

**MOTION FOR ORDER ALLOWING COUNSEL TO ATTEND PRE-SENTENCE
INVESTIGATION INTERVIEW**

The Defendant, by counsel, respectfully requests this court to issue an Order granting defense counsel permission to attend the pre-sentence investigation interview which will be conducted by the probation department. In support of this Motion, the Defendant states the following:

1. A pre-sentence investigation report is required in this case, pursuant to I.C. 35-38-1-8.
2. The probation department has scheduled a pre-sentence investigation interview with the Defendant on [insert date].
3. Defendant's right to counsel is secured by the Sixth and Fourteenth Amendments to the U.S. Constitution, as well as by Article I, section 13 of the Indiana Constitution.
4. In past practice, defense counsel has been denied permission to attend his clients' pre-sentence investigation interviews by the probation department. Probation department representatives have told undersigned counsel that he would not be allowed to attend without a court order.
5. The Indiana Supreme Court has determined that the pre-sentence investigation interview is not a "critical stage" of the proceedings requiring the presence of counsel. Emerson v. State, 724 N.E.2d 605 (Ind. 2000) (it is unclear whether Emerson's attorney asked to attend); Lang v. State, 461 N.E.2d 1110, 1116 (Ind. 1984) (it is unclear whether Defendant's attorney had asked to be present); Burch v. State, 450 N.E.2d 528, 530 (Ind. 1983) (issue of probation department refusing attendance of counsel did not arise because the Court noted that counsel had been present during the interview).
6. Even if the pre-sentence interview is not a "critical stage" for purposes of the Sixth Amendment, the refusal to allow participation of an attorney is unfair and serves no purpose. For instance, no Court refuses to allow attorneys from being present at initial hearings, although an initial hearing is not a "critical stage." Moreover, in the three cited Indiana cases, it is not apparent that such a refusal occurred.

7. Refusing to allow defense counsel's presence at the pre-sentence investigation interview violates the Defendant's Article I, Section 13 right to counsel under the Indiana Constitution. The right to counsel under the Indiana Constitution is broader than the right to counsel under the U.S. Constitution. Malinksi v. State, 794 N.E.2d 1071 (Ind. 2003) (under the Indiana Constitution, law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family is present at the police station seeking access to him); Hoy v. State, 75 N.E.2d 915, 917 (Ind. 1947) ("It has been held that a constitutional right to be heard by counsel is not limited to the right to be heard by counsel at the trial, but that the spirit of the provision contemplates the right to accused to consult with counsel at every stage of the proceedings.").
8. Attendance by counsel at a pre-sentence interview may be required as a minimum standard of effectiveness of counsel. See A.B.A. CRIMINAL JUSTICE PROSECUTION AND DEFENSE FUNCTION STANDARDS § 4.81 (3d Ed.) ("Where appropriate, defense counsel should attend the probation officer's interview with the accused." "The nature of the sentencing guidelines used in some jurisdictions may make counsel's attendance at such interviews necessary to provide the client with a complete and effective defense."); see also Ind. Public Defender Council, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, § 8.3, commentary at p. 176 ("Counsel should also consider being present for the interview").
9. Other courts have determined that, once a request is made, it is improper for the probation department to exclude counsel's attendance at the pre-sentence interview. U.S. v. Herrera-Figueroa, 918 F.2d 1430, 1431 (9th Cir. 1990) ("concluding that the exclusion of counsel from presentence interviews serves no rational purpose, we exercise our supervisory power over the orderly administration of justice to hold that when a federal defendant requests that his attorney be permitted to accompany him at a presentence interview, the probation officer must honor that request."); State ex rel.

Russell v. Jones, 293 Ore. 312, 647 P.2d 904 (1982). In fact, one federal court questioned why an attorney failed to attend. U.S. v. Davis, 919 F.2d 1181, 1185-86 (6th Cir. 1990) (“We are troubled, nonetheless, by the lawyer’s decision not to attend. If this had been a civil case, one wonders whether the lawyer would have let his client be deposed without counsel being present . . . Davis was in the presence of his lawyer when the probation officer requested the interview, and the lawyer, as we have seen, made no move to stop the interview or even to attend it.”). Such a rule is consistent with the Indiana Supreme Court’s holding in Malinski, *supra*.

10. Moreover, the Fifth Amendment privilege against self-incrimination extends throughout sentencing. Mitchell v. United States, 526 U.S. 314, 119 S.Ct. 1307 (1999). Although probation officer is not required to *Mirandize* the Defendant, the Defendant’s attorney should be present to help the Defendant intelligently exercise his Fifth Amendment privilege, if necessary.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to issue an Order directing the probation department to allow undersigned counsel to attend the Defendant’s pre-sentence interview, and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK E.2

I.C. 35-38-1-8 (pre-sentence report is required in all felony cases except Level 6 felonies in which the Defendant is not being sentenced to the Department of Corrections).

CASE LAW

Caraway v. State, 891 N.E.2d 122 (Ind.Ct.App. 2008) (right to counsel attached immediately prior to detective's request of Defendant to sign the stipulation agreement for a polygraph).