IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-CR-201

Steven Church,
Appellant (Defendant below),

–v–

State of Indiana,
Appellee (Plaintiff below).

Argued: December 2, 2021 | Decided: June 23, 2022

Appeal from the Marion Superior Court
No. 49G04-2003-F1-10092
The Honorable Lisa F. Borges, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 21A-CR-68

Opinion by Justice Massa

Chief Justice Rush and Justices David and Slaughter concur.
Justice Goff concurs in part and in the judgment with separate opinion.

Massa, Justice.

Unlike most of the country, Indiana generally allows criminal defendants to depose prosecution witnesses. But this right is neither constitutional nor absolute. In 2020, our General Assembly, without a single vote in opposition, restricted this statutory right for defendants accused of sexual offenses against children. This statute sought to protect children from being deposed by their alleged assailants. Here, a criminal defendant charged with several counts of child molesting unsuccessfully sought to depose the child victim after this statute went into effect. He then appealed, and the Court of Appeals reversed, concluding the statute is procedural and impermissibly conflicts with our Trial Rules. Even though the statute has procedural elements, we conclude it is substantive, as it predominantly furthers public policy objectives of the General Assembly, as opposed to judicial administration objectives characteristic of a procedural statute. Because we also reject his other arguments, we affirm the trial court.

Facts and Procedural History

On March 10, 2020, the State charged Steven Church with two counts of Level 1 felony attempted child molesting and four counts of Level 4 felony child molesting. The State later added an additional count of Level 4 felony child molesting. Throughout discovery, the State provided Church with fourteen pages of the detective's case notes, handwritten notes, and memorandum, multiple Department of Child Services reports, a detective exculpatory memo, the police department's case report, the alleged victim's juvenile history, the forensic examination report of Church's cell phone, and a recorded phone interview of Church. The State also provided the recordings and transcripts of interviews of the alleged child victim, the child's mother, the child's sister, and the child's friend. Church deposed the mother but before he sought to depose the eight-year-old victim, Indiana Code section 35-40-5-11.5 took effect.

The new statute limits depositions of child victims of sex offenses if they are under the age of sixteen. Per this statute, a defendant must first

contact the prosecuting attorney about deposing the child victim. Ind. Code § 35-40-5-11.5(d) (2020). If the prosecuting attorney does not agree to a deposition, the defendant may petition the court to authorize one. I.C. § 35-40-5-11.5(d)–(e). After holding a hearing, a trial court may only authorize the deposition if it finds either a "reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim's testimony," or that the deposition is necessary due to the "existence of extraordinary circumstances" and is "in the interest of justice." I.C. § 35-40-5-11.5(d)(2)–(3). The defendant must prove either circumstance by a preponderance of the evidence. I.C. § 35-40-5-11.5(f)–(g). On June 26, Church advised the prosecutor of his intention to depose the child. Because the prosecutor refused to agree to a deposition, Church petitioned for the court's authorization. Following a hearing, the trial court denied Church's petition, concluding there were no "extraordinary circumstances" under Indiana Code section 35-40-5-11.5. Church appealed, arguing the statute is unenforceable because: (1) it was impermissibly applied retroactively to him, (2) it conflicts with the Indiana Trial Rules, which should control, (3) it violates the separation of powers, and (4) it violates due process under both the state and federal constitutions.

The Court of Appeals reversed the trial court, concluding the statute was procedural, and "impermissibly conflict[ed] with the Indiana Trial Rules governing the conduct of depositions." *Church v. State*, 173 N.E.3d 302, 303 (Ind. Ct. App. 2021), *vacated*. The panel applied the reasoning of *Sawyer v. State*, 171 N.E.3d 1010, 1018 (Ind. Ct. App. 2021), *vacated*—another recent decision reversing a denied deposition request for a child sex victim—which concluded "the procedural provisions in the statute conflict with those of the Indiana Trial Rules, [so] the provisions of the Indiana Trial Rules govern." *Church*, 173 N.E.3d at 306–07. "Here, as in *Sawyer*, the process prescribed in [Indiana Code section 35-40-5-11.5] for a defendant's deposition of a child accuser is incompatible with that enumerated in Trial Rules 26 and 30 to such extent that the [statute] and the Trial Rules cannot both apply to Church." *Id.* at 307. Because the conflict should have been resolved in favor of the Trial Rules governing, the panel found the trial court abused its discretion in denying Church's

petition. *Id.* And since this issue was dispositive, the panel did not reach Church's other arguments. *Id.* at 303 n.1.

The State sought transfer, which we now grant. *See* Ind. Appellate Rule 58(A).[1]

Standard of Review

Because trial courts have broad discretion over discovery matters, *Beville v. State*, 71 N.E.3d 13, 18 (Ind. 2017), our review over these matters is typically "limited to determining whether the trial court abused its discretion," *Terre Haute Reg'l Hosp., Inc. v. Trueblood*, 600 N.E.2d 1358, 1362 (Ind. 1992). However, when a trial court's ruling involves a pure question of law, such as the interpretation or constitutionality of a statute, our standard of review is de novo. *Pierce v. State*, 29 N.E.3d 1258, 1265 (Ind. 2015); *Horner v. Curry*, 125 N.E.3d 584, 588 (Ind. 2019). Statutes are "clothed with the presumption of constitutionality until clearly overcome by a contrary showing." *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 199 (Ind. 2016) (citation and internal quotation marks omitted).

Discussion and Decision

In Indiana, depositions are a "routine component of pre-trial practice, both in civil and criminal matters." *Hale v. State*, 54 N.E.3d 355, 357 (Ind. 2016); I.C. § 35-37-4-3 ("The state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial

[1] We are compelled to answer this question of law, in part, because of the frequency with which it has arisen. Five other cases—*Sawyer v. State*, 171 N.E.3d 1010 (Ind. Ct. App. 2021), *vacated*, *State v. Wells*, No. 21A-CR-89, 2021 WL 3478637 (Ind. Ct. App. Aug. 9, 2021), *vacated*, *Pate v. State*, 176 N.E.3d 228 (Ind. Ct. App. 2021), *vacated*, *State v. Riggs*, 175 N.E.3d 300 (Ind. Ct. App. 2021), *vacated*, and *State v. Brown*, No. 21A-CR-732, 2021 WL 4999123 (Ind. Ct. App. Oct. 28, 2021), *vacated*—have recently presented the same issue on transfer. By separate orders, we grant transfer in those cases and remand them to their respective trial courts for reconsideration in light of this opinion.

Procedure."); *see also* Ind. Trial Rule 26; T.R. 30; Ind. Crim. Rule 21. However, Indiana is an outlier as one of only seven states that permit criminal defendants to depose prosecution witnesses. George C. Thomas III, *Two Windows into Innocence*, 7 Ohio St. J. Crim. L. 575, 592 (2010); *see* Fla. R. Crim. P. 3.220(h)(1)(A); Iowa R. Crim. P. 2.13(1); Mo. R. Crim. P. 25.12; N.D. R. Crim. P. 15; N.H. Rev. Stat. Ann. § 517:13; Vt. R. Crim. P. 15. Moreover, even this small minority of jurisdictions allowing regular depositions in criminal cases "often carve out special categories of witnesses who are not subject to that procedure," including child sex-crime victims and children in general. Wayne R. LaFave et al., 5 *Criminal Procedure* § 20.2(e) (4th ed. 2015); *see*, *e.g.*, Vt. R. Crim. P. 15(e)(5)(A) (providing no deposition shall be taken of a victim under the age of 16 in prosecutions for sexual assault cases unless agreed upon by the parties or ordered by the court after it finds the deposition is necessary, "the evidence sought is not reasonably available by any other means, and that the probative value of the testimony outweighs the potential detriment to the child being deposed"); N.H. Rev. Stat. Ann. § 517:13(V) (providing that "no party in criminal case shall take the discovery deposition of a victim or witness who has not achieved the age of 16 at the time of the deposition").

In addition to being rare, Indiana's statutory right to take depositions in criminal cases has never been absolute. Under our Trial Rules, and explicitly referenced in Indiana Code section 35-37-4-3, courts can limit criminal defendants' discovery privileges—including depositions—if they find "the defendant ha[s] no legitimate defense interest . . . or that the State ha[s] a paramount interest to protect." *Murphy v. State*, 265 Ind. 116, 119, 352 N.E.2d 479, 481–82 (1976). Indeed, Trial Rule 26(C) already allows a trial court to prohibit a deposition when justice requires it to protect an alleged victim from "embarrassment, oppression, or undue burden." And this Court has recognized the possibility of a defendant attempting "to utilize depositions as a harassment technique, by forcing his or her victims to unnecessarily relive the experience without the defendant having any real expectation of obtaining new information." *Hale*, 54 N.E.3d at 359–60.

This Court "has repeatedly 'refused to adjudicate constitutional questions when presented with other dispositive issues.'" *State v. Katz*, 179

N.E.3d 431, 441 (Ind. 2022) (quoting *Ind. Wholesale Wine & Liquor Co. v. State ex rel. Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 108 (Ind. 1998)). Adhering to this doctrine of judicial restraint, we first address Church's two non-constitutional arguments—that the statute is impermissibly retroactive as applied to him and that it conflicts with the Trial Rules. *See Bayh v. Sonnenburg*, 573 N.E.2d 398, 402 (Ind. 1991). Because we reject both these arguments, we will then address Church's two constitutional arguments—the statute violates the Indiana Constitution's separation of powers provision, and it violates Church's rights under both the Indiana Constitution and the United States Constitution. Because we find no constitutional violation under either argument, we affirm the trial court here.

I. Because the operative event of the statute—seeking to take a deposition—occurred after the statute became effective, the statute is being applied prospectively to Church.

Because the statute went into effect eight days after he was charged, Church argues it cannot apply retroactively to him. In response, the State argues the statute is being applied prospectively, because it was in effect several months before Church first sought to depose the child victim. In Indiana, "[a]bsent explicit language to the contrary, statutes generally do not apply retroactively." *N.G. v. State*, 148 N.E.3d 971, 973 (Ind. 2020). While there are exceptions to this general rule, *Martin v. State*, 774 N.E.2d 43, 44 (Ind. 2002), we only need to consider them if we determine the statute is being applied retroactively. Answering this question involves an issue of first impression—what event is determinative for the prospective application of a statute? Because we ultimately conclude the operative event of a statute—here, seeking a deposition—is determinative, the statute is being applied prospectively to Church.

"[D]eciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268

(1994). When this Court is faced with an issue of first impression, decisions from other jurisdictions can be instructive. *Ackerman v. State*, 51 N.E.3d 171, 184 (Ind. 2016); *see also Allen v. Van Buren Township of Madison County*, 243 Ind. 665, 671, 184 N.E.2d 25, 28 (1962). The Supreme Court has explained that a statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (internal citation omitted). Rather, the inquiry "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357–58 (1999) (quoting *Landgraf*, 511 U.S. at 270); *see also Weaver v. Graham*, 450 U.S. 24, 31 (1981).

"The critical first step in the retroactivity inquiry is identifying the conduct or event that triggers the statute's application." *State v. Beaudoin*, 137 A.3d 717, 722 (R.I. 2016). "Once properly identified, the triggering event guides the analysis." *Id.* A court must "look to the subject matter regulated by the statute and consider its plain language to determine the precipitating or triggering event," and "the proper triggering event is that which the statute intends to regulate." *In re Est. of Haviland*, 301 P.3d 31, 35–36 (Wash. 2013). Thus, a statute is "prospectively applied when it is applied to the operative event specified by the statute, and the event occurred after the date the statute became effective." *Pulaski Choice, L.L.C. v. 2735 Villa Creek, L.P.*, 362 S.W.3d 882, 885 (Ark. 2010); *see also Indep. Producers Mktg. Corp. v. Cobb*, 721 P.2d 1106, 1109 (Wyo. 1986); *Aetna Life Ins. Co. v. Wash. Life and Disability Ins. Guar. Ass'n*, 520 P.2d 162, 170 (Wash. 1974). We agree and hold a statute operates prospectively when it is applied to the operative event of the statute, and that event occurs after the statute took effect.

"Even when the later-occurring circumstance depends upon the existence of a prior fact, that interdependence, without more, will not transform an otherwise prospective application into a retroactive one." *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993) (citing *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 500, 505–06 (1909)). Phrased another way, a statute does not operate retroactively "merely because it draws upon antecedent facts for its operation," *Cox v.*

Hart, 260 U.S. 427, 435 (1922), or because it had "its origin in a situation existing prior to the enactment of the statute," *Haviland*, 301 P.3d at 34; *see also Klein v. Klein*, 882 N.W.2d 296, 299 (N.D. 2016). It is "[o]nly when the adverse effects of the statute are activated by events that occurred before the effective date of its enactment" that a statute applies retroactively. *R.I. Insurers' Insolvency Fund v. Leviton Mfg. Co.*, 716 A.2d 730, 735 (R.I. 1998).

Here, the statute regulates depositions of alleged child victims of sex offenses. I.C. § 35-40-5-11.5. The triggering event, then, is seeking to depose an alleged child victim. Because the deposition statute was in effect before Church sought to depose the alleged victim, the statute is being applied prospectively. Even though Church's desire to take this deposition may have its "origin in a situation existing prior to the enactment of the statute," *Haviland*, 301 P.3d at 34, that is, when he was charged, this does not "transform an otherwise prospective application into a retroactive one," *McAndrews,* 989 F.2d at 16. If Church had sought to depose the child victim in the eight days between being charged and the statute going into effect, there would be a retroactive application. But since he did not, there is no retroactive application.

II. The statute is substantive because it predominantly furthers the legitimate public policy objectives within the General Assembly's exclusive purview.

To the extent a procedural statute is at odds with one of our procedural rules, the rule governs. *Garner v. Kempf*, 93 N.E.3d 1091, 1099 (Ind. 2018); *see also State ex rel. Gaston v. Gibson Cir. Ct.*, 462 N.E.2d 1049, 1051 (Ind. 1984). However, our rules "cannot abrogate or modify substantive law." *State ex rel. Zellers v. St. Joseph Cir. Ct.*, 247 Ind. 394, 401, 216 N.E.2d 548, 553 (1966). If the statute is a "substantive law, then it supersedes [our Trial Rules], but if such statute merely establishes a rule of procedure, then [our Trial Rules] would supersede the statute." *State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1959). Accordingly, Church

argues the statute is procedural and unenforceable because it conflicts with our Trial Rules. And while the statute "contains procedural elements," the State argues "it is fundamentally a substantive statute balancing competing interests and rights." Appellee's Br. at 29. The threshold question is how a statute with both substantive and procedural elements is classified.

We have long held that laws are substantive when they establish rights and responsibilities, and laws are procedural when they "merely prescribe the manner in which such rights and responsibilities may be exercised and enforced." *Blood*, 239 Ind. at 400, 157 N.E.2d at 478. The General Assembly retains the "entire lawmaking power of the state" and the right to enact "all laws and regulations respecting the peace, the safety, the health, the happiness, and general well-being" of the citizenry. *Cent. Union Tel. Co. v. Indianapolis Tel. Co.*, 189 Ind. 210, 219, 126 N.E. 628, 632 (1920). And this power to make substantive law is exclusive to the General Assembly—our judicially created rules "cannot abrogate or modify substantive law." *Zellers*, 247 Ind. at 401, 216 N.E.2d at 553. In *Blood*, we concluded "the **right** to a change of judge granted by [a statute] is a substantive right which can be conferred only by the Legislature, **but** the **method** and **time** of asserting such right are matters of procedure and fall within the category of procedural rules." 239 Ind. at 400, 157 N.E.2d at 478. While not precisely on point, *Blood* foretells the General Assembly's power to narrow the scope of its substantive grant of deposition rights for criminal defendants in the service of protecting children. Or, stated differently, its power to extend a substantive right to children by limiting a right previously conferred without exception to defendants by statute.[2]

[2] The concurrence relies on *Jacobs v. State* to distinguish substantive and procedural law in the general "criminal justice realm," *post*, at 2, but our distinction there was only "in [the] context of post-conviction relief," 835 N.E.2d 485, 490 (Ind. 2005). Because *Jacobs* did not define this dichotomy for the criminal law broadly, nor did it attempt to answer the question before us, we do not rely on it for guidance here.

The United States Supreme Court has explained that "[e]xcept at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988). And even if statutes establishing substantive rights are "packaged in procedural wrapping," that does not alter their true nature. *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062, 1064 (Ohio 2006). In upholding a statute limiting disclosure of prescription records notwithstanding its alleged conflict with their trial rules, the Kentucky Supreme Court distinguished procedural laws which "predominantly foster accuracy in fact-finding" from substantive laws which "predominantly foster other objectives." *Cabinet for Health & Fam. Servs. v. Chauvin*, 316 S.W.3d 279, 285 (Ky. 2010) (internal citations omitted). We agree with this predominant purpose distinction and find further support from other states.

The Colorado Supreme Court encountered this issue with a "rape shield" statute that contained both substantive and procedural elements. *People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978). The court reiterated a "widely-recognized test" that distinguishes procedural laws as those with the purpose of allowing the courts to "function and function efficiently," while substantive laws have policy purposes "involving matters other than the orderly dispatch of judicial business." *Id.* Even though the rape shield statute changed the procedural rules governing the admissibility of evidence, the court concluded the statute reflected a "major public policy decision by the general assembly regarding sexual assault cases" that victims of sexual assaults "should not be subjected to psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders." *Id.* at 277–78. "Seen in the light of the policy it embodies," the Colorado Supreme Court upheld the statute because it "represents far more than merely a legislative attempt to regulate the day-to-day procedural operation of the courts." *Id.*

The Michigan Supreme Court also encountered this issue when it upheld a statute that "undoubtedly act[ed] as a rule of evidence," and provided for stricter requirements for the qualification of expert witnesses

in medical malpractice cases than the judicially promulgated rule did. *McDougall v. Schanz*, 597 N.W.2d 148, 154–55 (Mich. 1999); *see also Seisinger v. Siebel*, 203 P.3d 483 (Ariz. 2009) (reaching the same conclusion when interpreting a similar statute). The court refused to "mechanically . . . characterize all statutes that resemble 'rules of evidence' as relating solely to practice and procedure," opting for a "more thoughtful analysis that takes into account the undeniable distinction between procedural rules of evidence and evidentiary rules of substantive law." *McDougall*, 597 N.W.2d at 155 (internal quotation marks omitted). Instead, a statutory rule of evidence was impermissible only when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified." *Id.* at 156 (citation and internal quotation marks omitted). If "a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield." *Id.* (citation and internal quotation marks omitted). Under this "common-sense approach," the court upheld the statute as a valid enactment of substantive law, reflecting "a careful legislative balancing of policy considerations." *Id.* at 156, 158 (citation and internal quotation marks omitted).

Rather than utilize a mechanical test that simply stops when it finds a process, we too adopt a more thoughtful test that looks at the statute's predominant objective. *See Chauvin*, 316 S.W.3d at 285. If the statute predominantly furthers judicial administration objectives, the statute is procedural. But if the statute predominantly furthers public policy objectives "involving matters other than the orderly dispatch of judicial business," it is substantive. *McKenna*, 585 P.2d at 277 (citation and internal quotation marks omitted). This test is consistent with our own precedent—for while we have not explicitly engaged in this analysis before, we have repeatedly upheld statutes over competing Trial Rules when the statutes expressed public policy objectives. *See State ex rel. Hatcher v. Lake Superior Ct., Room 3*, 500 N.E.2d 737, 739–40 (Ind. 1986). For example, we refused to invalidate a statute that kept parties from seeking stays of condemnation orders pending appeal, even though this Court's rules allowed parties to obtain stays. *State ex rel. Ind. & Mich. Elec. Co. v. Sullivan Cir. Ct.*, 456 N.E.2d 1019, 1021 (Ind. 1983). While invalidating that

statute might have been "attractive in the sense that it would bring another proceeding under the general umbrella" of the Court's rules, doing so would have been "intolerable" because it would have frustrated a statutory right to immediate appeal of condemnation orders. *Id.*

The statute here is substantive because it predominantly furthers public policy objectives. As the State argues, this statute "creates substantive protections for child victims of sex crimes that guard against needless trauma inflicted through compelled discovery depositions"[3] by "declining to grant defendants in this limited set of circumstances the substantive right to take discovery depositions." Pet. to Trans. at 9–10. Victims in Indiana have a constitutional "right to be treated with fairness, dignity, and respect throughout the criminal justice process . . . to the extent that exercising these rights does not infringe upon the constitutional rights of the accused." Ind. Const. art. 1, § 13(b). As we soon explain, criminal defendants have no constitutional right to discovery depositions. And crime victims have the statutory right to be "treated with fairness, dignity, and respect," and be "free from intimidation, harassment, and abuse" "throughout the criminal justice process." I.C. § 35-40-5-1. The deposition statute implicates these substantive, constitutional rights granted to crime victims in Indiana, as evidenced by, among other things, its location in the "Victim Rights" Chapter of the Indiana Criminal Code.

On the other hand, defendants generally have the substantive right "to take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure." I.C. § 35-37-4-3. The deposition statute limits this substantive right, as it provides: "A defendant may depose a child

[3] Decades ago, the United States Supreme Court recognized the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court." *Maryland v. Craig*, 497 U.S. 836, 855 (1990). Studies suggest this trauma extends to pretrial proceedings conducted in a stressful, adversarial environment such as depositions, in part because the risk of psychological and emotional harm is greatest when the victim is required to testify multiple times. *See* Robert H. Pantell, *The Child Witness in the Courtroom*, 139 Pediatrics 1 (2017); Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes after Testifying in Criminal Court*, 70 Monographs Soc'y for Rsch. in Child Dev. 109 (2005); Gail S. Goodman et. al, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 Monographs Soc'y for Rsch. in Child Dev. (1992).

victim only in accordance with" it. I.C. § 35-40-5-11.5(c). The statute then provides the three circumstances in which a defendant's substantive right to take depositions may outweigh the child victim's substantive right not to be deposed. I.C. § 35-40-5-11.5(d). The statute then lays out the procedure for how these competing rights interact, but this does not alter the statute's true nature as a substantive right for this class of victims, and as a limitation on the substantive rights of defendants. And the procedural aspects of this statute do not deal with the "**method** and **time** of asserting such right," but rather explain the procedure for determining **whose** right prevails—the defendant's right to depose or the child victim's right not to be. *Blood*, 239 Ind. at 400, 157 N.E.2d at 478. The deposition statute reflects "clear legislative policy" to secure these rights and is not a statute that merely controls the "judicial dispatch of litigation." *McDougall*, 597 N.W.2d at 156 (citation and internal quotation marks omitted). It reflects "a careful legislative balancing of policy considerations." *Id.* at 158 (citation and internal quotation marks omitted). Thus, because the statute is substantive, we need not consider whether it conflicts with our procedural rules.

III. The statute does not violate the separation of powers.

Church argues the deposition statute violates the separation of powers because it is a legislative limitation upon the use of depositions in ways that conflict with the Indiana Trial Rules. Article 7, Section 1 of the Indiana Constitution vests judicial power in the courts, and Article 4, Section 1 vests legislative authority in the Indiana General Assembly. Our Constitution also contains an explicit separation of powers provision, which provides that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Ind. Const. art. 3, § 1. This Court long ago concluded that "the power to make rules of procedure in Indiana is neither exclusively legislative nor judicial." *Blood*, 239 Ind. at 399, 157 N.E.2d at 477. Because the statute here is substantive and not procedural, we need not explore the constitutional consequences that might arise if the

General Assembly enacted a purely procedural statute in conflict with one of our rules.

IV. This statute does not violate any of Church's constitutional rights.

In addition to his primary claim that the statute is strictly procedural and contrary to our Trial Rules in violation of our separation of powers, Church also challenges the statute's constitutionality on more general due process and confrontation grounds. This thinly briefed argument fails for want of authority here or elsewhere, as the right of confrontation applies at **trial**, not in discovery, and no court has found the unavailability of depositions in criminal cases to be unconstitutional, whether in the federal system, or in the forty-four states where the ability is prohibited or limited. "Because we only need to reach the federal constitutional analysis if the Indiana Constitution does not resolve the claim," we begin with Church's argument under the Indiana Constitution and find no violations. *Katz*, 179 N.E.3d at 442. We then consider the statute's constitutionality under the United States Constitution and find no violations.

However, this is not to say that criminal defendants do not enjoy any constitutional rights regarding information in the prosecution's possession. Under *Brady v. Maryland*, the prosecution's suppression of evidence favorable to the accused that is material either to guilt or punishment violates the Due Process Clause. 373 U.S. 83, 87 (1963). But "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), because *Brady* is a "disclosure rule, not a discovery rule," *United States v. Higgins*, 75 F.3d 332, 335 (7th Cir. 1996). Our conclusion that criminal defendants lack a constitutional right to **discovery** does not implicate their rights to the **disclosure** of *Brady* information by the prosecution.

A. Church's rights under the Indiana Constitution were not violated.

Church argues his confrontation rights under Article 1, Section 13 were implicated. This Section provides: "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face." Ind. Const. art. 1, § 13. "This Court has long recognized that this basic trial right is an ancient one," *Brady v. State*, 575 N.E.2d 981, 986 (Ind. 1991). Since it "bears only upon the procedure on the trial," *id.* at 987 (citing *Butler v. State*, 97 Ind. 378 (1884)), the right "does not exist when the deposition of a witness is taken," *id.* (citing *Jones v. State*, 445 N.E.2d 98 (1983); *Bowen v. State*, 263 Ind. 558, 334 N.E.2d 691 (1975)). Church's confrontation rights will be secured at trial but are not implicated here.[4]

Church also argues his due process rights under Article 1, Section 12 were violated. Section 12 provides: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Ind. Const. art. 1, § 12. By its plain language, criminal defendants do not have a general due process right under Article 1, Section 12. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975–76 (Ind. 2000). Since the first sentence "omits any reference to deprivation of 'life, liberty, or property,' which is the trigger of due process requirements in the criminal context," it therefore "applies only in the civil context." *McIntosh*, 729 N.E.2d at 976. Only the second sentence of Article 1, Section 12 has been

[4] As an aside, Article 1, Section 13 will provide slightly more protection to Church at trial than the Sixth Amendment's Confrontation Clause. *Compare Brady v. State*, 575 N.E.2d 981, 988–89 (Ind. 1991) (invalidating portions of Indiana Code section 35-37-4-8, a statute allowing testimony of certain classes of victims to be taken from a different room, and holding that Section 13's "face-to-face" requirement requires a two-way closed circuit television arrangement), *with Craig*, 497 U.S. at 844–850 (holding a child victim's live testimony transmitted to the courtroom and the trier of fact via one-way closed circuit television, was consonant with the Confrontation Clause because face-to-face confrontation is not absolutely essential for securing confrontation rights).

deemed "relevant in the criminal context," *Sanchez v. State*, 749 N.E.2d 509, 514 (Ind. 2001), as this language "has been the basis of criminal speedy trial claims," *McIntosh*, 729 N.E.2d at 976 n.2. This is "not to say our state constitution doesn't provide protections to criminal defendants." *Harris v. State*, 165 N.E.3d 91, 98 n.1 (Ind. 2021). "To the contrary, these protections have developed though the more specific provisions that make up our constitution's counterpart to the Bill of Rights."[5] *Id.* Church's due process rights are secured by numerous other provisions of our Bill of Rights, but not generally under Article 1, Section 12.

B. Church's rights under the United States Constitution were not violated.

Church argues his rights, secured by the Sixth Amendment's Confrontation Clause and applicable to the states through the Fourteenth Amendment, have been denied. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The Confrontation Clause provides criminal defendants with the right "to confront the witnesses against him," *id.*, but it "only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial," *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 n.9 (1987) (plurality opinion). "[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149, 157 (1970).

[5] Like our confrontation clause, our Bill of Rights sometimes provides even greater due process protections for criminal defendants than the United States Constitution. *See, e.g.*, *State v. Taylor*, 49 N.E.3d 1019, 1024 (Ind. 2016) (explaining that the right to counsel guaranteed by Article 1, Section 13 of the Indiana Constitution provides "greater protection" than the Sixth Amendment because "it attaches earlier—upon arrest, rather than only when formal proceedings have been initiated as with the federal right") (citation and internal quotation marks omitted); *Litchfield v. State*, 824 N.E.2d 356, 361, 363–64 (Ind. 2005) (providing that while warrantless searches of garbage are generally permissible under the Fourth Amendment to the Federal Constitution, the Indiana Constitution requires such a search to be reasonable, which turns on the balancing of: "1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs.").

The right to confrontation is a trial right—not a pretrial right. *See Ritchie*, 480 U.S. at 52 (rejecting a similar argument which would effectively "transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery"). Indeed, the original "primary object" of the Confrontation Clause was to "**prevent depositions** . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness" at trial. *Mattox v. United States*, 156 U.S. 237, 242 (1895) (emphasis added). As with the Indiana Constitution, Church's confrontation rights under the Sixth Amendment will be secured at trial but are not implicated here.

Church also argues the statute violates his rights under the Fourteenth Amendment's Due Process Clause, which prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. But the "Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). And over a century ago, the Supreme Court held a criminal defendant's due process rights were not violated by not getting to depose out-of-state witnesses because "the taking or use of depositions of witnesses [] in criminal cases on behalf of defendants is not provided for." *Minder v. Georgia*, 183 U.S. 559, 561–62 (1902). Church identifies no precedent concluding the unavailability of criminal depositions in most of the country violates the Due Process Clause. Instead, Church relies exclusively on *Wardius v. Oregon* to argue "one of the hallmarks of the federal guarantee of due process and fundamental fairness is **reciprocal discovery**." Appellant's Br. at 20 (citing 412 U.S. 470). But *Wardius* and the reciprocal discovery it requires in a limited set of circumstances does not apply to Church's situation.

The Supreme Court in *Wardius* answered a question left open by *Williams v. Florida*, 399 U.S. 78 (1970). In *Williams*, the Court upheld the constitutionality of Florida's notice-of-alibi rule, which required defendants intending to rely on an alibi defense to "submit to a limited form of pretrial discovery by the State." *Id.* at 80. "In exchange for the defendant's disclosure of the witnesses he propose[d] to use to establish that defense," the prosecution had to notify the defendant of any witnesses it proposed to offer to rebut that defense. *Id.* And both sides

were under a continuing duty to promptly disclose the names and addresses of additional witnesses bearing on the defense. *Id.* The Court rejected the due process argument, as "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant." *Id.* at 81 (footnote omitted). There is "ample room" in our adversarial system, "at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Id.* at 82. *Williams* merely allows states to adopt such a rule when there is fair reciprocity.

In *Wardius*, the Supreme Court encountered another notice-of-alibi rule, but unlike the rule in *Williams*, this one did not require any reciprocal discovery from the state. 412 U.S. at 471–72. Church cites *Wardius* for the proposition that he is constitutionally guaranteed reciprocal discovery in general, but the decision only held that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of **alibi rules** unless reciprocal discovery rights are given to criminal defendants." *Id.* at 472 (emphasis added). In reaching this conclusion, the Court noted that "Oregon grants no discovery rights to criminal defendants," and, more importantly, its notice-of-alibi rule had no provision which required the prosecution to reveal the names and addresses of its witnesses. *Id.* at 475. However, the Court was "not suggest[ing] that the Due Process Clause of its own force requires Oregon to adopt such provisions," just that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street" for notice-of-alibi rules. *Id.* "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* at 476. And Oregon did not "suggest any significant governmental interests which might support the lack of reciprocity." *Id.*

Far from supporting Church's argument that he is constitutionally guaranteed reciprocal discovery generally, *Wardius*' limited holding and analysis affirm the exact opposite. All that was deemed unconstitutional

in *Wardius* was the requirement that a defendant "divulge the details of his own case" without requiring the State to reciprocate. *Id.* Indeed, *Wardius* reaffirmed the longstanding principle that "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford*, 429 U.S. at 559, and explicitly rejected the suggestion that "the Due Process Clause of its own force requires" states to even adopt discovery provisions. *Wardius*, 412 U.S. at 475. Instead, *Wardius* only holds that the Due Process Clause is implicated when discovery is not a "two-way street," that is, if the State requires a defendant to "divulge the details of his own case," it must also require the State to provide discovery to the defendant "in the absence of a strong showing of state interests to the contrary." *Id.* at 475–76.

The statute at issue does not trigger *Wardius*: Church is not being required to divulge any of the details of his own case. The State, of course, cannot compel Church to be deposed. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding the Fifth Amendment's privilege against self-incrimination applies "wherever the answer might tend to subject to criminal responsibility him who gives it"). And even if the reciprocal discovery trigger were present with an alibi defense, for example, *Wardius* would still not require the State to provide reciprocal discovery about its entire case. It would only require the State to provide discovery about its rebuttal evidence for the defense. This general or absolute reciprocity Church argues for is unsupported—*Wardius* does not and cannot establish a constitutional right to general reciprocal discovery because "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor." *United States v. Agurs*, 427 U.S. 97, 106 (1976). "Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much." *Id*. at 109. Under the Due Process Clause, defendants are only entitled to reciprocal discovery when they are required to divulge details of their case to the State.

Our examination of the federal criminal justice system's discovery provisions lends further support to our conclusion that this reciprocity is not required in the absence of a defendant being required to disclose details of his own case. A deposition in a federal criminal case is not

allowed unless there are "exceptional circumstances," and it is "in the interest of justice." Fed. R. Crim. P. 15(a)(1). The stated objective of this rule is to "preserve testimony for trial." *Id.* "It is not to provide a method of pretrial discovery." *United States v. Adcock*, 558 F.2d 397, 406 (8th Cir. 1977). There are a few federal discovery provisions requiring reciprocal discovery, but always in situations in which the defendant is required to "divulge the details of his own case." *Wardius*, 412 U.S. at 476; *see*, *e.g.*, Fed. R. Crim. P. 12.1 (notice-of-alibi rule). For example, reciprocal discovery is required for expert witness testimony intended to be introduced at trial, but each side is only entitled to summaries of the experts' expected testimonies and the bases of the experts' opinions. Fed. R. Crim. P. 16(a)(1)(G), (b)(1)(C).

The federal criminal discovery provisions also confirm that "reciprocal discovery" does not mean discovery rules must operate identically. Federal criminal defendants are not entitled to the discovery or inspection of statements made by a prospective government witness until **after** the witness has testified on direct examination at trial. Fed. R. Crim. P. 16(a)(2); 18 U.S.C. § 3500. And neither Rule 16 of the Federal Rules of Criminal Procedure, which governs "information subject to disclosure by the Government in criminal cases, nor any other federal rule or statute requires the Government to supply names of potential witnesses to a criminal defendant in a non-capital case." *United States v. Hutchings*, 751 F.2d 230, 236 (8th Cir. 1984); *see* 18 U.S.C. § 3432. Church asserts it is fundamentally unfair for the State to have "unfettered access to a criminal defendant's accuser yet prohibit outright any access by the criminal defendant," Appellant's Br. at 21, but in the federal system, he would not be able to depose the child victim, let alone be entitled to see **any** of the statements or interviews until after the child victim testified at trial. "Reciprocal discovery" does not mean the defendant receives access to all the State's information. As *Wardius* makes plain, it violates due process to require a criminal defendant to divulge the details of his case to the government without requiring the same from the State.

The absence of the ability to depose a child victim does not violate a defendant's due process rights. To hold otherwise would be to say that the discovery provisions in the federal criminal justice system—and in the

justice systems in the vast majority of other states—routinely and systematically violate the Due Process Clause. Indeed, other states that have addressed this specific issue have consistently concluded due process rights are not violated by not allowing defendants to conduct discovery depositions of victims or witnesses. For example, the Supreme Court of Arkansas held "[n]either the Sixth Amendment nor the due process clause of the Fourteenth Amendment requires a State to provide pretrial depositions" in criminal cases. *McDole v. State*, 6 S.W.3d 74, 80 (Ark. 1999). And in a case also involving a defendant charged with child molesting, the Supreme Court of Iowa concluded "[t]he right to present a defense does not afford a criminal defendant the right to depose witnesses" because a defendant "has no due process right to pretrial discovery." *State v. Clark*, 814 N.W.2d 551, 561 (Iowa 2012); *see also State v. Hilton*, 744 A.2d 96, 99 (N.H. 1999) ("A defendant has no unqualified due process right under either the State or Federal Constitution to compel depositions in criminal cases."); *In re Int. of E.G.*, 368 P.3d 946, 952 (Colo. 2016); *State v. Tate*, 221 A.2d 12, 13 (N.J. 1966); *State v. Singleton*, 853 S.W.2d 490, 493 (Tenn. 1993).

While we have chosen to provide for discovery in favor of a criminal defendant, this choice "is not required by the constitutional guarantee of due process." *State ex rel. Grammer v. Tippecanoe Cir. Ct.*, 268 Ind. 650, 652, 377 N.E.2d 1359, 1361 (1978). Nonetheless, we chose to go above this constitutional floor and encourage "liberal discovery" through our Trial Rules so that trials are "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012) (citation and internal quotation marks omitted). This statute and this decision do not alter this conscious choice to provide greater access to the facts. Church's access to information in the State's possession remains unchanged—the State must still give Church every statement the victim makes before trial. This statute does not prevent Church from learning who may testify against him, nor prohibit access to the substance of the anticipated testimony. Indeed, Church has already received the transcripts and recordings of interviews of the child victim and other relevant individuals.

This is in addition to the other documents he has received and his ability to depose all other witnesses, as he has already done with the mother.

Denying Church the opportunity to conduct a pretrial deposition—a limitation defendants routinely operate under in most jurisdictions in this country—does not deny him fundamental fairness or the ability to prepare a defense. We have chosen to provide broader discovery in criminal cases, but "the Constitution surely does not demand that much." *Agurs*, 427 U.S. at 109. And discovery rights under our Trial Rules have never been absolute; a trial court has always been empowered to prohibit depositions or place limitations on the way it is taken to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See* T.R. 26(C). Church will have broad access to the facts against him before trial, and the opportunity to cross-examine the victim at trial, but his due process rights are not violated by this statute.

Conclusion

The General Assembly—through its exclusive power to enact laws protecting the health and safety of an extremely vulnerable class of citizens—passed this statute to protect alleged child sex-crime victims from unnecessary re-traumatization. This statute is not being retroactively applied to Church. It is not a procedural statute that could conflict with our Trial Rules, nor does it violate the separation of powers enshrined in our Constitution. Finally, it does not violate any of Church's rights under the state and federal constitutions. Having rejected Church's arguments, we affirm the trial court.

Rush, C.J., and David and Slaughter, JJ., concur.
Goff, J., concurs in part and in the judgment with separate opinion.

ATTORNEY FOR APPELLANT

Matthew R. Strzynski
Mercho Caughey
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Office of the Attorney General
Indianapolis, Indiana

Goff, J., concurring in part and concurring in the judgment.

I agree with the Court's conclusion that the trial court properly denied Church's petition to depose the child victim. However, I part ways with the Court on the grounds for sustaining that conclusion. In my view, Indiana Code section 35-40-5-11.5 (the Act) is a procedural law in conflict with our trial rules governing pre-trial discovery. But because the Act corresponds with this Court's long-held concern for child welfare, and because it retains the trial court's discretion, I would consider the Act, as our precedent permits, an exception to the relevant trial rules.

On all other issues—the retroactivity question, the separation-of-powers question, the right-to-confrontation question, and the due-process question—I concur in full.

Discussion

We've long recognized that "the power to make rules of procedure in Indiana is neither exclusively legislative nor [exclusively] judicial." *State ex rel. Blood v. Gibson Circuit Court*, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1959). This parallel authority embodies a spirit of "cooperation" between the otherwise "independent branches of our government" and, when one branch fails to speak on a matter, it prevents the "denial of a substantive right for want of an appropriate procedure." *State v. Bridenhager*, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

In the past, the concurrent exercise of this dual authority led to a "hodgepodge" of rules. *Id.* To avoid the potential for conflict, the General Assembly, in 1937, enacted legislation vesting exclusive responsibility in this Court to promulgate rules of practice and procedure. *State ex rel. Cox v. Superior Court of Marion Cty.*, 233 Ind. 531, 532–33, 121 N.E.2d 881, 882 (1954). All existing statutes governing practice and procedure continued in force, but the new legislation declared "all laws in conflict" with the rules of court to "be of no further force or effect." *Id.* (quoting Act of Mar. 8, 1937, ch. 91, § 1, 1937 Ind. Acts 459, 459). Among other things, this measure "enable[d] the Supreme Court to simplify and abbreviate the

pleadings and proceedings; to expedite the decision of causes; [and] to remedy such abuses and imperfections as may be found to exist in the practice." *Id.* This prudential legislation remains in effect today. *See* I.C. §§ 34-8-1-1 to -3.

While the General Assembly relinquished its authority to dictate the rules of procedure, it retains the "entire lawmaking power of the state" and the right to enact "all laws and regulations respecting the peace, the safety, the health, the happiness, and the general well-being" of the citizenry. *See Cent. Union Tel. Co. v. Indianapolis Tel. Co.*, 189 Ind. 210, 219, 126 N.E. 628, 632 (1920). This power is exclusive to the legislature, and our "[r]ules of court cannot abrogate or modify [the] substantive law." *State ex rel. Zellers v. St. Joseph Circuit Court*, 247 Ind. 394, 401, 216 N.E.2d 548, 553 (1966) (citation and quotation marks omitted).

Whether a law is procedural or substantive is rarely straightforward. Indeed, the "distinction is an elusive notion" and is "often avoided by courts and legislatures." *Jacobs v. State*, 835 N.E.2d 485, 488 (Ind. 2005) (citation and quotation marks omitted). Here, however, I find little difficulty in making the distinction.

I. The Act is procedural (rather than substantive) and conflicts with our applicable trial rules.

In general, a law is **substantive** when it creates duties or establishes rights and responsibilities. *Blood*, 239 Ind. at 400, 157 N.E.2d at 478. As relevant here, the substantive law refers broadly to "the law that 'declares what conduct is criminal and prescribes the punishment to be imposed for such conduct.'" *Jacobs*, 835 N.E.2d at 489 (quoting Wayne R. LaFave, Substantive Criminal Law § 1.2 (2d ed. 2003)). A law is **procedural**, by contrast, when it "prescribe[s] the manner in which [substantive] rights and responsibilities may be exercised and enforced." *Blood*, 239 Ind. at 400, 157 N.E.2d at 478. In the "criminal justice" realm, a procedural law tends to "control the means by which a court is to determine a defendant's guilt or innocence" rather than "what the government must prove to establish a criminal offense." *Jacobs*, 835 N.E.2d at 489.

A. Rather than specifying rights, the Act prescribes factors a court must consider for approving a deposition and "the manner in which" the parties may conduct it.

The Act prohibits a defendant from deposing a child victim unless the defendant first "contacts the prosecuting attorney" and the "prosecuting attorney agrees to the deposition," either with or without conditions on "the manner in which" the parties conduct it. I.C. § 35-40-5-11.5(d). If the prosecutor denies the request, the defendant may petition the court for a hearing on "whether to authorize a deposition" and, if necessary, "the manner in which" the parties conduct it. I.C. § 35-40-5-11.5(e).

Upon receiving the petition, the "court shall authorize the deposition" only when the defendant shows "a reasonable likelihood that the child victim will be unavailable for trial," making it "necessary to preserve the child victim's testimony." I.C. § 35-40-5-11.5(f). The court "may not" authorize the deposition unless the defendant shows that "extraordinary circumstances" and "the interest of justice" compel the deposition. I.C. § 35-40-5-11.5(g). For either showing, the defendant must overcome the burden of proof "by a preponderance of the evidence." I.C. §§ 35-40-5-11.5(f), (g).

Finally, whether in granting the petition or in denying it, "the court shall issue a written order describing the reason" for its decision. I.C. §§ 35-40-5-11.5(i), (j). When the court grants a request, the order must "describe the manner in which the deposition shall be conducted." I.C. § 35-40-5-11.5(j)(2). This step requires the court to consider the child victim's age, his or her rights under Indiana Code section 35-40-5-1,[1] and "any other relevant factors or special considerations." I.C. § 35-40-5-11.5(h).

In short, the Act specifies

[1] Indiana Code section 35-40-5-1 specifies a victim's right to be "treated with fairness, dignity, and respect" and right to be "free from intimidation, harassment, and abuse."

- the steps a defendant must take to request a deposition (seeking approval from the prosecutor and, if necessary, petitioning the trial court);
- the factors a court must consider when deciding whether to authorize a deposition (child-victim's likely unavailability at trial or "extraordinary circumstances" and "the interest of justice");
- the defendant's burden of proof (by a preponderance of the evidence);
- the processes a court must follow when granting or denying a petition (issuing a written order with express reasons); and
- the factors a court must consider in determining "the manner in which" the parties conduct the deposition (child-victim's age and certain statutory rights).

The State acknowledges the Act contains "procedural elements" but insists that it's "fundamentally a substantive statute balancing competing interests and rights." Appellee's Br. at 39. According to the State, the Act reflects the legislative intent "to protect the child victim's substantive right to be free from the unnecessary psychological harm that may result from" his or her subjection "to the stressful environment of [a] deposition" and from testifying "more than once about the molestation." *Id.* at 16. To that end, the State submits, the Act reflects a policy decision "not to grant a defendant the right to conduct a discovery deposition" in a specific class of cases and under a specific set of circumstances. *Id.* at 35. The Court ultimately agrees with the State, concluding that the Act is substantive "because it predominantly furthers public policy objectives." *Ante*, at 12.

I respectfully disagree.

To begin with, the plain language of the Act—whatever objectives the legislature may have intended—articulates no express policy of child-victim rights. In fact, the measure uses **none** of the standard bill-drafting language that creates a right ("is entitled to"). *See* Off. of Code Revision, Legis. Servs. Agency, Drafting Manual for the Indiana General Assembly 11 (2012) (hereinafter LSA Drafting Manual). To be sure, the Act cross-

references "the rights of the victim under" Indiana Code section 35-40-5-1. I.C. § 35-40-5-11.5(h)(2). But that section of our criminal code covers the rights of victims generally (to be "treated with fairness, dignity, and respect" and without "intimidation, harassment, and abuse"), **not**, as the State insists, the specific right of a child-victim "to be free from the unnecessary psychological harm" of a deposition. *Cf.* I.C. § 35-37-4-8(e) (authorizing the use at trial of videotaped testimony from a child witness who is a sex-crime victim upon a finding that the defendant's "physical presence" would likely create "a substantial likelihood of emotional or mental harm"). What's more, the court must consider these statutory rights **only** when determining "the manner in which" the parties conduct the deposition, **not** when deciding whether to authorize the deposition to begin with. I.C. § 35-40-5-11.5(h). In any case, once the legislature confers a substantive right, as it had under Indiana Code section 35-40-5-1, the manner and method of executing that right "lies with this Court in our rule making power." *See State ex rel. Hatcher v. Lake Superior Court, Room Three*, 500 N.E.2d 737, 739 (Ind. 1986).

Second, just as it expresses no policy of child-victim rights, the Act doesn't portend to abrogate or negate a defendant's "right to conduct a discovery deposition" in a particular class of cases and under a particular set of circumstances. *See* Appellee's Br. at 35. *Cf. Hatcher*, 500 N.E.2d at 739 (holding that a trial rule governing change of venue did not supersede a statute that "specifically [took] away" the "substantive right" to a change of venue under certain circumstances); LSA Drafting Manual 11 (urging use of "is not entitled to" to express negation of a right). Rather, the decision of whether to authorize a deposition ultimately rests with the trial court, with the Act dictating the means by which the court should decide and, if necessary "the manner in which the deposition shall be conducted." At the end of the day, it's the trial court, not the legislature, that's "in the best position to consider the sincerity of the parties' arguments" over the scope of discovery in criminal proceedings, "as well as the overall costs associated with the proposed depositions, and potential alternatives that may better promote pre-trial efficiency of the case." *Hale v. State*, 54 N.E.3d 355, 360 (Ind. 2016).

In short, rather than articulating "competing interests and rights," as the State argues, the Act explicitly prescribes the factors a court must consider for authorizing a deposition, "**the manner in which**" the parties may conduct that form of pre-trial discovery, the defendant's burden of proof, and the processes a court must follow when granting or denying a petition. These prescriptions, and the language used to describe them, clearly betray the Act's purpose as procedural.[2] *See Blood*, 239 Ind. at 400, 157 N.E.2d at 478 (procedural laws specify the "**method** of doing an act in court" or "prescribe the **manner in which** [substantive] rights and responsibilities may be exercised and enforced") (emphases added). *See also Chicago Terminal Transfer R. Co. v. Vandenberg*, 164 Ind. 470, 489, 73 N.E. 990, 996 (1905) ("Matters relating to the **procedure** in a case enforcing a right of action" include such things as the admissibility of evidence and the burden of proof.) (emphasis added).

B. The Act plainly conflicts with our court rules governing pre-trial discovery.

Indiana Trial Rule 26 permits a party to obtain discovery by one of several methods, including "depositions upon oral examination or written questions."[3] Ind. Trial Rule 26(A)(1). "Unless the court orders otherwise

---

[2] Rather than focus on the Act's plain language, the Court adopts a test, drawn largely from "other jurisdictions," that examines a statute's "predominant objective." *Ante*, at 7, 11. But with sufficient "guidance" from our own case law on how to "distinguish between substantive and procedural rules," *Jacobs*, 835 N.E.2d at 489, I see little need to rely on foreign precedent. In any case, under the Court's test, I still consider the Act a procedural measure. Pre-trial discovery, which the Act governs, aims to "enhance the accuracy and efficiency of the fact-finding process." *Lay v. State*, 428 N.E.2d 779, 781 (Ind. 1981). And other jurisdictions, as the Court recognizes, often classify as procedural those laws that promote judicial efficiency and "foster accuracy in fact-finding." *See Cabinet for Health & Family Servs. v. Chauvin*, 316 S.W.3d 279, 286 (Ky. 2010).

[3] The rules of trial procedure "apply to all criminal proceedings" to the extent they don't "conflict with any specific rule adopted by this court for the conduct of criminal proceedings." Ind. Crim. Rule 21. Because no rule of criminal procedure specifies the availability of or procedures for conducting discovery, the rules of trial procedure apply in criminal cases. *See id. See also* I.C. § 35-37-4-3 (permitting a criminal defendant to "take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure").

under subdivision (C) of this rule," there is no limit to the frequency a party may use these methods. T.R. 26(A). Under subdivision (C), a trial court, upon "motion by any party or by the person from whom discovery is sought, and for good cause shown," may enter "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." T.R. 26(C). Such an order may specify, among other things, the "terms and conditions" or "method" of discovery, it may limit the scope of discovery to "certain matters," and it may even prohibit discovery outright. T.R. 26(C)(1)–(4).

Indiana Trial Rule 30, in turn, permits "any party," after the action commences, to "take the testimony of any person, including a party, by deposition upon oral examination." T.R. 30(A). "Leave of court," whether "granted with or without notice," is necessary "only if the plaintiff seeks to take a deposition" before "the expiration of twenty [20] days after service of summons and complaint upon any defendant." *Id.* The court need not grant leave when "a defendant has served a notice of taking deposition or otherwise sought discovery." T.R. 30(A)(1).

In my view, the Act clearly conflicts with these rules.

For a conflict to arise, a statute need not stand "in direct opposition" to our trial rules. *Bridenhager*, 257 Ind. at 704, 279 N.E.2d at 796. Rather, incompatibility requires only "that both could not apply in a given situation." *Id.* And that's precisely the scenario we're presented with here, as a cursory comparison of the Act's procedural mechanisms reveals.

	Trial Rules	**I.C. § 35-40-5-11.5**
Application	**No limit** to the frequency a defendant may use these methods unless protective order applies. T.R. 26(A).	Defendant may depose "**only** in accordance with this section," signaling exclusion of trial rules.
Initiation Process	Defendant files notice **with no need for prosecutor's consent**. T.R. 30, 45(D).	Defendant asks for **consent of prosecutor,** who can refuse or agree to with conditions.

Leave of Court	**Only** when plaintiff seeks to depose before certain time. T.R. 30(A).	**Always** necessary when prosecutor denies request.
Motions and Burden of Proof	The "**person from whom discovery is sought"** must file and show "good cause" for protection. T.R. 26(C).	**Defendant** must file and show by "preponderance of the evidence" the likelihood of a witness's absence at trial or "extraordinary circumstances" and "the interest of justice."
Order of Court	Trial court "**may**" issue protective order with terms and conditions. T.R. 26(C).	Trial court "**shall**" issue written order when granting or denying petition.

Despite these clear and unambiguous differences, the State insists that, "[e]ven if deemed procedural," the Act "does not fatally conflict with the Trial Rules." Pet. to Trans. at 17. When taking a comprehensive view of our discovery rules, and when comparing them with the Act, the State submits, "they form a congruent process that ought to be followed with child sex-crime victims." *Id.* at 18.

To be sure, not all differences between a judicial rule and a procedural statute necessarily render the latter unenforceable. For example, in *Budden v. Board of School Commissioners of City of Indianapolis*, on which the State relies, we found no conflict where the "legislative analog to Rule 23 [governing class actions] is a nearly verbatim copy of the judicial rule" and where both share a common "heritage." 698 N.E.2d 1157, 1164 (Ind. 1998). The judicial rule, we acknowledged, calls for a "'hearing or waiver of hearing' on the motion for class certification, a point on which the legislative rule is silent." *Id.* at 1164 n.12. But that silence, we concluded, "does not rise to the level of a 'conflict' between the two" since both could potentially "apply in a given situation." *Id.* (quoting *Bridenhager*, 257 Ind. at 704, 279 N.E.2d at 796).

In contrast to the legislative rule at issue in *Budden*, the Act is **not** silent on certain procedures covered by our rules of pre-trial discovery. To the contrary, as the comparative table above illustrates, there's substantial

overlap between the two. And even if the Act and the trial rules share common procedural traits, as the State suggests, *see* Pet. to Trans. at 18–20, it doesn't change the fact that a given case precludes dual application. *See Williams v. State*, 681 N.E.2d 195, 200 n.6 (Ind. 1997) (holding that Evidence Rule 412 controls over Indiana's Rape Shield Law despite the former incorporating "basic principles" found in the latter). *See also Matter of M.S.*, 140 N.E.3d 279, 284 (Ind. 2020) (holding that a statute imposing a hard deadline for a factfinding hearing in a CHINS proceeding is procedural and conflicts with Trial Rule 53.5, which permits an extension of time "for good cause"); *State ex rel. Jeffries v. Lawrence Circuit Court*, 467 N.E.2d 741, 741–42 (Ind. 1984) (holding that a trial rule requiring a show of cause for a discretionary change of judge conflicted with and superseded a statute entitling a party in a criminal action, as "a substantive right," to a preemptory change of venue without cause).

II. Because it harmonizes with our concern for child welfare, the Act warrants an exception to the Rules.

Typically, when a statute conflicts with our rules of trial procedure, the latter supersedes the former. *McEwen v. State*, 695 N.E.2d 79, 89 (Ind. 1998). But even when presented with such a conflict, this Court may, in its discretion, decide to treat the otherwise incompatible statute as an exception to the rules of court.

In *Humbert v. Smith*, we considered whether to invalidate a section of Indiana's paternity statute expediting the admission of blood tests by eliminating—in conflict with our rules of evidence—the need to establish a proper foundation. 664 N.E.2d 356, 356–57 (Ind. 1996). While the statute and the rule "create[d] two different standards," thus precluding dual application in "a given situation," we treated the statute as an exception to our rules of evidence. *Id.* at 357. The statute, we reasoned, was "consistent with the special care" that our "courts have taken toward the expeditious resolution" of matters involving "paternity, custody, and support of children." *Id.* What's more, we explained, the statute eliminated the need for an evidentiary foundation only when a party failed to object to the

admission of evidence within thirty days of trial, thus accommodating those with "particularized grievances." *Id.*

Here, as in *Humbert*, the otherwise conflicting Act harmonizes with our long-held concern for the welfare of children, thus warranting, in my view, an exception to the relevant rules of court. In *Jones v. State*, for example, we held that a trial court may bar a criminal defendant from personally attending the deposition of a child-molest victim without violating the defendant's constitutional right to confront witnesses. 445 N.E.2d 98, 100 (Ind. 1983) (citing *Bowen v. State*, 263 Ind. 558, 334 N.E.2d 691 (1975)). Despite the lack of a record noting the reasons for excluding the defendant, we found it "reasonable to assume" that the trial court expected his presence to "be intimidating to the witnesses because of their relationship to him and their tender age." *Id.* While rules governing pre-trial discovery in Indiana typically entitle a party to attend a deposition, the circumstances in *Jones*, we later opined, warranted an exception to those rules. *Rita v. State*, 674 N.E.2d 968, 971 (Ind. 1996).

In addition to reflecting our concerns for the welfare of children, the Act, as with the statute at issue in *Humbert*, doesn't eliminate entirely the procedural apparatus of our judicial rules, thus accommodating those with a legitimate need. While the Act requires a defendant to petition the trial court to authorize a deposition, and while the defendant must make a sufficient showing of need, such procedural requisites aren't unheard of. In fact, neither our case law nor our trial rules grant a defendant an unlimited right to depose a victim. And the State's interest may subordinate the interests of the defendant in certain circumstances.

For example, we've found it appropriate for counsel of an indigent defendant, considering the public cost involved, to "seek prior approval" from the trial court to conduct a deposition. *Murphy v. State*, 265 Ind. 116, 120, 352 N.E.2d 479, 482 (1976). And Trial Rule 26 itself permits a trial court, upon motion by any party and for good cause shown, to issue an order, as "justice requires," to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." T.R. 26(C). Such an order may specify the "terms and conditions" or "method" of discovery, it may limit the scope of discovery to "certain matters," and it

may even prohibit discovery outright. *Id.* In contemplating a trial court's authority under this rule, we've cited concerns over a criminal defendant using a deposition as a "a fishing expedition, designed to impede the administration of justice," or even "as a harassment technique, by forcing his or her victims to unnecessarily relive the experience without the defendant having any real expectation of obtaining new information." *Hale*, 54 N.E.3d at 359–60.

In short, while our trial rules entitle a criminal defendant to discovery, including the taking of depositions, the trial court may deviate from those rules upon "a showing that the defendant had no legitimate defense interest in support of his petition or that the State had a paramount interest to protect." *Murphy*, 265 Ind. at 119, 352 N.E.2d at 481–82. And while our trial rules and the Act present "two different standards" governing depositions, thus precluding dual application in "a given situation," *see Humbert*, 664 N.E.2d at 357, the Act doesn't abrogate the judicial discretion to limit the scope of discovery or to prohibit depositions entirely.

Conclusion

For the reasons above, I agree with the Court's conclusion that the trial court properly denied Church's petition to depose the child victim, but because I consider the Act a procedural (rather than a substantive) measure, I part ways with the Court on the grounds for sustaining that conclusion. In my view, the Act, which otherwise conflicts with our court rules governing pre-trial discovery, warrants an exception because it harmonizes with our concern for child welfare and because it ultimately retains the trial court's discretion. Had the measure advanced a policy **not** conducive to our own, I likely would have come to a contrary conclusion. After all, by permitting the legislature "to impose [procedural] regulations and restrictions upon the jurisdiction of the Supreme Court," *Blood*, 239 Ind. at 401, 157 N.E.2d at 478 (internal quotation marks omitted), we risk blurring—if not collapsing—that fine line separating the "independent branches of our government," *see Bridenhager*, 257 Ind. at 703, 279 N.E.2d at 796.

On all other issues—the retroactivity question, the separation-of-powers question, the right-to-confrontation question, and the due-process question—I concur in full.