

[CAPTION]

**MOTION FOR LEAVE TO TAKE DEPOSITION OF CONFIDENTIAL
INFORMANT**

The Defendant, by counsel, respectfully requests leave of the Court pursuant to T.R. 30, to take the deposition of the credible and reliable confidential informant mentioned in the probable cause affidavit, in the application for a search warrant, and also mentioned in the search warrant issued on [insert date]. In support of the Motion, the Defendant states the following:

1. The discovery sought to be obtained by the deposition of the witnesses is necessary to a proper, complete and full preparation of the defense in this case.
2. The Defendant has filed a Motion to Suppress evidence seized during a search conducted pursuant to the search warrant issued on the basis of evidence obtained from the "credible and reliable confidential informant." *See attached copy of the search warrant herein incorporated and referenced as Exhibit A.*
3. The validity of the search warrant issued in this cause is dependent upon the credibility of the "reliable and credible confidential informant."
4. In determining a person's credibility, evidence of any pending prosecutions, probation or parole status, understanding or agreement as to pending prosecutions against them, promises of non-prosecution or promises of leniency is relevant and material. State v. Bowens, 722 N.E.2d 368 (Ind.Ct.App. 2000); Rowe v. State, 704 N.E.2d 1104 (Ind.Ct.App. 1999); Ferguson v. State, 670 N.E.2d 371, n.1 (Ind.Ct.App. 1996); Bell v. State, 655 N.E.2d 129 (Ind.Ct.App. 1995). In fact, it is misleading and erroneous for the State to omit from a probable cause affidavit the State's promise not to prosecute the confidential informant in return for his help with the probable cause. Newby v. State, 701 N.E.2d 593 (Ind.Ct.App. 1998).
5. The "preference for warrants is based on the belief that a neutral and detached magistrate is more likely to be a fair evaluator of the relevant circumstances than the police officer actively involved in investigating a particular crime." Query v. State, 745 N.E.2d 769,

774 (Ind. 2001) (Rucker, J., dissenting). The "totality of the circumstances" does not allow the omission of relevant information that could affect an independent judicial determination. Newby, 701 N.E.2d. at 603-04 (citing Jaggers v. State, 687 N.E.2d 180 (Ind. 1997)). Information concerning the credibility of an informant is critical to an independent magistrate's probable cause determination. Id.; Majko v. State, 503 N.E.2d 898 (Ind. 1987) (the court must consider the effect of an informant's later recantation to determine whether probable cause still existed), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995).

6. Undersigned counsel believes that there is a high probability that the State's affiant has omitted relevant, essential facts and information concerning the State's informant which could affect an independent magistrate's judicial determination of probable cause in this case and the disclosure of which is required by Newby, *supra*.
7. The State of Indiana through the Prosecutor has refused to disclose the following information requested by the Defendant:
 - (a) any pending prosecutions against the informant;
 - (b) any agreements regarding the disposition of cases pending against the informant;
 - (c) the criminal record of the informant; and
 - (d) cause numbers of cases in which convictions were obtained based upon information supplied by the informant.
8. The deposition of the informant is necessary to prepare an adequate defense, and without the deposition the Defendant will be denied his right to present evidence at a hearing on the Motion to Suppress which may demonstrate that the informant is neither credible nor reliable.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court:

1. To grant the Defendant leave to take a deposition of the informant used by the State of Indiana in effectuating the arrest and prosecution of the Defendant, and for an order

directing the above deposition;

2. To disclose all of the following within the possession, custody, control or the existence of which is known by the prosecutor, or his agents, including all involved law enforcement agencies:
 - (a) Any and all consideration or promises of consideration given or offered to the State's confidential informant by law enforcement officers. By "consideration" Defendant refers to absolutely anything of value or use, including but not limited to immunity grants, fees, plea agreements, promises of non-prosecution or deferred prosecution recommendations regarding parole, clemency or prosecutions in other jurisdictions, or anything else which could arguably create an interest or bias in the witness in favor of the State or against the defense or act as an inducement to testify or to color testimony; and
 - (b) Any and all prosecutions, investigations, or possible prosecutions pending or which could be or could have been brought against the State's confidential informant, and any probationary, parole or deferred prosecution status of the confidential informant; or
3. In the alternative, to compel the State to produce for *in camera* questioning, the confidential informant who supplied the information recited by the affiant in the State's affidavit for probable cause to search; and that the court conduct a tape-recorded examination of the confidential informant, out of the presence of defense counsel and the State, as based in part upon written questions to be submitted by the defendant's attorney; to seal and preserve the record of the Court's examination for submission to the appellate court in the event of appeal.

(Signature)

REFERENCES

CASEBANK M.2.b.2

Indiana Rules of Trial Procedure, T.R. 30 (depositions upon oral examination)

Indiana Rules of Trial Procedure, T.R. 31 (deposition of witnesses upon written questions)

CASE LAW

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (prosecution has a duty to disclose material, exculpatory evidence that is in the possession or control of the prosecution).

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (prosecutor has duty to disclose to the Defendant deals made with a State's witness).

Bland v. State, 468 N.E.2d 1032 (Ind. 1984) (Defendant has the right to make an initial inquiry as to existence of any agreement).

Carey v. State, 275 Ind. 321, 416 N.E.2d 1252 (1981) (deals include promises, grants of immunity or rewards in exchange for testimony).

Brewer v. State, 173 Ind.App. 161, 362 N.E.2d 1175 (1971) (trial rule 30 and trial rule 31 are the basic laws governing the taking of depositions in criminal cases).

McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967) (name of the informer need not be disclosed to the magistrate unless necessary to show his credibility; it may be required prior to trial if necessary to the Defendant's case on the merits).

Commonwealth v. Dias, 886 N.E.2d 713 (Mass. 2008) (Defendant may be entitled to informer's identity even when informer will invoke 5th Amendment).

Ortez v. State, 165 Ind.App. 678, 333 N.E.2d 838 (1975) (reversed and remanded where the police paid the informant, effectively put him beyond the Defendant's reach, and then refused to produce him for deposition; there was evidence that the informant had maintained telephone contact with the undercover officer).

Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970) (reversed and remanded the Defendant's case for a new trial where the State extensively used its informant, paid him and saw him off to California, and disobeyed a court order for his production).

Crull v. State, 540 N.E.2d 1195 (Ind. 1989) (given a sufficient showing of defense need for the evidence, courts have been willing to surmount evidentiary privileges).

State v. Cook, 582 N.E.2d 444 (Ind.Ct.App. 1991) (it was error for the trial court to order the State to disclose the identity of the confidential informant for the purpose of allowing the Defendant to challenge probable cause affidavit because the Defendant did not present sufficient evidence to warrant such disclosure).

Smith v. State, 829 N.E.2d 64 (Ind.Ct.App. 2005) (the trial court did not err in refusing to compel the State to disclose the names of the confidential informants as to three separate drug buys; distinguishing Roviaro v. U.S., 353 U.S. 53 (1957), the court found that while the informants were material witnesses,

they were not the “sole” material witness as the Defendant as accompanied by another individual during two of the buys and the Defendant did not allege that individual could not have testified at trial).

Pennsylvania v. Ritchie, 480 U.S. 39, 58, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (where the Defendant seeks pretrial discovery of information which might be privileged, due process may compel the judge to grant the Defendant access, if standing alone, the information “would” probably alter the outcome of the case).

Moore v. State, 839 N.E.2d 178 (Ind.Ct.App. 2005) (trial court did not abuse its discretion in modifying Defendant’s subpoena duces tecum request; no error in limiting access to confidential informant’s file).

State v. Fridy, 842 N.E.2d 835 (Ind.Ct.App. 2006) (exclusion of the evidence leading to dismissal of the case was improper sanction for the State’s refusal to disclose the addresses and names of confidential informants pursuant to the Court’s Order.).

Dickerson v. State, 957 N.E.2d 1055 (Ind.Ct.App. 2011) (trial court did not commit fundamental error when it granted the State’s request to allow the confidential informant to testify, without objection, using a number to identify himself; the record reveals the identity of the “anonymous witness” was well known to Defendant because he had been friends with the witness, as well as the witness’s girlfriend, for some time; moreover, defense counsel deposed the witness before trial.).

Sheckles v. State, 24 N.E.3d 978 (Ind.Ct.App. 2015) (speculation that disclosure of confidential informant’s identity may be useful is insufficient to meet Defendant’s burden to prove necessity of disclosure, and an informant’s identity shall not be disclosed to permit a mere fishing expedition).