

**NOTICE OF ASSERTION OF FIFTH AMENDMENT AND ARTICLE ONE, SECTION  
FOURTEEN RIGHTS PERTAINING TO PARTICIPATION IN THE PRE-SENTENCE  
INVESTIGATION INTERVIEW**

The Defendant, by counsel, asserts his right to be free from self-incrimination under the Fifth Amendment to the United States Constitution and Article One, Section Fourteen of the Indiana Constitution. In support, the Petitioner states the following:

1. “The privilege against self-incrimination contained in the Fifth Amendment exists up to the point where there can be no further incrimination.” Highbaugh v. State, 773 N.E.2d 247, 254 (Ind. 2002). The possibility of further incrimination ceases when the sentence has been fixed and the judgment of conviction has become final. Id.; Mitchell v. United States, 526 U.S. 314 (1999).
2. In addition, it is in violation of Article 1, Section 14 of the Indiana Constitution which has the same scope and effect as the privilege against self-incrimination in the Fifth Amendment, Haskett v. State, 255 Ind. 206; 263 N.E.2d 529 (1970).
3. The pre-sentence investigation interview has historically provided the Court with information used to aggravate sentences, often based on the defendant’s own admissions. See Hollins v. State, 679 N.E.2d 1305 (Ind. 1997); Carlson v. State, 716 N.E.2d 469 (Ind. Ct. App. 1999).
4. The Defendant, upon advice of counsel, asserts his Fifth Amendment to the United States Constitution and Article One, Section Fourteen of the Indiana Constitution rights to be free from self-incrimination by declining to participate in the pre-sentence investigation interview ordered by this Court for purposes of sentencing. The Defendant maintains his right to a pre-sentence report that is a neutral investigation and evaluation that contains only accurate information. Lang v. State, 461 N.E.2d 1110 (Ind. 1984); Gardner v. State, 270 Ind. 627, 388 N.E.2d 513 (1979); McMichael v. State, 471 N.E.2d 726 (Ind. Ct. App. 1984).

The probation officer should seek other sources to gather information with respect to “the convicted person’s history of delinquency or criminality, social history, employment history, family situation, economic status, education and personal habits.” I.C. 35-38-1-9(b)(2).

5. Should this Court compel the Defendant to participate in the pre-sentence investigation process, the Defendant asserts her/his right to the presence of counsel pursuant to the Sixth Amendment to the United States Constitution and Article One, Section 13 of the Indiana 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); see also Caraway v. State, 891 N.E.2d 122 (Ind.Ct.App. 2008) (right to counsel attaches immediately prior to officer’s request for Defendant to sign polygraph stipulation).

WHEREFORE, the Defendant, with and by counsel, respectfully asserts his right against self-incrimination, and will not participate in the interview with the probation officer.

(Signature)

## CASE LAW

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Limp v. State, 457 N.E.2d 189 (Ind. 1983) (where purpose of pre-sentence interview was clear and the Defendant knew or should have known that the information obtained might be relied upon to make a sentencing determination, the Defendant's admissions during the interview of sexual misconduct were volunteered and thus, did not implicate his right against self-incrimination).

Burch v. State, 450 N.E.2d 528 (Ind. 1983) (although a probation officer is not required to Mirandize the Defendant prior to a pre-sentencing investigation interview, a statement made by the Defendant during the pre-sentence interview should be excluded on Fifth Amendment grounds where it is shown to be involuntary).

Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136 (1984) (a probationer cannot be required to answer questions that may incriminate him; a defendant can assert the privilege against self-incrimination as to other possible crimes at any meeting with a probation officer, even after sentencing). See also Carswell v. State, 721 N.E.2d 1255 (Ind.Ct.App. 1999); Patton v. State, 580 N.E.2d 693 (Ind.Ct.App. 1991).

Ryle v. State, 842 N.E.2d 320 (Ind. 2005) (using Defendant's failure to object to a pre-sentence report to establish an admission to the accuracy of the report implicates the right against self-incrimination).

Stokes v. State, 828 N.E.2d 937 (Ind.Ct.App. 2005) (because rules of evidence do not apply to sentencing proceedings that are conducted by a judge sitting without a jury, a judge may use a pre-sentence interview (PSI) to discern a Defendant's criminal history, even though a PSI is hearsay).

Hines v. State, 856 N.E.2d 1275 (Ind.Ct.App. 2006) (Defendant ordered to undergo psychosexual evaluation as part of the pre-sentence investigation; Defendant told evaluator about uncharged, unrelated molestation which was then used to enhance his sentencing; held, no error).

Hulfachor v. State, 813 N.E.2d 1204 (Ind.Ct.App. 2004) (trial courts should look only to evidence properly placed in record when making sentencing determinations; looking outside the record for evidence in a sentencing hearing deprives Defendant of the opportunity to review information and refute its accuracy, creating a risk that sentencing will be based on inaccurate or irrelevant information).

Carmona v. State, 827 N.E.2d 588 (Ind.Ct.App. 2005) (where Defendant rigorously contests his criminal history and that criminal history is highly relevant to his sentence, it is incumbent upon the State to produce some affirmative evidence, e.g., docket sheets, certified copies of judgment of convictions, affidavits from appropriate officials, etc. to support a criminal history alleged in PST and urged as a basis for sentence enhancement).

Dillard v. State, 827 N.E.2d 570 (Ind.Ct.App. 2005) (information contained in a pre-sentence investigation (PSI) report is presumed accurate unless Defendant challenges it in some respect; knowing failure to object waives the issue of the report's accuracy for appellate review).