

[CAPTION]

**MOTION TO SUPPRESS EVIDENCE (INVALID CONSENT)**

The Defendant, by counsel, respectfully requests that this Court to suppress all property seized by the arresting officers, all observations made by the arresting officers, and all statements made by the Defendant as a result of the unconstitutional conduct of the police. In support of this Motion, the Defendant states the following:

1. The Defendant is charged with [insert offenses].
2. On [insert date], a police officer, without lawful authority, obtained consent to search the Defendant's [pick one: house, vehicle or person].
3. Any information or evidence obtained from the search of the Defendant's [house, vehicle or person], was unlawfully obtained because:

[CHOOSE APPROPRIATE PARAGRAPHS]

- a. The police officer failed to advise the Defendant, who was in custody, of his right to consult with counsel, before searching and thus violated the Defendant's Article I, Section 11 right to be free from unreasonable searches and Section 13 right to counsel.
- b. Defendant's consent to search was not voluntarily given, and thus, the resulting search violated the Fourth Amendment of the United States Constitution.
- c. The police obtained the Defendant's consent after the purpose of the stop of Defendant was completed, and thus, the resulting search violated the Fourth Amendment of the United States Constitution.
- d. The police exceeded the scope of the Defendant's consent, thereby violating the Fourth Amendment to the United States Constitution.
- e. The police lacked any reason to believe that the third party whom they asked to consent to the search had actual authority to grant consent, and in fact, the third

party lacked authority to grant consent. Thus, the resulting search was a violation of the Fourth Amendment of the U.S. Constitution.

- f. Considering the totality of the circumstances, the police officer's search of the Defendant's [vehicle or home] was unreasonable and, thus, violated Article I, Section 11 of the Indiana Constitution.

WHEREFORE, the Defendant requests the Court to:

1. Suppress and bar from use as evidence in the trial of this cause any items seized, observations, or statements made by the Defendant that resulted from the illegal search.
2. Suppress and bar from use in the trial of this cause all testimony relating to any items seized, observations, and statements made by the Defendant, which resulted from the illegal search.

(Signature)

## REFERENCES

## CASEBANK Z.3.d

Kerr, 16 Indiana Practice §§ 2.6(g) Kerr, 16 Indiana Practice §§ 2.6(g), 276 (19) (a juvenile who is living with his or her parents in the family residence should not be able to give a valid consent to a search of the family residence that is binding on the parents or other family members living in the residence). See also Deckard v. State, 425 N.E.2d 256 (Ind.Ct.App. 1981); Williams v. State, 433 N.E.2d 769 (Ind. 1982).

## CASE LAW

### ADVISEMENTS

Pirtle v. State, 323 N.E.2d 634 (Ind. 1975) (under the Indiana Constitution, a person in police custody must be informed of his or her right to consult with counsel about the possibility of consenting to a search before valid consent can be given). See also Sims v. State, 413 N.E.2d 556 (Ind. 1980), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995).

Torres v. State, 673 N.E.2d 472 (Ind. 1996) (the Defendant's consent to search his house was invalid because the police failed to advise the Defendant of his right to consult with counsel where the Defendant was handcuffed, police had read him Miranda rights and informed him that he was suspect in stabbing).

Sellmer v. State, 842 N.E.2d 358 (Ind. 2006) (search was unconstitutional where police failed to advise Defendant of her right to consult with an attorney prior to obtaining consent where police repeatedly asked for consent to search her vehicle and advised it was in her "best interests" to cooperate; reasonable person would have either believed she was under arrest or at least would have believed she was not free to refuse the request).

Ackerman v. State, 774 N.E.2d 970 (Ind.Ct.App. 2002) (field sobriety tests (FSTs) are searches governed by Article 1, Section 11 of the Indiana Constitution; however, the court declined to extend the Pirtle doctrine to require police to advise a person in custody that he or she may consult with an attorney before the administration of a FST).

Cohee v. State, 945 N.E.2d 748 (Ind.Ct.App. 2011) (Pirtle warnings not required when asking for consent to blood draw).

Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011) (Defendant not entitled to Pirtle warning before giving consent to cheek swab for DNA because intrusion was slight, swabbing caused no discomfort, and Defendant had virtually no legitimate interest in concealing his identity following his lawful arrest).

### VOLUNTARINESS

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (warning a suspect of his right to withhold consent is not required, but failing to so warn the suspect is a factor in the overall determination of voluntariness).

Campos v. State, 885 N.E.2d 590 (Ind. 2008) (after police asked for consent to search car, Defendant asked if it was "necessary," to which the officer responded "yes"; consent was involuntary).

Thurman v. State, 602 N.E.2d 548 (Ind.Ct.App. 1992) (the State has the burden of proving that consent was, in fact, freely and voluntarily given).

State v. Scheibelhut, 673 N.E.2d 821 (Ind.Ct.App. 1996) (in determining whether a consent to search was voluntary, courts should consider the “totality of circumstances,” including but not limited to: 1) whether the Defendant was advised of his Miranda rights prior to the request to search; 2) the Defendant’s degree of education and intelligence; 3) whether the Defendant was advised of his right not to consent; 4) whether the police officer made any express or implied claims of authority to search without consent; 5) whether the officer was engaged in any illegal action prior to request; 6) whether the Defendant previously was cooperative; and 7) whether the officer was deceptive as to his true identity or purpose of his search).

Overstreet v. State, 783 N.E.2d 1140 (Ind. 2003) (although “knock and talk” investigation is not a per se violation of the Fourth Amendment, it “pushes the envelope” and can easily be misused). See also Ware v. State, 782 N.E.2d 478 (Ind.Ct.App. 2003); Livermore v. State, 777 N.E.2d 1154 (Ind.Ct.App. 2002); Felker v. State, 819 N.E.2d 870 (Ind.Ct.App. 2004); Hayes v. State, 794 N.E.2d 492 (Ind.Ct.App. 2003); Suggs v. State, 991 N.E.2d 601 (Ind.Ct.App. 2013).

State v. Barker, 734 N.E.2d 671 (Ind.Ct.App. 2000) (officers' statement that they could go get a search warrant if they were not allowed inside the Defendant's home rendered the Defendant's choice illusory and vitiated subsequent consent to search). See also Roehling v. State, 776 N.E.2d 961 (Ind.Ct.App. 2002); McIlquham v. State, 10 N.E.3d 506 (Ind. 2014).

Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (although express consent is not required, mere acquiescence to a claim of lawful authority is not consent). See also Jorgensen v. State, 526 N.E.2d 1004 (Ind.Ct.App. 1988), *sum. aff'd*, 574 N.E.2d 915 (Ind. 1991).

Thurman v. State, 602 N.E.2d 548 (Ind.Ct.App. 1992) (where five or six officers ordered occupants out of car and patted them down after blocking their exit, atmosphere was intimidating, and the Defendant's consent was involuntary, merely submission to supremacy of law rather than voluntary relinquishment of known right).

Galvin v. State, 582 N.E.2d 421 (Ind.Ct.App. 1991) (involuntary consent where police illegally entered home, would not allow the Defendant to call lawyer, did not tell the Defendant that court refused to issue warrant, and detained the Defendant for over one hour).

Baldwin v. Reagan, 715 N.E.2d 332 (Ind. 1999) (plain language of seatbelt enforcement act evidences legislative intent that traffic stop based on seatbelt violation, standing alone, does not provide reasonable suspicion for police to unilaterally expand their investigation and "fish" for evidence of other possible crimes). See also State v. Morris, 732 N.E.2d 224 (Ind.Ct.App. 2000).

Krause v. Commonwealth, 206 S.W.3d 922 (Ky. 2006) (officers’ ruse rendered Defendant’s consent to search home involuntary and evidence seized as a result should be suppressed).

Crocker v. State, 989 N.E.2d 812 (Ind.Ct.App. 2013) (Defendant’s consent to search of rental car was voluntary where Defendant was given written advisement of Pirtle rights, even though Defendant’s incriminating statements should have been suppressed under Miranda).

State v. Cunningham, 26 N.E.3d 21 (Ind. 2015) (it is not inherently coercive for police to give conditional permission to step out of a vehicle during traffic stop, subject to motorist’s consent to pat-down search).

## **AUTHORITY TO CONSENT**

Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515 (2006) (if more than one occupants of a home are present and one objects to the search, then a resulting search is unreasonable).

Fernandez v. California, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014) (Randolph does not apply in situations where the objecting occupant is absent when another occupant consents to a search; girlfriend's consent to search of home after objecting Defendant had been removed from premises by police was valid).

Krise v. State, 746 N.E.2d 957 (Ind. 2001) (consent by male housemate to warrantless search of home he shared with the Defendant, a female, did not extend to the Defendant's purse; housemate clearly lacked any privacy interests in the Defendant's purse and had neither actual nor apparent authority to consent to search of the Defendant's purse); see also Godby v. State, 949 N.E.2d 416 (Ind.Ct.App. 2011) (Defendant's wife did not have actual or apparent authority to consent to search of Defendant's locked box kept in garage where box was closed container, Defendant paced box in area of home wife seldom entered, Defendant locked box, and wife did not have a key).

Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord cannot consent for tenant, and cannot use right to inspect to allow officers to search).

Norris v. State, 732 N.E.2d 186 (Ind.Ct.App. 2000) (it was unreasonable for officer to believe driver's consent to search car included backpack in back seat where passenger was sitting; officer should have ascertained who owned backpack in back seat of vehicle before searching backpack; officer could not have reasonably believed that driver's consent to search car extended to back pack in back seat). See also Friedel v. State, 714 N.E.2d 1231 (Ind.Ct.App. 1999) (passenger in car stopped by police and searched with driver's consent had legitimate expectation of privacy in her closed purse, of which she was undisputed owner and which was left by her on floor of backseat upon exiting car); Halsema v. State, 823 N.E.2d 668 (Ind. 2005).

State v. Foreman, 662 N.E.2d 929 (Ind. 1996) (lessor who consented to search of premises did not validly consent to search locked room, in light of fact that police officers removed door off its hinges to gain access to room instead of merely asking lessor to unlock door; where lessor never consented to search of room, apparent authority doctrine did not apply).

Halsema v. State, 823 N.E.2d 668 (Ind. 2005) (third party-sole lessee of house did not have actual or apparent authority to consent to search of dresser drawer in bedroom where the Defendant had been staying).

Lee v. State, 849 N.E.2d 602 (Ind. 2006) (consent to search house by co-inhabitant extended to viewing Defendant's videotapes).

Bulthuis v. State, 17 N.E.3d 378 (Ind.Ct.App. 2014) (tenant's consent to search of garage was valid under totality of the circumstances, although officer did not advise tenant of her right to refuse consent or her Miranda rights prior to asking for consent to search, where tenant had allowed officer into home where Defendant was found and taken into custody and officer then asked if he could look in garage).

Walker v. State, 986 N.E.2d 328 (Ind.Ct.App. 2013) (Defendant's mother was competent to give consent to search residence that she owned and where both she and Defendant resided, even though mother had Alzheimer's disease, where there was no legal guardianship over mother that would divest her of ability to make decisions for herself).

## SCOPE OF CONSENT

LaMunion v. State, 740 N.E.2d 576 (Ind.Ct.App. 2000) (despite fact they asked a neighbor to call 911, neither the Defendant nor his girlfriend manifested consent to full search of their home).

Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (the standard for measuring the scope of a suspect's consent is objective reasonableness -what would a typical reasonable person have understood by the exchange between the officer and the suspect?).

Cases in which officers exceeded consent to search the vehicle by searching people or objects within the vehicle. Smith v. State, 713 N.E.2d 338 (Ind.Ct.App. 1999); Friedel v. State, 714 N.E.2d 1231 (Ind.Ct.App. 1999); Norris v. State, 732 N.E.2d 186 (Ind.Ct.App. 2000); Ammons v. State, 770 N.E.2d 927 (Ind.Ct.App. 2002); Sallee v. State, 785 N.E.2d 645 (Ind.Ct.App. 2003).

Jones v. State, 409 N.E.2d 1254, 1260 n. 9 (Ind.Ct.App. 1980) (consent to police entry does not constitute a consent to search).

Nowling v. State, 955 N.E.2d 854 (Ind.Ct.App. 2011) (fact that roommate invited police and probation officer into his home and, in response to officer's question, told them where Defendant's room was located did not constitute consent to search room), *sum. aff'd*, 961 N.E.2d 34 (Ind.Ct.App. 2012).

Buckley v. State, 797 N.E.2d 845 (Ind.Ct.App. 2003) (consent to search home for officer safety did not allow officer to search any container in the house).

Smith v. State, 713 N.E.2d 338 (Ind.Ct.App. 1999) (although Defendant voluntarily consented to search of car for drugs, money or illegal contraband, police exceeded scope of consent by accessing computer memory of phone to retrieve its electronic contents).

State v. Stone, 653 S.E.2d 414 (N.C. 2007) (passenger in a vehicle who voluntarily consented to a police search of his person for drugs had his Fourth Amendment rights violated when officers pulled open the waist bands of his sweat pants and underwear to shine flashlight on his genitals).