[CAPTION]

BRIEF IN SUPPORT OF MOTION TO DISMISS (LACK OF SPECIFICITY)

(methamphetamine example)

I. COUNT I MUST BE DISMISSED AS THE CHARGE DOES NOT CONTAIN SUFFICIENT SPECIFICITY TO ALLOW THE DEFENDANT TO ANTICIPATE THE STATE'S EVIDENCE AND PREPARE A DEFENSE.

The Defendant has a fundamental right to know the specific nature of the allegations against him so that he can prepare his defense. The Indiana Constitution, Article 1, § 13, provides: "In all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against him . . .". The Sixth Amendment to the United States Constitution guarantees the Accused the right " . . . to be informed of the nature and cause of the accusation against [him]." Ind. Code 35-34-1-2(a)(4) requires that this Information "set[] forth the nature and elements of the offense charged in plain and concise language...". Ind. Code 35-34-1-2(d) requires that an information state "the essential facts constituting the offense charged." Ind. Code 35-34-1 4(a)(4) states that this information must be dismissed if it "does not state the offense with sufficient certainty." If an information employs vague terms which do not inform the Accused of the charge, dismissal is required; failure to adequately inform the Accused of the charges is fundamental error. Griffin v. State, 439 N.E.2d 160 (Ind. 1982).

In Flores v. State, 485 N.E.2d 890, 892-3 (Ind. 1985), the Court succinctly summed this rule of law:

> Indiana Cons. Art I, Sec 13 provides in the pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to demand the nature of the cause of the accusation against him, and to have a copy thereof." This constitutional provision requires that the indictment of information sufficiently appraise the accused of the nature of the charges against him so that he may anticipate the State's proof and prepare a defense in advance of trial. Accordingly, the requirement for sufficient information also implicates the protection provided by the "due course of law" clause in Art. I sect. 13, of our State Constitution. (citations omitted).

Therefore, in the case at bar, this Court must determine, from the charge itself, whether the Defendant can anticipate the State's proof and prepare a defense. It is clear that he cannot.

Count I states:

COUNT I: DEALING IN METHAMPHETAMINE

On or about November 23, 2002, in State of Indiana, at 1600 Pennsylvania Avenue Washington, DC 20500, the following named defendant John Doe did knowingly or intentionally manufacture methamphetamine (pure or adulterated), classified in Schedule II.

Count I's first failing is its un-amplified use of the term "manufacture." The term provides the Defendant no way of anticipating the State's proof or preparing a defense.

The statutory definition of "manufacture," itself, is intentionally broad and unspecific. Ind. Code § 35-48-1-18 defines "manufacture", as follows:

> (1)the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. It does not include the preparation, compounding, packaging, or labeling of a controlled substance:
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> (A) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or
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> (B) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale; or
>
> (2) The organizing or supervising of an activity described in subdivision (1).

See Poe v. State, 775 N.E.2d 681 (Ind.Ct.App. 2002) (holding this definitional section establishes elements of the offense of manufacturing). By its un-amplified use of the term "manufacture," the charge leaves the Defendant to speculate as to whether the State intends to offer evidence he produced, prepared, propagated, compounded, converted, or processed controlled substance; and whether the State will attempt to offer evidence that intended to do this directly or indirectly and / or by means of chemical synthesis, or by a combination of extraction and chemical synthesis and whether he is alleged to having simply organized or supervised this activity (whatever the activity is) or simply packaged, repackaged, labeled or relabeled it. This is specifically what has been prohibited by the Court's holding in the analogous case of Moran v. State, 477 N.E.2d 100, 104 (Ind.Ct.App. 1985).

In Moran, the Court considered charges of official misconduct which tracked the language of the criminal statute but left the Defendant to speculate as to the portion of the statute he allegedly violated.

The information, in four separate counts, alleged that the Defendant committed official misconduct by failing to comply with two Indiana statutes (Ind. Code 36-1-11-6-(b) and Ind. Code 36-1-12-5). However, as cited by the Court, these statutes contained multiple subdivisions detailing procedures and mandates.1 Id. at 104. The Court held:

> It is neither fair nor reasonable to have Moran speculate, at his peril, as to the particular procedure or mandates he failed to follow. In Gebhard v. State (1984), Ind.App., 459 N.E.2d 58, we held that when a criminal statute defines a crime in general terms, the information must be more specific than merely tracking the language of the statute to inform the defendant of the particular offense which comes under the general definition. This rationale is applicable to the present case. Although the statutes which form the basis of Moran's indictment are not in general terms, they contain a number of directives. Failure to follow a single directive could be the basis for the charge of official misconduct. Therefore, simply charging Moran with conduct which contravenes certain statutes, when each provision and subsection contain many directives is just as improper as using language from a statute which defines a crime in general terms when many different acts could fall within that general definition. We conclude that the indictment did not state the offenses with sufficient specificity to enable Moran to defend himself at trial.

Id. at 104 (citations omitted) (emphasis added).

Similarly to Moran, in the case at bar, it is inappropriate to refer the Defendant to a statutory definition containing numerous variations and leave it to him to speculate as to the exact nature of his alleged criminal act. Further, even if the Defendant could determine which of the one of many terms included in the statutory definition of "manufacture" he is accused of performing, several of the foregoing terms have various meanings: Production is defined2 as:

> 1. the act of producing; creation or manufacture. 2. something that is produced; a product. 3. the total amount produced. 4. a work of literature or art. 5. the act of presenting for display; presentation; exhibition: the production of evidence. 6. and unnecessarily or exaggeratedly complicated situation or activity: That child makes a production out of going to bed. 7. a. the organization and presentation of a play, motion picture, or other entertainment. b. the entertainment itself. 8. regularly manufactured; not custom-made or specially produced: a production model.

Preparation is defined as:

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1 For instance, as to Count I, the Court noted: "Count one states only that a sale or exchange or a caterpillar 'crawler-loader' was conducted in contravention of Ind. Code 36-1-11-6-(b). This subsection contains at least three distinct procedures to be followed. The property must be sold at a public auction. The sale must be advertised pursuant to statute. Finally the auction must be conducted by a duly licensed auctioneer." Id. at 104

2 All definitions are taken from WEBSTER'S AMERICAN DICTIONARY, COLLEGE ED., Random House (2000).

1. a proceeding, measure, or provision by which one prepares for something: preparations for a journey. 2. any proceeding, experience, or the like considered as a mode of preparing for the future. 3. an act of preparing. 4. the state of being prepared. 5. something prepared, manufactured, or compounded: a preparation for burns.

Propagation or propagate is defined as:

1. to cause an organism to multiply by any process of natural reproduction from the parent stock. 2. to reproduce (itself, its kind, etc.) as an organism does. 3. to transmit (hereditary features or elements) to or through offspring. 4. to spread (a report, doctrine, practice, etc.) from person to person; disseminate. 5. to cause to increase in number or amount. 6. to multiply by any process of natural reproduction, as organism; breed. . ..

Compounding is defined as:

1. composed of two or more parts, elements, or ingredients: Soap is a compound substance. 2. having or involving two or more actions or functions: The mouth is a compound organ. 3. (of a word) a. consisting of two or more parts that are also words, as housetop, many-sided, playact, or upon. b. consisting of two or more parts that are also bases, as biochemistry or ethnography. 4. (of a verb tense) consisting of an auxiliary verb and a main verb, as are swimming, have spoken, or will write (opposed to simple). 5. composed of several similar parts that combine to form a whole: a compound fruit. 6. composed of a number of distinct but connected individuals, as coral. 7. something formed by compounding or combining parts, elements, etc. 8. a pure substance composed of two or more elements whose chemical composition is constant. 9. a compound word, esp. one composed of two or more words that are otherwise unaltered, as moonflower or rainstorm. 10. to put together into a whole; combine: to compound drugs to form a new medicine. 11. to make or form by combining parts, elements, etc.; construct: a medicine compounded from various drugs. 12. to increase or add to, esp. so as to worsen: a problem that was compounded by their isolation. 13. to settle or adjust by agreement, esp. for a reduced amount, as a debt. 14. to agree, for a consideration, not to prosecute or punish a wrongdoer for: to compound a crime or felony. 15. to pay (interest) on the accrued interest as well as the principal. 16. to make a bargain; come to terms; compromise. 17. to form a compound.

Conversion is defined as:

1. the act or process of converting; the state of being converted. 2. change in character, form, or function. 3. change from one religion, political belief, viewpoint, course, etc., to another. 4. a change from indifference, disbelief, or antagonism to acceptance, faith, or enthusiastic support, esp. such a change involving religious belief. 5. a physical transformation from one material or state to another: conversion of base metals into gold. 6. the act of obtaining equivalent value, as of money or units of measurement, in an exchange or calculation. 7. a physical, structural, or design change, as in a building, to effect a change in function. 8. a substitution of one component for another so as to effect a change: conversion from oil heat to gas heat. 9. a change in the form or units of a mathematical expression. 10. the transposition of the subject and predicate of a logical proposition, as in converting "No good man is unhappy" to "No unhappy man is good." 11. a. unauthorized assumption and exercise of rights of ownership over personal property belonging to another. b. change from realty into personality, or vice versa, as in the sale or purchase of land. 12. the making of and additional score in certain sports, as on a try for a point after a touchdown in football or a free throw in basketball. 13.

> *Psychoanal*. the process by which a repressed psychic event, idea, feeling, memory, or impulse is represented by a bodily change or symptom. 14. the transformation of one radioactive material into another by neutron capture. 15 a. the process of enabling software for one computer system to run on another. b. the transformation of data from a form compatible with one computer program to a form compatible with another.

Processing or process is defined as:

> 1. a systematic series of actions directed to some end: a process for homogenizing milk. 2. a continuous action, operation, or series of changes taking place in a definite manner: a process of decay. 3. *Law*. a. the summons, mandate, or writ by which a defendant is brought before court for litigation. b. the whole course of the proceedings in an action at law. 4. photomechanical or photoengraving methods collectively. 5. *Anat*. a natural outgrowth, projection, or appendage: a process of a bone. 6. the action of going forward or on. 7. the condition of being carried on. 8. course or lapse, as of time. 9. CONK (defs. 1,2). 10. to treat or prepare by some particular process, as in manufacturing. 11. to handle (persons, papers, etc.) according to a routine procedure. 12. to institute a legal process against. 13. to serve a process or summons on. 14. CONK (def. 3)15. prepared or modified by a special process. 16. noting, pertaining to, or involving photomechanical or photoengraving methods: a process print.

Extraction is defined as:

> 1. serving to extract or based upon extraction: oil and other extractive industries. 2. capable of being extracted: extractive fuels. 3. of or of the nature of an extract. 4. something extracted or extractable.

Synthesis is defined as:

> 1. the combining of the constituent elements of separate material or abstract entitles into a single or unified entity (opposed to analysis). 2. a complex whole formed by combining. 3. the forming or building of a more complex chemical substance or compound from elements or simpler compounds.

Therefore, not only does the charge leave the Defendant to speculate among multiple statutory variables but also the meaning of those variables. For this reason, the charge does not allow the Defendant to anticipate the State's evidence and prepare a defense; therefore, Count I must be dismissed.

Count I's second constitutional failing is its failure to recite any facts. Again, Ind. Code 35-34-1-2(d) requires that an information state "the essential facts constituting the offense charged." (emphasis added). However, Count I contains no facts whatsoever; it simply recites the terms of the statutory offense. This is what exactly what is prohibited the Court's holding in the case of King v. State, 560 N.E.2d 491 (Ind. 1990).

In King, the Supreme Court discussed an information which also simply tracked the statutory language but failed to include any specific facts. Count I, as indicated by the Court, "alleged that appellant, in the spring of 1981, performed or submitted to deviate sexual conduct with a child under the age of twelve, while appellant was over the age sixteen years"; Count II, as indicated by the Court, "allege[d] that, during the spring of 1983, appellant did perform or submit to deviate sexual conduct, with a child over the age of twelve years and under the age of sixteen years." Id. at 492. In discussing this information, the Court stated:

> The information in the present case was inadequate. It failed to name the victim and it did not provide any of the facts and circumstances describing how the molestation was said to have occurred. Ind. Code 35-34-1-2 delineates the minimum standards which must be met in Indiana for a pleading to be sufficient, and among the criteria enumerated in it is the requirement that "the nature and elements" of an offense be stated "in plain and concise language." The minimum statutory requirements were not met in this case.

Id. at 494 (emphasis added).

Pursuant to the holding in King, because Count I fails to provide any of the facts and circumstances whatsoever as to how the Defendant allegedly "manufactured" methamphetamine, it fails to contain constitutionally required specificity and must be dismissed.

The State will argue that Count I of the information tracks the language of the statute and therefore is sufficient. However, this is not the law, as numerous cases have found that an information is fatally defective if it fails to allege the facts of the crime with specificity. In Flores, supra, the Supreme Court considered a robbery information that tracked the language of the statute alleging the Accused took "property." The Court found that the information which did not specify specific property was inadequate. Id. at 894. In Griffin v. State, 439 N.E.2d 160 (Ind. 1982), the Court again reviewed an information that tracked the language of the statute regarding the offense of receiving stolen property. The Court found that an information which did not specify property was "totally inadequate" as it did not adequately inform the Accused of the allegation and allow him to prepare for trial. Id. at 162. In Stwalley v. State, 534 N.E.2d 229 (Ind. 1989), the Supreme Court discussed an information which directly tracked the language of the burglary statute: "[t]he information charging burglary alleged that Stwalley broke and

entered the victim's home with the intent to commit a felony." Id. at 232. The Court continued: "the information did not specify the felony intended and therefore was insufficient." Id. Finally, in Gebhard v. State, 459 N.E.2d 58 (Ind.Ct.App. 1984), the Court considered a disorderly conduct information that tracked the statute by alleging "tumultuous conduct." The Court found this information insufficient as it failed to state facts and circumstances to apprise the Defendant of the allegations against him. Therefore, as Count I is not sufficiently specific to allow the Defendant to anticipate the State's proof at trial and formulate a defense, the charge must be dismissed.

II. COUNTS II AND IV MUST BE DISMISSED AS THE CHARGES DO NOT CONTAIN SUFFICIENT SPECIFICITY TO ALLOW THE DEFENDANT TO ANTICIPATE THE STATE'S EVIDENCE AND PREPARE A DEFENSE.

Counts II and IV state:

COUNT II: POSSESSION OF TWO OR MORE CHEMICAL REAGENTS OR PRECURSORS WITH INTENT TO MANUFACTURE

> On or about November 23, 2002, in the State of Indiana, at 4 Walnut St. in Walnut Valley, the following named defendant John Doe did possess two or more chemical reagents or precursors. To wit: sulfuric acid, ether, ephedrine and / or pseudoephedrine, with intent to manufacture methamphetamine, a schedule II controlled substance under Ind. Code 35-48-2-6.

COUNT IV: ILLEGAL POSSESSION OF ANHYDROUS AMMONIA OR AMMONIA SOLUTION

> On or about November 23, 2002, in the State of Indiana, at 4 Walnut St. in Walnut Valley, the following named defendant John Doe did possess anhydrous ammonia or ammonia solution with intent to manufacture methamphetamine, a schedule II controlled substance under Ind. Code 35-48-2-6.

Counts II and IV charge the Defendant with possession of certain items with the "intent to manufacture" methamphetamine. As argued in regards to Count I, this simple statement does not provide the Defendant with sufficient information to anticipate the State's evidence or prepare a defense. In Stwalley v. State, 534 N.E.2d 229 (Ind. 1989), the Defendant was charged with the offense of burglary which alleged he "broke and entered the victim's home with the intent to commit a felony." Id. at 232. Because "the information did not specify the felony intended", the Court found the information to be "insufficient." Id. In the present case, as has been demonstrated above, charging the Defendant with the "intent to manufacture" is at least as vague as "intent to commit a felony." It is no more sufficient to

charge "intent to manufacture," when "manufacture" could mean so many different things, than it is to charge "intent to commit a felony" which could also mean so many different things. Therefore, because the charge does not contain sufficient specificity to permit the Defendant to anticipate the State's proof or prepare a defense, the charge must be dismissed.

III. COUNT VI MUST BE DISMISSED AS THE CHARGE DOES NOT CONTAIN SUFFICIENT SPECIFICITY TO PERMIT THE DEFENDANT TO ANTICIPATE THE STATE'S EVIDENCE OR PREPARE A DEFENSE.

Count VI states:

COUNT VI: STORAGE OR TRANSPORTATION OF ANHYDROUS AMMONIA ILLEGALLY

> On or about November 23, 2002, in the State of Indiana, at 4 Walnut St. in Walnut Valley, the following named defendant John Doe did knowingly or intentionally store anhydrous ammonia (NH3) in a container that does not conform to the requirements of a law governing the design, construction, location, installation, or operation of equipment for storage, handling, use, or transportation of anhydrous ammonia (NH3) or an ammonia solution . . . ..

In regards to Count VI, the case of Moran is specifically on point. Again, in Moran the State alleged the Defendant had committed a crime because he had failed to follow the requirements of certain statutes. Count VI is, in fact, much broader and less specific than that discussed in Moran. At least in Moran, the charge specified certain statutes; in the case at bar, the Defendant is merely charged with failing to store the substance in a container that "conform[ed] to the requirements of a law governing the design, construction, location, installation . . .." Further, again the state has merely alleged all the statutory variables (storage, handling, use or transportation) and left to the Defendant to speculate as to which variable he allegedly committed. Lastly, as prohibited by King, supra, the charge contains absolutely no facts whatsoever. Because the charge lacks constitutionally required specificity, it must be dismissed.

(Signature)