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

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ALLEGED AGGRAVATORS

FACTS

[Insert facts necessary for the determination of the Motion to Dismiss]

ARGUMENT

I. The alleged aggravators that the Defendant is at risk of committing another crime, is in need of correctional treatment in a penal facility, and the imposition of the reduced sentence would depreciate the seriousness of the crime cannot serve as aggravators and must be dismissed.

A. **The aggravators are legal observations to be made by the judge when determining the weight of aggravators, and not separate aggravators under Blakely.**

Facts, other than a prior conviction, used to aggravate a sentence must be proven beyond a reasonable doubt to a jury or admitted by the Defendant. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Legitimate observations about the weight to be given to facts used to aggravate a sentence are not separate aggravating circumstances. Morgan v. State, 829 N.E.2d 12 (Ind. 2005). For instance, in Morgan, the aggravator that "previous punishments had failed to rehabilitate" the defendant could not serve as a separate Blakely aggravator, but only as a legal determination reserved for the judge when determining the weight to give the defendant's criminal history. Id. at 17.

Here, the State has alleged, as separate aggravating circumstances, observations about the weight given to facts rather than the facts, themselves. In order to aggravate a defendant's sentence based on the defendant's risk of committing another crime and the defendant's need for treatment that can best be provided in a penal facility, a trial court has always been required to justify its findings with facts. Brown v. State, 698 N.E.2d 779 (Ind. 1998) (court supported its conclusion that the defendant was at risk to commit another crime with the defendant's past behavior); Ajabu v. State, 722 N.E.2d 339 (Ind. 2000) (the court must provide particularized reasons to support the conclusion that the defendant is in need treatment in excess of the presumptive). These alleged aggravators are observations that are to be made

by the trial court in sentencing from the facts proven by the State at a jury trial, and thus, must be dismissed.

B. The Legislature has evidenced its intent that the alleged aggravators of a Defendant's need for correctional rehabilitation and the imposition of a reduced sentence depreciating the seriousness of the crime are no longer proper aggravators.

The Legislature has evidenced its intent that the Defendant's need for correctional rehabilitation and the imposition of a reduced sentence depreciating the seriousness of the crime are no longer proper aggravators to be considered in sentencing. Effective May 11, 2005, in emergency legislation, the legislature amended I.C. 35-37-2.5 in order to comply with the constitutional dictates of Blakely v. Washington, *supra*. The legislature removed from the list of aggravators that the Defendant is in need of correctional rehabilitation and the imposition of a reduced sentence would depreciate the seriousness of the crime. When the legislature amends a statute in response to caselaw, the legislature's intent to clarify the law is clear. Senn v. State, 766 N.E.2d 1190 (Ind.Ct.App. 2002). Thus, after Blakely, the alleged aggravators of a Defendant's need for correctional rehabilitation and the imposition of a reduced sentence are no longer proper aggravators.

C. **The manner in which the State alleged the aggravator of the Defendant's need for correctional treatment was improper.**

Even if the alleged aggravator that the "Defendant is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility" is a fact and not an observation, it is still an improper aggravator. Although no longer a statutory aggravator as of May 11, 2005, the aggravator has always required a finding that the defendant was in need of treatment in a penal facility *in excess* on the presumptive. Battles v. State, 688 N.E.2d 1230, 1236 (Ind.Ct.App. 2001). Here, the State failed to properly allege that the Defendant was in need of correctional treatment *in excess* of the presumptive sentence, and thus, the aggravator must be dismissed.

II. The State has failed to allege multiple aggravators with sufficient specificity to allow the Defendant to prepare a defense to the aggravators.

In order to satisfy the due process clause, an information must charge an offense in direct and unmistakable terms, and any reasonable doubt as to offense charged must be resolved in favor of accused.

Moran v. State, 477 N.E.2d 100 (Ind.Ct.App. 1985); Gebhard v. State, 459 N.E.2d 58 (Ind.Ct.App. 1984). When more than one act can fall under the general definition provided by statute, the State must do more than simply recite the statute in the Charging Information in order to provide Due Process notice to the defendant. Id. at 61.

The Defendant is entitled to notice of the aggravators set forth against him just as if they were charged crimes. Blakely, 542 U.S. 296 at 311-12, 124 S.Ct. at 2541 (noting the concern that a "defendant, with no warning in either his indictment or plea," could see his sentence balloon "based not on facts proved to his peers beyond a reasonable doubt"). "A fact that enhances a defendant's sentence beyond the maximum, as understood in Blakely, operates as the functional equivalent of an element and must be charged in the indictment, submitted to a jury and proved beyond a reasonable doubt." U.S. v. Terrell, 2004 U.S.Dist. LEXIS 13781, *14 (Neb. Dist. July 22, 2004) (citing Blakely, 124 S.Ct. at 2537); Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 154 L.Ed.2d 588, 123 S.Ct. 732 (2003); Ring v. Arizona, 536 U.S. 584, 609 (2002); Apprendi, 530 U.S. at 490; Jones v. U.S., 526 U.S. 227, 243, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)); see also U.S. v. Harris, 2004 U.S. Dist. LEXIS 16239, * 28 (N.J. Dist. August 18, 2004) (although the sentencing aggravators do not need to be charged in the original indictment, a defendant "should be provided with due notice of the sentencing factors with which they would be charged to prevent prejudicial surprise at trial").

Even if the aggravators submitted are proper, the State has failed to allege the aggravators with sufficient specificity to allow the Defendant to prepare a defense. The Defendant does not know if the State intends to argue and attempt to prove that he is at risk of committing another crime because of alleged uncharged conduct, because he had a methamphetamine addiction or because of another allegation. If the State is going to rely on uncharged conduct, the State has to allege the uncharged conduct in a manner in which the Defendant can defend. He cannot prepare for the sentencing jury trial without knowing why he allegedly is at risk of committing another crime and is in need of prison in excess of the presumptive.

Similarly, the alleged aggravators of "the nature and circumstances of the crime committed" and "the Defendant's character" are woefully unspecific. What particular circumstance of the crime is sufficiently aggravating to enhance the sentence? What aspect of the Defendant's character is sufficiently offensive to enhance the sentence? "The factors that disclose 'the character of an offender' are an assortment of general and specific, mandatory and discretionary considerations…." Hildebrandt v. State, 770 N.E.2d 355, 361 (Ind.Ct.App. 2002). A Defendant's character and the nature and circumstances of a crime, alone, are not specific aggravators. Every defendant has character, and every crime has nature and circumstances. The State must be more specific in order to allow the Defendant to prepare a defense.

Further, the Defendant's right to a jury trial encompasses his right to a unanimous verdict. As the aggravators are currently charged, it would be impossible to know whether the jury unanimously agreed that the State proved beyond a reasonable doubt a specific nature and circumstance or a specific characteristic of the Defendant. Thus, the State's alleged aggravators that the Defendant is at risk of committing another crime, the Defendant is need of correctional treatment, his character and the nature and circumstances of the crime must be dismissed in that they violate the Fourteenth Amendment of the U.S. Constitution.

III. The aggravators not pursued by the State at the first sentencing hearing cannot now be pursued by the prosecution without violating the Defendant's due process right to be free from vindictiveness.

Because the prosecutor elected not to pursue the aggravators of the Defendant's risk of committing another crime, his lack of remorse or the planned nature of the crime in his first sentencing, the State cannot now charge the Defendant with these aggravators. The State should not be afforded a second bite at the apple by being permitted to attempt to prove new aggravators beyond those initially presented to, and found by, the trial court. Neff v. State, 849 N.E.2d 556 (Ind. 2006). Moreover, "it is clear that when the prosecution has occasion to file more numerous or more severe charges for the same basic criminal conduct against an accused after the accused has successfully exercised his statutory or constitutional rights to an appeal, the prosecution bears a heavy burden of proving that any increase in the

number or severity of the charges was not motivated by a vindictive purpose." Cherry v. State, 414 N.E.2d 301, 305 (Ind. 1981) (citing to Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); Owens v. State, 822 N.E.2d 1075, 1077 (Ind.Ct.App. 2005).

"[U]nless there is new evidence or information discovered to warrant additional charges, the potential for prosecutorial vindictiveness is too great for courts to allow the State to bring additional charges against a defendant who successfully moves for a mistrial." Owens, 822 N.E.2d at 1077 (quoting Warner v. State, 773 N.E.2d 239, 243 (Ind. 2002)). "The rationale of protecting a defendant's right to a fair trial, which justifies the presumption of prosecutorial vindictiveness, is even more compelling in the case of a successful appeal than in the case of a successful motion for mistrial." Id. "[A]ctual vindictiveness is not required; rather the 'realistic apprehension of vindictiveness controls.'" State v. Selva, 444 N.E.2d 329, 330 (Ind.Ct.App. 1983) (quoting Cherry, 414 N.E.2d at 306).

At the original sentencing hearing, the State did argue that the Defendant was deserving of the maximum sentence, but failed to cite, as aggravators, his risk of committing another crime, lack of remorse or that the commission of the crime was well-planned. *Exhibit A.* The State cannot now increase the number or severity of aggravators it pursues against the Defendant without citing to evidence that was not available to them at the first trial. The addition of the alleged aggravators of lack of remorse, presence of minors and well-planned crime must be presumed vindictive and dismissed.

Thus, the Defendant respectfully requests this Court to dismiss the following alleged aggravators: (1) Defendant is at risk of committing another crime; (2) The nature and circumstances of the crime committed; (3) The Defendant's character; (4) Defendant is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility; (5) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime; and (6) Defendant shows lack of remorse; and (7) The commission of the crime was well-planned rather than spur of the moment.

(Signature)