Discovery and Related Statutes

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Constitutional Discovery

- The State must turn over evidence favorable to an accused 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). Favorable to the accused means exculpatory or impeachment evidence.
- Evidence qualifies as "material" under *Brady* when there is any reasonable likelihood it could affect the judgment of the jury. Wearry v. Cain, 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016)
- The test for a constitutional violation is whether the information at issue is of such significance that its nondisclosure "undermines confidence in the outcome of the trial." Whitley, 514 U.S. at 434

Constitutional Discovery

- Should the materiality standard be applied pretrial?
- Federal DOJ says yes! The Federal DOJ has a policy to be more expansive than Brady but will withhold evidence that does not meet the brady materiality standard when they feel like it.
- This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust . . . . [S]trictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *Strickler v. Greene 527 U.S. 263 (1999).*
- During the oral arguments in *Smith v. Cain 132 S. Ct. 627 (2012)* Five Justices, individually expressed the view that Brady requires a prosecutor to disclose pretrial favorable evidence, regardless of materiality.

Constitutional Discovery

- Evidence favorable to the accused includes impeachment evidence. I.e. credibility of witnesses, the criminal record of the State's witnesses, evidence of bias, etc. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481 (1985)
- The State is obligated to turn over material favorable evidence even if no request has been made. United States v. Agurs, 427 U.S. 97, 112–113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)
- The State, "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Or persons and agencies working on behalf of the government. Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995)

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**:

Upon demand

- Always file a discovery demand. Has to be served on the DA (just efiled these days)
- When to do that?
  - Felony – After the information has been filed:
    - 971.31(5)(b) In felony actions, …motions under s. 971.23 … shall not be made at a preliminary examination and not until an information has been filed.
    - 971.30(1) ``Motion'' means an application for an order. But see:
    - State v. Schaefer, 2008 WI 25, ¶ 46, 308 Wis. 2d 279, 303–04, 746 N.W.2d 457, 470
  - Misdemeanor: After the initial appearance:
    - 971.31(5)(a)Motions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action …
- Also applies to State.

within a reasonable time before trial

- We hold that in order for evidence to be disclosed "within a reasonable time before trial" for purposes of § 971.23, it must be disclosed within a sufficient time for its effective use. State v. Harris, 2004 WI 64, ¶ 37, 272 Wis. 2d 80, 114, 680 N.W.2d 737, 755
- A court scheduling order may create what a reasonable time before trial is:

  [scheduling orders] established a "reasonable time before trial" for the parties to list their witnesses. State v. Prieto, 2016 WI App 15, ¶ 12, 366 Wis. 2d 794, 800, 876 N.W.2d 154, 157
- Under prior law, the Wisconsin Supreme Court approved the time period of fifteen to thirty days before trial as realistic for discovery of witness lists. The court acknowledged that in most criminal cases, "serious preparation is not commenced until shortly before trial." State v. Irby, 60 Wis.2d 311, 319-20, 210 N.W.2d 755(1973).

if it is within the possession, custody or control of the state

- The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence he should have discovered it. Wold v. State, 57 Wis. 2d 344, 349–50, 204 N.W.2d 482, 487 (1973)
- The prosecutor's duty to obtain information from investigative agencies is not, however, limitless. For example, due diligence does not require that the prosecutor "consult every law enforcement officer who conceivably could have information respecting a case." This limitation is consistent with the ABA Standards and in keeping with the principles in Jones and Wold. The State is charged with knowledge of material and information in the possession or control of others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecutor's office. State v. DeLao, 2002 WI 49, ¶ 24, 252 Wis. 2d 289, 303, 643 N.W.2d 480, 487

if it is within the possession, custody or control of the state

- 1) have participated in the investigation or evaluation of the case and
- 2) a) regularly report to the prosecutor's office[i.e. any L.E. agency in the county] or

  b) with reference to the particular case have reported to the prosecutor's office (DHHS, school district, etc.)

971.23(1) – DA must disclose:

- (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 [John Doe] 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.

plans to use

- Objective standard not subjective
- i.e. is this information that "a reasonable prosecutor would have planned to use" in the course of trial. State v. DeLao, 2002 WI 49, ¶ 33, 252 Wis. 2d 289, 306, 643 N.W.2d 480, 488

971.23(1) – DA must disclose:

- (bm) Evidence obtained in the manner described under s. 968.31 (2) (b)[electronic intercept], if the district attorney intends to use the evidence at trial.
- (c) A copy of the defendant's criminal record. [906.09]
- (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.**

A list of all witnesses

- The pretrial discovery is a device to speed up trials, to make them more fair and to eliminate some of the sporting features of the old-fashioned criminal trial in the search for justice. This being so, counsel cannot use the discovery to harass or to place the opposite party under an unreasonable burden of preparation. We think the trial court should have conducted a hearing to discover which of the 97 witnesses the district attorney in fact and in good faith intended to call. Irby v. State, 60 Wis. 2d 311, 320–21, 210 N.W.2d 755, 760–61 (1973)

rebuttal witnesses

- However, as a general rule, only evidence which has been made necessary by new facts entered in the record during the defendant's case in chief, and which is responsive thereto, is admissible on plaintiff's rebuttal. Karl v. Employers Ins. of Wausau, 78 Wis. 2d 284, 254 N.W.2d 255 (1977).
- the proper analysis for determining whether evidence is "bona fide rebuttal evidence" is not whether the evidence could have been admitted in the State's case-in-chief, but rather whether the evidence became necessary and appropriate upon presentation of the defense's case State v. Novy, 2013 WI 23, ¶ 40, 346 Wis. 2d 289, 309, 827 N.W.2d 610, 619–20
- State is not "barred from putting on legitimate rebuttal evidence simply because it correctly anticipated the defense." Konkol, 256 Wis.2d 725, ¶ 16, 649 N.W.2d 300. State v. Hatcher, 2016 WI App 75, ¶ 34, 371 Wis. 2d 758, 886 N.W.2d 592, review denied, 2017 WI 8, ¶ 34, 374 Wis. 2d 156, 895 N.W.2d 841
- CAUTION: State v. Novy allowed in physical evidence (finger print cards) for the purpose of rebuttal that had been excluded for a discovery violation.

those called for impeachment only.

- The witness's capacity (strong or weak) to perceive, to remember, or to narrate events accurately.
- Whether the witness possesses a bias or self-interest that might consciously or subconsciously color his or her testimony.[906.16]
- Contradictory testimony by other witnesses that call into question the credibility of the subject witness.
- The consistency or inconsistency of the witness's testimony with his or her prior statements.
- The witness's character for truthfulness, including any prior convictions for crimes.

971.23(1) – DA must disclose:

- (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.

any reports or statements of experts

- All witnesses must be either lay witnesses or experts (no longer any skilled lay observers).
- Lay testimony is the product of ‘reasoning familiar in everyday life’ while expert testimony ‘results from a process of reasoning which can be mastered only by specialists in the field.’ Fed. R. Evid. 701 advisory committee note (2000)
- If an officer testifies that based on his “training and experience” he is an expert witness.

971.23(1) – DA must disclose:

- (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.**

exculpatory evidence

- Exculpatory evidence has been defined as evidence tending to negate the defendant's guilt. See Brady v. Maryland, 373 U.S. 83 (1963); State v. Stanislawski, 62 Wis.2d 730, 216 N.W.2d 8, (1974); and Nelson v. State, 59 Wis.2d 474, 208 N.W.2d 410 (1973). Further, *Giglio v. United States, 405 U.S.150 (1972)* defines exculpatory evidence as any evidence which would affect the weight and credibility of any evidence used against a defendant, including anything that affects the credibility of a state's witness.
- Evidence used to "discredit the caliber of the investigation or the decision to charge the defendant" Kyles v. Whitley, 514 U.S. 419, 446, 115 S. Ct. 1555, 1572, 131 L. Ed. 2d 490 (1995)
- Whether or not the evidence is ultimately admissible doesn't affect whether it is exculpatory State v. Harris, 2003 WI App 144, ¶ 35, 266 Wis. 2d 200, 217, 667 N.W.2d 813, 822, aff'd, 2004 WI 64, ¶ 35, 272 Wis. 2d 80, 680 N.W.2d 737 [Rape shield, etc]

971.23(2m) - What a defendant must disclose to the district attorney.

- Upon demand, the defendant or his or her attorney shall, within a reasonable time before trial, disclose to the district attorney and permit the district 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 defendant:

The defense must disclose:

- (a) A list of all *witnesses, other than the defendant*, whom the defendant intends to call at trial, together with their addresses. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.
- (am) Any relevant written or recorded statements of a witness named on a list under par. (a),

including 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 including the results of any physical or mental examination, scientific test, experiment or comparison that the defendant intends to offer in evidence at trial.

The defense must disclose:

- (b) The criminal record of a defense witness, other than the defendant, which is known to the defense attorney.
- *(c)* Any physical evidence that the defendant intends to offer in evidence at the trial.

written or recorded statements

- “It is our belief that there must be some indicia of the reliability of the statement (including its accuracy, completeness, and authenticity) as a requirement to ordering the production of the statement, pursuant to sec. 971.24(1)” Pohl v. State, 96 Wis. 2d 290, 310–11, 291 N.W.2d 554, 563–64 (1980)
- Written or recorded statement:
  - 1) a written statement made by said witness and signed or otherwise adopted or approved by him (i.e. investigator reads back statement to witness and the witness acknowledges it is accurate)
  - 2) a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously (i.e. recording, transcript, etc) Goldberg v. United States, 425 U.S. 94 (1976)
- Not notes or reports (even detailed ones) Pohl v. State, 96 Wis. 2d 290, 310–11, 291 N.W.2d 554, 563–64 (1980)

Statements at trial

- **906.12 Writing used to refresh memory.** If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. … If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.
- **906.13(1) Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination.
- 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. State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995)

Continuing duty to disclose.

- **971.23(7) - Continuing duty to disclose.** If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production under this section, the party shall promptly notify the other party of the existence of the additional material or names.

971.23(7m) Sanctions for failure to comply.

- (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).

Shall Exclude and Good Cause

- If no good cause shown, the only remedy is exclusion of the witness/evidence. State v. Gribble, 2001 WI App 227, ¶ 34, 248 Wis. 2d 409, 440, 636 N.W.2d 488, 503
- The burden [is] on the district attorney's office to show that it had good cause for [a] violation, not on [the defendant] to show that she was prejudiced. State v. Prieto, 2016 WI App 15, ¶ 11, 366 Wis. 2d 794, 800, 876 N.W.2d 154, 157
- In *Martinez* the court refused to hold that "negligence or lack of bad faith constitutes 'good cause' as a matter of law." Martinez 166 Wis.2d at 253-55, 479 N.W.2d 224.

Shall Exclude and Good Cause

- We understand that many district attorneys' offices are short-staffed and the workload is heavy. Nevertheless, accuseds whose lives and liberty are at stake have statutory and constitutional rights to information in the district attorney's possession to enable them to prepare adequately for trial. State v. Harris, 2008 WI 15, ¶ 36, 307 Wis. 2d 555, 575, 745 N.W.2d 397, 406–07
- Where good cause can be demonstrated, the remedy of a recess, an adjournment, or a continuance is preferred over the exclusion of evidence. Wild, 146 Wis. 2d at 28–30, 429 N.W.2d at 109. See also Wis. St. § 971.23(7m)(a) and Irby v. State, 60 Wis. 2d 311, 322, 210 N.W.2d 755, 761 (1973).

What if evidence is excluded and the state moves to dismiss?

- The trial court has the discretion to order a dismissal without prejudice at the prosecutor's request if it is in the public interest to do so... State v. Miller, 2004 WI App 117, ¶ 16, 274 Wis. 2d 471, 484, 683 N.W.2d 485, 492
- "the [circuit] courts of this state do not possess the power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of a constitutional right to a speedy trial." *Braunsdorf,* 98 Wis.2d at 586, 297 N.W.2d 808. State v. Britton, 2016 WI App 75, ¶ 13, 371 Wis. 2d 759, 886 N.W.2d 592
- Offer to have a court trial in exchange for the state moving to dismiss once jeopardy has attached.

Defendant's Constitutional Right to Present a Defense

- Every state is generally free to exercise its sovereign prerogative as to the evidence it will admit in its courts. The federal constitution, however, imposes a limited restraint upon state evidentiary rules where exculpatory evidence is excluded by arbitrary state rules. The genesis of this restriction is found in the defendant's sixth amendment right to compulsory process for obtaining witnesses in his favor. The Constitution imposes this limitation because the state may not deny an accused in a criminal trial the right to a fair opportunity to defend against the state's accusations. However, the right of a defendant to present relevant and competent evidence is not absolute and may bow to accommodate other legitimate interests in the criminal trial process, although the competing state interests must be substantial to overcome the claims of the defendant. Most importantly, where constitutional rights directly affecting the ascertainment of guilt are implicated, a state evidentiary rule may not be applied mechanistically to defeat the ends of justice. Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982)

Defendant's Constitutional Right to Present a Defense

- Supreme Court "cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."
- It may well be true that alternative sanctions are adequate and appropriate in most cases, Taylor v. Illinois, 484 U.S. 400, 413, 108 S. Ct. 646, 655, 98 L. Ed. 2d 798 (1988)
- It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Defendant’s Constitutional Right to Present a Defense

- A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.
- Applicable to WI: State v. McClaren, 2009 WI 69, 318 Wis. 2d 739, 767 N.W.2d 550

971.23(8) **Notice of alibi.**

- "The word, 'alibi,' is merely a short-hand method of describing a defense based on the fact that the accused was elsewhere at the time the alleged incident took place. …since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Harp, 2005 WI App 250, ¶ 15-16, 288 Wis. 2d 441, 453, 707 N.W.2d 304, 310
- A defendant who simply claims that he was not present at the scene of the crime when the crime occurred does not present an alibi defense within the meaning of the notice-of-alibi statute. See State v. Starr, 60 Wis.2d 763, 764, 211 N.W.2d 510 (1973). If the State gets into the defendant's alibi on cross, there is no violation of the notice statute State v. Harp, 2005 WI App 250, ¶ 21, 288 Wis. 2d 441, 457, 707 N.W.2d 304, 312
- (a) … 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. …

971.23(8) **Notice of alibi.**

- (d) Within 20 days after receipt of the notice of alibi, or such other time as the court orders, the district attorney shall furnish the defendant notice in writing of the names and addresses, if known, of any witnesses whom the state proposes to offer in rebuttal to discredit the defendant's alibi. In default of such notice, no rebuttal evidence on the alibi issue shall be received unless the court, for cause, orders otherwise.
- Under sub (e) the alibi witnesses need to be identified on both the standard witness list (if they are being used for purposes other than alibi) and on the alibi witness list.
- Under notice of alibi statute, the name of State's witness, who testified in State's case-in-chief and identified defendant as being at scene of crime, should have been provided to defense counsel in list of alibi rebuttal witnesses; Tucker v. State, 84 Wis. 2d 630, 267 N.W.2d 630 (1978)
- State's failure to comply? 971.23(7m)

Constitutional right of the defendant to testify that he was in another location when the crime occurred.

- 7th circuit says a defendant has the right to testify that he was in another location when the crime occurred. Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982)
- Wisconsin says a defendant does not have that right. State v. Burroughs, 117 Wis. 2d 293, 344 N.W.2d 149 (1984)

Miscellaneous 971.23 provisions

- **(3) Comment or instruction on failure to call witness.** No comment or instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such comment or instruction is the fact the name of the witness appears upon a list furnished pursuant to this section.
- **(6c) Interviews of victims by defense.** The defendant may not compel a victim of a crime to submit to a pretrial interview or deposition. Depositions under 967.04 are allowed.
- **(6m) In camera proceedings.** Either party may move for an in camera inspection 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.
- **(7) Continuing duty to disclose. …**prior to or during trial, … shall promptly notify
- **(10) Payment of copying costs in cases involving indigent defendants.** Maximum fee for discovery set by Admin Code PD 8 - applies to information that a DA is required to turn over due to discovery laws (you can argue that "discoverable material" obtained through open records and not turned over by the DA should nonetheless be subject to PD rates).

967.04 Depositions in criminal proceedings.

- Allowed if:
- 1) A prospective witness may be unable to attend or prevented from attending a criminal trial or hearing,
- 2) the prospective witness's testimony is material and,
- 3) it is necessary to take the prospective witness's deposition in order to prevent a failure of justice
- The name of the witness need not be divulged before the deposition under 971.23(6). (likely unconstitutional)

971.23(6) - 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.

DNA Evidence

- 971.23(9)(b) requires the proponent of the evidence to provide 45 days notice.
- The court may waive the 45 day notice requirement …upon stipulation of the parties, or for good cause, if the court finds that no party will be prejudiced by the waiver or extension. The court may in appropriate cases grant the opposing party a recess or continuance.

Revocation Hearings 304.06(3d) and 973.10(2g)

- Require a district attorney to disclose the existence of any videotaped oral statements of a child under section 908.08 to the defense upon demand before a revocation hearing and to arrange for the defense to view the video.

NGI Pleas

- Section 905.04(c) provides that the doctor patient privilege does not apply when the patient's mental condition is an element of a claim or defense. Thus, a plea of NGI (insanity) waives the confidentiality of relevant treatment records. State v. Taylor, 142 Wis.2d 36, 41, 417 N.W.2d 192 (Ct. App. 1987). Also, after entry of an NGI plea, the State may obtain reports upon which an expert relies in reaching an opinion about the defendant's mental responsibility. State v. Jacobsen, 164 Wis.2d 685, 686-87, 476 N.W.2d 22 (Ct. App. 1991).

What type of Discovery Demand should I file?

- Just the statutes or list everything you can think of?
- “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. 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.”
- The Supreme Court has recognized that the specificity of the defense request is relevant to an assessment of whether the prosecutor has an obligation to disclose the information. See United States v. Bagley, 473 U.S. 667, 680-83 (1985); Agurs, 427 U.S. at 103-08. If the defense fails to request information or if the request is general, the prosecutor is expected to produce evidence when the exculpatory nature of such evidence is “obvious.” “[W]hen the prosecution receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” Bagley, 473 U.S. at 682 (quoting Agurs, 427 U.S. at 106).
- Perhaps use to require state to investigate witnesses for you?

What type of Discovery Demand should I file?

- Therefore, the prosecutor had no duty of his own accord, in response to a general discovery motion, to seek Henderson's arrest record from these sources. Jones v. State, 69 Wis. 2d 337, 349, 230 N.W.2d 677, 685 (1975)
- Youngblood / Greenwold destruction of evidence standard: A defendant's due process rights are violated if police fail to preserve evidence that is apparently exculpatory or act in bad faith by failing to preserve evidence which is potentially exculpatory. State v. Greenwold, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994)
- Dismissal can be an appropriate sanction. State v. Huggett, 324 Wis.2d 786, 793 (Ct. App. 2010).

Other legal tools to use for investigations

- Subpoena Duces Tecum
- Open Records
- Juvenile Records
- School Records
- Confidential Records
- Order to have witness undergo testing
- Crime Lab Testing
- Outlaw Motion
- Daubert Motion
- Other Evidentiary Hearings

Subpoena Duces Tecum

- Wis. Stat. 885.01-885.03 “require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending ”
- Must subpoena to a court date
- 757.35 – Defense attorneys do not have the authority to issue subpoenas but clerks can sign blank subpoenas for attorneys. State v. Schaefer, 2008 WI 25

Subpoena Duces Tecum

- Employment Records
- Business Records
- Social Media Records
- Cellphone Records
- Bank Records

Open records

- Wis. Stat. 19.31-19.39
- Read DOJ Open records Compliance Guide
- Can use on government agencies to get records held by the government.
- records custodian must balance the strong public interest in disclosure of the record against the public interest favoring nondisclosure.
- Can bring Mandamus action to require disclosure

Open Records

- Squad Video
- 911 Calls
- Dispatch Audio / CAD
- Policy Manuals
- Disciplinary Files
- Witness’s Probation Records

Juvenile Records

- 938.396(1j) [Law Enforcement Records] and 938.396(2g)(d) [Court Records]
- 938.396(1j) - If the court determines that the information sought is for good cause and that it cannot be obtained with reasonable effort from other sources, it shall then determine whether the petitioner's need for the information outweighs society's interest in protecting its confidentiality

School Records

- 118.125(2)(f), “Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness’s credibility or competency.”
- Issue a subpoena duces tecum to the school, inform the court what is going on by filing a letter, provide court with a memo (under seal).

Confidential Records

- A trial court may order an in camera inspection of confidential records relating to a complaining witness, the defendant must make a preliminary showing that the records sought are material to his or her defense (i.e. reasonable likelihood that the records will be necessary to a determination of guilt or innocence). State v. Navarro, 2001 WI App 225, ¶ 7, 248 Wis. 2d 396, 401, 636 N.W.2d 481, 484. Comes into play when confidentiality interests conflict with a defendant's due process right to present a complete defense (i.e. treatment records, personnel files, social service records, names of witnesses, etc)(can be in possession of third party or State). Pennsylvania v. Ritchie, 480 U.S. 39, 56-61, 107 S. Ct. 989 (1987); State v. Shiffra, 175 Wis.2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993); State v. Migliorino, 170 Wis.2d 576, 585-596, 489; N.W.2d 678 (Ct. App. 1992) ; State v. Behnke 203 Wis.2d 43, 55-57, 553 N.W.2d 265 (Ct. App. 1996); State v. Anderson, 2009 WI App 95, ¶ 13, 320 Wis. 2d 482, 769 N.W.2d 877;
- If the defense meets this burden, the judge will then request, but cannot compel, production of the records. The witness may consent to the request. When consent is given, the judge scrutinizes the records to determine whether disclosure is warranted (test is noncumulative relevant info necessary to determination of guilt or innocence). When consent is not given, the remedy is exclusion of the witnesses records.

Shiffra / Green Motions

- Healthcare / counseling records are privileged under Wis. Stat. 905.04.
- WI DOJ wants to get rid of Shiffra / Green – see State v. Lynch and proposed Marsy's Law. (Victim has a right to, "refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.")

971.23(5c) Psychiatric testing of victims or witnesses.

- In a prosecution of s. 940.225, 948.02, or 948.025 or of any other crime if the court determines that the underlying conduct was sexually motivated, as defined in s. 980.01 (5), the court may not order any witness or victim, as a condition of allowing testimony, to submit to a psychiatric or psychological examination to assess his or her credibility.

When can a court order a witness to submit to an examination?

- Where the mental capacity of the witness is at issue, the trial court may in the exercise of its discretion, order a psychiatric examination. State v. Miller, 35 Wis.2d 454, 471, 151 N.W.2d 157, 165 (1967). The burden is a "strong and compelling reason." Id.
- The four basic capacities necessary for providing testimony: (1) the capacity to be sincere (truthful); (2) the capacity to perceive accurately; (3) the capacity to remember accurately; and (4) the capacity to narrate (communicate) those memories. *Blinka, Wis. Evidence § 601.1 Qualifications of witnesses*
- Usually a Court will not bar a witness from testifying but will rely on impeachment of the witness by the opponent.

Review of credibility evidence

- Haseltine rule: No witness, lay or expert, is permitted to express an opinion about whether another mentally and physically competent witness is telling the truth about some fact or an event.
- Jensen / Richard A.P. evidence: Used by the prosecutor (Jensen) to provide an explanation for some act of a sexual assault victim which, on the surface, appears to be odd or inconsistent with what a juror believes the reaction of a sexual assault victim should be. Used by defense counsel(Richard A.P.) to explain that the defendant does not exhibit character traits consistent with a sexual disorder such as pedophilia.
- The expert can testify to 1) the behavior of the particular victim 2) the behavior typically observed in that class of victims 3) its her opinion that the particular victim's behavior is consistent with that of the class.
- Cannot testify that the witness is being truthful about whether the crime occurred (Haseltine)

Maday Rule: State v. Maday, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993)

- The use of expert psychological testimony by the State triggers the right of the defense to present contradictory expert testimony and, in extreme cases, creates a right to have the complainant examined by defense experts.
- The defense right to examine the victim occurs only where the prosecutor offers an expert who testifies that (1) he personally examined the victim and that (2) the victim's behavior is “consistent” with the behavior traits demonstrated by abuse victims generally. Pure exposition, it seems, did not trigger the right to examine the victim.
- State can work around the defense’s right to an examine by having a separate expert provide the Jensen testimony.
- Sanction for victim refusing to be examined is to prevent State’s expert from testifying. State v. Maday 179 W2d 3
- May not be allowed in sex assault cases because of 971.23(5c) but should be allowed otherwise (DV, etc)

Scientific Testing / Crime Lab Testing

- 165.79 - 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.
- Arguably can be done ex parte and under seal.
- 971.23(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.

Outlaw Motion – How to learn the identity of a CI.

- First, the defendant must make an initial showing that the "informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence...." Wis. Stat. § 905.10(3)(b). Next, if the defendant satisfies this step and the State continues to invoke the privilege, the circuit court must conduct an in camera review to determine if the informer can in fact provide such testimony. 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.

Daubert Motion

- Request that the court hold a pretrial ruling to determine, under 901.04(1) whether the expert meets the 907.02 standard.
- 1) qualified as an expert by knowledge, skill, experience, training, or education
- 2)testimony is based upon sufficient facts or data
- 3) the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.
- Prelims / Motion Hearings