

[CAPTION]

**DEFENDANT’S OBJECTION TO THE STATE’S MOTION TO COMPEL
DEFENDANT TO GIVE BUCCAL SWAB SAMPLE**

The Defendant, by counsel, respectfully requests the Court to deny the State’s Motion to Compel Defendant to Give Buccal Swab, and in support would state as follows:

1. On [insert date], the State filed its Motion to Compel Defendant to Give Buccal Swab Sample.
2. Defendant does not consent to providing any DNA sample.
3. According to the State’s Motion, the State wishes to compel a DNA sample because:
 - a. Defendant has been charged with [insert offense];
 - b. physical evidence was recovered during the investigation;
 - c. the State wishes to request DNA testing of said evidence;
 - d. a buccal swab from the defendant is necessary to conduct the DNA testing; and
 - e. said testing is necessary for the State to prepare its case.
4. The State should be required to demonstrate Probable Cause and to obtain a Search Warrant before being allowed to compel a Defendant to provide any DNA Sample, pursuant to Article 1, Section 11 of the Indiana Constitution and the Fourth Amendment of the United States Constitution. The Indiana Supreme Court recently declined to make a ruling as to whether a cheek swab is a search requiring its own separate warrant or other justification. See Garcia-Torres v. State, 949 N.E.2d 1229 (Ind. 2011). The Indiana Supreme Court, in reviewing United States Supreme Court cases involving searches which required some manner of bodily intrusion, concluded that “Fourth Amendment principles seem to suggest that DNA has more in common with fingerprints.” Id. at 1236-37. However, as pointed out by Justice Rucker in the dissent, while “the United States Supreme Court has not spoken on the question of whether a DNA swab is a search,” “every Federal Circuit Court addressing this issue has expressly concluded that the gathering and testing of DNA samples, by either a blood sample or a cheek swab, are searches

subject to the Fourth Amendment.” Id. at 1239. Indeed, in Green v. Berge, 354 F.3d 675, 676 (7th Cir. 2004), the Seventh Circuit determined that “the taking of a DNA sample is clearly a search.”

5. The State’s Motion to Compel Defendant to Give Buccal Swab Sample is not a sufficient basis for a Court to find probable cause to issue a warrant. Neither is this a sufficient basis to find reasonable suspicion. Furthermore, there is no indication that the physical evidence recovered during the investigation of this case will even yield a DNA profile suitable for comparison, as it has not yet been tested as far as the Defendant is aware.

WHEREFORE, Defendant requests the Court deny the State’s motion, and for all other relief just and proper in the premises.

(Signature)