[CAPTION]

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE (PROBATION SEARCH)

FACTS

[INSERT FACTS RELATING TO SEARCH]

WARRANTLESS SEARCHES, GENERALLY

The Fourth Amendment to the United States Constitution provides each person the right to be secure in his or her person, houses, papers and effects against unreasonable searches and seizures. Bryant v. State, 660 N.E.2d 290, 300 (Ind. 1995), *cert. denied*, 519 U.S. 926 (1996). The Fourth Amendment reads:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297, 313 (1972). A principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter a residence for purposes of search or arrest. Welsh v. Wisconsin, 466 U.S. 740, 748 (1984).

> Article I, Section 11 of the Indiana Constitution states:
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> > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The protection provided by the Fourth Amendment is the minimum amount of protection a state may provide for its citizens. State v. Hanley, 802 N.E.2d 956, 958-59 (Ind. Ct. App. 2004), *trans. denied*.

States are permitted to provide additional protection based on their state constitutions. State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002) ("The Indiana Constitution has unique vitality, even where its words parallel federal language."). Although Art. I § 11 of the Indiana Constitution appears to have been derived from the Fourth Amendment and shares the same language, Indiana Courts have interpreted and applied Art. I, § 11 independently from Fourth Amendment jurisprudence. State v. Bulington, 802 N.E.2d 435, 438 (Ind. 2004). Rather than looking to federal requirements such as warrants and probable cause when evaluating Article I, Section 11 claims, the burden is on the State to show that under the totality of the circumstances its intrusion was reasonable.

LEGAL ANALYSIS / PROBATION AND SPECIAL NEEDS

Fourth Amendment

Defendant acknowledges that the operation of the probation system presents "special needs" beyond the normal need for law enforcement, which may justify a departure from the usual warrant and probable cause requirements imposed by the Fourth Amendment. Rivera v. State, 667 N.E.2d 764, 766 (Ind. Ct. App. 1996), *trans. denied*. Thus, a search of a probationer or his home may be conducted absent probable cause. Purdy v. State, 708 N.E.2d 20, 22-23 (Ind. Ct. App. 1999). Nonetheless, "a probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168 (1987).

Probation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment. Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999); see also Griffin, 483 U.S. at 873-876, 107 S. Ct. at 3168-3169. As such, probation is a conditional liberty dependent upon the observance of certain restrictions. Carswell, 721 N.E.2d at 1258. These restrictions are designed to ensure that the probation serves as a period of genuine rehabilitation and that the public is not harmed by a probationer living within the community. Id. The trial court is vested with broad discretion in establishing conditions of probation. Id. The only limitation is that the conditions must demonstrate a reasonable relationship to the treatment of the accused and the protection of the public. Id. Thus, as a result of the trial court's broad discretion, appellate review is essentially

limited to determining whether the conditions placed upon the defendant are reasonably related to attaining these goals. Id.

Where a defendant contends that a probation condition is unduly intrusive upon a constitutional right, the following three factors must be balanced: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement. Id. Moreover, to determine the validity of a search condition, it must first be established whether the condition as written is so broad as to be facially invalid. Id. at 1260. Only if the condition is not facially invalid, must the Court determine whether the imposition of the search condition is "reasonably related to [a defendant's] rehabilitation and the protection of the public." Id.

A probationer is entitled to limited protection of his privacy interests. Polk v. State, 739 N.E.2d 666, 669 (Ind.Ct.App. 2000). The Fourth Amendment requires that a search of a probationer's home be reasonable. Purdy, 708 N.E.2d at 23; Griffin, 483 U.S. at 875. "[A]ffording probationers lesser protections is predicated on the premise that probation officers, or police working with probation officers, are conducting searches connected to the enforcement of conditions of probation and not for normal law enforcement purposes." Polk, 739 N.E.2d at 669. When a search is not conducted within the regulatory scheme of probation enforcement, a probationer's normal privacy rights cannot be stripped from him. Id. The State must demonstrate that a warrantless search of a probationer was a true probationary search and not an investigatory search. Purdy, 708 N.E.2d at 23. "A probation search cannot be a mere subterfuge enabling the police to avoid obtaining a search warrant." Id.

Should an initial determination be made that the search condition was valid, the court must conduct a bifurcated inquiry. Allen v. State, 743 N.E.2d 1222, 1228 (Ind.Ct.App. 2001). First, a court should determine whether the search was indeed a parole or probation search. Id. If the search was not conducted within the regulatory scheme of parole/probation enforcement, then it will be subject to the usual requirement that a warrant supported by probable cause be obtained. Id. If the search is a true parole/probation search, then a court must determine whether the search was reasonable. Id.

Article I, Section 11 of the Indiana Constitution

Indiana Constitutional analysis is on the reasonableness of the official behavior in conducting a warrantless search. Rivera, 667 N.E.2d at 767. In deciding Rivera, the Court of Appeals sought guidance from the federal courts. In order to adequately protect a probationer's privacy interest, a probation agreement requiring the probationer to submit to searches should contain narrowly tailored restrictions. Id.; United States v. Wryn, 952 F.2d 1122, 1124 (9th Cir. 1991); United States v. Giannetta, 909 F.2d 571, 575 (1st Cir. 1990); United States v. Schoenrock, 868 F.2d 289, 292-93 (8th Cir. 1989). Moreover, Judge Staton's concurring opinion in Rivera noted that a condition of probation requiring the probationer to submit to a search without reasonable suspicion is overly broad and in conflict with the dictates of the Supreme Court's decision in Griffin. Rivera, 667 N.E.2d at 767-68.

In Purdy v. State, 708 N.E.2d 20, 23 (Ind.Ct.App. 1999), the appellate court adopted such analysis and affirmed the importance of a reasonableness limitation on a probationer's consent to waive his rights against warrantless searches in a probation agreement. The determination of the validity of consent to search is a factual matter for the trial court that will not be set aside unless it is clearly erroneous. Id. While conditions of probation may impinge upon the probationer's exercise of a constitutionally protected right, those impingements must be designed to accomplish the explicit goals of protecting the community and promoting the probationer's rehabilitation process. Id. In other words, the State must present evidence that this was at true probation search.

VALIDITY OF SEARCH CONDITION OF PROBATION

A trial court has broad discretion to impose conditions of probation which will aid in the furtherance of the goals of assuring that the probation serves as a period of genuine rehabilitation and that the community is not harmed by a probationer being at large. Carswell v. State, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999). These conditions may impinge upon the probationer's exercise of an otherwise constitutionally protected right. Purdy v. State, 708 N.E.2d 20, 22 (Ind. Ct. App. 1999). However, probationers are entitled to some limited protection of their privacy interests. Id. at 23. A probationer's home is protected by the Fourth Amendment's requirement that a search be reasonable.

Griffin v. Wisconsin, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987); Carswell, 721 N.E.2d at 1260; Purdy, 708 N.E.2d at 23. Similarly, Indiana Constitutional analysis is based upon the reasonableness of the official behavior in conducting a warrantless search. Purdy, 708 N.E.2d at 23.

When a defendant contends that a probation condition is unduly intrusive on a constitutional right, the following factors must be balanced: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement. Carswell, 721 N.E.2d at 1258. Moreover, to determine the validity of a search condition, the court must establish whether the condition as written is so broad as to be facially invalid. Bonner v. State, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002), *trans. denied*. If the condition is not facially invalid, then we must determine whether the imposition of the search condition is reasonably related to the defendant's rehabilitation and the protection of the public. Id. at 1247-48.

In Fitzgerald v. State, 805 N.E.2d 857, 864 (Ind.Ct.App. 2004), the defendant challenged the following provision from his Order of Probation: "You shall waive your right against *unreasonable* searches by the Probation Officer or anyone acting on behalf of the Probation Officer for the purpose of insuring compliance with your conditions of probation." In the instant case, the condition reads, "You shall waive your right against unreasonable searches by the probation officer or anyone acting on behalf of the probation department, law enforcement officers or Community Corrections Officers for the purpose of insuring compliance with your conditions of probation." The conditions at issue are nearly identical. Fitzgerald relied upon several cases in which the Indiana Court of Appeals and the United States Supreme Court conclusively stated that the search of a probationer's home must be conducted in compliance with the reasonableness requirement of the Fourth Amendment. The instant probation condition in those cases and the probation condition at issue in Fitzgerald, is that the condition would have Fitzgerald waive his right to ***unreasonable*** searches, whereas the probation conditions in those other cases made no mention of whether the searches must be reasonable or unreasonable. [emphasis in original]. The Defendant's conditions of probation likewise require that he waive his right against **unreasonable** searches. In each case cited by the State in Fitzgerald, which cases the State likewise relies upon in the instant matter, the

court held that a reasonableness requirement was inherently included within the provision, even though not explicitly contained. See, e.g., Carswell, 721 N.E.2d at 1262.

In Fitzgerald as in the instant case, the State asks that the Court apply similar logic to the provision at issue in this case and determine that the condition survives because "reasonableness is inherent in the test of the probation condition." Fitzgerald, 805 N.E.2d at 865. To support this argument, the State relied upon the language in the provision which states that a search may be conducted by "the Probation Officer or anyone acting on behalf of the Probation Office for the purpose of insuring compliance with your conditions of probation." Id. In effect, the State argued that any search conducted by a Probation Department for purposes of probation compliance is automatically cloaked with reasonableness. Such is not the case. Id.

The Fitzgerald Court held that such provision is invalid because it explicitly attempts to allow Probation Officers to perform *unreasonable* searches, even though it has repeatedly been stated that probationers enjoy a constitutionally protected right against such. Fitzgerald, 805 N.E.2d at 865-66. As a result, the Court of Appeals was unable to conclude, as it had in Bonner, Carswell, and Purdy, that the provision is valid due to the inherent reasonableness requirement. Id. To determine the validity of a search condition, the Court must first establish whether the condition as written is so broad as to be facially invalid. Bonner, 776 N.E.2d at 1247 (quoting Carswell, 721 N.E.2d at 1260). Further analysis is required only if the condition is not facially invalid. In the instant case, the Fitzgerald holding is directly on point holding that the condition is facially invalid.

WAS THIS A "TRUE" PROBATION SEARCH

If the search was not conducted within the regulatory scheme of probation enforcement, the probationer's normal privacy rights cannot be stripped from him. Allen v. State, 743 N.E.2d 1222, 1228 (Ind. Ct. App. 2001), *trans. denied.* The State has the burden of proving that a warrantless search of a probationer was a probationary search and not an investigatory search. Id. Specifically, "[a] probation search cannot be a mere subterfuge enabling the police to avoid obtaining a search warrant." Id. If the

search was not conducted within the regulatory scheme of probation enforcement, then it will be subject to the usual requirement that a warrant supported by probable cause be obtained. Id.

In Bonner v. State, 776 N.E.2d 1244 (Ind.Ct.App. 2002), Marion County Probation Officer Spellman was conducting a "routine probation sweep" to verify probationers' addresses. Probation Officer Spellman was accompanied by two deputy sheriffs. Id. Probation Officer Spellman and one deputy knocked on Bonner's door, whereupon Bonner fled through the rear of the residence, being apprehended by the second deputy. Id. Thereafter, Bonner was returned to the residence, where Probation Officer Spellman reviewed Bonner's probation condition permitting a search of his residence. Probation Officer Spellman then directed the deputies to search the house, where contraband was located. Id. In determining that a search was within the regulatory scheme of probation enforcement, the Bonner Court placed emphasized that Probation Officer Spellman was conducting a routine probation sweep that led to the search. Id. at 1250.

In Allen v. State, 743 N.E.2d 1222 (Ind.Ct.App. 2001), a police officer, Lobosky, had information that the parolee, Allen, had brandished a firearm. Lobosky passed such information to Allen's parole officer, Thornberry. Id. Thornberry, accompanied by Lobosky and another officer, went to Allen's home, where Thornberry initiated and conducted a search. Id. at 1228. Thornberry was in charge of the search. Id. Although the officers eventually entered the home, they initially stood outside with Allen during the search. Id. at 1228, n. 9. The parole officer discovered the contraband, whereupon Lobosky entered the home. Id. "The record indicates that Thornberry initiated and oversaw the search, and that, after some evidence had been found, Lobosky assisted Thornberry." Id.

Additionally, a person on probation occupies a status similar to that of a person on parole. Carswell, 721 N.E.2d at 1262). The Allen Court upheld the determination that the search in that case was a true probation/parole search, as it was the parole officer's main objective to determine if the parolee was in violation of his parole agreement. 743 N.E.2d at 1228.

The search of the instant home, by contrast, was not a true probation search. [INSERT FACTS THAT ILLUSTRATE SEARCH WAS PRETEXT FOR INVESTIGATION AND THE SEARCH WAS

NOT PART OF A ROUTINE CHECK, IT WAS INITIATED BY POLICE, NO PROBATION REVOCATION WAS FILED, HOMES ARE NOT GENERALLY SEARCHED AS PART OF PROBATION, ETC.].

REASONABLE SUSPICION

[EITHER INSERT ARGUMENT THAT THE SEARCH WAS NOT SUPPORTED BY REASONABLE SUSPICION OR ARGUE Defendant concedes that the reports to the probation officer constitute reasonable suspicion for a probation search. However, the Court can only reach analysis of reasonable suspicion, if it can first determine that the probation condition was facially valid in the first instance, and that the search was a true probation search in the second instance. The State of Indiana cannot meet its burden in either respect.

CONCLUSION

For the foregoing reasons, in the singular and in the aggregate, the Court should grant Defendant's Motion to Suppress the physical evidence and statements illegally obtained in this cause of action.

(Signature)

ADDITIONAL CASE LAW:

United States v. Knights, 534 U.S. 112; 122 S. Ct. 587; 151 L. Ed. 2d 497 (2001) (only "reasonable suspicion," rather than probable cause, and no warrant is required for a law enforcement officer to search a probationer's residence, where a court has conditioned probation on consent to search; the probationer's expectation of privacy is diminished by being subject to search by law enforcement as a condition of probation).

Nowling v. State, 955 N.E.2d 854 (Ind.Ct.App. 2011) (fact that probationer's drug counselor claimed probationer lived in "la la land" about his addictions and probationer's status as a high-risk probationer did not constitute reasonable suspicion to search probationer's room), *aff'd on reh'g*, 961 N.E.2d 34 (Ind.Ct.App. 2012).

Hensley v. State, 962 N.E.2d 1284 (Ind.Ct.App. 2012) (at the point police began their own investigatory search without the probation officer, the officer's search ceased being a probationary search and was unreasonable).

Kopkey v. State, 743 N.E.2d 331 (Ind.Ct.App. 2001) (trial court did not err in denying Defendant's motion to suppress laboratory results of chemical analysis of two urine samples obtained by community corrections officers that revealed that Defendant had recently used cocaine where Defendant voluntarily consented to random drug tests as a condition of home detention).

Micheau v. State, 893 N.E.2d 1053 (Ind.Ct.App. 2008) (probation officer's "home visit" for safety reasons was reasonable despite the presence of police where he made police get a warrant as soon as they found evidence of a crime).

Shelton v. State, 26 N.E.3d 1038 (Ind.Ct.App. 2015) (reasonable suspicion existed for warrantless search of Defendant's home, as a condition of serving time through community corrections, where police corroborated details of an anonymous tip).