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IN THE
COURT OF APPEALS OF INDIANA

Frank E. Minges, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 4, 2022

Court of Appeals Case No. 21A-CR-216

Appeal from the Dearborn Superior Court

The Honorable Jonathan N. Cleary, Judge

Trial Court Cause No. 15D01-2010-CM-754

May, Judge.

[1] Frank E. Minges, III, appeals the trial court's denial of his motion to compel discovery of a complete and accurate copy of the police report that outlined the events resulting in Minges being charged with two counts of misdemeanor

operating while intoxicated. He raises a number of issues on appeal, which we consolidate and restate as one:

> Did the trial court properly deny Minges' motion to compel discovery of a complete and accurate copy of the arresting officer's police report because, pursuant to *Keaton v. Circuit Court of Rush County*, 475 N.E.2d 1146 (Ind. 1985), trial courts lack authority to order production of verbatim copies of police reports alleging criminal conduct when the prosecutor timely asserts the report is protected by privilege as the work product of the prosecuting attorney?

We affirm.

Facts and Procedural History

[2] On October 13, 2020, police conducted a traffic stop of a vehicle driven by Minges. As a result of the stop, on October 14, 2020, the Dearborn County Prosecutor's Office (hereinafter "Prosecutor") charged Minges with Class A misdemeanor operating while intoxicated[1] and Class C misdemeanor operating while intoxicated.[2] That same day, Minges' counsel (hereinafter "Defense Counsel") entered an appearance and filed a motion for discovery that requested the Prosecutor turn over twenty-three different forms of evidence that

[1] Ind. Code § 9-30-5-2(b).

[2] Ind. Code § 9-30-5-2(a).

the Prosecutor might have in the case. Amongst the requested documents was a request for police reports:

> 5. Any and all reports known to the State made in writing by any policeman or investigating officer which are relevant to the charge against Defendant. Also, any such reports which the Prosecuting Attorney may acquire or learn of in the future at any time prior to trial.

(Appellant's App. Vol. 2 at 19.)

[3] On October 26, 2020, the Prosecutor filed its Discovery Answer. The Prosecutor listed its witnesses therein, and thereto the Prosecutor attached copies of the following documents: charging information and probable cause affidavit, blood search warrant, toxicology request form, receipt for license form, defendant's driver's license, and law enforcement drug screen collections for Indiana Department of Toxicology. The Discovery Answer then indicated Minges' "Criminal History" and the "Dearborn County Sheriff's Department Case Report Narrative" were "available to review upon appointment[.]" (*Id*. at 37.)

[4] On November 22, 2020, Defense Counsel emailed the Prosecutor and requested a copy of the police report by email. On November 23, 2020, the Prosecutor declined and indicated that, pursuant to its policy, Defense Counsel could view the police report in the Prosecutor's Office or, if Defense Counsel agreed to a

non-negotiable protective order,[3] the Prosecutor would give Defense Counsel a copy. That same day, Minges filed a motion to compel discovery that requested the trial court order the Prosecutor "to produce a complete and accurate copy" of the police report. (*Id*. at 59.) The trial court set Minges' motion to compel for a hearing.

[5] At the hearing, Defense Counsel acknowledged he had reviewed the police report at the Prosecutor's Office, but he indicated he was not permitted to take a copy of that report with him because he would not sign the protective order. Defense Counsel asserted he did not feel comfortable signing the protective order, which required him to return the document after the case, because he had an ethical obligation to maintain his client file, and he argued the requirement to prepare the defense by viewing the document at the Prosecutor's Office was particularly limiting during the Covid-19 pandemic. The Prosecutor argued the trial court had no "power to order production of verbatim copies of police reports over a work product objection." (Tr. Vol. 2 at 6-7.) The trial court indicated that its hands were tied by *Keaton* unless Defense Counsel had case

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[3] A copy of this protective order was not submitted to the trial court and is not in the record before us. At the hearing on the motion to compel, the following explanation of its language was provided:

> THE COURT: And then what's the term of the protection order? Basically if the State gives it, the State wants it back at disposition of the case?
>
> [DEFENSE COUNSEL]: That, Your Honor, as well as he's not – it's not to be disseminated to anyone beyond obviously counsel, and I believe the exact terms were that the Defendant is allowed to view it, but not retain a copy.

(Tr. Vol. II at 6.) At oral argument, the State acknowledged it did not know whether that protective order restricts defense counsel's use of the police report at trial. (Oral argument video at 18:23-18:35.)

law overturning *Keaton*. Thereafter, the court denied Minges' motion in an order that included no findings of fact or conclusions of law. Over the State's objection, the trial court certified its order for interlocutory appeal. We accepted jurisdiction and, following briefing by the parties, held oral argument.[4]

Discussion and Decision

[6] Minges appeals from the trial court's denial of his motion to compel discovery of a police report. Discovery is a matter left to the "broad discretion" of the trial court. *State v. Jones*, 169 N.E.3d 397, 402 (Ind. 2021), *reh'g denied*. Accordingly, we review the trial court's denial of Minges' motion for an abuse of discretion, *see id.*, which occurs if the "decision is clearly against the logic and effect of the facts and circumstances before the court or when the trial court has misinterpreted the law." *Brown v. Katz*, 868 N.E.2d 1159, 1165 (Ind. Ct. App. 2007).

[7] Indiana's discovery rules are intended "'to allow a liberal discovery procedure' for the purpose of providing litigants 'with information essential to the litigation of all relevant issues, eliminate surprise and to promote settlement.'" *Doherty v. Purdue Props. I, LLC*, 153 N.E.3d 228, 235 (Ind. Ct. App. 2020) (quoting *Canfield v. Sandock*, 563 N.E.2d 526, 528 (Ind. 1990), *reh'g denied*), *trans. denied*.

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[4] Oral argument was held October 20, 2021, at the Indiana Statehouse. We thank counsel for their preparation and excellent arguments. https://mycourts.in.gov/arguments/default.aspx?&id=2598.

Pursuant to Trial Rule 26(A),[5] one of the discovery methods parties may use to prepare for trial is requesting the "production of documents." Generally speaking:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Trial Rule 26(B)(1). "Trial Rule 34(A) allows the defendant the opportunity not only to inspect the item but also to make a copy of it." *Beville v. State*, 71 N.E.3d 13, 18 (Ind. 2017).

[8] If a party wishes to assert a privilege and avoid divulging information during discovery, that party has "the burden to allege and prove the applicability of the privilege as to each question asked or document sought." *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 994 (Ind. 2014) (quoting *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996)). *See also* Ind. Trial Rule 26(B)(5) (party

[5] The Indiana Rules of Criminal Procedure incorporate the Rules of Trial Procedure by reference. Ind. Crim. Rule 21 ("The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings.").

claiming privilege "shall make the claim expressly and shall describe the nature of the . . . communications . . . not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege"). "Absent an articulation of specific reasons why the documents sought are privileged, the information is discoverable; otherwise, the whole discovery process is frustrated and vital information may be 'swept under the rug.'" *Brown*, 868 N.E.2d at 1167 (quoting *Airgas Mid-America, Inc. v. Long*, 812 N.E.2d 842, 845 (Ind. Ct. App. 2004)).

[9] One such privilege is the work product privilege, which is defined in Indiana Trial Rule 26(B)(3):

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

This privilege was created to ensure that lawyers can work "'with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel'" and to allow lawyers to "best serve 'the interests of clients and the cause of justice.'" *TP Orthodontics*, 15 N.E.3d at 995 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)).

[10] While Rule 26(B)(3) permits a party to obtain discovery of documents prepared in anticipation of litigation if there is a showing of "substantial need" and if obtaining the information in another way would create "undue hardship," "a party seeking discovery is never entitled to the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation." *Nat. Eng'g & Contracting Co., Inc. v. C&P Eng'g & Mfg. Co., Inc.*, 676 N.E.2d 372, 376 (Ind. Ct. App. 1997). These types of materials are called "opinion work product [and are] entitled to absolute protection from discovery." *Id*. *See also* T.R. 26(B)(3) ("the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation").

[11] A party asserting work-product privilege "must establish that the materials sought to be protected from disclosure were prepared in anticipation of litigation rather than in the normal course of business." *TP Orthodontics*, 15 N.E.3d at 995. "A document is gathered in anticipation of litigation if it can fairly be said that the document was prepared or obtained because of the prospect of litigation." *WESCO Dist., Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 713 (Ind. Ct. App. 2014), *trans. dismissed*.

[12] With this general background in mind, we turn to whether the trial court herein abused its discretion when, after the prosecutor's timely assertion of work product privilege, the trial court refused to compel production of a verbatim copy of the police report describing the circumstances surrounding Minges' arrest for operating while intoxicated.

[13] In 1985, our Indiana Supreme Court decided *Keaton v. Circuit Court of Rush County*, 475 N.E.2d 1146 (Ind. 1985). There, a prosecutor, Keaton, filed a murder charge against a defendant, Kidd. Kidd filed several discovery motions, including one that requested copies of all police reports, and Keaton objected to producing the police reports. Later, Kidd requested production of three specific police reports, and the trial court ordered Keaton to produce verbatim copies of the reports. *Id*. at 1147. Keaton appealed, claiming the trial court "exceeded its jurisdiction by ordering pretrial discovery of verbatim copies of police reports over [Keaton's] work product objection." *Id*. Our Indiana Supreme Court held "police reports . . . constitute the work product of the prosecuting attorney" and "a trial court in a criminal proceeding does not have the inherent power to order production of verbatim copies of police reports over the timely work product objection of the prosecuting attorney."[6] *Id*. at 1148.

[14] The Supreme Court identified two bases for its holding. The first was that "[p]roduction of complete police reports . . . would place an undue burden on the prosecuting attorney" because the prosecutor "would be forced to excise non-discoverable information from copies of reports it has been compelled to produce." *Id.* The second was that "use of verbatim copies of police reports by

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[6] *Keaton* also held the work-product privilege was not waived because the State was fulfilling its *Brady* obligation by allowing defense counsel to see, but not retain, a copy of a police report. *Keaton*, 475 N.E.2d at 1148 (Prosecutor "was complying with his affirmative duty to disclose exculpatory information not otherwise revealed through discovery.") (citing *Brady v. Maryland*, 373 U.S. 83 (1963) (holding "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution")).

the defense at trial is subject to abuse" because "[d]efense counsel cognizant of the theories and speculations of the investigating officers could subject the officers to misleading and unfair cross-examination." *Id.*

[15] Minges argues *Keaton*'s holdings are problematic for multiple reasons, and the State responds by reminding us we do "not have the authority to overturn Supreme Court precedent, but must adhere to the existing law." (State's Br. at 6.) While it is true that we, as an intermediate appellate court, cannot "declare invalid" any decision of our Indiana Supreme Court, *Culbertson v. State*, 929 N.E.2d 900, 906 (Ind. Ct. App. 2010) (quoting *Horn v. Hendrickson*, 824 N.E.2d 690, 694 (Ind. Ct. App. 2005)), *trans. denied*, we do have the authority to criticize existing law, *see* Appellate Rule 65(A) (Court of Appeals opinion shall be published if it "criticizes existing law"), and "it is not inappropriate for the parties or the judges of this court to ask the [supreme] court to reconsider earlier opinions." *Horn*, 824 N.E.2d at 694. Accordingly, as we agree with Minges that *Keaton*'s holding and analysis are problematic in a number of respects, we address Minges' concerns regarding *Keaton* "solely for the purpose of urging reconsideration of the particular issue." *Cont'l Ins. Co. v. Wheelabrator Techs., Inc.*, 960 N.E.2d 157, 162 (Ind. Ct. App. 2011), *reh'g, denied*, *trans. denied.*

[16] First, while the Supreme Court held that police reports are always subject to the work product protection, its two bases for the holding—burden and the risk of misleading cross-examination—are not generally considerations for a work product analysis. Instead, work product analysis generally turns on whether the document was prepared in anticipation of litigation at the direction of counsel.

See generally 23 Am. Jur. 2d Depositions and Discovery § 53 ("The work product doctrine or privilege may apply to work produced by government attorneys in anticipation of litigation, as well as to material prepared by nonlawyer staff members of a government agency at the direction of agency counsel."). Whether a discovery request is overly burdensome would generally be analyzed under Trial Rule 26(B)(1), which allows trial courts to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit." Whether the use of evidence results in a misleading cross-examination would generally be evaluated under Evidence Rule 403, which empowers trial courts to exclude relevant evidence if its probative value is substantially outweighed by the risk of "misleading the jury." Neither burden nor unfair prejudice are elements of the work product protection.

[17] Second, and relatedly, *Keaton* recognized that the doctrine of "work product protects materials prepared by agents for the attorney as well as those prepared by the attorney himself," *Keaton*, 475 N.E.2d at 1147, but the analysis seemed to conflate agents of a party with agents of an attorney. "It is not up to the client to determine whom to make an agent for the purposes of asserting the work-product privilege; the privilege extends to the work of the attorney's agents, not the client's agents." *United States v. Smith*, 502 F.3d 680, 689 (7th Cir. 2007). No doubt, the police are agents of the State, but it seems problematic to treat them categorically as agents of the prosecutor before the prosecutor is even involved in a case.

[18] Police officers perform multiple functions for our government – responding to emergency situations, care-taking functions, public education, securing public safety, investigating accidents, and investigating alleged criminal activities – not all of which relate to being agents of a prosecutor. In this way, *Keaton* provided a blanket claim of privilege[7] to police reports that was not provided, for example, to reports by investigators for insurance agencies:

> An investigation by an insurance company does not automatically require a finding that the investigation was conducted in anticipation of litigation. And the fact that the plaintiff has hired an attorney also does not mandate a finding that an investigation was undertaken in anticipation of litigation. . . . An insurance company cannot reasonably argue that the entirety of its claim file is accumulated in anticipation of litigation when it has a duty to investigate, evaluate, and make a decision regarding an insured's claim.

WESCO Distrib., 23 N.E.3d at 713. *See also Brandenburg Indus. Serv. Co. v. Ind. Dept. of State Rev.*, 26 N.E.3d 147, 155 (Ind. T.C. 2015) ("Documents assembled in the ordinary course of business, pursuant to public requirements unrelated to litigation, or for any other non-litigation purpose, however, are not work product" of the Department of State Revenue when litigation of tax refund claims was not on the horizon.).

[19] Moreover, even when only evaluating police activity related to the investigation of a crime, it is still problematic to categorically treat police officers as agents of

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[7] Our Indiana Supreme Court has elsewhere indicated that it disfavors "blanket" claims of privilege. *See Brown*, 868 N.E.2d at 1167 (citing *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996) ("courts disfavor blanket claims of privilege")).

the prosecutor. For example, "the law permits the police to pressure and cajole, conceal material facts, and actively mislead" suspects, within certain limits, as part of the evidence gathering process. *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990); *see also Kahlenbeck v. State*, 719 N.E.2d 1213, 1217 (Ind. 1999) (recognizing that police deception does not render a confession inadmissible). As attorneys, prosecutors cannot engage in that sort of conduct, and they cannot allow their agents to do so either. Ind. Professional Conduct Rule 4.1(a) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . ."); Prof. Cond. R. 5.3(b) "a lawyer having direct supervisory authority of the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer"). Because the ethical limitations on prosecutors do not carry through to police prior to a prosecutor's involvement, it would seem to follow that police officers are not always to be treated as agents of the prosecutor whenever they are investigating a crime. Similarly, prosecutors would presumably dispute that police officers are their agents in every excessive force case and every instance of an illegal search.

[20] Third, the burden of excising non-discoverable information is a burden that exists for all parties who wish to protect opinion work product from discovery when disclosing ordinary work product prepared in anticipation of litigation. However, *Keaton* gives the State advantages provided to no other party under the work product doctrine. Prosecutors received a blanket privilege, while every other party in Indiana who wishes to assert work product privilege has

"the burden to allege and prove the applicability of the privilege *as to each question asked or document sought*." *TP Orthodontics, Inc.*, 15 N.E.3d at 994 (quoting *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996)) (italics added). Every other party also has the burden to "establish that the material sought to be protected from disclosure were prepared in anticipation of litigation rather than in the normal course of business." *Id*. at 995. Taking the time to excise "opinion work product entitled to absolute protection from discovery[,]" *Nat. Eng'g & Contracting Co.*, 676 N.E.2d at 376, seems a rather small burden to place on prosecutors when viewed in light of the burden shifting *Keaton* created in prosecutors' favor.[8] Moreover, as Minges argues, police reports "are often made and investigated by police in their regular course of business and day-to-day operations" without the knowledge of the prosecuting attorney, (Appellant's Br. at 15), such that many police reports may contain little information that prosecutors would need to excise. (*See*, *e.g.*, Tr. Vol. 2 at 7-8 (prosecutor acknowledges no harm would come to the State's case by releasing an unredacted copy of the police report regarding Minges' misdemeanor OWI to defense counsel).)

[8] We also note that, in this burden-shifting respect, *Keaton* is analogous to Allen County Local Rule LR02-TR26-1(B)(1), which creates a presumption whereby defense counsel cannot obtain a copy of audio or videotape evidence in possession of the prosecutor without first applying to the trial court and proving the "necessity" of a copy. *See* https://www.in.gov/courts/files/allen-local-rules.pdf. Our Indiana Supreme Court is currently considering the validity of Allen County's rule, *see Ramirez v. State*, 21S-CR-00373, and held oral argument on October 21, 2021. *See* https://mycourts.in.gov/arguments/default.aspx?&id=2592.

[21] Finally, this case illustrates that *Keaton*'s concerns about burdening the State and subjecting police officers to misleading cross-examination are misplaced, or at least they do not warrant shielding *all* police reports. Both sides acknowledge that the majority of counties in Indiana—and they only mention Dearborn and Elkhart Counties as the exceptions—have an open file policy, which generally means that the prosecutor allows defense counsel to review the prosecutor's complete file. *See, e.g.*, *Johnson v. State*, 446 N.E.2d 1307, 1310 (Ind. 1983) (stating that the prosecutor's open file policy gave the defendant access to police reports). The fact that prosecutors all over the State routinely produce police reports severely undermines the notions that allowing defendants access to police reports—redacted or unredacted—is too burdensome or will subject officers to unfair cross-examination.

[22] Even in this case particularly, the Prosecutor allowed Defense Counsel to examine the police report in person. Especially during a pandemic, that is far more burdensome to everyone than producing a copy. There can also no longer be any basis to claim that a copy of the report—as opposed to in-person inspection—could subject a testifying officer to unfair cross-examination.

[23] The State argues that because it allowed Defense Counsel access to the report in the Prosecutor's office, this appeal is really not about the *discoverability* of the report but rather the *manner* of production. But that just further proves the point—the State's refusal to produce a copy of the police report has nothing to do with attorney work product even though the attorney work product doctrine is its sole basis for refusing to provide a copy of the report. Indeed, both in the

trial court and on appeal the State is unable to articulate any interest whatsoever that it has in refusing to produce a copy of a police report in a misdemeanor OWI case beyond blind adherence to a policy that appears to serve no legitimate purpose in this case. (Tr. at 7:21 ("THE COURT: . . . What's the harm if the State hands Defense counsel a police report and this – this is a misdemeanor OWI? . . . MR. KRUMWIED: Your Honor, frankly, I am not sure there is a harm.").)

[24] This is especially disconcerting given all the work that has gone into transitioning Indiana to utilizing electronic information exchanges. This allows lawyers to serve clients more efficiently because trips no longer need to be made to the Courthouse or to opposing counsel's office, and this efficiency permits lawyers to serve clients whose cases may be occurring at greater distance from the lawyer's office. In this evolving legal landscape, it makes little sense for a Prosecutor's Office to expect defense counsel to arrive at the Prosecutor's Office merely to review a document.[9]

[25] Despite our concerns about the continued viability of *Keaton*, we are "bound by the precedent established by our supreme court." *McDonald v. State*, 173 N.E.3d

[9] Nor do we agree with the State's assertion that the State's interest in maintaining the privacy of its file materials should prohibit defense counsel from obtaining a copy of the police report. Criminal proceedings frequently include presentence investigation reports, which are confidential pursuant to Indiana Code section 35-38-1-3(a), and yet we trust defense counsel to protect the confidentiality of those documents. Ind. Code § 35-38-1-3(b) (listing defense counsel as among those permitted access). Trial courts through protective orders, or the Indiana Supreme Court through its rulemaking function, can establish protection to prohibit distribution of police reports. We trust that, if so ordered, defense counsel will abide by their obligation to not release a copy of the police report to the defendant or anyone else.

1043, 1047 (Ind. Ct. App. 2021). We accordingly hold the trial court did not abuse its discretion when, after the State's assertion of work product privilege, the court relied on *Keaton* to deny Minges' request for "complete and accurate copies" of the police report regarding Minges' alleged operating while intoxicated. *See Keaton*, 475 N.E.2d at 1148 (trial court cannot compel production of verbatim copies if a timely work product objection is made).

Conclusion

[26] Because the Indiana Supreme Court's 1985 opinion in *Keaton v. Circuit Court of Rush County*, 475 N.E.2d 1146, concluded trial courts cannot order prosecutors to produce verbatim copies of police reports over a timely work-product objection, we conclude the trial court did not err in declining Minges' request for unredacted copies of the police reports describing the circumstances surrounding his arrest for OWI. Nevertheless, we agree with Minges that reconsideration of that precedent by our Supreme Court is warranted.

[27] Affirmed.

Bailey, J., concurs with separate opinion.

Molter, J., concurs.

Frank E. Minges, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

Court of Appeals Case No.
21A-CR-216

Bailey, Judge, concurring.

[28] I join the majority in urging our Supreme Court to revisit *State ex rel. Keaton v. Cir. Ct. of Rush Cnty.*, 475 N.E.2d 1146 (Ind. 1985). As it stands, the rule derived from *Keaton* and its progeny conflicts with Trial Rule 26(B)(3) and, in doing so, unnecessarily broadens the scope of "work product" protection for the State. Trial Rule 26(B)(3) was meant to codify the "work product" protections recognized at common law. *See Am. Bldgs. Co. v. Kokomo Grain Co., Inc.*, 506 N.E.2d 56, 59 (Ind. Ct. App. 1987) ("Our Trial Rule 26 is adopted from the Federal Rules of Civil Procedure."); *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981) (noting that federal "Rule 26(b)(3) codifies the work-product doctrine[.]"); 48 F.R.D 487, 500 (explaining that amendments related to "work product" rules "conform to the holdings of the cases"); 8 Richard L. Marcus, *Federal Practice and Procedure* § 2023 (3d ed.) ("The adoption of the rule was not intended to cause any drastic change in practice in the federal courts. Instead, it

was designed as a largely accurate codification of the doctrine announced in [*Hickman v. Taylor*, 329 U.S. 495 (1947)], and developed in later cases[.]").

[29] Under Rule 26(B)(3), a party generally may withhold any material categorized as "work product." To constitute "work product" under Rule 26(B)(3), the material must satisfy two requirements. First, the material must have been "prepared in anticipation of litigation." *Id.* Second, it must have been prepared "by or for [that] party" or "by or for that . . . party's representative[.]" *Id.* As the majority explains, whether an item amounts to work product—*i.e.*, whether an eligible person prepared the material in anticipation of litigation—is decided on a case-by-case basis. *See* Slip op. at 13-14. And in each case, the party asserting the "work product" privilege must establish that "the materials sought to be protected from disclosure" satisfy the requirements. *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995 (Ind. 2014). In other words, Rule 26(B)(3) favors disclosure, placing an initial burden on the party seeking to avoid disclosure.

[30] Moreover, the "work product" privilege is not absolute. That is, even if a party shows that the materials at issue amount to "work product," that party must still turn over the materials if the other party shows (1) a "substantial need of the materials in the preparation of [the] case" and (2) an inability "without undue hardship to obtain the substantial equivalent of the materials[.]" Ind. Trial Rule 26(B)(3).

[31] There is, however, an exception to the exception. Indeed, even if a party establishes adequate need and hardship, the trial court must "protect against

disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* In other words, although a showing of need and hardship could result in the disclosure of certain materials categorized as "work product," Rule 26(B)(3) still provides absolute protection for a subcategory of "work product." *See id.*

[32] Even though *Keaton* spoke to the scope of "work product" protection, the case did not cite Trial Rule 26(B)(3). As to the interplay between *Keaton* and Trial Rule 26(B)(3), although *Keaton* seemed to focus on the "inherent power of a trial court to guide and control discovery," 475 N.E.2d at 1147, our Supreme Court has since embraced *Keaton* for a broader proposition. That is, three years after handing down *Keaton*, the Court cited *Keaton* for the proposition that, "in general, police reports are not discoverable and are considered protected as 'work product' of the prosecutor." *Beckham v. State*, 531 N.E.2d 475, 476 (Ind. 1988). Later, the Court cited *Keaton* for the proposition that, "[u]nless the ['work product'] privilege has been waived, investigative police reports are not discoverable and are considered protected as the work product of the prosecutor." *Goudy*, 689 N.E.2d at 695; *see id.* (stating that "police reports . . . are specifically excluded from discovery"). Thus, because of *Keaton* and its progeny, police reports, categorically, are not subject to discovery and the analytical rigor otherwise placed on a proponent under Trial Rule 26 is absent.[10]

[10] I therefore disagree with the State's assertion at oral argument that Trial Rule 26(B)(3) provides a viable path around the *Keaton* rule. *See* Oral Argument Video at 36:47-37:37.

[33] Moreover, the *Keaton* rule provides no guidance about how the defendant may reasonably confirm that the material is what the State purports it to be or that the *Keaton* disclosure requirements (substantially verbatim witness statements and exculpatory information) have been met. *See, e.g.*, *Goudy*, 689 N.E.2d at 695. Indeed, although the defendant could ask the trial court to conduct *in camera* review, the trial court has discretion to deny the request. *See id.*

[34] All in all, I would urge our Supreme Court to embrace for all litigants, including the State, the tried and true analytical approach set forth in Trial Rule 26(B)(3) for analyzing "work product" claims. That is, where there is a discovery dispute, allow the trial court to determine—on a case-by-case basis—the true nature of the materials sought, with the burden on the proponent to establish that the materials at issue constitute "work product." And then, if the trial court determines that any item, in whole or in part, constitutes protectible "work product," allow the trial court to decide whether the item should nevertheless be disclosed due to an adequate showing of need and hardship.

[35] For the above reasons, I concur.