pretrial interviews. *Id.* at 1075. This holding is consistent with a prior Supreme Court ruling in *Pohl v. State*, 96 Wis.2d 290, 310-311, 291 N.W.2d 554 (1980).

Investigator Notes / Reports

They can become discoverable if:

- the investigator reads back his or her notes to the witness and has the witness acknowledge they are accurate
- the investigator has the witness sign the notes
- the investigator takes a written or recorded statement from the witness

Goldberg v. United States, 425 U.S. 94, 98, 96 S. Ct. 1338 (1976)

Or:

If defense counsel examines a witness at trial on direct or cross-examination about a statement made to a defense investigator, the statement becomes discoverable under section 906.13, and the investigative report containing the statement must be turned over to the prosecutor upon request

Hereford, *Id*. at1076-77.

Testing

§ 971.23(5) – Scientific Testing

"On motion of a party subject to s. 971.31 (5), the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes."

§ 165.79 - You may also move the Court for an order requiring the crime lab to test evidence

"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."

Testing

§ 971.23(5c) prevents the Court from ordering psychiatric testing of victims or witnesses in sexually motivated offenses

But *See*:

Defendant is entitled to a pretrial psychological examination of the victim when State gives notice that it intends to introduce evidence generated by experts hired specifically for purpose of examining victim and supplying testimony at trial. State v. Maday, 179 Wis. 2d 346, 357-58, 507 N.W.2d 365 (Ct. App. 1993).

DNA Evidence

§ 971.23(9)(b) requires the proponent of evidence provide 45 days notice

Notwithstanding sub. (1) (e) or (2m) (am), if either party intends to submit deoxyribonucleic acid profile evidence at a trial to prove or disprove the identity of a person, the party seeking to introduce the evidence shall notify the other party of the intent to introduce the evidence in writing by mail at least 45 days before the date set for trial; and shall provide the other party, within 15 days of request, the material identified under sub. (1) (e) or (2m) (am), whichever is appropriate, that relates to the evidence.

§ 971.23(9)(c) allows the court to exclude DNA evidence as a sanction for failure to comply

Waiver / extension / continuance also available remedies

Notice of Alibi

§ 971.23(8) requires the defense to give 30 days notice of an alibi defense

- Must provide notice of place
- Must provide names/addresses of alibi witnesses if known

(a) If the defendant intends to rely upon an alibi as a defense, the defendant shall give notice to the district attorney at the arraignment or at least 30 days before trial stating particularly the place where the defendant claims to have been when the crime is alleged to have been committed together with the names and addresses of witnesses to the alibi, if known. If at the close of the state's case the defendant withdraws the alibi or if at the close of the defendant's case the defendant does not call some or any of the alibi witnesses, the state shall not comment on the defendant's withdrawal or on the failure to call some or any of the alibi witnesses. The state shall not call any alibi witnesses not called by the defendant for the purpose of impeaching the defendant's credibility with regard to the alibi notice. Nothing in this section may prohibit the state from calling said alibi witnesses for any other purpose.

State must respond within 20 days listing any rebuttal witnesses

Sanction for not providing notice is exclusion of alibi evidence

Protective Order / In Camera Review

§ 971.23(6) allows either party to apply for a protective order

"Upon motion of a party, the court may at any time order that discovery, inspection or the listing of witnesses required under this section be denied, restricted or deferred, or make other appropriate orders."

Also allows for depositions in limited circumstances

"If the district attorney or defense counsel certifies that to list a witness may subject the witness or others to physical or economic harm or coercion, the court may order that the deposition of the witness be taken pursuant to s. 967.04 (2) to (6). The name of the witness need not be divulged prior to the taking of such deposition. If the witness becomes unavailable or changes his or her testimony, the deposition shall be admissible at trial as substantive evidence."

§ 971.23(6m) allows an *in camera* inspection to redact materials

"Either party may move for an in camera inspection by the court of any document required to be disclosed under sub. (1) or (2m) for the purpose of masking or deleting any material which is not relevant to the case being tried. The court shall mask or delete any irrelevant material."

Shiffra / Green Motion

The defense may move for an *in camera* inspection of protected healthcare / counseling records. The defense must make a preliminary showing that "the sought-after evidence is material to his or her defense."

If the victim/witness or record custodian refuses to release the records, the remedy is exclusion of his/her testimony at trial.

Shiffra/Green doctrine still valid law, but in flux – *See State v. Lynch* (2016).


This is my
discovery request.
I want the defendant's
entire "naughty" file.
stus.com

Misc. Provisions

§ 971.23(7) – Continuing duty to disclose

§ 971.23(6c) – No right to compel interview of victim

§ 971.23(10) – SPD responsible for fees for indigent defendants

§ 971.23(11) – Special considerations for child pornography

"shall remain in the possession, custody, and control of a law enforcement agency or a court but shall be made reasonably available to the defense."

Exception if defense meets burden of proving material has not been made reasonably available.

Sanctions

§ 971.23(7m) allows for exclusion or an instruction

(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).

§ 971.23(3) – No comment may be made when a party fails to call a witness on the witness list

State's Duty to Disclose

Brady v. Maryland, 373 U.S. 83 (1963) requires the State to disclose exculpatory evidence

Constitutionally required by the Due Process Clause

Kyles v. Whitley, 514 U.S. 419 created a duty of the individual prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf."

Three Types of *Brady* Violation

(1) Undisclosed evidence shows that the State's case included perjured testimony and the State knew or should have known

"fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97 (1967).

(2) The Defense makes a specific request for evidence

"[I]t is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.*

(3) General Request / No Request

"In the general or no request situation, which the court said are to be treated the same, the defendant has been denied due process only if the undisclosed evidence creates a reasonable doubt that did not otherwise exist." *State v. Ruiz*, 118 Wis.2d 177 (1984).

"Ve vill soon find verr you keep
ze confidential information . . ."

Discovery Motion and Demand

- File at onset of every case
- Be as inclusive and specific as possible
- Supplement your request as needed
- Think outside the box

Destruction of Evidence

Due process violation when evidence is destroyed that is either:

Clearly exculpatory

OR

Potentially exculpatory and the State acted in bad faith

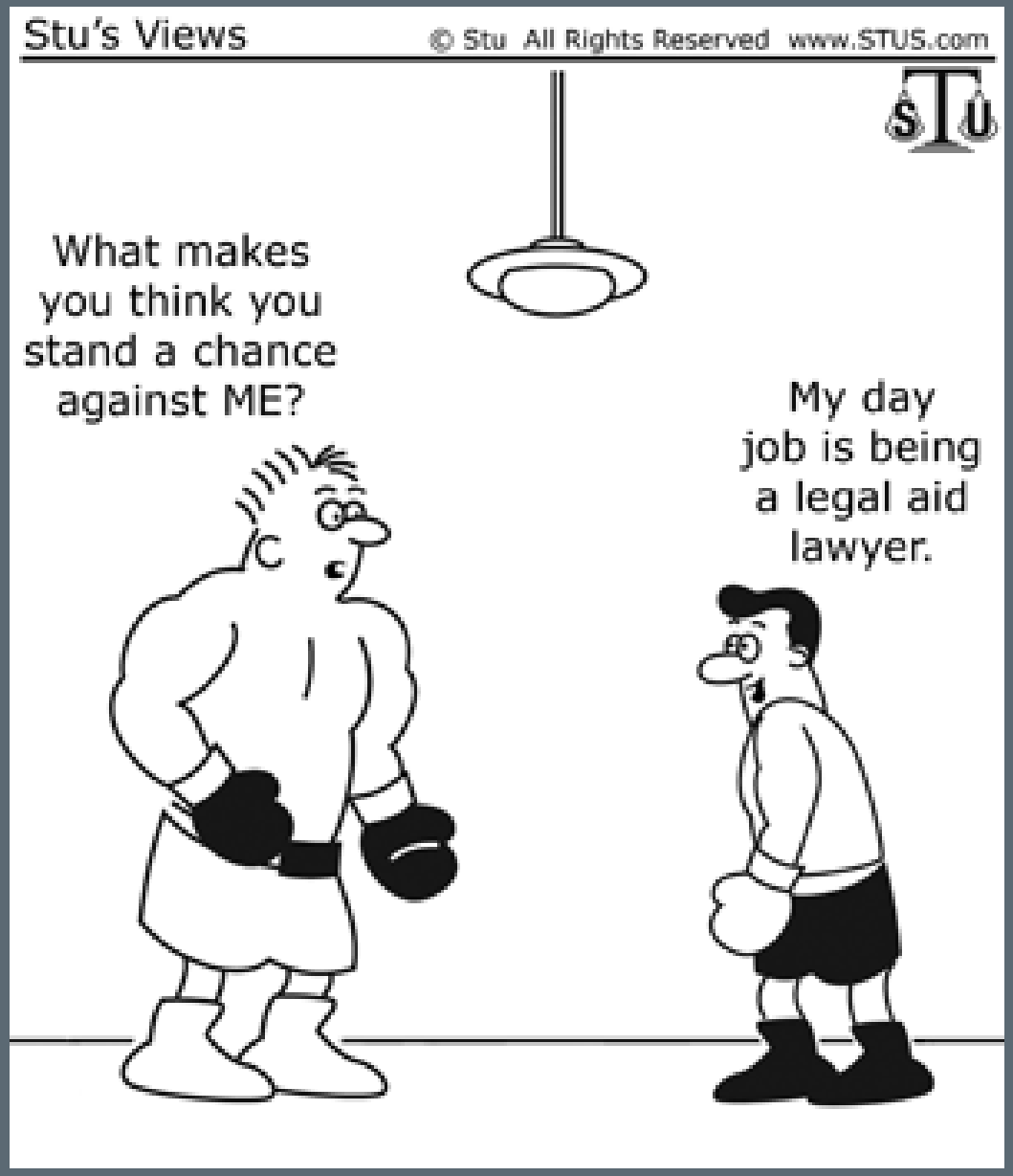
State v. Huggett, 324 Wis.2d 786, 793 (Ct. App. 2010); *State v. Greenwold*, 189 Wis.2d 59, 67-68 (Ct. App. 1994); *Arizona v. Youngblood*, 488 U.S. 81 (1988).

Dismissal can be an appropriate sanction – *See Huggett*.
Can also ask for suppression and/or a spoliation instruction.

Other Sources of Information

- Records
  - Open records request – Ch. 19
  - Release for confidential records
  - Juvenile Court records - § 938.396
  - Have client request, i.e. insurance, cell phone, etc..
- Subpoena Duces Tecum
- Investigation
- Electronic / Social Media
  - Ethical considerations – can you “friend”?
  - Also helpful for *voir dire*

Questions?


Stu's Views
© Stu All Rights Reserved www.STUS.com
What makes you think you stand a chance against ME?
My day job is being a legal aid lawyer.