[CAPTION]

ACCUSED'S MOTION IN LIMINE
(Hearsay statements given to the investigation officer as part of his investigation)

COMES NOW, (insert name), the Accused by Counsel, and respectfully requests that the Court issue an order *in limine* instructing the Prosecuting Attorney and all witnesses offering testimony on behalf of the State, without first obtaining permission of the Court, outside the presence and hearing of the jury, from making any statements, arguments, comments or questions during the trial of this cause pertaining to:

Any hearsay statement given to the officer as part of his investigation.

In support of this motion the Accused states:

1. That Accused fears that investigating officer may be asked to testify to statements of other persons given to him in the course of his investigation.

2. Introduction of this type of evidence is not relevant. Where an Accused does not challenge the propriety of the initiating of an investigation, evidence of the specific statements that led to the initiation of an investigation is irrelevant and inadmissible. Bonner vs. State, 650 N.E.2d 1139, 1141 (Ind. 1995) ("[T]he propriety of the police initiating an investigation was [not] seriously questioned at trial. Because the out-of-court statements lacked relevance to any contested issue other than the matters asserted therein, they must be viewed as either irrelevant or hearsay, and their admission was improper").

3. Testimony of the Officers course of the investigation is generally irrelevant. In Kindred v. State, 973 N.E.2d 1245, 1252 - 1253 (Ind. Ct. App. 2012), the Court stated:

> Course-of-investigation evidence is often offered to explain why police officers, investigators, or other law enforcement officers proceeded in a particular manner.

"This 'background' information, however, generally is irrelevant and should be excluded." 1 Wharton's Criminal Evidence § 4:47 (15th ed. 1997). It is irrelevant if it does not make it more or less probable that the defendant committed the acts alleged. "In other words, the explanation for why the police did what they did may add nothing to the determination of the defendant's guilt or innocence." Id. While jurors may be curious about why investigators acted, an explanation of their actions may have no probative value. Id. (*citation omitted*).

(*Emphasis added*).

4. In Craig v. State, 630 N.E.2d 207, 210-211 (Ind. 1994), our Supreme Court held that consideration of this type of evidence requires "additional judicial effort" and prescribed the following analysis:

. . . where proof of out-of-court statements received by police officers engaged in investigative work are challenged as hearsay, that additional judicial effort in this area is appropriate. A full consideration of the viability of such a hearsay challenge in this area would include several discrete steps. After a proper hearsay objection has been made, the following analytical questions are essential:

1. Does the testimony or written evidence describe an out-of-court statement asserting a fact susceptible of being true or false?

If the statement contains no such assertion, it cannot be hearsay and the objection should be overruled. If the out-of-court statement does contain an assertion of fact, then the Court should consider the following before ruling:

2. What is the evidentiary purpose of the proffered statement?

Whether evidence of an extrajudicial utterance qualifies as hearsay depends upon the purpose for which it is offered. Indianapolis Newspapers, Inc. v. Fields (1970), Ind., 254 Ind. 219, 259 N.E.2d 651 (Per DeBruler, J. with one Justice concurring). If the evidentiary purpose is to prove a fact asserted, and such purpose is not approved under Evid. R. 801(d), then the hearsay objection should be sustained, unless the statement fits an exception to the hearsay rule.

If the proponent of the statement urges a purpose other than to prove a fact which is asserted, then the Court should consider the following before ruling:

3. Is the fact to be proved under the suggested purpose for the statement relevant to some issue in the case, and does any danger of prejudice outweigh its probative value?

> Consideration of the relevance of the fact sought to be proved under the proffered non-hearsay purpose is essential to a proper ruling upon the objection. Relevance is the tendency to make a fact of consequence to the determination of the action more or less probable. Evid. R. 401; Barnes v. Barnes (1992), Ind., 603 N.E.2d 1337. If the fact sought to be proved under the suggested non-hearsay purpose is not relevant, or it is relevant but its danger of unfair prejudice substantially outweighs its probative value, the hearsay objection should be sustained.

5. Proper application of the foregoing analysis would show that any evidence offered by the State under the course of investigation theory is inadmissible.

6. Subsequent decisions of the Indiana Court of Appeals have held such proffered testimony to be inadmissible. In Winbrush v. State, 776 N.E.2d 1219 (Ind. Ct. App. 2002*), trans. denied*, the Court found that course of investigation testimony from a police detective about information he had received regarding about an accused's past criminal acts had "little relevance" to the proceedings as there was no challenge to "the quality or validity of the investigation" but did pose a high risk of prejudice and should not have been admitted at trial. Id. at 1221-22.

7. In Hernandez v. State, 785 N.E.2d 294, 300 (Ind. Ct. App. 2003), *trans. denied*, the Court concluded that a police captain's testimony about prior complaints of prostitution where an accused was arrested was irrelevant because the "genesis of the investigation was not relevant to any contested issue" while "the prejudicial impact was great."

8. In Kindred v. State, 973 N.E.2d 1245 (Ind. Ct. App. 2012), the Court reviewed the relevancy of Course of Investigation testimony in a child molesting case. The Court found that such "'background' information . . . is irrelevant if it does not make it more or less probable that the defendant committed the acts alleged." Id. at 1252 (*quoting* 1 Wharton's Criminal Evidence § 4:47 (15th Ed. 1997)). The Court would later

find that "charging criteria may be an area of interest for jurors. However, this fact does not justify the admission of irrelevant and potentially prejudicial testimony." Id. at 1253.

9. In Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011), the Seventh Circuit noted that introduction of hearsay pursuant to the course of investigation exception may infringe on the constitutional right of confrontation:

> While such "course of investigation" evidence usually has little or no probative value, the dangers of prejudice and abuse posed by the "course of investigation" tactic are significant. More than thirty years ago, we cautioned that the "testimonial repetition of a declarant's out-of-court charge that the defendant would engage or was engaged in specific criminality would seem to create too great a risk" of prejudice and confusion than can be "justified simply to set forth the background of the investigation." Mancillas, 580 F.2d at 1310. More recently, we pointed out that an unthinking, expansive application of the "course of investigation" exception would effectively undermine the Confrontation Clause: "Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule." Silva, 380 F.3d at 1020. Consistent with these observations, then, "the use of out-of-court statements to show background has been identified as an area of 'widespread abuse.'" United States v. Sallins, 993 F.2d 344, 346, (3d Cir. 1993); see 2 McCormick on Evidence § 249 ("One area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime.").
>
> Such statements offered to show "background" or "the course of investigation" can easily violate a core constitutional right, are easily misused, and are usually no more than minimally relevant. Courts asked to admit such statements for supposed non-hearsay purposes must be on the alert for such misuse. See Lovelace, 123 F.3d at 653. A trial court should not "accept without scrutiny an offering party's representation that an out-of-court statement is being introduced for a material non-hearsay purpose." Sallins, 993 F.2d at 346 (reversing conviction). Our colleagues on the Second Circuit have explained in reversing a conviction on these grounds:
>
> > the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice. The greater the likelihood of prejudice resulting from the jury's misuse of the statement, the greater the justification needed to introduce the "background" evidence for its non-hearsay uses.

Reyes, 18 F.3d at 70 id. 25-27

> **A legitimate non-hearsay purpose most certainly does not open the door for law enforcement officers to "narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination."** Silva, 380 F.3d at 1020. Nor is it necessary to put before the jury extensive "eyewitness accounts of bad acts by the defendant that the jury would not otherwise have heard." United States v. Price, 458 F.3d 202, 210 (3d Cir. 2006). Unless the testimony at issue "clarif[ies] noncontroversial matter without causing unfair prejudice on significant disputed matters," Reyes, 18 F.3d at 70, the best course of action is to exclude the evidence altogether.

(*emphasis added*).

10. In sum, this type of evidence is irrelevant and unfairly prejudicial and should be excluded under Indiana Rules of Evidence 401 and 403.

11. Additionally, introduction of such evidence or argument will deprive Accused of his right to a fair trial to confront and cross examine witnesses and to Due Process of Law.

12. An ordinary objection during the course of the trial, even if sustained with proper instructions to the jury, will not remove the prejudicial effect of this evidence.

WHEREFORE, the Accused, respectfully request that the Court issue an order in limine instructing the Prosecuting Attorney and all witnesses offering testimony on behalf of the State, without first obtaining permission of the Court, outside the presence and hearing of the jury, from making any statements, arguments, comments or questions during the trial of this cause pertaining to the evidence and issues set out above.

Respectfully submitted,
(signature)