NOTE: This motion applies only to offenses committed before April 25, 2005, prior to the advisory sentencing scheme.

VERIFIED MOTION FOR CHANGE OF JUDGE AND CHANGE OF VENUE

The Defendant, by counsel, respectfully requests this Court under Indiana Criminal Rules 12(A) & (B), to recuse himself from this cause and transfer this cause to a different venue. In support of this Motion, the Defendant states the following:

1. On [insert date], this Court held a hearing at which it accepted the Defendant's guilty plea and ordered the preparation of a pre-sentence investigation report.

2. On [insert date], this Court's Probation Department filed its pre-sentence investigation report ("PSI"). That report identified aggravating circumstances to support the Department's recommendation of an enhanced sentence. The aggravators included [specify aggravators].

3. This Court's probation officers serve entirely at the pleasure of this Court and the county courts with criminal jurisdiction. See Ind. Code 11-13-1-1(c) (Burns Supp. 2004) ("Probation officers shall serve at the pleasure of the appointing court and are directly responsible to and subject to the orders of the court."). Indeed, "a special, confidential relationship exists between a probation officer and judge. In the realm of criminal law, their respective roles are intertwined and . . . the position of probation officer would be incongruous in the absence of a judiciary ." Blackwell v. Cook, 570 F. Supp. 474, 479 (N.D. Ind. 1983) (holding that the firing of a probation officer is a judicial act).

4. On June 24, 2004, the United States Supreme Court issued its decision in Blakely v. Washington, 524 U.S. 296, 124 S.Ct. 2531 (2004). Blakely held that the jury trial guarantee of the Sixth Amendment and the Due Process Claus of the Fourteenth Amendment require: 1) the State to charge and prove beyond a reasonable doubt any fact, other than the fact of a prior conviction, that may be used to extend a sentence beyond the "statutory maximum," Id. at 301, 2537; and that "the relevant `statutory maximum' is not

the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id. at 303-04, 2537.

5. In the context of Indiana's sentencing scheme, the "statutory maximum" is the presumptive, "fixed" sentence for a given class of felony-four years in the case of a Class C felony under I.C. § 35-50-2-6(a) (Burns Supp. 2004). Smyliev. State, 823 N.E.2d 679 (Ind. 2005).

6. Indeed, after Blakely v. Washington, Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 248, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), aggravating circumstances are now to be treated as elements of an offense. See Blakely, 124 S. Ct. at 511, 2536 ("[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.") (quoting 1 J. Bishop, Criminal Procedure § 87, at 55 (2d ed. 1872)); see also McCormick v. State, 233 Ind. 281, 285-86, 119 N.E.2d 5, 7 (1954) ("[T]he accused has a right to have all the essential elements that enter into the offense, charged in the affidavit, so that he may know what he has to meet . . . .") (Internal quotation marks and internal citations omitted).

7. Because this Court has itself, through its Probation Department, investigated and "charged" the aggravating circumstances, now essential elements of the offense, included in the PSI, this Court has acted as a second prosecutor, and the Defendant is entitled to a change of judge. Ind. Crim. Rule 12(B); see also In re Morton, 770 N.E.2d 827, 831 (Ind. 2002) (under Judicial Canon 3(E)(1), judge's impartiality could reasonably be questioned where he initiated a criminal investigation). Perhaps more importantly, it would be a violation of federal due process for this Court to continue presiding over this case, having "occupie[d] two practically and seriously inconsistent positions, one partisan and the other judicial . . . ." Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 60 (1972); see

also Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) (Due Process Clause requires "a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." (Citation omitted)); In re Murchison, 349 U.S. 133, 136 (1955) (the requirements of due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."); Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) (freedom of a tribunal from bias or prejudice is a central element of substantive due process of the Federal Constitution).

8. Because this Court's Probation Department and its officers work for all of the county courts with criminal jurisdiction, the Defendant is also entitled to a change of venue from the county to a court untainted by the prosecutorial actions of the [insert current county] courts through their Probation Department.[1]

9. The Defendant is also entitled to have the existing PSI stricken from the record of this case.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court grant his requests: 1) for a change of judge; 2) for a change of venue from [insert current county]; 3) that the pre-sentence investigation report be stricken from the record of this case; and for all relief just and proper in the premises.

(Signature)

[1] The involvement of the Probation Department in investigating and "charging" the aggravating circumstances in this case was not *de minimis* or indirect. The Department's conclusion that the Defendant "minimizes his involvement" was a result of an interview with the Defendant. Had the responsibility for investigating and charging the aggravating circumstances in this case resided where it properly belongs after Blakely, *i.e*, the prosecutor's office, it is almost unimaginable that would have given any statement to the State, much less the one that Probation Department relies on to support its conclusions.