[**CAPTION**]

MOTION TO DISMISS (VARIOUS STATUTORY DEFECTS)

The Defendant, by counsel, respectfully requests this Court, pursuant to Ind. Code 35-34-1-4, to dismiss the [indictment/information] filed in the above-captioned cause. In support of this Motion, the Defendant states the following:

1. On [insert date], an information was filed charging the Defendant with [insert offense(s)].

2. The [indictment/information] is defective under Ind. Code 35-34-1-4 for the following reasons: [SELECT APPROPRIATE PARAGRAPHS]

   a. [Count #] fails to specify [insert specific facts], thereby not providing sufficient specificity to allow the Defendant to prepare a defense and, therefore, does not comply with the requirements of Article I, Sec. 13 of the Indiana Constitution, the 6th and 14th Amendments of the United States Constitution and Ind. Code 35-34-1-4(a)(4).

   b. [Count #] does not substantially conform to the requirements of Ind. Code 35-34-1-2(a) in that it does not set forth the nature and elements of the offense charged in plain and concise language. Ind. Code 35-34-1-2(a)(4) and 6(c).

   c. [Count #] fails to recite facts that constitute an offense, and must be dismissed under Ind. Code 35-34-1-4(a)(5).

3. In accordance with Criminal Rule 3, a memorandum stating specifically the grounds for dismissal is filed contemporaneously with this Motion.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to set this matter for hearing, if the allegations set forth in this Motion are denied by the State. If the allegations are either admitted or shown at hearing on the Motion to be correct, the Defendant requests that the [indictment/information] be dismissed.

(Signature)

REFERENCES **CASEBANK B.10.a.1; B.10.d; B.10.e; B.10.a.3**

Ind. Code 35-34-1-4(c) (defendant must raise every ground upon which he intends to challenge the information in single motion, and a subsequent motion based upon a ground not properly raised may be summarily denied).

Ind. Code 35-34-1-4(b) (challenges to lack of specificity and failure to state an offense must be raised no later than twenty days for felonies and ten days for misdemeanors prior to the omnibus date).

Ind. Code 35-34-1-6 (defects within indictment and information that require dismissal under Ind. Code 35-34-1-4(a)(1)).

Ind. Code 35-34-1-8 (motion to dismiss by defendant; requisites; affidavits; documentary evidence; hearing; disposition; procedures).

CASE LAW

FAILURE TO STATE A CRIME (Ind. Code 35-34-1-4(a)(5))

State v. Isaacs, 794 N.E.2d 1120 (Ind.Ct.App. 2003) (charge of operating a vehicle with a schedule I or II controlled substance in the body was facially deficient because none of the alleged substances in the Defendant's body were schedule I or II controlled substances).

State v. D.M.Z., 674 N.E.2d 585 (Ind.Ct.App. 1996) (interpretation of statute is not question of fact but one of law reserved for the trial court; whether the Defendant met the definition of "custodian" is a question for the court).

Kemp v. State, 753 N.E.2d 47 (Ind.Ct.App. 2001) (trial court properly granted the Defendant's motion to dismiss two counts of attempted child molesting and one count of child solicitation because facts set forth in charging information failed to establish criminal offense; facts alleged in information did not reach level of overt act leading to commission of child molesting), *superseded by statute as recognized in* LaRose v. State, 820 N.E.2d 727 (Ind.Ct.App. 2005).

Lebo v. State, 977 N.E.2d 1031 (Ind.Ct.App. 2012) (trial court did not abuse its discretion by denying Defendant's motion to dismiss charge of failure to report child abuse or neglect on grounds of State's failure to state a crime; Defendant was not required to have knowledge of abuse, but reason to believe abuse was occurring to trigger reporting statute).

Often when challenging whether the charged offense is a crime, the rules of statutory construction will play a significant role.

Gebhard v. State, 484 N.E.2d 45, 47 (Ind.Ct.App. 1985) ("[w]ords and phrases shall be taken in their plain, ordinary and usual sense unless a different purpose is manifested by the statute itself").

Gore v. State, 456 N.E.2d 1030, 1033 (Ind.Ct.App. 1983) (penal statutes cannot be construed to include anything beyond their letter, though within their spirit, and such statues cannot be enlarged by construction, implication, or intendment beyond the fair meaning of the language used).

Purcel1 v. State, 721 N.E.2d 220, 223 (Ind. 1999) (it is the cardinal rule of criminal justice that penal statues must be strictly construed against the State and any ambiguity is to be resolved in the favor of the

accused). See also State v. Timmons, 723 N.E.2d 916 (Ind.Ct.App. 2000), *vacated in part on other grounds*, 734 N.E.2d 1084 (Ind.Ct.App. 2000)

Sanders v. State, 466 N.E.2d 424 (Ind. 1984) (statutes relating to the same general subject matter are in pari materia and should be considered together to produce an harmonious statutory scheme; if the statutes are irreconcilable, then the more detailed and specific statute controls).

Ware v. State, 441 N.E.2d 20 (Ind.Ct.App. 1982) (statutes passed during the same legislative session should be interpreted as harmonious, as to give effect to each).

State v. Boles, 810 N.E.2d 1016 (Ind. 2004) (a fundamental rule of statutory construction is that an amendment changing a prior statute indicates a legislative intention that the meaning of the statute has changed).

LACK OF SPECIFICITY (Ind. Code 35-34-1-4(a)(4))

Flores v. State, 485 N.E.2d 890, 894 (Ind. 1985) (although the Defendant's defense was alibi, the State's failure to specify the actual property that was stolen unconstitutionally affected the Defendant's ability to challenge the State's prima facie case).

Moran v. State, 477 N.E.2d 100 (Ind.Ct.App 1985) (when more than one act can fall under the general definition provided by statute, the State must do more than simply recite the statute in the charging information in order to provide Due Process notice to the defendant).

Fadell v. State, 450 N.E.2d 109 (Ind.Ct.App. 1983) (the trial court erred in failing to dismiss indictment for theft by deception; indictment was insufficient because it did not identify "deputies and employees" to whom the Defendant induced county to pay Compensation).

Gebhard v. State, 484 N.E.2d 45, 47 (Ind.Ct.App. 1985) (if a statute defines crime in general terms, then information must specify facts/circumstances to inform the Defendant of particular offense; "tumultuous conduct" is precisely type of charge requiring additional facts/circumstances in order to fully apprise the Defendant of nature of offense charged).

Gilliland v. State, 979 N.E.2d 1049 (Ind.Ct.App. 2012) (where a charging instrument may lack appropriate factual detail, additional materials such as the probable cause affidavit supporting the charging instrument may be taken into account in assessing whether a defendant has been appraised of the charges against him).

State v. Gill, 949 N.E.2d 848 (Ind.Ct.App. 2011) (allegation that Defendant committed domestic battery by knowingly or intentionally touching his spouse in a rude, insolent or angry manner resulting in bodily injury, along with probable cause affidavit which further elaborated upon Defendant's alleged criminal conduct, stated the offense of domestic battery upon a spouse sufficiently to survive Defendant's motion to dismiss).

Pavlovich v. State, 6 N.E.3d 969 (Ind.Ct.App. 2014) (information that charged Defendant with child solicitation was facially sufficient, even though it failed to specify precisely how he allegedly solicited the child).

DUPLICITY (Ind. Code 35-34-1-4(a)(2))

Phillips v. State, 518 N.E.2d 1129 (Ind.Ct.App. 1988) (a duplicitous information charges two offenses in one count).

CONSTITUTIONALITY

Matter of Estate of Wilson, 610 N.E.2d 851 (Ind.Ct.App. 1993) (the party contesting constitutionality of a provision of a statute is not required to serve notice on attorney general before attacking constitutionality of the provision, as long as the party does not seek a declaratory judgment).

FREEDOM OF SPEECH/OVERBREADTH

Art. I, § 9 of Ind. Const. states: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible."

Price v. State, 622 N.E.2d 954 (Ind. 1993) (unreasonable noise provision of disorderly conduct statute is not overbroad or vague, but must be narrowly construed to be constitutional under the Indiana Constitution; reversing conviction for insufficiency under constitutional interpretation of the statue; disorderly conduct statute will be interpreted so that political expression becomes “unreasonably noisy” within meaning of statute if and only if it inflicts on determinant parties harm analogous to that which would sustain tort liability against speaker).

Helton v. State, 624 N.E.2d 499 (Ind.Ct.App. 1993) (the Defendant's motion to dismiss based on overbreadth challenge to gang statute was properly denied; statutes are not overbroad merely because one may conceive of a single impermissible application, but only if they prohibit a substantial amount of protected conduct; there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment rights of parties before it will be facially challenged on overbreadth grounds).

Shuger v. State, 859 N.E.2d 1226 (Ind.Ct.App. 2007) (In order to determine whether a statute regulating speech violates the First Amendment, the court must determine whether the statute is content-neutral regulation of speech, and if so, whether the statute is a valid time, place, and manner regulation that is “narrowly tailored” to serve significant interest.; Indiana’s Hunter Harassment Act does not violate freedom of speech).

Doe v. Prosecutor, Marion County, Indiana, 705 F.3d 694 (7th Cir. 2013) (prior version of I.C. 35-42-4-12, which provided blanket ban on social media for registered sex offenders, violates First Amendment).

VAGUENESSS

Chicago v. Morales, 527 U.S. 41, 119 S.Ct. 1849; 1999 U.S. LEXIS 4005 (1999) (the Illinois Supreme Court held that the Chicago Gang Congregation Ordinance violated the Fourteenth Amendment and was invalid on its face; the U.S. Supreme Court affirmed, holding that the language of the statute was impermissibly vague).

Vaughn v. State, 782 N.E.2d 417 (Ind.Ct.App. 2003) (Ind. Code 35-42-2-1.3, defining domestic battery as "a person who knowingly or intentionally touches a person who...is or was living as a spouse of the other person in a rude, insolent, or angry manner that results in bodily injury" is unconstitutionally vague; the statute fails to define what constitutes “living as if a spouse” of another and therefore, no one can know with any reasonable degree of confidence whether they are, or were in the past, living with another as a spouse for purposes of domestic battery statute). But see Williams v. State, 798 N.E.2d 457 (Ind.Ct.App.

2003) (Vaughn, *supra*, was superseded by an amendment in the statute).

Plummer v. Columbus, 414 U.S. 2, 94 S.Ct. 17 (1973) (ordinance penalizing the use of "fighting words" was vague and invalid on face).

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839 (1972) (vagrancy ordinance void for vagueness).

Brown v. State, 868 N.E.2d 464 (Ind. 2007) (criminal confinement statute, Ind. Code 35-42-3-3, as to the inclusion of the words "fraud" and "enticement" is void for vagueness and cannot be a basis for the Defendant's convictions, but is not invalidated as a whole; removing a person by enticement or fraud would include a vast assortment of very acceptable and even salutary conduct that is clearly not criminal in nature, such as asserting an untruth to persuade an Alzheimer's patient to enter the location of a caregiver).

Morgan v. State, 22 N.E.3d 570 (Ind. 2014) (term “annoys” in public intoxication statute was not unconstitutionally vague; although term was undefined, application of reasonableness standard to the term satisfied constitutional requirements).

Tiplick v. State, 43 N.E.3d 1259 (Ind. 2015) (synthetic drug statute gave adequate notice to ordinary people of the proscribed conduct, and therefore was not unconstitutionally vague where an ordinary person was able to determine through appropriate testing whether they were attempting to sell any products containing chemical compounds listed in statute; although information failed to name specific synthetic drug within its four corners, the supporting probable cause affidavit alleged that the products sold contained a specific synthetic drug); see also Elvers v. State, 22 N.E.3d 924 (Ind.Ct.App. 2014) (synthetic drug law not unconstitutionally vague as applied to Defendant despite his alleged lack of knowledge and understanding of makeup of chemical compounds).

Whatley v. Zatecky, 7th Cr., 8/15/16 (statute defining "youth program center" for purposes of 1,000-foot drug enhancement was unconstitutionally vague).