[CAPTION]

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO THE ISSUANCE OF A SEARCH WARRANT (CONFIDENTIAL RECORDS)

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana State Constitution articulate the defendant's constitutional right to be free from unreasonable searches and seizures at the hands of the State. The issuance of the search warrant herein was contrary to the reasonableness requirement of the Federal and State Constitutions as pursuant to Federal and State law, and the defendant is entitled to a reasonable expectation of privacy in his confidential medical records. The defendant has standing to raise this issue pursuant to Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), which provides that where the accused has a "legitimate expectation of privacy" which is violated by the search in issue, the defendant has standing to object to the constitutionality of the search. The defendant has never consented to the release of the medical records here in issue, nor was he capable of giving informed consent at the time he received treatment due to his being in an unconscious state.

Pursuant to Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 684, 6 L.Ed. 2d 1081 (1961), the exclusionary rule provides that evidence seized in violation of the Fourth Amendment and the fruits of illegally seized evidence cannot be used against the defendant in a State criminal proceeding.

Federal Law Pertaining to the Confidentiality of Substance Abuse Treatment Records

Pursuant to Title 42 U.S.C. 290dd-2(a):

> Records of the identity, diagnosis, prognosis or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse ... treatment ... which is conducted, regulated or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Pursuant to Title 42 U.S. C. 290dd-2(c):

> Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or

> substantiate any criminal charges against a patient or to conduct any investigation of a patient. [Emphasis added].

[HOSPITAL NAME] is subject to the dictates of the federal confidentiality statute. As is apparent from the attached two paged [HOSPITAL NAME] Confidential Release of Information Form at page 2 in the first full paragraph, the [HOSPITAL NAME] Release Form expressly references the fact that drug treatment records are protected by Federal law and, in so doing, cites Federal Regulations 42 C.F.R., Part 2. See "Exhibit A", a copy of which is attached to this Memorandum of Law. Because [HOSPITAL NAME] receives direct and/or indirect assistance from the Federal Medi-Care Program, it is subject to the dictates of Title 42 U.S.C. 290dd-2.

Pursuant to the Federal confidentiality of substance abuse records statute, the only permitted disclosures are those which are explicitly set forth in 290dd-2(b). The permitted disclosures are two-fold: first, when the patient gives prior written consent which is not the case in the instant litigation and, second, pursuant to 290dd-2(b)(2)(C), disclosure is only allowed:

> If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore, including the need to avert a substantial risk of death or seriously bodily harm. In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

The only exception to the non-consensual disclosure of court records section set forth immediately above is that which is stated in 290dd-2(e), which notes that the statute is inapplicable in cases of child abuse and neglect.

Relevant terms are defined broadly under the Code of Federal Regulations. "Diagnosis means any reference to an individual's alcohol or drug abuse or to a condition which is identified as having been caused by that abuse which is made for the purpose of treatment or referral for treatment." 42 C.F.R. 2.11. The same section defines "treatment" as "the management and care of a patient suffering from alcohol or drug abuse, a condition which is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient."

Pursuant to 42 C.F.R. 2.12(e)(4):

> These regulations cover any record of a diagnosis identifying a patient as an alcohol or drug abuser which is prepared in connection with the treatment or referral for treatment of alcohol or drug abuse. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by these regulations. The following are not covered by these regulations:
>
> > (i) Diagnosis which is made solely for the purpose of providing evidence for use by law enforcement or authorities; or
> >
> > (ii) a diagnosis or drug overdose or alcohol intoxication which clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

By implication, the wording of 42 C.F.R. 2.12(e)(4)(ii) makes it clear that the confidentiality provisions of the federal code do apply to the diagnosis and treatment of a drug abuser's drug overdose, which is the case here.

In issuing the search warrant in the instant case, the Court did not comply with the mandatory obligation under Title 42 U.S.C. § 290dd-2(b)(2)(C) that dictates that the confidentiality of drug treatment records shall only be breached subsequent to the court's review of an application showing good cause. The court, prior to any lawful disclosure, is also under mandatory obligation to weigh the harm to the patient of said disclosure as well as the harm to the physician-patient relationship and to the treatment services program. Obviously, no such showing of good cause was made to this Court, nor did this Court engage in the mandatory weighing process set forth in Title 42 U.S.C. 290dd-2(b)(2)(C). In view of the fact that the search warrant issued with neither the defendant/patient's consent nor any effort whatsoever at compliance with 42 U.S.C. 290dd-2(b)(2)(C), the exclusionary clause of Title 42 U.S.C. 290dd-2(c) applies, and, as is stated in the latter section, the records here in issue may not "be used to initiate or substantiate any criminal charges" against the defendant herein "or to conduct any investigation" of the defendant. A copy of the federal confidentiality statute referenced hereinabove is attached to this Memorandum of Law as "Exhibit B".

Pursuant to the Code of Federal Regulation Section which interprets this statute, 42 C.F.R. 2.65(d), a court may only authorize disclosure of confidential drug treatment records for the purpose of

conducting an investigation of a prosecution for a crime of which the patient is suspected where all of the following five (5) enumerated criteria are met:

> 1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.
>
> 2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.
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> 3) Other ways of obtaining the information are not available or would not be effective.
>
> 4) The potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.
>
> 5) If the applicant is a person performing a law enforcement function that:
>
> > (i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and
> > (ii) Any person holding the records which is an entity within Federal, State, or local government has in fact been represented by counsel independent of the applicant.

In 42 C.F.R. 2.65(e)(2), the federal regulations further mandate that any order of disclosure must:

> Limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of extremely serious crime or suspected crime.

Clearly, possession of drugs is not one of the enumerated crimes, nor is it credible to contend that the simple possession here in issue, as a Class D felony, meets the "extremely serious" definition.

In United States v. Eide, 875 F.2d 1429 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that the results of the defendant's urinalysis test at a Veteran's Administration Hospital emergency room were protected under this federal confidentiality statute from disclosure in the criminal case. Similarly, in United States v. Graham, 548 F.2d 1302 (8th Cir. 1977), the court barred release of drug records of a government witness pursuant to the mandate created by Title 42 U.S.C. 290dd. Accord United States v. Banks, 520 F.2d 627, 631 (7th Cir. 1975) (interpreting a predecessor of the current law).

In United States v. Graham, the Eighth Circuit Court of Appeals cited approvingly from the Congressional history regarding the paramount public interest in the confidentiality of drug treatment records as follows:

> The strictest adherence to the provisions of [21 U.S.C. 1175 (1975), the predecessor statute to the law here in issue] is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

548 F.2d at 1314 (citing H. Conf. Rep. No. 92-920, 92d Cong., 2nd Sess.-(1972), Reprinted in 1972 U.S. Code Concr. and Admin. News PP. 2062, 2072).

The Federal drug treatment confidentiality statute has been held applicable in State criminal proceedings. See State v. Rollinson, 526 A.2d 1283 (Conn. 1987) (applying the Federal statute but upholding disclosure as crime in issue was murder, an "extremely serious" crime enumerated under the exceptions clause); Commonwealth v. Mandeville, 436 N.E.2d 912 (Mass. 1982) (applying the Federal statute (a predecessor to the current law) but noting on the facts of the case that there was no indication that the defendant therein was treated as a patient); Bell v. State, 385 So.2d 78 (Ala. Crim. App. 1980) (applying the Federal statute (the predecessor of the current law) but denying the defendant disclosure of the government witnesses' drug treatment records as cumulative). The confidentiality provisions of the Federal statute have also been held to apply in the military courts. See United States v. Fenyo, 6 M.J. 933 (A.F.C.M.R. 1979) (holding that where the accused did not consent to the release of confidential drug records for his "benefit" it was error to permit witness to testify as to accused's confidential drug rehabilitation record during sentencing portion of the trial).

In I.C. § 16-39-1-9, our Legislature explicitly states that “[a]lcohol and drug abuse records described in 42 U.S.C. 290dd-2 may not be disclosed unless authorized in accordance with 42 U.S.C. 290dd-2.” Thus, Indiana acknowledges the controlling effect of the federal enactment. This is in accord with 42 C.F.R. 2.20, which provides that "no state law may either authorize or compel any disclosure prohibited by these regulations."

Issuance Of The Search Warrant Was Unreasonable In That It Violated State Confidentiality Statutes

Pursuant to I.C. 34-46-3-1(2), the Indiana legislature has created a physician-patient privilege which renders physicians and their agents, as to matters communicated to them as such by patients in the course of their professional business or advice given in such cases, incompetent as witnesses.

The statute is couched in terms of competency, but is has been held to create a privilege. Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971). The purpose of the privilege is to foster communications necessary to allow proper diagnosis and treatment. Id. To deny the privilege would destroy the confidential nature of the physician-patient relationship and possibly cause the patient to either forego necessary medical treatment or to withhold pertinent information of an embarrassing or confidential nature for fear of being exposed. Id.; Canfield v. Sandock, 563 N.E.2d 526 (Ind. 1990). The only exceptions to the physician-patient privilege authorized under Indiana statutory and case law are those set forth pursuant to I.C. 31-32-11-1 which sets forth the doctor's mandatory obligation in reporting child neglect or abuse and I.C. 9-30-6-6(c) and (d), which provides that the patient-physician privilege does not apply to proceedings under I.C. 9-30-5 (operating while intoxicated prosecutions), and I.C. 9-30-9 (alcohol abuse deterrent programs).

The physician-patient privilege has been held to include technicians drawing blood from the patient at the behest of a treating physician. Schultz v. State, 417 N.E.2d 1127 (Ind.Ct.App. 1981), *reh. den'd*, 421 N.E.2d 22 (1981). The subject matter covered by the physician-patient privilege has been defined as information obtained in the sick room, heard or observed by the physician, or of which he is otherwise informed pertaining to the patient and upon which he is persuaded to act or give some direction or advice in the discharge of his professional obligation. Myers v. State, 192 Ind. 592, 137 N.E. 547 (1922); Vaughan v. Martin, 145 Ind.App. 455, 251 N.E.2d 444 (1969); Baker v. Whittaker, 133 Ind.App. 347, 182 N.E.2d 442 (1962). The privilege has been held to protect against disclosures of information received by physicians from the patient, whether through verbal communication, observation or examination. Chicago, L.S. & S.B. Ry. Co. v. Walas, 192 Ind. 369, 135 N.E. 150 (1922). Physicians are

barred from testifying to communications made by the patient that were necessary for diagnosis and treatment if the conversation was overheard by other persons. Indiana Union Traction Co. v. Thomas, 44 Ind.App. 468, 88 N.E. 356 (1909). A physician's comments in the hospital records are protected by the privilege from disclosure. Stalker v. Breeze, 186 Ind. 221, 114 N.E. 968 (1917). The physician-patient privilege belongs to the patient and only he may waive the privilege. Collins v. Bair, *supra*.

WHEREFORE, in light of the above arguments, the defendant respectfully requests that this Honorable Court issue an Order suppressing all records and fruits of records seized pursuant to the issuance of the search warrant in this cause.

(Signature)