

[CAPTION]

**REQUEST FOR PRETRIAL HEARING ON ADMISSIBILITY
OF EXPERT WITNESS TESTIMONY OR LAY OPINION**

Comes now the Defendant, by counsel, and pursuant to Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 12 of the Constitution of the State of Indiana respectfully requests a hearing on admissibility of expert witness testimony or lay opinion. In support of his request the Defendant would show the Court as follows:

1. The State intends to offer testimony from a police officer they have designated a “skilled witness” about the differences between drug users and drug dealers.

2. Preliminary questions concerning witness qualifications or admissibility of evidence **shall** be determined by the court. Rule 104 (a) IRE.

3. Only two types of opinion are admissible under the Indiana Rules of Evidence. Lay opinion pursuant to Rule 701, IRE or expert opinion pursuant to Rule 702, IRE.

4. Lay opinion must first be “rationally based on the perception of the witness” Rule 701 (a).

5. A witness may be qualified as an expert under Rule 702 (a) if their knowledge, skill, experience, training, or education is such as to render their opinion testimony useful to the jury. Any one, or any combination, of the listed factors may suffice. Vaughn v. Daniels Company, 841 N.E.2d 1133, 1138 (Ind. 2005).

6. A “skilled witness” may be offered pursuant to the “other specialized knowledge” language of Rule 702 (a), IRE or Rule 701, IRE.

7. The personal knowledge requirement distinguishes the admissibility of opinions under Rule 701 from admissibility of opinions of those qualified as expert witnesses under Rule 702. “Courtroom Handbook on Indiana Evidence”, p. 223, Robert L. Miller, Jr. a witness with

specialized experience may testify as a “skilled witness” either under Rule 702 (a) or, if the opinion is based on facts within the witness’s personal knowledge, under Rule 701. Id. at p. 230.

8. Under Rule 701, IRE the witness must set forth enough facts to allow the trial court to find that the testimony is based on the witness’s personal perceptions and there need be a sufficient basis for the judge to find that the witness is testifying from personal knowledge rather than upon hearsay or opinions of another. Id. at p. 223. Ackles v. Hartford Underwriters Ins. Corp., 699 N.E.2d 740 (Ind. Ct. App. 1998); Kubsch v. State, 784 N.E.2d 905 (Ind. 2003); Hape v. State, 903 N.E.2d 977 (Ind. Ct. App. 2009).

9. Whether a witness is qualified to give an opinion or testimony as a skilled witness is an issue for the trial judge to determine under Rule 104 (a). Moore v Ashland Chemical, Inc., 126 F.Ed.3d 679, 684 (5th Cir. 1997) and the burden of proving the witness’s qualifications rests upon the party seeking to admit the evidence. State Department of Transportation v. Hoffman, 721 N.E.2d 356, 358 (Ind. Ct. App. 1999).

10. The listed police witness perceived nothing in this case but has only been told things either by written document or spoken word.

11. The Court must first determine whether the necessary qualifications can be established then it must engage in the balancing test under Rule 403 IRE

12. There is no accepted, unique pattern of behavior distinguishing one who sells drugs from one who uses drugs.

13. The attached search warrant template reveals the lack of any standard. The requested use of “sometimes”, “generally”, and “often” is indicative of the speculative nature of any expert or skilled witness testimony.

14. Since there is no acceptable standard against which the witness's opinion and beliefs can be tested the testimony is purely speculative and therefore unhelpful to the fact finder. Hanaan v. Pest Control Svc, 734 N.E.2d 674 (Ind. Ct. App. 2000).

15. The facts available are too sparse to support the proffered inference rendering the opinion speculative and inadmissible. Estate of Dyer v. Doyle, 870 N.E.2d 573 (Ind. Ct. App. 2007); Tyger Constr. Co. Inc, v. Pensacola Constr. Co., 29 F.Ed.3rd 137, (4th Cir. 1994); Shulz v. Celotex Corp., 942 F.Ed 2d 204 (3rd Cir. 1991)

16. The probative value, if any at all, is minuscule and the prejudice great.

17. The State only uses the witness, or one like them, in "intent to deliver" cases and no matter how the State packages it or advertises it, it is intended to present an opinion, directly or indirectly, on intent and is prohibited by Rule 704, IRE.

WHEREFORE, the Defendant respectfully prays for a pretrial hearing to determine the admissibility of testimony regarding unrelated cases, beliefs and opinions to avoid tainting the jury with inadmissible evidence and to promote a fair and efficient determination of a serious evidentiary crime.

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