

FILED FOR RECORD
2008 NOV 17 PM 4:50
CENTRE COUNTY
CRIMINAL JUSTICE

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA

v.

No.: CP-14-CR-1610-2008

HOBSON MCKOWN

DEFENDANT'S OMNIBUS PRE-TRIAL MOTION TO SUPPRESS

AND NOW, comes the Defendant, Hobson McKown, by and through his counsel, Jason S. Dunkle, Esquire, and Masorti & Sullivan, P.C. and brings this Omnibus Pretrial Motion, whereof the following is a statement:

I. PROCEDURAL HISTORY

1. On September 10, 2008, Detective Joshua A. Martin of the Ferguson Township Police Department filed a Police Criminal Complaint charging Defendant with Possession of a Small Amount of Marijuana, 35 P.S. §780-113(a)(31), and Possession of Paraphernalia, 35 P.S. §780-1113(a)(32), charges.
2. A preliminary hearing was on the controlled substance case was scheduled for September 17, 2008.
3. Defendant waived his preliminary hearing on the new case and thereby bound the charges over to the Court of Common Pleas.
4. Defendant appeared for Formal Arraignment on October 13, 2008

II. FACTS

5. Defendant appeared at Central Court in the Centre County Courthouse on September 10, 2008, for a preliminary hearing on another matter.
6. Upon the conclusion of the preliminary hearing, Magisterial District Judge Leslie A. Dutchcot modified Defendant's bail to include a special condition that he was not able to possess any firearms.
7. Defendant was advised that he must surrender his firearms to the Centre County Sheriff's Department in order to comply with the bail conditions and thereby avoid

pretrial incarceration.

8. Upon leaving the courthouse, Defendant immediately went to the Sheriff's Department to discuss the surrender of his firearms.
9. The Sheriff's Department transported Defendant to his residence.
10. Defendant attempted to enter his residence to retrieve the firearms.
11. The Sheriff's Department prevented Defendant from entering his residence.
12. The Sheriff's Department advised Defendant that they would enter the residence to retrieve the weapons.
13. Defendant refused consent for the Sheriff's to enter his residence.
14. The Sheriff's Department handcuffed Defendant and took him into custody.
15. The Sheriff's Department made a warrantless entry into Defendant's apartment.
16. The Sheriff's Department then contacted the Ferguson Township Police Department.
17. It is believed that members of the Ferguson Township and Penn State Police Departments entered Defendant's residence and conducted a warrantless search.
18. The warrantless search led to the discovery of alleged marijuana and related paraphernalia.
19. Upon finding the alleged marijuana and paraphernalia, law enforcement filed an Application for Search Warrant and Authorization before Judge Dutchcot. (A true and correct copy of the Application and Affidavit of Probable Cause is attached hereto as "Defendant's Exhibit A").
20. Judge Dutchcot issued the search warrant.
21. Law enforcement executed the search warrant and seized a yellow envelope with suspected marijuana and a woven bag with suspected marijuana smoking device. (A true and correct copy of the Receipt/Inventory is attached hereto as "Defendant's Exhibit B").

III. MOTION TO SUPPRESS PHYSICAL EVIDENCE-WARRANTLESS ENTRY

22. The averments contained in the foregoing paragraphs are incorporated herein by reference as though set forth at length.

23. When a Motion to Suppress is filed by a defendant, the Commonwealth has the burden of establishing by a preponderance of the evidence that the challenged evidence was not obtained in violation of defendant's rights and is thereby admissible. Pa.R.Crim.P. 581(h); Commonwealth v. Beaman, 846 A.2d 764, 767 (Pa. Super. 2004).
24. The "burdens of production and persuasion are on the Commonwealth to prove the challenged evidence was not obtained in violation of the defendant's rights." Commonwealth v. West, 834 A.2d 625, 629 (Pa. Super. 2003).
25. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment of the United States Constitution, and Article 1, Section 8 of the Pennsylvania Constitution states that people shall be free from unreasonable searches and seizures.
26. The Fourth Amendment has drawn a firm line at the entrance to a house, applying equally to seizures of persons or seizures of property. Payton v. New York, 445 U.S. 573, 589-590 (1980).
27. The purpose is not to protect the person of the suspect but to protect the homes from physical entry. Minnesota v. Olson, 495 U.S. 91, 95 (1990). See New York v. Harris, 495 U.S. 14 (1990)(holding that the chief evil sought to be eliminated by the Fourth Amendment is physical entry).
28. A warrantless search of a residence is *per se* unreasonable unless justified by a specific exception to the warrant requirement. Commonwealth v. Dommel, 885 A.2d 998, 1003 (Pa. Super. 2005); Commonwealth v. Richter, 791 A.2d 1181, 1184 (Pa. Super. 2002).
29. Searches by the state shall be permitted only upon obtaining a warrant issued by a neutral and detached magistrate, and, as a general proposition, warrantless searches are unreasonable for constitutional purposes. Commonwealth v. Perry, 798 A.2d 697, 699-700 (Pa. 2002).
30. Exceptions to the warrant requirement include: 1) exigent circumstances; 2) consent; 3) plain view. See Dommel supra (holding that exigent circumstances justified warrantless arrest of suspect in suspect's residence); See Commonwealth v. Bell, 871 A.2d 267 (Pa. Super. 2005)(holding that consent is a recognized exception to the warrant requirement); See Commonwealth v. Harris, 888 A.2d 862 (Pa. Super. 2005)(holding that plain view is exception to the warrant requirement).
31. Home entries predicated upon "exigent circumstances" place a heavy burden on police to show a legitimate need for immediate entry, and such decisions must be made only in restricted circumstances or the exception will swallow the rule. Richter, 791 A.2d at 1184; Commonwealth v. Govens, 632 A.2d 1316, 1324 (Pa.

- Super. 1993).
32. Members of the Centre County Sheriff's Department made a warrantless entry and search of Defendant's residence by opening the door and crossing threshold of the doorway.
 33. Defendant expressly refused consent to allow members of the Sheriff's Department to enter his residence.
 34. The Sheriff's Department lacked probable cause to believe that criminal activity was afoot or that exigent circumstances existed to justify the warrantless entry.
 35. None of the recognized exceptions to the warrant requirements are applicable under the facts presented here.
 36. Defendant was required to surrender the firearms to the Sheriff's Department IF he wanted to remain free on bond.
 37. If Defendant refused to surrender his weapons, then the remedy available to the Commonwealth was to revoke his bail.
 38. The Sheriff's Department did not have an Order signed by a judge that permitted them to enter Defendant's apartment to retrieve the weapons.
 39. The warrantless entry and subsequent search of Defendant's residence was unreasonable.
 40. The warrantless search of Defendant's vehicle violated his constitutional rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitutions.
 41. All evidence derived from the warrantless entry into Defendant's residence must be suppressed.

WHEREFORE, Defendant respectfully requests that this Honorable Court issue an Order suppressing all evidence obtained via the warrantless entry in to Defendant's residence as said entry and search violated Defendant's constitutional rights as set forth in the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitutions.

IV. MOTION TO QUASH WARRANT – LACK OF PROBABLE CAUSE

42. Article I, Section 8 of the Pennsylvania Constitution provides that "people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizures, and no warrant to search any place or to seize any person or things shall

issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.”

43. Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. Commonwealth v. Rivera, 816 A.2d 282, 291 (Pa. Super. 2003).
44. The standard for determining whether probable cause existed for the issuance of a search warrant is the “totality of the circumstances” test. Commonwealth v. Hernandez, 892 A.2d 11, 20 (Pa Super. 2006).
45. The task of the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Commonwealth v. Camperson, 650 A.2d 65, 70 (Pa. Super. 1994).
46. “The information offered to demonstrate probable cause must be viewed in a common sense, nontechnical, ungrudging and positive manner.” Rivera, 816 A.2d at 291.
47. Pennsylvania Rules of Criminal Procedure provides that each application for a search warrant shall be supported by written affidavit, and the affidavit must “specify or describe the crime which has been or is being committed” and “set forth specifically the facts and circumstances which form the basis for the affiant’s conclusion that there is probable cause to believe that the items or property sought are located at the particular place described.” Pa.R.Crim.P. 206(5)(6).
48. At any hearing on a motion for suppression of evidence seized pursuant to the execution of a warrant, no evidence shall be admissible to establish probable cause other than the Affidavit of Probable Cause submitted with the Application for the Search Warrant. Pa.R.Crim.P. 203(d); Commonwealth v. Ryerson, 817 A.2d 510, 513 (Pa. Super. 2003).
49. Evidence discovered as a result of a search that violates the fundamental constitutional guarantees of Article I, Section 8, will be suppressed. Commonwealth v. Gordon, 683 A.2d 253, 256 (Pa. 1996).
50. The Affidavit of Probable Cause states that Officer White of the Penn State University Police “observed what he recognized as a baggie of marijuana and a woven bag containing a glass blown smoking device within the residence.”
51. The Affidavit of Probable Cause is devoid of any statement that references White’s training, experience, or participation in prior drug cases that would provide him with

the basis of knowledge to identify a substance as being marijuana or that a glass blown smoking devices is associated with marijuana use.

52. The issuing authority was not provided with any information upon which the issuing authority could conclude that White's identification of suspected marijuana was reasonable.
53. The warrant lacks probable cause to believe that the substance found in Defendant's home was marijuana.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant the relief sought and quash the warrant that was issued by Judge Dutchcot and thereby suppress all physical evidence obtained therefrom.

V. **MOTION FOR RESERVE**

54. Defendant requests the opportunity to supplement the foregoing Motion in the event new evidence is presented by the Commonwealth or received in discovery.
55. To date, the Commonwealth has not forwarded all requested discovery materials, so discovery in this case is incomplete.
56. Defendant requests that permission to file additional and supplemental motions, including appropriate additional motions in limine.
57. Defendant's investigation in this case is also not complete and Defendant requests the right to file other motions, if required.

WHEREFORE, the Defendant respectfully requests that the above-referenced Motions be granted.

Respectfully submitted,

MASORTI & SULLIVAN, P.C.

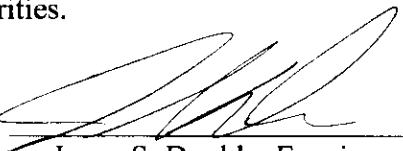
By: 

Jason S. Dunkle, Esquire
302 South Burrowes Street
State College, PA 16801
(814) 234-9500
Attorney I.D. # 93690

VERIFICATION

I, Jason S. Dunkle, Esquire, do hereby verify that I am the Attorney for the Defendant, that I am fully authorized to make this verification on his behalf and that the Defendant is unavailable to this make this verification and that the facts set forth in the foregoing document are true and correct to the best of my knowledge, information and belief, and that the source of my information is from discussions with my client and the documents provided.

I understand that the statements therein are made subject to the penalties of 18 Pa. C.S. A. §4904 relating to unsworn falsification to authorities.

By: 
Jason S. Dunkle, Esquire
Attorney for Defendant

Dated: 11/17/08

Commonwealth of Pennsylvania



APPLICATION FOR SEARCH WARRANT AND AUTHORIZATION

COUNTY OF Centre

Docket Number (Issuing Authority): MD-0000094 08 Police Incident Number: 3708-3301 Warrant Control Number:

Det. J. Martin AGENCY: FTPD PHONE NUMBER: 814-237-1172 DATE OF APPLICATION: 09/10/08

IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED (Be as specific as possible): Marijuana, Marijuana packaging material, and smoking devices

SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSON TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.): 592 Pierson Drive, the rear unit of a two unit white mobile home.

NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED (If proper name is unknown, give alias and/or description): Hobson L. McKown

VIOLATION OF (Describe conduct or specify statute): Possession of Controlled Substance DATE(S) OF VIOLATION: 09/10/08

Warrant Application Approved by District Attorney - DA File No. Additional Pages Attached (Other than Affidavit of Probable Cause) Probable Cause Affidavit(s) MUST be attached (unless sealed below) Total number of pages:

The below named Affiant, being duly sworn (or affirmed) before the Issuing Authority according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at the particular premises or in the possession of the particular person as described above.

Signature of Affiant: Ferguson Township Police Agency or Address if private Affiant: 3724 Badge Number

Sworn to and subscribed before me this 10 day of September 10 2008 Mag. Dist. No. 49-2-01 Office Address: 1524 W. College Ave., State College, PA

SEARCH WARRANT TO LAW ENFORCEMENT OFFICER: WHEREAS, facts have been sworn to or affirmed before me by written affidavit(s) attached hereto from which I have found probable cause, I do authorize you to search the premises or person described, and to seize, secure, inventory and make return according to the Pennsylvania Rules of Criminal Procedure.

This Warrant shall be served as soon as practicable and shall be served only between the hours of 6AM to 10PM but in no event later than 9:19 P M, o'clock September 12 2008

* The issuing authority should specify a date not later than two (2) days after issuance. Pa.R.Crim.P. 2005(d). ** If the issuing authority finds reasonable cause for issuing a nighttime warrant on the basis of additional reasonable cause set forth in this block and wishes to issue a nighttime warrant, then this block shall be checked. Pa.R.Crim.P. 2008(g).

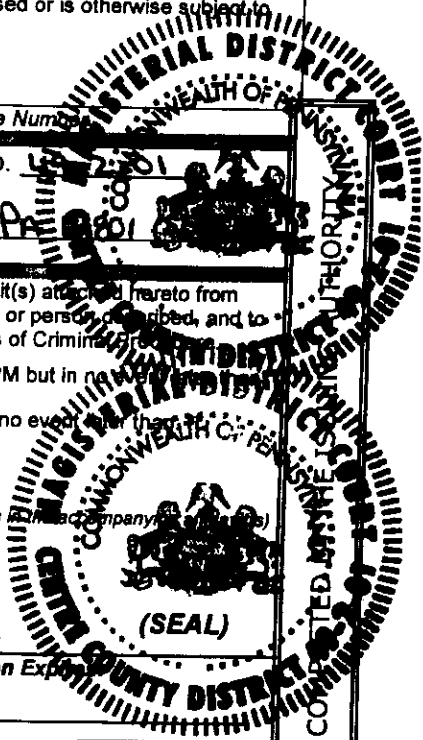
Issued under my hand this 10 day of September 10 2008 at 9:19 P M, o'clock. Signature of Issuing Authority: 49-2-01 Mag. Dist. or Judicial Dist. No. Jan. 2014 Date Commission Expires

Title of Issuing Authority: [X] District Justice [] Common Pleas Judge []

[] For good cause stated in the affidavits(s) the Search Warrant Affidavit(s) are sealed for by my certification and signature. (Pa.R.Crim.P. 2011)

Signature of Issuing Authority (Judge of the Court of Common Pleas or Appellate Court Justice or Judge)

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DEFENDANT'S EXHIBIT A

Commonwealth of Pennsylvania



AFFIDAVIT OF PROBABLE CAUSE

COUNTY OF Centre

Docket Number
(Issuing Authority):

Police Incident
Number: 3708-3301

Warrant Control
Number:

PROBABLE CAUSE BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

On 9/10/08 I was contacted by Det. Sprinkle of the Ferguson Township Police. Det. Sprinkle advised that he was at 592 Pierson Drive. I recognized the address as belonging to Hobson L. McKown (hereinafer defendant). Sprinkle advised that Cenrte County Sheriff Deputies had escorted the defendant to his residence.

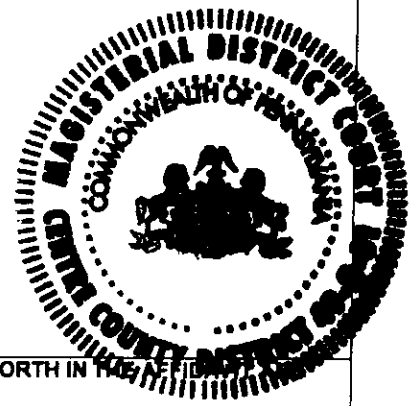
The defendant appeared in Central Court for a preliminary hearing this date. The defendant's bail conditions were modified. A MDJ ordered the surrender of the defendant's weapons. Centre Co. Sheriff deputies escorted the defendant to his residence. The defenant became evasive when Deputies wanted access to his residence to seize the weapons.

Once inside the residence Deputy Albright observed what he recognized as possible components used to manufacture an explosive device. Albright advised that he has had explosive training.

PSU bomb technician, Officer White was contacted to make sure that the residence was safe to search for weapons. While White was securing the residence he observed what he recognized as a baggie of marijuana and a woven bag containing a glass blown smoking device within the residence.

Based on my experience and participation in training, execution of search warrants where I have seen marijuana, its packaging material and the paraphernalia used to injest marijuana, I am requesting to search the aforementioned residence for the above items.

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CENTRE COUNTY, PENNSYLVANIA



I, THE AFFIANT, BEING DULY SWORN ACCORDING TO LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

[Signature]
Affiant Signature

9/10/08
Date

[Signature]
Issuing Authority Signature

9-10-08 (SEAL)
Date

Commonwealth of Pennsylvania



RETURN of SERVICE AND INVENTORY

COUNTY OF Centre

Docket Number
(Issuing Authority):

Police Incident
Number: 3708-3301

Warrant Control
Number:

Date of Search:
09/10/08

Time of Search:
2147

Property Seized as result of Search (Y/N):Y

Date of Return:
09/11/08

Time of Return:
1254

Officer making Return:
Det. Martin

Signature of Person Seizing Property:

Other Officers Participating in Search: Officer Mayer

Pa.R.Crim.P. Chapter 2000. SEARCH WARRANTS

Rule 2002A. Approval of Search Warrant Applications by Attorney for the Commonwealth – Local Option.

- (a) The District Attorney of any county may require that search warrant applications filed in the county have the approval of an attorney for the Commonwealth prior to filing.

Rule 2004. Person To Serve Warrant.

A search warrant shall be served by a law enforcement officer.

Rule 2005. Contents of Search Warrant.

Each search warrant shall be signed by the issuing authority and shall:

- (a) specify the date and time of issuance;
- (b) identify specifically the property to be seized;
- (c) name or describe with particularity the person or place to be searched;
- (d) direct that the search be executed within a specified period of time, not to exceed 2 days from the time of issuance;
- (e) direct that the warrant be served in the daytime unless otherwise authorized on the warrant, PROVIDED THAT, for purposes of the Rules of Chapter 2000, the term "daytime" shall be used to mean the hours of 6 a.m. to 10 p.m.;
- (f) designate by title the judicial officer to whom the warrant shall be returned;
- (g) certify that the issuing authority has found probable cause based upon the facts sworn to or affirmed before the issuing authority by written affidavit(s) attached to the warrant; and
- (h) when applicable, certify on the face of the warrant that for good cause shown the affidavit(s) is sealed pursuant to Rule 2011 and state the length of time the affidavit(s) will be sealed.

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CLERK OF SUPERIOR COURT
HARRISBURG, PA

Rule 2006. Contents of Application for Search Warrant.

Each application for a search warrant shall be supported by written affidavit(s) signed and sworn to or affirmed before an issuing authority, which affidavit(s) shall:

- (a) state the name and department, agency, or address of the affiant;
- (b) identify specifically the items or property to be searched for and seized;
- (c) name or describe with particularity the person or place to be searched;
- (d) identify the owner, occupant, or possessor of the place to be searched;
- (e) specify or describe the crime which has been or is being committed;
- (f) set forth specifically the facts and circumstances which form the basis for the affiant's conclusion that there is probable cause to believe the items or property identified are evidence or the fruit of a crime, or are contraband, or are otherwise unlawfully possessed or subject to seizure, and that these items or property are located on the particular person or at the particular place described;
- (g) if a "nighttime" search is requested (i.e., 10 p.m. to 6 a.m.), state additional reasonable cause for seeking permission to search in the nighttime; and
- (h) when the attorney for the Commonwealth is requesting that the affidavit(s) be sealed pursuant to Rule 2011, state the facts and circumstances which are alleged to establish good cause for the sealing of the affidavit(s).

Rule 2008. Copy of Warrant; Receipt for Seized Property.

- (a) A law enforcement officer, upon taking property pursuant to a search warrant, shall leave with the person from whom or from whose premises the property was taken a copy of the warrant and affidavit(s) in support thereof, and a receipt for the property seized. A copy of the warrant and affidavit(s) must be left whether or not any property is seized.
- (b) If no one is present on the premises when the warrant is executed, the officer shall leave the documents specified in paragraph (a) at a conspicuous location in the said premises. A copy of the warrant and affidavit(s) must be left whether or not any property is seized.
- (c) Notwithstanding the requirements in paragraphs (a) and (b), the officer shall not leave a copy of an affidavit that has been sealed pursuant to Rule 2011.

Rule 2009. Return with Inventory.

- (a) An inventory of items seized shall be made by the law enforcement officer serving a search warrant. The inventory shall be made in the presence of the person from whose possession or premises the property was taken, when feasible, or otherwise in the presence of at least one witness. The officer shall sign a statement on the inventory that it is a true and correct listing of all items seized, and that the signer is subject to the penalties and provisions of 18 Pa.C.S. Section 4904(b) - Unsworn Falsification To Authorities. The inventory shall be returned to and filed with the issuing authority.
- (b) The judicial officer to whom the return was made shall upon request cause a copy of the inventory to be delivered to the applicant for the warrant and to the person from whom, or from whose premises, the property was taken.
- (c) When the search warrant affidavit(s) is sealed pursuant to Rule 2011, the return shall be made to the justice or judge who issued the warrant.

THE LAW ENFORCEMENT OFFICER SHALL MAKE ALL RETURNS TO THE ISSUING AUTHORITY DESIGNATED ON THE SEARCH WARRANT.

Commonwealth of Pennsylvania



**RECEIPT / INVENTORY
OF SEIZED PROPERTY**

COUNTY OF Centre

Docket Number
(Issuing Authority):

Police Incident
Number: 3708-3301

Warrant Control
Number:

Date of Search:
09/10/08

Time of Search:
2147

Inventory Page Number:
1 of 1 Pages

Ferguson Township Police

3724

The following property was taken / seized and a copy of this Receipt / Inventory with a copy of the Search Warrant and affidavit(s) (if not sealed) was

- personally served on (name of person) _____
- was left at (describe the location) _____

| Item Number | Quantity | Item Description | Make, Model, Serial No. Color, etc. |
|---|----------|---|-------------------------------------|
| 1 | 1 | Yellow envelope w/ susp marijuana / smoking dev | |
| 2 | 1 | Woven bag w/ susp marijuana / smoking dev | |
| <p><i>Rest Item # 3708-3301</i></p> | | | |
| <p><i>FILED FOR RECORD</i></p> <p><i>2008 SEP 17 10:10:15</i></p> | | | |

I/we do hereby state that this inventory is to the best of my/our knowledge and belief a true and correct listing of all items seized, and that I/we sign this Receipt / Inventory subject to the penalties and provisions of Title 18 Pa.C.S. 4904 (b). Unsworn Falsification to Authorities.

[Signature] *Det. J. Martin* *FTP* *3724*
 Signature of person issuing Receipt / Inventory Printed Name Affiliation Badge or Title

[Signature] *Det. J. Martin* *FTP*
 Signature of Witness Printed Name Affiliation

[Signature] *Det. J. Martin* *FTP*
 Signature of person making Search Printed Name Affiliation

**DEFENDANT'S
EXHIBIT**
8

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL ACTION - LAW

COMMONWEALTH OF PENNSYLVANIA

v.

HOBSON MCKOWN

:
:
:
:
:

No.: CP-14-CR-1610-2008

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2008, a true and correct copy of

Defendant's Omnibus Pre-Trial Motion was served via hand delivery to the following:

Carolyn Larrabee, Assistant District Attorney
4th Floor, Centre County Courthouse
Allegheny and High Streets
Bellefonte, PA 16823

Respectfully submitted,

MASORTI & SULLIVAN, P.C.

By: 

Jason S. Dunkle, Esquire
302 South Burrowes Street
State College, PA 16801
(814) 234-9500
Attorney I.D. # 93690