VERIFIED MOTION FOR CHANGE OF JUDGE (Pre-determination of Guilt)

The Defendant, by counsel, respectfully requests this Court pursuant to Criminal Rules 12 and 13 and the Code of Judicial Conduct, Canon 2, for a Change of Judge, thereby recusing himself and transferring the case to a special judge. In support of the Motion, Defendant states the following:

1. On [insert date], Defendant was convicted of [insert convictions], and is scheduled for sentencing on [insert date].
2. There exists a rational inference that the trial court is biased. The facts and reasons for such belief that bias or prejudice exists are set forth in an Affidavit of undersigned counsel attached and incorporated by reference as Exhibit A.
3. Appearance of bias and partiality requires recusal not only prior to conviction, but also for sentencing or appellate review. Thakkar v. State, 644 N.E.2d 609 (Ind.Ct.App. 1994). When a Motion for Change of Judge is filed, "whether the trial court [is] actually and in fact biased against the defendant is not the determinative issue. The true question is whether 'an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality.'" Thakkar, 644 N.E.2d at 612 (quoting Mahrdt v. State, 629 N.E.2d 244, 248 (Ind.Ct.App. 1994)); Indiana Code of Judicial Conduct, Canon 1, Rule 1.2 ("A judge…shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.").

[INSERT REASON FOR APPEARANCE OF IMPARTIALITY. FOR EXAMPLE: (this example applies only to offenses committed before April 25, 2005, prior to the advisory sentencing scheme):

4. On [insert date], the Court of Appeals remanded this case for a sentencing hearing that comports with Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). The Indiana Supreme Court later denied transfer in the above-captioned cause.
5. On [insert date], the Defendant received notice that the State is seeking to pursue six aggravators

in a jury trial via a Notice of Aggravating Factors for Sentencing Purposes. Five of the six aggravators alleged by the State in the Notice of Aggravating Factors for Sentencing Purposes are the same aggravators used by this Court to support the original maximum sentence. Thus, the Court has expressed an opinion that the Defendant has committed the alleged Aggravators and is deserving of the maximum sentence, thereby creating a reasonable inference of prejudice against the Defendant.

6. When a judge expresses his opinion as to ultimate legal conclusion in a case pending before him, there is a rational inference of bias and prejudice. Allen v. State, 737 N.E.2d 741 (Ind. 2000) (bias and prejudice exists where a judge has expressed an opinion on the merits of the case, being the issue of guilt or innocence).
7. The local newspaper has already reported that the trial court "cited all but one of the same factors [being alleged by the State] in the original sentencing." *See Article herein incorporated and referenced as Exhibit B.*
8. Because this Court has already publicly found that five of the six aggravators alleged in the Notice of Aggravating Factors existed and justified a maximum sentence, the judge has directly commented on the merits of the Defendant's case, and thus, under the Indiana Code of Judicial Conduct and Criminal Rule 12 must recuse himself in order to avoid the appearance of impropriety.]

WHEREFORE, the Defendant, by counsel, respectfully requests this Court for a change of judge by recusing himself and transferring the case to a special judge according to Criminal Rule 13, and all other relief just and proper in the premises.

(Signature)

VERIFICATION

I affirm, under the penalties for perjury, that the foregoing representations are true.

(Signature of attorney)

NOTE

Although cases such as Sturgeon v. State, 719 N.E.2d 1173 (Ind. 1999) and Garland v. State, 788 N.E.2d 425 (Ind. 2003), hold that an adverse ruling or the imposition of an enhanced sentence do not illustrate prejudice on the part of the Court, neither one of these cases deal with the unique situation presented by a re-trial after a reversal due to Blakely. Neither in Sturgeon nor Garland did the judge preside over a jury trial in which the jury was required to make the decision that the judge had already publicly made. In other words, neither Sturgeon nor Garland dealt with a judge publicly ruling on the ultimate legal and factual issues.

CASE LAW

French v. State, 754 N.E.2d 9 (Ind.Ct.App. 2001) (where judge's comments at sentencing regarding defendant's character strayed from objectivity and impartiality which trial judges are obligated to display and illustrated a high degree of antagonism so as to make fair judgment virtually impossible, defendant is entitled to a new sentencing with a new judge).