[CAPTION]

MOTION TO SUPPRESS EVIDENCE (PURSUANT TO WARRANT)

The Defendant, by counsel, respectfully requests this Court to suppress as evidence all items seized and observations and statements made during, or as a result of, the execution of the search warrant in the above-captioned cause. In support of this Motion, the Defendant states the following:

1. The Defendant has been charged with [insert offenses].

2. On [insert date], the police entered and searched the Defendant's home, pursuant to a search warrant, a copy of which is marked as Exhibit "A", attached and hereby incorporated by reference.

3. Defendant was immediately detained and arrested after the execution of the search warrant attached as Exhibit "A".

4. The search of the Defendant's house was unconstitutional for the following reasons:

[SELECT APPROPRIATE PARAGRAPHS]

a. The issuance of the search warrant was the result of an improper ex parte application for the search warrant in that the affiant in this search warrant [SELECT ONE: failed to advise the Judge who issued the search warrant of material facts OR made false and misleading representations with a reckless disregard for the truth], thereby violating the Fourth Amendment of the Indiana Constitution. Without the false and misleading representations OR omissions, a search warrant would not have been issued.

b. The search warrant did not describe with particularity the place to be searched, causing the resulting search to violate the Fourth Amendment of the U.S. Constitution.

c. The search warrant did not describe the person to be searched, thereby resulting in the search violating the Fourth Amendment of the U.S. Constitution.

d. The search warrant did not accurately describe the person who was actually searched, thereby causing the resulting search to violate the Fourth Amendment of the U.S. Constitution.

e. The search warrant did not specifically lists items to be searched

for and seized, and thus was a general, overly broad warrant violating the Fourth Amendment of the U.S. Constitution.

f. The State's [probable cause Affidavit or oral showing] failed to establish probable cause that a crime had been committed and evidence of the crime would be found in the Defendant's home, thereby causing the resulting search to violate the Fourth Amendment of the U.S. Constitution. *See probable cause Affidavit OR transcript herein incorporated and referenced as Exhibit B.*

g. The State's [probable cause Affidavit or oral showing] consisted of stale information, thereby failing to establish probable cause and causing the resulting search to violate the Fourth Amendment of the U.S. Constitution. *See probable cause Affidavit OR transcript herein incorporated and referenced as Exhibit B.*

h. The State failed to substantially comply with the statutory requirements to obtain a warrant.

i. The search warrant was not issued by a neutral and detached magistrate, thereby violating the Fourth Amendment of the U.S. Constitution.

j. The officers, in executing the warrant, exceeded the scope of the warrant and the authority vested in the officers through the warrant, thereby violating the Fourth Amendment of the U.S. Constitution in that:

[SELECT APPROPRIATE PARAGRAPHS]

(1) the search of the premises was a general search outside the authority granted by the search warrant, and resulted in the seizure of articles not described in the search warrant. The evidence seized, as evidenced by the return, is not that which is described on the face of the search warrant as required by I.C. 35-33-5-2.

(2) the Defendant was not specified in search warrant to be searched.

(3) The search warrant was executed more than ten (10) days after the date of issuance in violation of I.C. 35-33-5-7.

(4) The police unlawfully entered the home without properly knocking and announcing their presence.

k. Under the totality of the circumstances, the search of the Defendant's home, pursuant to the search warrant, was unreasonable, and thus violated Article I, Section 11 of the Indiana Constitution.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to suppress as evidence all items seized and observations and statements made during, or as a result of, the execution of the warrant, and for all other relief just and proper in the premise.

(Signature)

REFERENCES **CASEBANK Z.2.c; Z.9.d**

IC 35-33-5-1 et seq. (search warrants; issuance, affidavit, execution)

I.C. 35-33-5-2(b) (A probable cause affidavit based on hearsay must either contain: 1) reliable information establishing the credibility of the hearsay source and a factual basis for the information furnished; or 2) information that establishes that the totality of circumstances corroborates the hearsay).

I.C. 35-33-5-7(d) (requires officer executing search warrant to announce authority and purpose of visit).

I.C. 35-37-4-5 (codified good faith exception).

CASE LAW

PROBABLE CAUSE

Hensley v. State, 778 N.E.2d 484 (Ind.Ct.App. 2002) (police officer's affidavit did not link drugs allegedly purchased by the Defendant with premises described in affidavit; affidavit merely contained description of home and allegation that the Defendant had purchased drugs the previous day). See also Merritt v. State, 803 N.E.2d 257 (Ind.Ct.App. 2004).

Jaggers v. State, 687 N.E.2d 180 (Ind. 1997) (use of information received from anonymous informants presents heightened reliability concerns). See also State v. Mason, 829 N.E.2d 1010 (Ind.Ct.App. 2005).

Eaton v. State, 889 N.E.2d 297 (Ind. 2008) (where there is probable cause that the Defendant is involved in drug trafficking, it is reasonable to believe that the Defendant keeps evidence of his activities in his home). See also U.S. v. Kelly, 772 F.3d 1072 (7th Cir. 2014) (in probable cause determinations, court is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense).

Doss v. State, 649 N.E.2d 1045 (Ind.Ct.App. 1995) (officer's personal feelings about confidential informant's credibility was irrelevant and did not meet requirements of I.C. 35-33-5-2(a)(2)).

Bradley v. State, 609 N.E.2d 420 (Ind. 1993) (probable cause affidavit was insufficient where it did not contain reliable information establishing credibility of anonymous confidential informant); see also Cartwright v. State, 26 N.E.3d 663 (Ind.Ct.App. 2015) (uncorroborated hearsay from a source whose credibility is itself unknown, standing alone, cannot support a finding of probable cause); Buford v. State, 40 N.E.3d 911 (Ind.Ct.App. 2015).

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) ("if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny on the basis of his knowledge unnecessary").

Houser v. State, 678 N.E.2d 95 (Ind. 1997) (declarations against penal interest can furnish a sufficient basis for establishing the credibility of the informant within the meaning of I.C. 35-33-5-2(b)). See also State v. Shipman, 987 N.E.2d 1122 (Ind.Ct.App. 2013).

Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998) (statement that placed declarant near drugs was not statement against interest because it was made pursuant to immunity deal with prosecutor).

Dolliver v. State, 598 N.E.2d 525 (Ind. 1992) (general rule is that affidavit to obtain warrant based on

"second-hand hearsay" is insufficient to support warrant). See also Mers v. State, 482 N.E.2d 778 (Ind.Ct.App. 1985); Everroad v. State, 590 N.E.2d 567 (Ind. 1992).

Mehring v. State, 884 N.E.2d 371 (Ind.Ct.App. 2008) (in determining whether an affidavit provided probable cause for issuance of search warrant, doubtful cases are to be resolved in favor of upholding the warrant). See also Pattison v. State, 958 N.E.2d 11 (Ind.Ct.App. 2011).

Cases in which speculative information or information known to the public could not serve as corroboration of hearsay. Newby v. State, 701 N.E.2d 593, 601 (Ind.Ct.App.1998); Jaggers v. State, 687 N.E.2d 180 (Ind. 1997); Bryant v. State, 655 N.E.2d 103 (Ind.Ct.App. 1995); Flaherty v. State, 443 N.E.2d 340 (Ind.Ct.App. 1982); Dolliver v. State, 598 N.E.2d 525 (Ind. 1992); Bradley v. State, 609 N.E.2d 420 (Ind. 1993).

Methene v. State, 720 N.E.2d 384 (Ind.Ct.App. 1999) (affidavit presented issuing magistrate with virtually no factual basis that controlled buy had occurred; affiant's failure to set forth any facts to establish that controls were adequate rendered affidavit alleging controlled buy insufficient to establish probable cause). See also Flaherty v. State, 443 N.E.2d 340 (Ind.Ct.App. 1982); Walker v. State, 829 N.E.2d 591 (Ind.Ct.App. 2005). Cf. Perryman v. State, 13 N.E.3d 923 (Ind.Ct.App. 2014) (controlled buy sufficient to support probable cause for issuance of search warrant, notwithstanding Defendant's claim that officers positioned so as to view rear door of residence at time of buy could not have observed front door of his residence).

Decker v. State, 19 N.E.3d 368 (Ind.Ct.App. 2014) (dismissal of child pornography possession charge did not negate probable cause relied on by search warrant).

Perez v. State, 27 N.E.3d 1144 (Ind.Ct.App. 2015) (search of Defendant's home did not violate state or federal constitutions; even if warrantless canine sniff of front door was unconstitutional, officers had substantial legally obtained information, detailed in probable cause affidavit, to suspect that violation of law had occurred).

Bennett v. State, 5 N.E.3d 498 (Ind.Ct.App. 2014) (even if informant's statements to police were not declarations against informant's penal interest, but rather statements to garner favor with police, the State's probable cause affidavit contained additional information to corroborate informant's statements).

STALENESS

Huffines v. State, 739 N.E.2d 1093 (Ind.Ct.App. 2000) (although police executed search warrant for the Defendant's home within ten-day statutory limit, considering totality of circumstances, probable cause dissipated in eight days that elapsed between time of warrant's issuance and search of the Defendant's home). See also Breitweiser v. State, 704 N.E.2d 496 (Ind.Ct.App. 1999); Caudle v. State, 749 N.E.2d 616 (Ind.Ct.App. 2001), *aff'd on rehearing*, 754 N.E.2d 33 (Ind.Ct.App. 2001); Frasier v. State, 794 N.E.2d 449 (Ind.Ct.App. 2003).

MISLEADING AND FALSE AFFIDAVITS

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (if a defendant establishes by a preponderance of the evidence that a false statement knowingly, intentionally, or with a reckless disregard for the truth was included by the affiant in the search warrant affidavit, and the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded). See also Stephenson v. State, 796 N.E.2d 811 (Ind.Ct.App. 2003).

Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998) (probable cause affidavit that did not include that the State promised not to prosecute the confidential informant in return for his help on this case was misleading).

Query v. State, 745 N.E.2d 769 (Ind. 2001) (the State has the duty to inform Court of new information relevant to probable cause; the Court found extremely unusual example of immaterial change where, although new information undermined crime suggested by information supplied to magistrate, it also simultaneously provided probable cause for second crime; if second search warrant had been issued, police would have been authorized to search same location for virtually identical items).

Majko v. State, 503 N.E.2d 898 (Ind. 1987) (where statement used to establish probable cause is recanted after sentencing, the Defendant has right to hearing on question of probable cause for original arrest warrant), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995).

Keeylen v. State, 14 N.E.3d 865 (Ind.Ct.App. 2014) (detective's failure to reference improper warrantless GPS tracking of Defendant's vehicle in probable cause affidavit was insufficient to show that detective engaged in a deliberate falsehood or a reckless disregard for the truth, as required to support Defendant's claim that search warrant had been improperly issued), *aff'd on rehearing*, 21 N.E.3d 840.

DESCRIPTION OF ITEMS TO BE SEIZED AND PLACE AND PERSON TO BE SEARCHED

McAllister v. State, 306 N.E.2d 395 (Ind.Ct.App. 1974) (a search warrant for a person or persons must be as specific as a search warrant for a particular location and property).

Hester v. State, 551 N.E.2d 1187 (Ind.Ct.App. 1990) (search warrant that failed to provide any description of property to be seized, but which merely authorized executing officers to take "any and all" property was invalid as leaving too much discretion to executing officers).

Warren v. State, 760 N.E.2d 608 (Ind. 2002) (search warrant that included language authorizing search for "any other indicia of criminal activity including but not limited to books, records, documents, or any other such items" granted police officers unlawful unbridled discretion to conduct general exploratory search).

Conn v. State, 496 N.E.2d 604 (Ind.Ct.App. 1986) (where search warrant specified nine items as object of search, plain view could not justify seizure of 254 items; suppression granted).

Levenduski v. State, 876 N.E.2d 798 (Ind.Ct.App. 2007) (evidence of methamphetamine manufacturing was illegally seized as part of over-broad catch-all phrase of warrant because State failed to present any evidence that the evidence was in plain view).

Frasier v. State, 794 N.E.2d 449, 461 (Ind.Ct.App. 2003) (although inadvertence is no longer an indispensible element of the plain view doctrine for the Fourth Amendment analysis, it "still has application with respect to Article I, Section 11 of the Indiana Constitution.").

U.S. v. Kelly, 772 F.3d 1072 (7th Cir. 2014) (detective who submitted probable cause affidavit, which mistakenly identified place to be searched as "upper apartment" of multi-family residence, rather than multi-story unit at back of residence, was not required to seek modified warrant before continuing his search of all levels of the residence).

OTHER STATUTORY REQUIREMENTS OF WARRANTS

Timmons v. State, 723 N.E.2d 916 (Ind.Ct.App. 2000) (because telephonic warrant hearing was so defective, resulting arrest warrant was characterized as non-existent), *reversed on reh'g*, 734 N.E.2d 1084 (warrant was so defective, good faith exception could not save it). See also State v. Davis, 770 N.E.2d 338 (Ind.Ct.App. 2002); Volz v. State, 773 N.E.2d 894 (Ind.Ct.App. 2002).

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) (town Justice's presence and participation in search did not ensure that no items would be seized absent probable cause to believe that they were obscene; nor did his presence provide immediate adversarial hearing on issue; Justice was not acting as neutral and detached judicial officer).

EXCEEDED SCOPE OF WARRANT

Conn v. State, 496 N.E.2d 604 (Ind.Ct.App. 1986) (where search warrant specified nine items as object of search, plain view could not justify seizure of 254 items; suppression granted).

State v. Figgures, 839 N.E.2d 772 (Ind.Ct.App. 2005) (where warrant is specific to the individual named, police were not allowed to open mail of Defendant who was not named in the warrant but who lived at the address named in the warrant; the mail was irrelevant to the criminal activity being investigated and was outside the scope of the warrant).

Lee v. State, 715 N.E.2d 1289 (Ind.Ct.App. 1999) (search warrant for person only allows police officer to search areas which would be big enough to hide that person; thus, police officers were not justified in searching the pockets of a coat in a closet in hopes of finding 180-pound man therein). See also Manning v. State, 459 N.E.2d 1207 (Ind.Ct.App. 1984).

McAllister v. State, 306 N.E.2d 395 (Ind.Ct.App. 1974) (the fact that an officer is armed with a search warrant for a particular building does not authorize searching all persons found in it). See also Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979).

Adams v. State, 299 N.E.2d 834 (Ind. 1973) (operation to remove bullet from inside Defendant's body to secure evidence for purposes of establishing guilt or innocence constituted an unreasonable search. Fourth Amendment prohibits the forcible removal of bullet from Defendant's body as intrusion into Defendant's body, even with a search warrant); see also Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forced stomach pumping of Defendant in order to obtain evidence of narcotics possession is per se unreasonable in violation of substantive due process).

EXECUTION OF WARRANT

Richardson v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) (blanket rule allowing "no knock" entry with warrant for felony drug investigations violated Fourth Amendment).

Lacey v. State, 946 N.E.2d 548 (Ind. 2011) (Indiana Constitution does not require prior judicial authorization for no-knock execution of a warrant when justified by exigent circumstances, even if such circumstances are known by police when the warrant is obtained; rather, courts will assess the reasonableness of entry based on totality of circumstances at the time the warrant was served).

Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001) (police officers could prevent the Defendant from entering his home unescorted for two hours while they obtained and served a search

warrant; officers had probable cause to believe that the Defendant had hidden marijuana in his home, had good reason to fear that Defendant would destroy drugs if permitted back in home, and restraint lasted no longer than reasonably necessary to obtain warrant). See also Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). But see Bailey v. United States, 133 S.Ct. 1031, 185 L.Ed.2d 19 (2013) (the Summers rule, which allows officers executing a search warrant to detain the occupants of the premises, without probable cause for an arrest or particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers, is spatially constrained and limited to the immediate vicinity of the premises to be searched).

Shotts v. State, 53 N.E.3d 526 (Ind.Ct.App. 2016) (Court rejected D's argument that he was not an "occupant" of the premises because he was not a resident of the house but only approached it as police were executing a search warrant; requiring officers to determine whether D was a resident before detaining him would diminish utility of Summers' bright-line rule).

GOOD FAITH EXCEPTION

U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (the good faith exception to the exclusionary rule permits admission of evidence seized pursuant to a properly issued, but subsequently invalidated search warrant; however, the good faith exception will not apply if: 1) the warrant is based on false information knowingly or recklessly supplied by law enforcement; 2) the warrant is facially deficient; 3) the issuing magistrate is not detached and neutral; or 4) the affidavit or sworn testimony upon which probable cause rests is so lacking in indicia of probable cause as to render official belief in the existence of the warrant unreasonable). See also Doss v. State, 649 N.E.2d 1045 (Ind.Ct.App. 1995).

Herring v. U.S., 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply; thus, officer's reliance on dispatch's mistaken assertion that there was an arrest warrant for the Defendant was in good faith; no suppression of evidence found during search incident to illegal arrest); See also Shotts v. State, 925 N.E.2d 719 (Ind. 2010).

Rice v. State, 916 N.E.2d 296 (Ind.Ct.App. 2009) (court refused under state constitution to apply Herring, which expanded good faith doctrine; if court were to apply good faith exception in this case and hold it was objectively reasonable for officer to rely on a warrant supported by an affidavit wholly lacking probable cause, officers would have no incentive to discover and attest to facts amounting to probable cause in future affidavits, the defendant's right to seek review of probable cause determination would be empty and exclusionary rule would have no meaning).

Membres v. State, 889 N.E.2d 265 (Ind. 2008) (Indiana Supreme Court's decision in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), requiring articulable reasonable suspicion prior to a trash search, is a new rule of state criminal procedure that does not affect the reliability of the fact-finding process, and thus is not to be applied retroactively; officers who pulled trash prior to Litchfield were relying on the established law at that time).

Merritt v. State, 803 N.E.2d 257 (Ind.Ct.App. 2004) (if the good faith exception is not argued by the State in a memorandum in opposition to motion to suppress or at suppression hearing, it is waived and cannot be advanced on appeal).

Jaggers v. State, 687 N.E.2d 180 (Ind. 1997) (officer who personally visited marijuana plots just a few hours earlier testified that the plots were near the Defendant's residence, but actually plots were at least

two to six miles away from the home; because this was a misleading statement, the good faith exception could not save the warrant). See also Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998).

Hayworth v. State, 904 N.E.2d 684 (Ind.Ct.App. 2009) (because informant's tip of an active meth lab was not corroborated, search warrant was improperly issued; officer's admissions at suppression hearing (i.e., that informant had *not* told him that she had seen Defendant manufacture or use methamphetamine) amount to deliberate, reckless, or grossly negligent conduct; thus, good faith doctrine was inapplicable).

State v. Mason, 829 N.E.2d 1010 (Ind.Ct.App. 2005) (where the police failed to adequately investigate all the information provided by an informant, the good faith exception could not save the warrant). See also Cartwright v. State, 26 N.E.3d 663 (Ind.Ct.App. 2015).

Figert v. State, 686 N.E.2d 827 (Ind. 1997) (because the warrant was issued based solely on the officer's opinion, the officer's reliance could not be deemed objectively reasonable under Leon; if probable cause could be so easily imputed from one dwelling to another through overbroad application of the good faith exception, nothing would prevent searches of residences merely because of the fortuity of their proximity to illegal conduct).

Hensley v. State, 778 N.E.2d 484 (Ind.Ct.App. 2002) (where nothing in the affidavit linked the Defendant's alleged purchase of drugs to the premises described in the warrant, no reasonable officer could have relied on the search warrant in good faith).

Brown v. State, 905 N.E.2d 439 (In.Ct.App. 2009) (good faith exception rests upon the affidavit or sworn testimony presented before the warrant has been issued; State cannot backfill with previously undisclosed hearsay evidence to show good faith in the execution of a defective warrant; here, good faith inapplicable where officers should have known there was no probable cause to support warrant).

Hudson v. Michigan, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (violation of knock and announce rule does not require suppression of evidence under Fourth Amendment).

Blakenship v. State, 5 N.E.3d 779 (Ind.Ct.App. 2014) (even if dog sniff-search of hotel hallway violated Defendant's rights under Article I, Section 11, police officers acted in good faith when they executed search warrant of hotel room, where there was no evidence that officers had knowledge, or should be charged with knowledge, that the sniff-search in the hallway may have been unconstitutional).

NOTE:

There is an argument that no good faith exception exists under the Indiana Constitution. Relying on Article I, Sections 11 and 14 of the Indiana Constitution, the Indiana Supreme Court adopted the exclusionary rule long before the Fourth Amendment exclusionary rule was applied to the States in Mapp v. Ohio, 367 U.S.643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Membres v. State, 889 N.E.2d 265, 274 (Ind. 2008) (citing to Callender v. State, 193 Ind. 91, 96-97, 138 N.E. 817, 818-19 (1923); State v. Canelo, 653 A.2d 1097 (N.H. 1995) (New Hampshire rejects good faith as incompatible with and detrimental to the right of privacy and prohibition against search warrant without probable cause contained within the New Hampshire Constitution). In the very least, the Indiana Supreme Court must determine whether the U.S. Supreme Court's expansion of the good faith doctrine in Herring, supra, does not apply in Indiana. Rice v. State, 916 N.E.2d 296 (Ind.Ct.App. 2009) (court refused under state constitution to apply Herring, which expanded good faith doctrine).