CHAPTER NINE
Motions to Dismiss
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MOTIONS TO DISMISS

I. MOTION TO DISMISS BY DEFENDANT

A. IN GENERAL

Although it may be apparent before trial that the prosecutor's case is weak, or that the State will be unable to prove all of the elements of the crime, it is error for an Indiana trial court to grant a pretrial motion to dismiss based on evidentiary insufficiency. Unlike some other jurisdictions where a defendant can demand a preliminary hearing and require the state to make some evidentiary showing before the case may proceed, Indiana does not have a statutory pretrial procedure to dispose of criminal cases solely on grounds that the state's evidence is weak.

> State v. Houser, 622 N.E.2d 987 (Ind. Ct. App. 1993) (a pretrial motion to dismiss directed to the insufficiency of the evidence is improper, and a trial court errs when it grants such a motion). See also State v. Helton, 837 N.E.2d 1040 (Ind. Ct. App. 2005).

However, trial courts have the same responsibility as prosecutors "to make certain that a person is not erroneously charged." State v. D.M.Z., 674 N.E.2d 585, 587 (Ind. Ct. App. 1996); State v. Fettig, 884 N.E.2d 341 (Ind. Ct. App. 2008). Thus, a trial court considering a motion to dismiss need not rely entirely on the text of the charging information but can hear and consider evidence in determining whether a defendant can be charged with the crime alleged. Id.; Ind. Code § 35-34-1-8.

> Davis v. State, 898 N.E.2d 281, 285 (Ind. 2008) ("First, Courts have the inherent authority to dismiss criminal charges where the prosecution of such charges would violate a defendant's constitutional rights. Subsections (a)(7) and (a)(9) [of IC 35-34-1-4] are merely a legislative recognition of this authority. Second, the open-ended catchall provision of subsection (a)(11) is recognition that there may be additional reasons for the dismissal of criminal charges.").

1. Grounds

Upon motion of defendant, Ind. Code § 35-34-1-4(a) provides court may dismiss indictment or information on the following grounds:

(1) The indictment or information, or any count thereof, is defective under [Ind. Code § 35-34-1-6].
(2) Misjoinder of offenses or parties' defendant, or duplicity of allegation in counts.
(3) The grand jury proceeding was defective.
(4) The indictment or information does not state the offense with sufficient certainty.
(5) The facts stated do not constitute an offense.
(6) The defendant has immunity with respect to the offense charged.
(7) The prosecution is barred by reason of a previous prosecution.
(8) The prosecution is untimely brought.
(9) The defendant has been denied the right to a speedy trial.

(10) There exists some jurisdictional impediment to conviction of the defendant for the offense charged.

(11) Any other ground that is a basis for dismissal as a matter of law.

2. Use of Motion to Raise Defenses before Trial

Ind. Code § 35-34-1-8 specifies the manner for a defendant to make a motion to dismiss, and when the trial court may grant motion without hearing. A motion to dismiss may be supported by material outside the pleadings. Ind. Code § 35-34-1-8; State v. Fields, 527 N.E.2d 218, 221-22 (Ind. Ct. App. 1988); State v. D.M.Z., 674 N.E.2d 585, 587 (Ind. Ct. App. 1996). However, it is unclear whether a motion to dismiss may be used to raise affirmative defenses before trial.

State v. Fettig, 884 N.E.2d 341 (Ind. Ct. App. 2008) (trial court did not abuse its discretion in dismissing battery charge against the defendant/teacher, whom the trial court found acted within bounds of her authority to physically discipline her student).

Ceasar v. State, 964 N.E.2d 911 (Ind. Ct. App. 2012) (agreeing with dissent in Fettig, court held that whether a person has statutory defense to charges goes beyond issues that may be decided by motion to dismiss and instead is matter to be decided at trial).

Littleton v. State, 954 N.E.2d 1070 (Ind. Ct. App. 2011) (given inability to control autistic child's self-injurious behavior, efforts to gradually try new measures to bring child's conduct under control, and an apparent lack of training or established school rules for measures to control child's behavior, teacher's condoning of confining child for limited duration was neither unreasonable use of force nor based upon unreasonable belief such action was necessary to protect child and others in classroom; teacher was immune from prosecution for battery, neglect of dependent and confinement).

Staton v. State, 853 N.E.2d 470 (Ind. 2006) (court held that when age of defendant is element of crime, defendant does not waive sufficiency issue by failing to file motion to dismiss on ground that he is not of required age, *overruling* McGowan v. State, 366 N.E.2d 1164 (Ind. 1977)).

Cf. State v. King, 502 N.E.2d 1366 (Ind. Ct. App. 1987) (questions of fact relating to defenses are not properly decided in ruling on motion to dismiss. Motion to dismiss only allows those facts to be raised by affidavit which show as a matter of law that crime had not been charged properly; documentary evidence, in form of sworn affidavit could not be used to conclusively establish exception to statute; whether defendants' statutory defense was adequate was issue of fact to be decided at trial).

See also State v. Morgan, 60 N.E.3d 1121 (Ind. Ct. App. 2016) (dismissal inappropriate because motion to dismiss raised issues of fact that jury should resolve; defendant had successfully sought dismissal of charges on basis that it was impossible for her to have known, as a non-physician, whether her actions were outside usual course of professional medical practice).

PRACTICE POINTER: The King opinion took a very restrictive view of the applicable statutes. Note that Ind. Code § 35-34-1-4(a)(11) allows dismissal for '[a]ny other ground that is a basis for dismissal as a matter of law.' Ind. Code § 35-34-1-8(d)(3) provides courts may grant motions to dismiss if facts essential to such grounds are admitted by the prosecution, or the documentary evidence conclusively establishes facts essential to such grounds. See also State v. D.M.Z., 674 N.E.2d 585, 587 (Ind. Ct. App. 1996).

3. State May File Answer

Prosecutor may file answer denying or admitting any or all of the allegations of the motion and may submit documentary evidence tending to refute defendant's allegations. Ind. Code § 35-34-1-8(b).

4. Court's Options in Ruling on Motion

Pursuant to Ind. Code § 35-41-1-4(d), Court's choices in ruling on motions to dismiss are:

(1) to deny the motion;
(2) to grant the motion and discharge defendant; and
(3) to grant the motion and deny discharge to the defendant, if defect in indictment/information which was the basis for the motion may be cured by amendment, and prosecutor has moved for leave to amend.

5. Re-prosecution after Dismissal

An order of dismissal does not, of itself, constitute a bar to subsequent prosecution of the same crime or crimes except as otherwise provided by law. Ind. Code § 35-34-1-4(f). See Double Jeopardy, Section II.H.

6. Appellate Review

On appeal from denial of motions to dismiss, defendant can obtain a reversal only if the evidence is without conflict and leads inescapably to the conclusion that defendant is entitled to dismissal.

Richardson v. State, 456 N.E.2d 1063 (Ind. Ct. App. 1983) (reversing denial of motion to dismiss, on grounds offense charged was related to offense which had been subject of prior plea bargain).

B. PLEADING REQUIREMENTS

1. Written Motion with Notice to Prosecutor

Motion to dismiss indictment or information must be in writing and must give the prosecutor reasonable notice of the motion. Ind. Code § 35-34-1-8(a).

a. Memorandum

(1) Criminal Rule 3

A memorandum must be filed with any motion to dismiss an indictment or "affidavit" (i.e., information), stating specifically the grounds for dismissal. Ind. Criminal Rule

3. A memorandum that merely restates the conclusions in the motion does not satisfy the requirements of this rule.

Hitch v. State, 284 N.E.2d 783 (Ind. 1972) (the memorandum must "enlighten" the court with counsel's reasoning and authorities, not merely thrust on the court the burden of finding the errors mentioned).

(2) Statute

Defendant must file a memorandum specifically stating the legal question in issue with any motion to dismiss based expressly or impliedly on a question of law and defendant may also submit documentary evidence tending to support the allegations of the motion. Ind. Code § 35-34-1-8.

PRACTICE POINTER: State the legal grounds for dismissal and provide argument and authority in the memorandum accompanying the motion to dismiss, or the motion will be subject to summary dismissal. Hitch v. State, 284 N.E.2d 783 (Ind. 1972).

b. Raise Every Ground to Support Dismissal

Raise every ground upon which you intend to challenge the indictment or information in your original motion. A subsequent motion based on grounds available but not raised in the original motion may be summarily denied. The court, however, in the interests of justice and for good cause shown, may entertain and dispose of such a motion on the merits. Ind. Criminal Rule 3; Ind. Code § 35-34-1-4(c).

NOTE: See Section I.C.3 regarding amendments to motion to dismiss.

c. Affidavits and Documentary Evidence with Motion Based Upon Facts

Ind. Code § 35-34-1-8(a) requires that if the Motion to Dismiss is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts. Note that the defendant may also submit documentary evidence tending to support the allegations of the motion. Affidavits may be based either on personal knowledge or on information and belief if the source of information/grounds for belief are identified. Ind. Code § 35-34-1-8(a).

Both Ind. Criminal Rule 3 and Ind. Code § 35-34-1-8 require an affidavit where there is a disputed issue of fact.

2. Support with Materials Outside the Pleadings

Motion to dismiss may be supported by material that is outside pleadings.

State v. Fields, 527 N.E.2d 218 (Ind. Ct. App. 1988) (in ruling on motion to dismiss perjury indictment, trial court could receive materials outside pleadings showing alleged false statement was not material to grand jury investigation). See also State v. D.M.Z., 674 N.E.2d 585, 587 (Ind. Ct. App. 1996); State v. Fettig, 884 N.E.2d 341 (Ind. Ct. App. 2008).

C. TIME FOR FILING DEPENDS ON GROUNDS ASSERTED

1. Not Later than 20 Days before Omnibus Date

Motion must be filed not later than 20 days before the omnibus date when the following grounds are alleged:

(a) Defective indictment or information;

But see Stwalley v. State, 534 N.E.2d 229 (Ind. 1989) (challenge to sufficiency of information must be made by motion to dismiss prior to arraignment);

(b) Misjoinder of offenses or duplicity of allegations;

(c) Defective grand jury proceedings;

(d) The facts stated do not constitute an offense; or

(e) Offense(s) charged are not stated with sufficient certainty.

(f) Any other ground which is a basis of dismissal as a matter of law.

[**NOTE**: Daugherty v. State, 466 N.E.2d 46, 51 (Ind. Ct. App. 1984) suggests that motions on this ground must be brought at least 20 days prior to the omnibus date in felony cases.]

See Ind. Code § 35-34-1-4(b).

a. For Misdemeanors Only

Motion must be filed 10 days before the omnibus (i.e., the trial) date where the only charges filed are misdemeanors. Ind. Code § 35-34-1-4(b)(2).

2. Any Time Prior or During Trial

Motions to dismiss on the following grounds may be brought "at any time" prior to or during trial:

(a) Claim of immunity;

(b) Double jeopardy;

(c) Statute of limitations bar, or other time bar;

(d) Speedy trial [**CAVEAT**: Failure to object to setting of trial date may waive speedy trial rights. See "Speedy Trial", Chapter 11, II. C.]

(e) Claim of jurisdictional impediment; see also CR 3 (motions to dismiss on grounds of lack of jurisdiction over subject matter may be brought at any time);

(f) Any other ground which is a basis of dismissal as a matter of law. [**CAVEAT**: Daugherty v. State, 466 N.E.2d 46, 51 (Ind. Ct. App. 1984), suggests that motions on this ground must be brought at least 20 days prior to the omnibus date in felony cases. But see Smith v. State, 194 N.E.3d 118 (Ind. Ct. App. 2022) (finding that when motion raised question of law, it was not untimely because it was made before trial under IC 35-34-1-4(a)(11)]

Ind. Code § 35-34-1-4(a).

3. Amendments

Amendments to add grounds to a motion to dismiss must be made within the time provided for filing of the motion to dismiss. Amendments do not relate back to the time of filing the

original motion. Sappenfield v. State, 462 N.E.2d 241 (Ind. Ct. App. 1984).

4. Avoiding Waiver of Error or Defect

Defects in pleading must be raised within the time requirements of Ind. Code § 35-34-1-4(b) to avoid waiver of error. Foster v. State, 526 N.E.2d 696 (Ind. 1988).

> Flores v. State, 485 N.E.2d 890 (Ind. 1985) (defendant preserved issue for review where information was amended on day of trial over defendant's broad objection, defendant moved for continuance and mistrial and defendant argued issue in motion to correct errors and appellate brief).
>
> King v. State, 560 N.E.2d 491 (Ind. 1990) (contents of defendant's motion to dismiss inadequate information placed motion within purview of statute pertaining to failure to state offense with sufficient certainty; thus, where defendant's motion to dismiss came well after omnibus date, motion was untimely).
>
> Brittain v. State, 565 N.E.2d 757 (Ind. Ct. App. 1990) (motion to dismiss misdemeanor disorderly conduct charge on ground that defendant's name was omitted from charging portion of information untimely, since motion was not made until after jury was sworn).

Error is fundamental only if mistake constitutes clearly blatant violation of basic and elementary principles and resulting harm or potential for harm is substantial. Marshall v. State, 602 N.E.2d 144 (Ind. Ct. App. 1992).

> Miller v. State, 634 N.E.2d 57 (Ind. Ct. App. 1994) (although information charging defendant with resisting law enforcement was defective for not alleging essential element of force, omission did not constitute fundamental error; defendant failed to show he was misled or unable to prepare his defense).
>
> Townsend v. State, 632 N.E.2d 727 (Ind. 1994) (defendant may not raise objection to indictment on grounds of duplicity for first time on appeal).

However, the constitutionality of a statute can be raised at any time, including for the first time on appeal. Poling v. State, 853 N.E.2d 1270, 1274 n.3 (Ind. Ct. App. 2006).

D. HEARINGS ON MOTIONS TO DISMISS

1. Summary Grant and Denial without a Hearing

a. Summary Grant

Pursuant to Ind. Code § 35-34-1-8(d), the court shall grant a motion to dismiss without conducting a hearing only if:

(a) The legal basis for the motion is alleged and is among those specified under Ind. Code § 35-34-1-4;

(b) The ground for the motion, if based upon certain facts, is supported by sworn allegations of the essential facts; and

(c) The essential allegations are admitted as true by the prosecutor or are conclusively established by documentary evidence.

b. Summary Denial

Pursuant to Ind. Code § 35-34-1-8(e), the court shall deny the motion without a hearing only if:

(a) No legal basis for the motion is alleged;
(b) No sworn allegations necessary to establish essential facts are attached; or
(c) Essential facts are conclusively refuted by documentary evidence.

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (summary denial proper where defendant's motion and sworn statement contained only bald assertion that habitual offender count was selectively brought on basis of gender; sworn allegations not based on personal knowledge or disclosing sources of information and grounds for belief that gender was a factor in charging him in this case).

Marbley v. State, 461 N.E.2d 1102 (Ind. 1984) (prosecutor's remark to defense counsel doubting defendant's guilt not a basis for dismissal).

2. Burden of Proof

Defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion. Ind. Code § 35-34-1-8(f).

3. Cannot Resolve Factual Dispute as to State's Allegations at Hearings

A factual hearing is clearly not appropriate at the prosecution's request, to attempt to establish, for example, that an indictment states an offense. State v. Lopez, 156 Ind. App. 379, 296 N.E.2d 918 (1973).

II. GROUNDS FOR DISMISSAL

A. DEFECTIVE INFORMATION OR INDICTMENT - B.10.a

There are five grounds under which an information or indictment is defective; see Ind. Code § 35-34-1-6(a) and (b). If defective, information or indictment shall be dismissed upon motion. Ind. Code § 35-34-1-6(c).

1. Information

a. Deficiencies in Charging Information

An information which fails to conform to the requirements of Ind. Code § 35-34-1-2(a) is defective.

See "Information\Indictment," Chapter 1, Section II.A. on statutory requirements for charging documents.

Compare Tiplick v. State, 43 N.E.3d 1259 (Ind. 2015) (trial court should have dismissed counts related to one of alleged chemical compounds specified by emergency rule by Indiana Pharmacy Board because charging information failed to specifically reference emergency rule naming that particular substance (XLR11) to be synthetic drug; State is

free to refile an amended information).

(1) Timing

To challenge deficiencies in charging information, file a motion to dismiss not later than 20 days before omnibus date. Ind. Code § 35-34-1-4(b); Foster v. State, 526 N.E.2d 696 (Ind. 1988); Miller v. State, 634 N.E.2d 57 (Ind. Ct. App. 1994).

But see Stwalley v. State, 534 N.E.2d 229 (Ind. 1989) (any challenge to the sufficiency of information must be made by motion to dismiss prior to arraignment, which is equivalent to defendant's initial hearing under Ind. Code § 35-33-7 *et seq*).

(2) Show Impact of Defective Information

Marshall v. State, 602 N.E.2d 144 (Ind. Ct. App. 1992) (State's failure to delete inapplicable portions of form information charging public indecency, which resulted in state apparently charging defendant with all four varieties of public indecency, was not fundamental error; information alleged that on specified date, at particular location, defendant fondled genitals of undercover officer, and defendant failed to demonstrate how or in what manner his defense was impeded by defective information).

Davis v. State, 74 N.E.3d 1215 (Ind. Ct. App. 2018) (no error in denying motion to dismiss traffic information summons and complaint, which did not bear signature of officer who stopped defendant for speeding; electronic signature was sufficient).

b. Court Lacks Jurisdiction

The information is defective, under Ind. Code § 35-34-1, if the allegations in the motion to dismiss demonstrate that the court does not have jurisdiction of offense charged. Ind. Code § 35-34-1-6(a) (2).

See this chapter, Section II.K.

c. Statute Unconstitutional or Otherwise Invalid

The information is defective if the statute defining the offense is unconstitutional or otherwise invalid. Ind. Code § 35-34-1-6(a)(3).

See this chapter, Section II.L.

d. Defendant was Grand Jury Target

The information is defective if the defendant was a grand jury target identified under Ind. Code § 35-34-2-12(a) (1). See Ind. Code § 35-34-1-6(b)(1).

e. Grand Jury's Refusal or Failure to Indict

The information defective if the offense alleged was identified on the grand jury record and the grand jury deliberated on whether to issue indictment and voted not to indict defendant for offense identified on the record. Ind. Code § 35-34-1-6(b)(2) and (3).

However, if the prosecuting attorney shows there is newly discovered material evidence that was not presented to grand jury before grand jury's failure to indict, then the information is not defective. Ind. Code § 35-34-1-6(b).

f. Lack of Probable Cause Not Ground for Dismissal

Lack of probable cause is not grounds to dismiss a charging information. Probable cause affidavit relates to pre-trial detention of defendant, not charging instrument. Gilliam v. State, 270 Ind. 71, 383 N.E.2d 297 (1978); Hicks v. State, 544 N.E.2d 500, 505 (Ind. 1989).

Generally, a defendant may not be held in jail to await trial unless an independent magistrate (or grand jury) finds probable cause. Gerstein v. Pugh, 420 U.S. 103 (1975); see Determination of Probable Cause, Chapter 2, Section Ind. Code Detention without probable cause violates the Fourth Amendment of the U.S. Constitution and Article I, Section 11 of the Indiana Constitution.

2. Indictment

An indictment is defective when:

(1) it does not substantially conform to the requirements of Ind. Code § 35-34-1-2(a) (see Chapter 1, Section II, statutory requirements for charging documents);
(2) the allegations demonstrate that the court does not have jurisdiction of the offense charged (see this chapter, Section II.K); or
(3) the statute defining the offense charged is unconstitutional or otherwise invalid (see this chapter, Section II.L).

See Ind. Code § 35-34-1-6(a).

3. State's Appeal of Dismissal - "Final Judgment" No Longer Needed

a. Information

Effective July 1, 2015, the amended version of Ind. Code § 35-38-4-2(1) allows the State to immediately appeal the dismissal of one count of a multi-count information or indictment (State may appeal . . . "[f]rom an order granting a motion to dismiss one (1) or more counts of an indictment or information").

Previously, Ind. Code § 35-38-4-2(1) did not provide for an appeal where only a single count of a multi-count information has been dismissed. See Campos v. State, 845 N.E.2d 1074 (Ind. Ct. App. 2006) (motion to dismiss an information to authorize an appeal by the State "must be a judgment which finally disposes of the whole case, and not merely a ruling").

b. Indictment

Dismissal of an indictment is not a final judgment *per se* but may be "treated" as final judgment where warranted by circumstances. State v. McCarty, 243 Ind. 361, 185 N.E.2d 732, 736 (1962).

State v. Moore, 553 N.E.2d 199, 201 (Ind. Ct. App. 1990) (trial court ruled indictment defective; when State elected not to amend indictment but instead to re-file same indictment, it was electing to stand on the charge as filed; court's ruling became final judgment and State was required to initiate an appeal under [former Ind. App. R. 3, see now Ind. App. R. 9.A.1]; when State failed to timely file an appeal of the dismissal, dismissal became law of the case; State was prohibited from re-filing the identical defective charge).

B. MISJOINDER OF OFFENSES OR PARTIES - B.10.b

1. Severance, Not Dismissal

Where offenses or parties are improperly joined, the usual remedy is severance, not dismissal of charges.

a. Misjoinder of Offenses

Older case law holds that if indictment shows on its face separate offenses relating to different transactions improperly joined, indictment may be quashed. State v. Reichert, 226 Ind. 171, 78 N.E.2d 785 (1948) (*citing* Rokvic v. State, 194 Ind. 450, 143 N.E. 357 (1924)).

Legal issues in area of joinder and severance of offenses involve:

(1) whether two offenses were part of a "common scheme or plan," (courts stretch to find a common scheme or plan because it allows trial court greater discretion in joining and severing offenses), and

(2) whether defendant's constitutional right to due process and a fair trial impacted by joinder, (e.g., that fair trial rights are compromised when evidence of crimes which would otherwise be excluded is admitted when offenses are joined).

Goodman v. State, 708 N.E.2d 901(Ind. Ct. App. 1999) (separate burglary charges were not properly joined where the only similarities were that the crimes occurred at night, along back roads in a rural county, over a period of a month).

Robbins v. State, 264 Ind. 503, 346 N.E.2d 251 (1976) (where separate crimes were all committed by defendant in single series of events on same day involving same person it was proper to join three separate counts in one indictment).

Holland v. State, 265 Ind. 216, 352 N.E.2d 752 (1976) (defendant could properly be charged with first-degree murder and murder in commission of robbery, which offenses grew out of single transaction; separate counts did not increase burden upon defendant in making his defense).

Where a trial court has jurisdiction over a juvenile defendant because one of the charged offenses is a crime over which the trial court has automatic jurisdiction, the trial court does not lose jurisdiction over the juvenile defendant if the defendant is acquitted of the automatic jurisdiction offense but convicted of a joined offense over which the juvenile court have otherwise had jurisdiction. Philson v. State, 899 N.E.2d 14 (Ind. Ct. App. 2008).

b. Misjoinder of Parties

In joining defendants for trial, there are several grounds:

(1) a common scheme or plan,
(2) identity of offenses,
(3) conspiracy,
(4) joint enterprise, or
(5) difficulty in separate proof.

See Ind. Code 35-34-1-9(b); see also *Chapter 8*, "Joinder and Severance, Section II.A

See "Joinder and Severance," Section II.A).

C. DUPLICITY OF ALLEGATIONS

A duplicitous information charges two offenses in one count. If information is unchallenged and trial is permitted, jury may appropriately convict for either offense because requirements of notice and assurances against double jeopardy have been met. Phillips v. State, 518 N.E.2d 1129 (Ind. Ct. App. 1988).

1. Filing Repetitive Charges

State has unrestricted discretion to file allegedly repetitive charges, although a defendant charged and found guilty may not be convicted and sentenced more than once for same offense. Marshall v. State, 590 N.E.2d 627 (Ind. Ct. App. 1992).

a. If Information Satisfies Statute, Not Subject to Dismissal

When an information complies with its statutory requirements, the State is not required to dismiss repetitive charges; however, the court may compel State to elect among the various offenses charged. Schweitzer v. State, 531 N.E.2d 1386 (Ind. 1989).

Vaughn v. State, 269 Ind. 142, 378 N.E.2d 859 (1978) charging of multiple crimes for the same act did not prejudice defendant; question of whether prosecution should be compelled to elect between the counts is a matter of trial court discretion).

b. Double Jeopardy

State may allege a single offense in more than one count, provided that only a single judgment and sentence is imposed. Underwood v. State, 535 N.E.2d 507 (Ind. 1989).

Collins v. State, 521 N.E.2d 682 (Ind. 1988) (defendant was not prejudiced by being alternatively charged with murder and felony-murder arising out of same incident);

See Section II.H.

c. Examples of Duplicitous Counts

Whether multiple charges are duplicitous depends on whether acts are part of one transaction or occurrence.

Marshall v. State, 602 N.E.2d 144 (Ind. Ct. App. 1992) (form indictment charging public indecency was bad for duplicity, as State failed to delete inapplicable portion of indictment, and thereby apparently charged defendant with all four varieties of public indecency; thus, information could not have withstood attack by timely motion to dismiss).

Wiseman v. State, 521 N.E.2d 942 (Ind. 1988) (charges of uttering with intent to defraud, involving seven stolen checks deposited with the same deposit slip on the same day at the same bank, were held one offense).

Raines v. State, 514 N.E.2d 298 (Ind. 1987) (theft of truck and scuba equipment inside truck was single offense).

Stout v. State, 479 N.E.2d 563 (Ind. 1985) (convictions on two counts of theft of items from house and garage was merged into one conviction; only one offense).

Keller v. State, 989 N.E.2d 1283 (Ind. Ct. App. 2013) (regardless of what defendant did with checks after he took them - whether he put them in his garage or cashed them - offense was committed when he took the checks from mailbox and from that point on committed single continuing act of theft).

Moritz v. State, 465 N.E.2d 748 (Ind. Ct. App. 1984) (defendant who received one lump sum bribe for five orders of supplies for the city was charged with six bribery counts and convicted of four; court ordered judgment on three counts vacated as duplicitous; there was one transaction, single intent and design).

2. Alleging Several Acts for One Offense

It is proper for the State to allege in one count several acts any one of which would constitute the offense charged.

Layne v. State, 164 Ind. App. 486, 329 N.E. 2d 612 (1975) (charging affidavit stated in part that defendant did "touch, beat, strike, cut, and wound" the victim; affidavit not subject to dismissal).

However, it is improper for the State to present evidence of and argue several different ways the defendant could have committed the charged offense without charging the different methods. To do so would make it impossible to determine whether the jury unanimously found the defendant committed one method of the charged offense. Castillo v. State, 734 N.E.2d 299 (Ind. Ct. App. 2000).

Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006) (where State charged defendant with three counts of dissemination of materials harmful to minors based on three different victims but presented evidence that one of the victims was shown materials on more than one occasion, the court cannot know whether jury convicted the defendant based on incidents involving only the one victim or incident involving all three victims).

D. DEFECTIVE GRAND JURY PROCEEDINGS

Upon motion, grand jury indictment shall be dismissed when the grand jury proceedings were conducted in violation of Ind. Code § 35-34-2. See Ind. Code § 35-34-1-7.

1. Successful Grounds for Dismissal

a. Target Served with Defective Subpoena

Generally, failure to inform a witness in the subpoena served on him or her of his/her target status is grounds for a motion to dismiss.

> Snyder v. State, 182 Ind. App. 24, 393 N.E.2d 802 (1979) (subpoena, which did not inform defendant of nature of investigation or that he was target, was defective; denial of motion to dismiss was harmless error since defendant was aware of nature of investigation and that he was the subject).

b. Prosecutorial Misconduct Affected Outcome

Prosecutorial misconduct is grounds for dismissal only where flagrant abuse of authority affects independent judgment of the grand jury. United States v. Cederquist, 641 F.2d 1347 (9th Cir. 1981).

c. Unauthorized Persons Present During Proceedings

Presence or participation of unauthorized person in grand jury room is grounds for dismissal if defendant shows prejudice to substantial rights.

> Robinson v. State, 477 N.E.2d 883 (Ind. 1985) (fact that attorney for murder victim's mother was allowed to question her during grand jury proceedings was insufficient to establish prejudice against party who was ultimately charged and convicted of the murder).

> State v. Hardy, 406 N.E.2d 313 (Ind. Ct. App. 1980) (dismissal of indictment was justified on basis of presence and active participation of elected prosecuting attorney in grand jury proceedings after granting of motion for appointment of special prosecuting attorney).

d. Improper Jury Instructions

Because grand jury proceedings are investigative rather than adjudicative, instructions to grand jury require less precision than those to petit jury. However, instruction that invades province of grand jury to determine whether facts establish probable cause violates Ind. Code § 35-34-2-4(j) and may warrant dismissal of indictment. Ajabu v. State, 677 N.E.2d 1035 (Ind. Ct. App. 1997). Erroneous instruction will not invalidate indictment absent showing of prejudice. To show prejudice, instructions in their entirety must be so misleading or deficient that fundamental integrity of indictment process is compromised. Sparks v. State, 499 N.E.2d 738 (Ind. 1986).

> Ajabu v. State, *supra* (grand jury was instructed to hear evidence and take such further action as they deem advisable and "to present their Report & Indictment to the court;" to extent instruction appeared to mandate return of indictment, it infringed upon province of grand jury; however, entirety of information presented to grand jury by judge and special prosecutor properly advised grand jury of its responsibility, and questions from jury indicated clear understanding of its independent responsibility to weigh facts; therefore, defendant failed to show that he was prejudiced by improper

instruction).

2. Unsuccessful Grounds

a. Lack of Impartiality or Bias of Grand Jury

"A claim of impartiality [sic] or bias of a grand jury is neither grounds for disqualification of a jury, grounds for finding it is illegally constituted, nor grounds for dismissal." Averhart v. State, 470 N.E.2d 666, 679 (Ind. 1984). **NOTE**: The court probably meant "A claim of *partiality* or bias..."

Jones v. State, 270 Ind. 285, 385 N.E.2d 426 (1979) (prejudicial pretrial publicity not shown to have compromised impartiality of grand jury).

Jarver v. State, 265 Ind. 525, 356 N.E.2d 215 (1976) (where defendant failed to allege that grand juror who knew him from prison and was familiar with the circumstances surrounding the crime was not acting impartially towards him, trial court properly *overruled* defendant's motion to dismiss).

b. Evidentiary Challenges based on the sort of evidence produced before the grand jury rarely succeed.

Averhart v. State, 470 N.E.2d 666 (Ind. 1984) (presentation of irrelevant evidence to the grand jury does not justify dismissal of indictment).

3. No Discharge of Defendant if State Re-files

If basis for dismissal order is defect in grand jury proceeding [Ind. Code § 35-34-1-4(a) (3)] and the prosecutor represents charges will be refiled within 72 hours:

(1) the court may not discharge defendant;
(2) any prior order concerning release pending trial remains in force unless modified or removed.

Ind. Code § 35-34-1-4(e).

E. OFFENSE NOT STATED WITH SUFFICIENT CERTAINTY

Indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend and protects the defendant against double jeopardy. Hamling v. U.S., 418 U.S. 87, 117, 94 S. Ct. 2887, 2907 (1974); Flores v. State, 485 N.E.2d 890 (Ind. 1985).

1. Test for Adequacy - Due Process

An indictment or information does not state the offense with sufficient certainty under Ind. Code § 35-34-1-4(a)(4) when it:

(1) does not provide adequate notice of the offense charged;
(2) does not allow preparation of a defense; or
(3) does not allow a defendant to plead a judgment on the indictment as a bar in a future

prosecution (to plead a judgment on the charges brought as a defense, under double jeopardy provisions, in future prosecutions for the same offense). See also Ind. Const. Art. 1, §13; U.S. Const. Amend. 5, 14.

Fadell v. State, 450 N.E.2d 109 (Ind. Ct. App. 1983) (indictment or affidavit must be certain and particular enough to enable the accused, the court, and the jury to determine the crime for which conviction is sought; defendant must be given sufficient information to enable him to prepare his defense and to assure that he will not twice be put in jeopardy for the same crime).

See "Information\Indictment," Chapter 1, Section III.A.

2. Examples

a. Where Specificity Lacking

Indictment must state crime charged in direct and unmistakable terms. 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) (information charging defendant with knowingly engaging in tumultuous conduct failed to state facts and circumstances with sufficient precision to apprise defendant of charge against him).

Salary v. State, 523 N.E.2d 764 (Ind. Ct. App. 1988) (defendant could not be convicted for not yielding right of way to oncoming traffic at through intersection under information charging him with failing to stop, absent any language in information defining traffic to which defendant failed to yield).

Moran v. State, 477 N.E.2d 100 (Ind. Ct. App. 1985) (indictment for official misconduct by violating bidding procedures was inadequate under Art. 1, Sec. 13 and Ind. Code 35-34-1-4(a) (4) because specific procedures required by statute which were allegedly violated were not set out).

Fadell v. State, 450 N.E.2d 109 (Ind. Ct. App. 1983) (failure to identify county employees who were allegedly "ghost employees" precludes defendant from preparing defense, may subject defendant to double jeopardy; convictions reversed in part).

Where information tracks language of a statute it will usually withstand a motion to dismiss unless statute defines crime only in general terms.

Taylor v. State, 614 N.E.2d 944, 948 (Ind. Ct. App. 1993) (disjunctive phrase "performing or submitting to acts of child molesting" was not invalid).

b. Where Sufficient Specificity Found

(1) Lack of Detail

Absence of detail in information is fatal only if phraseology misleads defendant or fails to give defendant notice of charges against him or her. Kerlin v. State, 573

N.E.2d 445 (Ind. Ct. App. 1991).

Smith v. State, 465 N.E.2d 702 (Ind. 1984) (use of "murder," "knowingly" and statement of specific acts in attempted murder prosecution gave defendant sufficient notice of charge).

Johnson v. State, 194 N.E.3d 98 (Ind. Ct. App. 2022) (allegations in charging information and probable cause affidavit sufficiently identified securities-related crimes with which defendant was charged), *trans. pending*.

(2) Mis-citing Statute

It is the allegation in the body of the information that defines the crime and not the cited statute.

Hestand v. State, 491 N.E.2d 976, 980 (Ind. 1986) (information contained all essential elements of crime but incorrectly cited statute).

(3) Child Molesting Prosecutions

Indiana Supreme Court approved lack of specificity as to time in two counts of child molesting, which alleged same conduct in same two-year period. Hodges v. State, 524 N.E.2d 774 (Ind. 1988).

Hillenburg v. State, 777 N.E.2d 99 (Ind. Ct. App. 2002) (time is not of essence in information alleging child molesting unless age of victim serves to elevate charged offense).

Jones v. State, 581 N.E.2d 1256 (Ind. Ct. App. 1991) (indictment which alleged that defendant molested his adoptive daughter during 1988 and 1989 was sufficiently specific to inform defendant of charges against him and permit presentation of any available defenses).

(4) Failure to Name Victims, Witnesses

Greer v. State, 543 N.E.2d 1124 (Ind. 1989) (State's failure to list names of its witnesses in its amended information did not require dismissal of charges against defendant, where defendant was able to obtain the names, and State had difficulty in locating some of the witnesses).

Kindred v. State, 524 N.E.2d 279 (Ind. 1988) (State's failure to specifically name defrauded parties in indictment charging uttering forged instrument was not defective because identity of parties was clearly ascertainable in attached photographic copies of two instruments involved).

For other specific examples see "Information\Indictment," Chapter 1, Sections II.A.1.a. and IV.A.2.c.

F. FACTS STATED DO NOT CONSTITUTE AN OFFENSE

Information must in fact state the crime intended to be charged, and not some other act which is

not prohibited by the statutory provision underlying the charge.

Gutenstein v. State, 59 N.E.3d 984 (Ind. Ct. App. 2016) (even though defendant was not driving his car when a fatal accident occurred, dismissal of charge for OWI Causing Death was improper because OWI statute does not require that a person's vehicle be in motion at the time of the accident, but rather that the victim's death be caused by a person's operation of the vehicle while intoxicated).

State v. Pickett, 424 N.E.2d 452 (Ind. Ct. App. 1981) (court properly dismissed counts of information where the State alleged an act, approval of additional legal fees, which was not prohibited by statute cited in information).

State v. Gotwals, 165 Ind. App. 109, 330 N.E.2d 766 (1975) (information charged defendant with selling marijuana, "a statutory offense," when at the time of filing it was not a statutory offense; motion to dismiss properly sustained).

G. DEFENDANT HAS IMMUNITY FROM PROSECUTION

1. Use Immunity for Witness

When the prosecution grants use immunity to a witness, testimony compelled of that witness may not be used at a subsequent criminal proceeding. In re Caito, 459 N.E.2d 1179 (Ind. 1984).

Ind. Code § 35-37-3-3(a) provides:

Upon request of the prosecuting attorney the court shall grant use immunity to a witness. The court shall instruct the witness that any evidence the witness gives, or evidence derived from that evidence may not be used in any criminal proceeding against that witness unless the evidence is volunteered by the witness or is not responsive to a question by the prosecuting attorney.

a. Exceptions

Grant of use immunity does not prohibit the use of evidence the witness has given in a subsequent prosecution for perjury. Ind. Code § 35-37-3-3(b).

Testimony under grant of immunity can be used in disciplinary proceedings against the witness. Matter of Mann, 270 Ind. 358, 385 N.E.2d 1139 (1979).

Any evidence witness gives, or evidence derived from that evidence, may not be used against witness, unless evidence is volunteered by witness or is not responsive to question by prosecutor. Ind. Code § 35-37-3-3.

b. Use of Evidence if from Independent Source

Once immunity has been granted, the State has an affirmative burden to prove that evidence used in a subsequent prosecution is derived from a source wholly independent of the compelled testimony. Worthington v. State, 181 Ind. App. 365, 391 N.E.2d 1164 (1979) (*citing* Kastigar v. U.S., 406 U.S. 441, 92 S. Ct. 1653 (1972)).

U.S. v. Hubbell, 530 U.S.27, 120 S. Ct. 2037 (2000) (defendant was granted immunity and compelled to produce documents; contents of those documents led to an indictment by another grand jury on new tax and fraud charges; held: indictment was tainted because the Government could not demonstrate a prior awareness that documents sought existed and were in defendant's possession).

2. No Authority to Grant Transactional Immunity

Transactional immunity prohibits State from criminally prosecuting witness for any offense to which compelled testimony relates. If transactional immunity is conferred upon an individual witness, the compelled testimony can never be used against the witness in any criminal proceedings. In Re Caito, 459 N.E.2d 1179 (Ind. 1984).

In Indiana, prosecutor has no statutory authority to grant a defendant transactional immunity.

Abner v. State, 479 N.E.2d 1254 (Ind. 1985) (agreement purporting to grant defendant transactional immunity in fact granted only use immunity or was void; no error in denying motion to dismiss when defendant violated terms of agreement by withholding information).

3. Case Law

Fox v. State, 997 N.E.2d 384 (Ind. Ct. App. 2013) (no abuse of discretion in denying defendant's motion to dismiss where defendant did not live up to terms of immunity agreement).

Everroad v. State, 571 N.E.2d 1240 (Ind. 1991) (failure to dismiss murder charges and to suppress defendant's ten statements given to police during investigation was not reversible error, because defendant failed to demonstrate how admission of statements inculpated him or otherwise worked to his detriment, despite contention that admission of statements violated Fifth Amendment right to avoid self-incrimination and breached alleged immunity agreement. (Per Givan, J., with the Chief Justice concurring and two Justices concurring in the result)).

Bullock v. State, 397 N.E.2d 310 (Ind. Ct. App. 1979) (defendant entered agreement that if she testified before grand jury against target, charge of shoplifting would be dismissed; defendant available to testify, but never called; case against target dismissed; court properly denied dismissal of subsequent shoplifting charge).

See also, IPDC Trial Manual, Chapter 9, Immunity.

H. DOUBLE JEOPARDY

1. In General

Double jeopardy issues most often arise when a single sovereign seeks to prosecute defendant for multiple offenses which resemble each other and arise from same factual scenario.

The U.S. Constitution, Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056 (1969) (Fifth Amendment provision against double jeopardy is binding on states through the 14th Amendment).

Article 1, §14 of the Indiana Constitution states: "No person shall be put in jeopardy twice for the same offense."

See the discussion of Double Jeopardy in Chapter 1 of this manual and Chapter 9 of the IPDC Sentencing Manual.

PRACTICE POINTER: In many areas, the Indiana Constitution provides greater protection and rights than the U.S. Constitution. Double jeopardy is one of those areas. In Wadle v. State, 151 N.E.3d 227, 244 n.15 (Ind. 2020), the Court noted that Richardson's actual evidence test as a bar to procedural double jeopardy is still good law. It is always a good idea, but especially in double jeopardy issues, to make separate arguments from the Indiana Constitution and from the U.S. Constitution. See Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

a. Three Basic Protections

Double jeopardy protects defendant from both successive *prosecution* for the "same offense," and from multiple *punishment* for the "same offense." It prohibits:

(1) retrial for the same offense after acquittal (see Ind. Code § 35-41-4-3(a) (1)),
(2) retrial for the same offense after conviction (see Ind. Code § 35-41-4-3(a) (1)), and
(3) multiple punishments for the same offense (see Ind. Code § 35-41-5-3). See IPDC Sentencing Manual, Chapter 9.

See North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072 (1969); Jackson v. State, 625 N.E.2d 1219, 1221 (Ind. 1993).

b. Applicability

(1) Criminal Prosecutions; Proceedings Labeled "Civil"

Double Jeopardy Clause applies to criminal proceedings, or to proceedings labeled "civil" as a matter of convenience.

Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779 (1975) (applies to juvenile delinquency proceedings).

Hayse v. Indiana Dept. of State Revenue, 660 N.E.2d 325 (Ind. 1995) (a civil sanction levied under Ind. Code 6-7-3-1 *et seq*., Indiana's Controlled Substance Excise Tax, is a jeopardy within meaning of Fifth Amendment's double jeopardy prohibition, barring a subsequent criminal conviction for the same offense) (*citing* Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937 (1994)).

Cf.

Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997) (commitment under sexually violent predator statute was civil and not punitive in nature, and so did not violate double jeopardy clause).

(2) Administrative Punishment by Prison Officials

Double jeopardy does not prevent a subsequent criminal prosecution for conduct punished administratively by prison officials. Brown v. State, 172 N.E.3d 1273 (Ind. Ct. App. 2021).

Williams v. State, 493 N.E.2d 431 (Ind. 1986) (solitary confinement in a correctional setting).

Lyons v. State, 475 N.E.2d 719 (Ind. Ct. App. 1985) (criminal and administrative conviction and punishment for same act does not constitute double jeopardy; Administrative punishment by Institutional Conduct Adjustment Board for attempted escape does not bar subsequent criminal prosecution).

(3) Ordinance Violations

Boss v. State, 944 N.E.2d 16 (Ind. Ct. App. 2011) (federal double jeopardy clause does not bar filing criminal charges based on facts that previously resulted in citations for violations of ordinance regarding dogs).

c. When Jeopardy Attaches

(1) Jury Trial

Jeopardy attaches when jury is impaneled and sworn.

Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156 (1978) (rule that jeopardy attaches when jury is impaneled and sworn is applicable to the states).

(2) Bench Trial

In a bench trial jeopardy attaches when the first witness is sworn. Ind. Code 35-41-4-3(a)(2); Corley v. State, 455 N.E.2d 945 (Ind. 1983).

Jeopardy attaches at taking of evidence in non-jury case.

Serfass v. U.S., 420 U.S. 377, 95 S. Ct. 1055 (1975) (jeopardy attaches when jury is sworn; when judge begins to hear evidence on issue of guilt).

State v. Proctor, 471 N.E.2d 707 (Ind. Ct. App. 1984) (prior to bench trial, judge viewed videotape showing defendant at time of his arrest; State subsequently dismissed charges and then refiled them; retrial barred).

Swearing in does not end double jeopardy analysis.

Emmons v. State, 847 N.E.2d 1035 (Ind. Ct. App. 2006) (where all witnesses sworn in prior to testifying in bench trial, jeopardy attached under IC 35-41-4-3(a) (2) based on the swearing in, but this "begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial"; if defendant moves for or consents to termination of proceedings after jeopardy attaches, he forfeits right to raise double jeopardy later unless government conduct necessitated motion).

(3) Court's Acceptance of Guilty Plea

State v. Keith, 482 N.E.2d 751, 754 (Ind. Ct. App. 1985) (where trial court accepted defendant's guilty plea to various misdemeanor charges after a determination of factual basis and voluntariness, jeopardy attached and a second prosecution on same charges was prohibited), *op. on reh'g*.

d. Burden of Proof

Defendant bears burden of raising and establishing double jeopardy defense. Waiver by failing to make a timely objection.

Lutes v. State, 272 Ind. 699, 401 N.E.2d 671 (1980) (defendant has burden of showing his conviction violated his constitutional right against double jeopardy).

2. Tests

a. Federal - Blockburger "Same Elements" Test

Where same act or transaction violates two distinct statutory provisions, test to determine whether there are two offenses, or one is if "each provision requires proof of a fact which other does not." Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932).

Whalen v. United States, 445 U.S. 684, 692-93, 100 S.Ct. 1432, 1438 (1980) (assumption underlying Blockburger test is that legislative body ordinarily does not intend to punish the same offense under two distinct statutes).

If each offense does not require proof of a different fact or element, the offenses are the "same offense" under Blockburger, and double jeopardy bars additional punishment and successive prosecution for each. U.S. v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 2864 (1993).

b. Indiana

(See also the discussion of double jeopardy at Chapter 1, Section III.C).

Always make separate arguments on double jeopardy issues under both the federal and Indiana state constitutions. Article 1, Section 14 of the Indiana Constitution, and Indiana common law provides greater protection against double jeopardy than the Fifth Amendment to the U.S. Constitution. In Wadle v. State, 151 N.E.3d 227 (Ind. 2020), the Indiana Supreme Court expressly overruled the Constitutional tests formulated in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), as they apply to claims of substantive double jeopardy, noting that the standard had caused "more confusion than clarity." In its place, the court articulated a new analytical framework to resolve multiple punishment claims going forward. However, the constitutional tests of Richardson still apply to claims of procedural double jeopardy. See Wadle, 151 N.E.3d at 244 n.15.

3. Retrial Not Permitted

a. Same Offense, Same Facts

Ind. Code § 35-41-4-3 provides:

(a) A prosecution is barred if there was a former prosecution of defendant based on the same facts and for commission of the same offense if:

(1) The former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.); or

(2) The former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless

(i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination,

(ii) it was physically impossible to proceed with the trial in conformity with the law,

(iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law,

(iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state,

(v) the jury was unable to agree on verdict, or

(vi) false statements of a juror on voir dire prevented a fair trial.

(b) If the prosecuting authority brought about any of the circumstances in subdivisions (a) (2) (i) through (a) (2) (vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

See Garrett v. State, 992 N.E.2d 710 (Ind. 2013) (in issue of first impression, Court held that where defendant was acquitted on Count 1 Rape and the jury hung on Count 2 Rape, retrial on Count 2 Rape violated Indiana Constitution's prohibition against double jeopardy because the State's evidence regarding Rape 2 in the second trial largely consisted of evidence used to convict on Rape 1 in the first trial).

Jury unable to agree on a verdict, see Menifee v. State, 512 N.E.2d 142 (Ind. 1987).

False statements of a juror on voir dire prevented a fair trial, see Ried v. State, 610 N.E.2d 275 (Ind. Ct. App. 1993), *aff'd,* 615 N.E.2d 893 (Ind.).

b. Different Offense or Same Offense, Different Facts

Ind. Code § 35-41-4-4 provides:

(a) A prosecution is barred if all of the following exist:

(1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.

(2) The former prosecution resulted in an acquittal or a conviction of the

defendant or in an improper termination under section 3 of this chapter [Ind. Code § 35-41-4-3].

(3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

(b) A prosecution is not barred under this section if the offense on which it is based was not consummated when the trial under the former prosecution began.

The successive prosecution statute provides that a prosecution is barred by reason of a former prosecution if the offense charged should have been charged in the former prosecution. This statutory scheme provides a check upon an otherwise unlimited power of State to pursue successive prosecutions. Williams v. State, 762 N.E.2d 1216 (Ind. 2002).

Seay v. State, 550 N.E.2d 1284, 1288 (Ind. 1990), *superseded by statute on other grounds as recognized by* Davidson v. State, 763 N.E.2d 441, 445 (Ind. 2002). (holding IC 35-41-4-4(a)(3) does not "automatically bar successive prosecutions for separate offenses which are committed at the same time or during the same general criminal episode. Neither can it be interpreted to bar successive prosecutions for separate offenses arising from temporally distinct criminal episodes").

Hahn v. State, 67 N.E.3d 1071 (Ind. Ct. App. 2017) (dismissal not required under successive prosecution statute because defendant failed to show that charges should have been joined in earlier proceeding).

Moore v, State, 697 N.E.2d 1268 (Ind. Ct. App. 1998) (subsequent prosecution for felony murder was not barred by earlier prosecution for robbery based on same criminal episode).

Williams v. State, 762 N.E.2d 1216 (Ind. 2002) (because charges in two courts were based on series of acts so connected that they constituted part of single scheme or plan, they should have been charged in single prosecution).

Schmidt v. State, 986 N.E.2d 857 (Ind. Ct. App. 2013) (defendant's separate series of distinct thefts against different victims would not have required joinder of charges because they were not part of "a single criminal transaction" identified by "a distinctive nature . . . common modus operandi, and a common motive").

Thompson v. State, 966 N.E.2d 112 (Ind. Ct. App. 2012) (while better practice might have been for State to join all the charges, dismissal under successive prosecution statute not required because there was no evidence that defendant's driving while suspended offense was part of a single scheme or plan with the drug offenses in this case).

Estrada v. State, 969 N.E.2d 1032 (Ind. Ct. App. 2012) (successive prosecution prohibition does not apply where juvenile court lacks jurisdiction over criminal charges).

Allen v. State, 956 N.E.2d 195 (Ind. Ct. App. 2011) (prosecuting defendant for Class A felony dealing in heroin after he pled guilty to Class B misdemeanor visiting a common nuisance was barred under Ind. Code § 35-41-4-4; it is reasonable to assume

that defendant went to apartment with intention to sell heroin as well as to visit a common nuisance).

State v. McDonald, 954 N.E.2d 1031 (Ind. Ct. App. 2011) (where new evidence that defendant molested his son was discovered after he had been investigated for molesting all of his children, charged with neglect of all the children and molest of his daughter and pled guilty to a lesser charge, the subsequent prosecution of defendant for molest of his son was not prohibited; because probable cause of molestation of defendant's son did not exist at time of original charges, such charge should not have been joined).

Honeycutt v. State, 974 N.E.2d 525 (Ind. Ct. App. 2012) (distinguishing State v. McDonald, *supra*, court held that new charges were barred by successive prosecution statute; after arrest during traffic stop, defendant pled guilty to marijuana possession and a traffic infraction; after obtaining lab results showing marijuana in defendant's system, State charged him with two counts of operating while intoxicated; because new charges arose from the same traffic stop, and because probable cause existed for OWI at the time defendant was arrested, the trial court should have granted defendant's motion to dismiss the new charges).

Dixon v. State, 924 N.E.2d 1270 (Ind. Ct. App. 2010) (where defendant was charged with criminal recklessness after he pled guilty to OWI, trial court abused its discretion by granting motion to dismiss criminal recklessness charge; criminal recklessness charge, which was based on defendant having gun in cell the day after he was arrested for the OWI, was not part of a single scheme or plan requiring joinder of charges).

Haywood v. State, 875 N.E.2d 770 (Ind. Ct. App. 2007) (defendant's offenses charged in City Court occurred within a short period of time and in limited locale, and thus were part of "single scheme or plan" such that they should have been joined in initial prosecution).

Hamer v. State, 771 N.E.2d 109 (Ind. Ct. App. 2002) (successive prosecution upheld because defendant did not object prior to start of second trial, but only at close of evidence).

State v. Wiggins, 661 N.E.2d 878 (Ind. Ct. App. 1996) (trial court has discretionary authority under Ind. Code § 35-34-1-10(c) to dismiss charges which could have been joined in earlier prosecution, even where double jeopardy principles do not apply; statute allows defendant who has been tried for one offense to thereafter move to dismiss offense which could have been joined for trial of prior offenses).

c. Former Prosecution in Another Jurisdiction

When an act charged as public offense is within jurisdiction of another state as well as within jurisdiction of Indiana, conviction or acquittal in other state is bar to prosecution or indictment in Indiana.

NOTE: See dual sovereignty doctrine discussion at Section II.H.5, below.

Ind. Code § 35-41-4-5 provides:

In a case in which the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution in any other jurisdiction is a bar to a subsequent prosecution for the same conduct in Indiana, if the former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter [Ind. Code § 35-41-4-3].

Johnson v. State, 183 N.E.3d 1118 (Ind. Ct. App. 2022) (Indiana's successive prosecution statute not violated by trial on state criminal charges for attempted murder, battery, and intimidation after defendant's acquittal on federal kidnapping charge stemming from same incident).

Dill v. State, 82 N.E.3d 909 (Ind. Ct. App. 2017) (trial court did not violate Indiana's successive prosecution statute by denying defendant's motion to dismiss state charge for possessing methamphetamine with intent to deliver, where she had earlier pled guilty in federal court to conspiracy to possess and distribute methamphetamine. Even though factual basis for federal conspiracy offense referred to facts resulting in state charge, federal plea was only to conspiracy, not possession with intent to deal, so successive prosecution statute did not require dismissal of state charge).

But see State v. Allen, 646 N.E.2d 965 (Ind. Ct. App. 1995) (where federal and state conspiracy charges rested on same conduct, state charge must be dismissed).

Brewer v. State, 35 N.E.3d 284 (Ind. Ct. App. 2015) (under IC 35-41-4-5, defendant's Kentucky conviction for receiving stolen property prohibited Indiana's prosecution for auto theft; however, Kentucky conviction for fleeing/evading police did not prohibit Indiana from prosecuting defendant for resisting law enforcement, even though he committed one act of fleeing because part of flight occurred in Kentucky and part occurred in Indiana).

Wilson v. State, 270 Ind. 67, 383 N.E.2d 304 (1978) (within statute [IC 35-1-2-15 (repealed; see now above section)] in effect at time of defendant's offense, providing that conviction or acquittal in "another state, territory or country" was bar to prosecution in Indiana, quoted phrase included United States, and thus prosecution and conviction of defendant in federal court for armed robbery and assault on federal agent precluded prosecution in state court based on same conduct and evidence).

Haggard v. State, 445 N.E.2d 969 (Ind. 1983) (for double jeopardy purposes, cities and counties are regarded as subordinate governmental agencies of State, since their power is granted to them by State, whereas states and federal government are regarded as separate political entities inasmuch as each derives its power from different source), *modified on other grounds by* Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002).

Thomas v. State, 764 N.E.2d 306 (Ind. Ct. App. 2002) (trial court erred in denying defendant's motion to dismiss dealing in cocaine charge after he previously pled guilty to and was sentenced for conspiracy to deliver cocaine upon same evidence in another county).

Swenson v. State, 868 N.E.2d 540 (Ind. Ct. App. 2007) (trial court erred in determining that State's theft charge was not barred by former prosecution in

Kentucky for receipt of stolen property pursuant to Ind. Code § 35-41-4-5).

Smith v. State, 993 N.E.2d 1182 (Ind. Ct. App. 2013) (double jeopardy barred further prosecution of 20 out of 25 charges in state court after defendant's guilty plea to charges of federal conspiracy to commit mail and wire fraud; Ind. Code § 35-41-4-5 provides that former conviction in any other jurisdiction bars subsequent prosecution by Indiana for the "same conduct," which applied here because both federal indictment and state charges arose from same Ponzi scheme); see also Smith v. State, 993 N.E.2d 1185 (Ind. Ct. App. 2013) (15 of 18 counts in Dearborn County were barred by double jeopardy, as State prosecution was for same conduct as conduct in federal conviction).

Cf. Patterson v. Lash, 452 F.2d 150 (7th Cir. 1971) (where defendant was arrested in Ohio and officer, in search of trunk of automobile, seized proceeds of Ohio robbery and also found items which had been taken in Indiana robbery a week earlier, Ind. Code § 35-41-4-5 not applicable since claim was merely that trial judge in Ohio ruled differently from Indiana trial judge with respect to admissibility of fruits of search), *cert. den*.

In re Stivers, 260 Ind. 120, 292 N.E.2d 804 (1973) (disciplinary proceedings in two states based on same facts did not violate double jeopardy; courts of each state have a right to inquire into conduct and determine whether respondent's right to practice in that state should be terminated or suspended).

Fadell v. State, 450 N.E.2d 109 (Ind. Ct. App. 1983) (because federal prosecution of defendant for conspiracy to commit perjury did not result in judgment or an "improper termination," it was not a bar to state prosecution for same conduct, refusal to dismiss conspiracy charge on this basis was no error).

d. After Reversal for Insufficient Evidence

Double Jeopardy Clause forbids a second trial for purpose of affording prosecution another opportunity to supply evidence which it failed to muster in first proceeding. Tibbs v. Florida, 457 U.S. 31, 41, 102 S. Ct. 2211, 2217 (1982); Vest v. State, 621 N.E.2d 1094 (Ind. 1993); Williams v. State, 634 N.E.2d 849, 852 (Ind. Ct. App. 1994).

Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745 (1986) (trial court granted defendant's motion for directed verdict at close of State's case, finding insufficient evidence to sustain conviction; retrial barred). See also Evans v. Michigan, 568 U.S. 313 (2013) (midtrial directed verdict is acquittal precluding retrial even if directed verdict was premised on trial court's erroneous decision to exclude evidence or its misunderstanding of law).

Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970 (1981) (where action of trial judge was based on legal insufficiency of the evidence and not because he would have decided differently, double jeopardy clause bars retrial).

Sanabria v. United States, 437 U.S. 54, 98 S. Ct. 2170 (1978) (trial court erroneously excluded evidence of the alleged crime and then granted an acquittal based on the insufficiency of the remaining evidence; the double jeopardy clause barred retrial).

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978) (where appellate court reverses a conviction because of insufficient evidence, jeopardy attaches, and retrial is barred by the Fifth Amendment).

Webster v. Duckworth, 767 F.2d 1206 (7th Cir. 1985) (habeas relief granted where defendant had obtained appellate court reversal on the grounds of insufficient evidence but was retried and convicted of the same crimes; Indiana Supreme Court erred in affirming later convictions; reversal on the grounds of insufficient evidence constitutes an acquittal and bars any retrial, unless evidence of the prosecution was improperly excluded at trial).

Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005) (in light of Monge v. California, 524 U.S. 721 (1988), Double Jeopardy Clause of U.S. Constitution does not bar retrial of a habitual offender enhancement set aside on appeal for insufficient evidence); see also Moore v. State, 769 N.E.2d 1141 (Ind. Ct. App. 2002) (Article 1 § 14 of Indiana Constitution does not bar retrial of habitual offender charge when it was earlier reversed on basis of insufficient evidence).

Cf. Martinez v. Illinois, 134 S. Ct. 2070 (2014) (where jury was empaneled but State presented no evidence, not guilty directed verdict constituted an acquittal and, thus, Double Jeopardy Clause barred retrial).

Where defendant charged with several offenses, but court instructs jury only on one offense, and conviction of that one offense is reversed on grounds of sufficiency of the evidence, the double jeopardy clause bars retrial of the other offenses. Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988).

e. Disposal of Lesser Included Offense

Double jeopardy considerations bar separate convictions and sentencing when offenses are charged in manner that lesser crime is element of greater crime. Wilson v. State, 611 N.E.2d 160 (Ind. Ct. App. 1993).

A conviction of an included offense constitutes an acquittal of greater offense, even if conviction subsequently set aside. Ind. Code § 35-41-4-3(a).

Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957) (conviction of lesser offense; on retrial cannot be tried for greater offense).

Blueford v. Arkansas, 132 S.Ct. 2044 (2012) (double jeopardy clause did not bar retrial on capital murder and lesser included charges where jury advised trial court that it was unanimous against guilt on capital murder and first-degree murder but was deadlocked on other charges; jury's report was not a final resolution of case)

Haddix v. State, 827 N.E.2d 1160 (Ind. Ct. App. 2005) (defendant's double jeopardy rights were not violated by retrial when trial court refused to enter previous jury conviction on lesser included offense into judgment).

Kocielko v. State, 938 N.E.2d 243 (Ind. Ct. App. 2010) (allegations of sexual conduct with single victim in single encounter does not necessarily involve only "included" offenses for double jeopardy purposes such that an acquittal on any count

precludes retrial on all others; defendant properly retried for Class B and C felony sexual misconduct with a minor after jury hung on first two counts and acquitted him of third Class C felony count).

Hoover v. State, 918 N.E.2d 724 (Ind. Ct. App. 2009) (where jury acquitted Defendant of murder, hung on felony-murder charge, and convicted him of lesser-included offense of robbery, Ind. Code § 35-41-4-3(a) bars retrial on hung felony murder charge; even though statute is silent on hung-jury situations, the import of statute's plain language is to bar retrial on greater offense when defendant has been convicted of lesser-included offense; conviction of lesser included robbery offense constitutes acquittal on greater felony-murder charge).

Griffin v. State, 717 N.E.2d 73 (Ind. 1999) (if jury is given full opportunity to return verdict on greater offense and instead convicts on lesser offense, implicit acquittal with respect to greater offense results).

Cf. Garrett v. State, 992 N.E.2d 710 (Ind. 2013) (in issue of first impression, Court held that where defendant was acquitted on Count 1 Rape and the jury hung on Count 2 Rape, retrial on Count 2 Rape violated Indiana Constitution's prohibition on double jeopardy because the State's evidence regarding Rape 2 in second trial largely consisted of evidence used to convict on Rape 1 in first trial).

Cf. Cleary v. State, 23 N.E.3d 664 (Ind. 2015) (defendant's double jeopardy rights were not violated by retrial when trial court refused to enter previous jury conviction on lesser included offenses into judgment; jury in first trial deadlocked on felony charges of driving while intoxicated causing death but found defendant guilty of misdemeanor charges; implied acquittal provision in Ind. Code § 35-41-4-3(a) does not apply when jury returns a guilty verdict on a lesser-included offense but deadlocks on the greater charge). See also Bullock v. State, 106 N.E.3d 53 (Ind. Ct. App. 2018) (retrial of greater offense not barred even though CCS entries erroneously indicated that judgment of conviction was entered on lesser offenses and trial court *clarified* shortly thereafter that it had not actually entered judgment of conviction).

Cf. Davenport v. State, 734 N.E.2d 622 (Ind. Ct. App. 2000) (jury's determination of guilt on lesser included possession of cocaine charge but deadlock on greater dealing charge did not preclude State from retrying defendant for greater offense).

State v. Hurst, 688 N.E.2d 402 (Ind. 1997) (failure to yield right-of-way infraction judgment entered against defendant did not bar subsequent prosecution for reckless homicide; imposition of $7.00 fine for infraction did not constitute "punishment" under Double Jeopardy Clause, thus defendant was not placed in jeopardy), *overruled on other grounds*, 810 N.E.2d 1064.

Whether an offense is a lesser included offense of another is determined by whether each offense requires proof of a fact not required in proof of the other offense. Whalen v. U.S, 445 U.S. 684, 100 S. Ct. 1432 (1980); Martakis v. State, 450 N.E.2d 128 (Ind. Ct. App. 1983).

Ind. Code § 35-31.5-2-168 defines "included offense."

CAVEAT: Where defendant pleads guilty to a lesser included offense, trial on the

greater offense is not barred if the two offenses were joined and there is no plea bargain which otherwise bars trial of the greater offense.

Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536 (1984) (no barrier under Double Jeopardy Clause to trial on greater offense after plea to lesser-included offense).

Boze v. State, 514 N.E.2d 275 (Ind. 1987) (under Indiana law, defendant "waives" double jeopardy claims when he pleads to a lesser offense to avoid trial on the greater).

f. Disposal of Greater Offense

Judgment on greater offense, whether by conviction, acquittal, or plea, bars later conviction on the lesser included offense. Boze v. State, 514 N.E.2d 275 (Ind. 1987).

Payne v. Virginia, 468 U.S. 1062, 104 S. Ct. 3573 (1984) (conviction of greater offense bars prosecution for lesser included offense).

Griffin v. State, 717 N.E.2d 73 (Ind. 1999) (acquittal of greater offense does not preclude retrial on lesser offense to which continuing jeopardy has attached, regardless of whether continuing jeopardy resulted from appellate reversal of conviction or from mistrial caused by deadlocked jury; here, defendant's federal double jeopardy rights were not violated by retrial on robbery charge after he was acquitted of felony murder in first trial and mistrial was declared on robbery charge).

g. Felony Murder and Underlying Felony

Defendant may not constitutionally be **separately** tried for felony murder and the underlying felony. Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912 (1977).

Scott v. State, 510 N.E.2d 170 (Ind. 1987) (indictment for murder in commission of felony may include additional count for felony itself, and if defendant is convicted of felony murder, merger occurs, and defendant may not be sentenced on both counts).

Douglass v. State, 466 N.E.2d 721, 723 (Ind. 1984) (State not precluded from charging defendant with felony murder and the underlying felony, despite the fact that he could not be convicted on both offenses).

Smith v. State, 408 N.E.2d 614 (Ind. Ct. App. 1980) (sentences may not be imposed separately for felony murder and the underlying offense).

However, exception may exist in extraordinary circumstances.

Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221 (1977) (an exception "may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite due diligence." The Court cited Diaz v. United States, 223 U.S. 442, 32 S. Ct. 250 (1942), where the victim died after the defendant was convicted of assault and battery).

h. No Retrial on Hung Counts with Same Element as Acquitted Counts

Yeager v. United States, 129 S.Ct. 2360 (2009) (If a jury finds defendant guilty on some counts but can't agree on others, prosecutors may not retry defendant on "hung" counts if they had a common element with those on which the jury acquitted. Double Jeopardy Clause precludes government from re-litigating any issue that was necessarily decided by a jury's acquittal in a prior trial).

i. Drug Tax - Controlled Substance Excise Tax (CSET)

CSET is punishment within meaning of Fifth Amendment's double jeopardy prohibition. Cannot impose tax in a proceeding subsequent to underlying prosecution. Department of Revenue v. Kurth Ranch, 511 U.S.767, 114 S. Ct. 1937, 1948 (1994).

Indiana's CSET is punishment and thus jeopardy for double jeopardy purposes. Bryant v. State, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind. 1995).

Hayse v. Indiana Dept. of State Revenue, 660 N.E.2d 325 (Ind. 1995) (CSET assessment was a jeopardy for purposes of the Double Jeopardy clause, barring a second jeopardy by criminal prosecution for cultivating marijuana).

Garcia v. State, 686 N.E.2d 883 (Ind. Ct. App. 1997) (convictions for dealing and possession of marijuana that occurred after CSET assessment violated double jeopardy).

But see

State v. Mohler, 694 N.E.2d 1129 (Ind. 1998) (Bryant does not apply retroactively to cases on collateral review).

Tuan Chu v. State, 991 N.E.2d 142 (Ind. Ct. App. 2013) (even assuming Bryant is still good law and is applicable in determining whether civil sanction is punishment for Indiana double jeopardy purposes, defendant did not show that the nonpayment penalties were punishments for double jeopardy purposes).

Failure to pay CSET tax

Whitt v. State, 659 N.E.2d 512 (Ind. 1995) (prosecution for failure to pay CSET, contemporaneous with prosecution for possession of cocaine within 1000 feet of school, did not violate Blockburger "same elements" test for double jeopardy because each charged offense contained an element that other did not).

Cf. Collins v. State, 659 N.E.2d 509 (Ind. 1995) (convictions for both dealing drugs and failing to pay the CSET, imposed in the same proceeding, violate the Double Jeopardy Clause).

j. Drunk Driving and Administrative Licensing Sanctions

If civil or administrative action not solely remedial (designed to reimburse the government for its actual costs arising from the defendant's criminal conduct), but has

some retributive or deterrent purposes, State cannot also punish through criminal process. Department of Revenue v. Kurth Ranch, 511 U.S.767, 114 S. Ct. 1937 (1994).

Schrefler v. State, 660 N.E.2d 585 (Ind. Ct. App. 1996) (because administrative suspensions of driving privileges serves legitimate, non-punitive governmental purpose, double jeopardy does not prohibit implementation of subsequent criminal proceedings based on same conduct).

Cf. Hoffman v. State, 957 N.E.2d 992 (Ind. Ct. App. 2011) (defendant's OWI conviction after he was disciplined by Army for same conduct did not violate double jeopardy, where record did not show defendant was actually prosecuted by Army, rather than simply disciplined; under Uniform Code of Military Justice, military can punish service personnel through judicial proceedings or by imposing non-judicial punishment (NJP); NJP is usually deemed an administrative rather than a criminal proceeding).

NOTE: For argument that driving license is a right, see Hunter v. State, 516 N.E.2d 73, 74 n.3 (Ind. Ct. App. 1987) ("It is often stated that driving is a privilege, not a right; however, the realities of modern society have altered the logic of such a statement. In a country with less than varied and complete mass transportation systems, it is impractical to expect a person to accomplish necessary daily tasks without a driver's license. Further, the statutorily imposed due process requirements prior to suspending an individual's license, tend to clothe driving with the appearance of a right. Notwithstanding any privilege versus right issue, suspension of one's driver's license for life and a felony conviction absent evidence of the mailing of a notice of the original suspension or habitual offender determination, carries serious implications."), *trans. denied*.

k. After Acquittal/Dismissal

(1) General Rule

"Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution.'" United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S. Ct. 1349, 1354 (1977) (*quoting* U.S. v. Ball, 163 U.S. 662, 671, 16 S. Ct. 1192, 1195 (1896)).

Sanabria v. United States, 437 U.S. 54, 65, 98 S. Ct. 2170, 2179 (1978) (even where an acquittal is "based upon an egregiously erroneous foundation," a defendant may not be retried for the same offense). Accord, State v. Keel, 512 N.E.2d 420 (Ind. Ct. App. 1987).

State v. Harner, 450 N.E.2d 1005 (Ind. 1983) (acquittal acts as a bar to retrial on same offense or any offense which should have been joined in prior proceedings (such as lesser included offenses or greater offenses)), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995).

Cf. Boles v. State, 595 N.E.2d 272 (Ind. Ct. App. 1992) (prosecution for conspiracy to deal cocaine did not violate double jeopardy, even though defendant had already been acquitted of dealing in cocaine based on same

transaction; substantive crime and conspiracy to commit that crime were not "same offense" for double jeopardy purposes).

(2) Test

Whether trial court's action constitutes an acquittal for purposes of the Double Jeopardy Clause is ascertained by determining whether substance of ruling actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. Martin Linen Supply Co., 430 U.S. 564, 97 S. Ct. 1349 (1977); State v. Lewis, 543 N.E.2d 1116, 1118 (Ind. 1989). See also Evans v. Michigan, 133 S. Ct. 1069 (2013).

(3) Judgment on Evidence = Acquittal

In Indiana, "acquittal" as defined for purposes of the Double Jeopardy Clause may take the form of a judgment on the evidence.

Williams v. State, 634 N.E.2d 849 (Ind. Ct. App.1994) (judgments on evidence, on grounds that state had failed to prove venue, were "acquittals;" court evaluated State's evidence and determined it to be legally insufficient for conviction; whether or not counts were dismissed or court's ruling was correct, court's action brought an end to the jeopardy which had attached when first witness was sworn before this particular jury; defendant may not now be retried).

State v. McKissack, 625 N.E.2d 1246 (Ind. Ct. App. 1993) (when trial judge granted defendant's motion for judgment on evidence in rape prosecution, even when he erred in applying law, that judgment acted as acquittal and barred second trial).

Baca v. State, 122 N.E.3d 1019 (Ind. Ct. App. 2019) (trial court erred and double jeopardy violated when, after it had entered directed verdict for defendant on two counts, the court then permitted State to amend one of those counts).

But see Milo v. State, 137 N.E.3d 995 (Ind. Ct. App. 2019) (double jeopardy did not bar trial court from reconsidering its earlier ruling granting motion defense counsel had described as for directed verdict because its ruling did not resolve all factual elements of burglary).

Double jeopardy does not bar reinstatement of guilty verdict set aside by trial court since no new fact-finding would be required. State v. Monticello Developers, Inc., 527 N.E.2d 1111 (Ind. 1988).

4. Retrial Permitted

Retrial generally permitted in the following circumstances:

(1) in cases where trial is terminated as a result of manifest necessity. Blevins v. State, 591 N.E.2d 562 (Ind. Ct. App. 1992) (hung jury operated to discharge operation of double jeopardy);
(2) in most circumstances where the trial is terminated at the defendant's request;
(3) in some cases, after a dismissal;

(4) in most cases where the conviction is reversed on appeal. See Ind. Code § 35-41-4-6(3); and

(5) invalid or fraudulently procured prosecution. See Ind. Code § 35-41-4-6.

a. Actual Evidence Test Applies Only to Convictions, Not Acquittals

Harris v. State, 992 N.E.2d 887 (Ind. 2013) (after jury acquitted defendant of rape, retrial on hung charge of sexual misconduct with a minor alleging "sexual intercourse with a child" did not violate double jeopardy under Indiana Constitution; actual evidence test does not apply to acquittals, mistrials, or a combination thereof; see also Buggs v. State, 844 N.E.2d 195 (Ind. Ct. App. 2006).

b. Mistrial for "Manifest Necessity"

Trial court may permit re-prosecution where trial terminated as result of manifest necessity. Manifest necessity contemplates sudden and overwhelming emergency beyond control of court. It includes any legal defect that would make any judgment in the case reversible as a matter of law, such as a defective information. Crim v. State, 156 Ind. App. 66, 294 N.E.2d 822, 829 (1973); see Ind. Code 35-41-4-3(a)(2)(iii).

Explicit finding of manifest necessity is not required as long as record provides sufficient justification for court's ruling on mistrial.

Renico v. Lett, 130 S.Ct. 1855 (2010) (trial judge's three-minute inquiry before determining that jurors in murder trial were deadlocked after four hours of deliberations was not so cursory to justify federal habeas corpus relief; retrial did not violate double jeopardy prohibition even though trial court made no finding that "manifest necessity" required mistrial).

Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824 (1978) (mistrial granted because of improper opening statement of defense; high degree of necessity required; degree of deference to trial judge differs regarding circumstances; trial court upheld despite failure to make specific findings; better practice to make findings and show consideration of alternatives to mistrial). See also Pavey v. State, 764 N.E.2d 692 (Ind. Ct. App. 2002).

United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547 (1971) (jury discharged during trial without manifest necessity; judge erred by discharging jury, but double jeopardy barred retrial).

Hall v. State, 722 N.E.2d 1280 (Ind. Ct. App. 2000) (manifest necessity did not exist to warrant mistrial when defense counsel's question elicited inadmissible evidence from witness at bench trial since we presume trial court disregards inadmissible testimony and makes decision based only on probative and relevant evidence).

Domangue v. State, 654 N.E.2d 1 (Ind. Ct. App. 1995) (double jeopardy barred re-prosecution because defendant's alleged violation of motion *in limine* was not manifest necessity warranting mistrial when trial court's order was unclear, elicited evidence was relevant, and any error could have been cured by admonishing jury).

Phillippe v. State, 458 N.E.2d 1159 (Ind. Ct. App. 1984) (no double jeopardy bar to

re-prosecution where prosecution dismissed over defendant's objection after jeopardy attached; prosecution discovered that original charge of child molesting was invalid because child was not under 12 years of age at time of alleged offense; error was trivial non-prejudicial mistake).

Green v. State, 875 N.E.2d 473 (Ind. Ct. App. 2007) (where detective inadvertently did not provide phone records to prosecutor until just before trial, State did not intentionally cause mistrial when phone records only came up due to jury question).

(1) Defendant's Conduct Provokes Mistrial

Retrial allowed where defendant's conduct or actions provoked the declaration of mistrial or a witness' refusal to testify undercuts the proceeding.

Brock v. State, 955 N.E.2d 195 (Ind. 2011) (denial of defendant's motion to dismiss was not abuse of discretion and retrial permissible where mistrial was necessity because defense counsel repeatedly made argument trial court had repeatedly admonished counsel about and because counsel implied that redacted parts of defendant's driving record were beneficial to him).

White v. State, 460 N.E.2d 132 (Ind. 1984) (medical examiner refuses to give opinion as to cause of death in double murder trial; judge declares witness in contempt, and then mistrial; retrial not barred).

Cabell v. State, 267 Ind. 664, 372 N.E.2d 1176, 1177 (1978) (if defendant moves for or consents to mistrial, he forfeits right to raise double jeopardy in further proceedings).

Bridwell v. State, 507 N.E.2d 644 (Ind. Ct. App. 1987) (defendant tells jury he passed polygraph test).

Unless the motion was necessitated by governmental conduct "intended to provoke the defendant into moving for a mistrial."

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 2091 (1982) (prosecutorial misconduct, even if viewed as harassment or overreaching sufficient to cause a mistrial on motion of defendant, does not bar retrial unless prosecutor intended to goad defendant into moving for a mistrial; states not required to follow under own constitutions).

(2) Errors Made by Prosecutor, Judge, or Juror

Corley v. State, 455 N.E.2d 945 (Ind. 1983) (manifest necessity did not include discharge so prosecutor could depose surprise witness; jury was discharged without showing manifest necessity that trial be discontinued; double jeopardy bars re-prosecution).

Tyson v. State, 543 N.E.2d 415 (Ind. Ct. App. 1989) (prosecution witness' failure to appear at trial did not constitute "manifest necessity" for declaring a mistrial; thus, retrial of defendant on charges of burglary and theft was barred by double jeopardy).

Burton v. State, 510 N.E.2d 228 (Ind. Ct. App. 1987) (defendant's right to be free

from double jeopardy was violated, where, at conclusion of trial on charge of driving with blood-alcohol content of .10% or more, trial court took cause under advisement and granted new trial to permit State to admit results of breath test, which had been excluded from first trial; circumstances did not bring case within "manifest necessity" doctrine).

Hall v. State, 722 N.E.2d 1280 (Ind. Ct. App. 2000) (manifest necessity did not exist to warrant mistrial when defense counsel's question elicited inadmissible evidence from witness at bench trial since we presume trial court disregards inadmissible testimony and makes decision based only on probative and relevant evidence).

Calvert v. State, 14 N.E.3d 818 (Ind. Ct. App. 2014) (Court rejected defendant's argument that Indiana Constitution's double jeopardy prohibition barred retrial on conviction reversed where trial court denied continuance request and let trial proceed *in absentia*; defendant failed to move for mistrial based on State's bad faith pursuit of trial *in absentia* and challenged misconduct occurred in argument prior to trial).

Glasscock v. State, 759 N.E.2d 1170 (Ind. Ct. App. 2001) (no manifest necessity for mistrial where State's witness claimed Fifth Amendment privilege since State could have granted immunity and proceeded with direct examination).

Cf.

Ried v. State, 610 N.E.2d 275 (Ind. Ct. App. 1993) (juror's untruthful answers on jury questionnaire and during voir dire concerning prior child molestation prosecution in which her daughter was alleged victim created manifest necessity for mistrial in child molestation prosecution, permitting retrial without violating double jeopardy), *aff'd by* 615 N.E.2d 893.

(3) Pre-Trial Publicity

Jackson v. State, 925 N.E.2d 369 (Ind. 2010) (even though five jurors said they would not be influenced by letter from defendant to prosecutor, which said AI know my life to you doesn't mean anything, just another poor black man the state can clean-up the book on," trial court did not abuse discretion in granting a mistrial and allowing retrial because it was in best position to determine if exposure to article would influence jurors).

(4) Defendant's Waiver of Objection to Retrial,

Defendant's motion to disqualify a judge or motion for mistrial waives any objections to retrial unless the prosecutor intended to provoke a defendant's motion for mistrial. Whitehead v. State, 511 N.E.2d 284 (Ind. 1987); Jenkins v. State, 492 N.E.2d 666 (Ind. 1986); see Ind. Code § 35-41-4-3(b).

Calvert v. State, 14 N.E.3d 818 (Ind. Ct. App. 2014) (Court rejected defendant's argument that Indiana Constitution's double jeopardy prohibition barred retrial on conviction reversed where trial court denied continuance request and let trial proceed *in absentia*; defendant failed to move for mistrial based on State's bad faith pursuit of trial *in absentia* and the challenged misconduct occurred in argument prior to defendant's trial).

Mears v. State, 533 N.E.2d 140 (Ind. 1989) (prosecutor's intern's remark in final argument that defendant who did not take the stand had failed to rebut State's case, an impermissible comment on his failure to testify, was innocent mistake; resultant mistrial was not provoked); see also Noble v. State, 734 N.E.2d 1119 (Ind. Ct .App. 2000) (prosecutor did not try to goad defendant into mistrial when he elicited testimony concerning lab report he did not disclose); and Wilson v. State, 697 N.E.2d 466 (Ind. 1998) (record supported finding that mistrial was not caused by deliberate conduct by prosecution).

Etter v. State, 56 N.E.3d 53 (Ind. Ct. App. 2016) (trial court's intemperate comments were not intended to goad defendant into seeking mistrial, so retrial did not violate double jeopardy prohibition; in heated exchange with defense counsel, trial court loudly proclaimed, "Have it your way," and "it's Burger King Day").

Harbert v. State, 51 N.E.3d 267 (Ind. Ct. App. 2016) (trial court did not err by denying co-defendant's motion to dismiss charges after mistrial; prosecutor had referred to defendant's criminal history, and trial court immediately granted mistrial; however, double jeopary did not bar retrial because there was no evidence the prosecutor intended to cause a mistrial, that the prosecutor colluded with the officer or that the officer knew that his comments would cause a mistrial).

Diaz v. State, 524 N.E.2d 1283 (Ind. 1988) (prosecution for dealing in narcotic drug was not barred following declaration of mistrial due to prosecutor's asking witness if defendant had served time previously for dealing in narcotics, where prosecutor had not been attempting to goad defense into moving for mistrial, but was sincere in his position that witness had brought defendant's character into controversy and that he was thus entitled to bring in prior convictions).

A defendant waives his right to raise double jeopardy by failing to make a timely objection to the discharge of the jury. Moyer v. State, 177 Ind. App. 461, 379 N.E.2d 1036 (1978).

Manns v. State, 459 N.E.2d 435 (Ind. Ct. App. 1984) (error to discharge jury in theft prosecution after it returned defective verdict finding defendant guilty of having in his possession stolen property, but it was not abuse of discretion to order retrial as defendant had waived double jeopardy claim where counsel waited until after jury had been discharged and left the courtroom before he raised any question as to appropriateness of the verdict).

c. State's Evidence Improperly Excluded

The Indiana Supreme Court has allowed retrial in cases where prosecution was not given fair opportunity to offer whatever proof it could assemble and relied on erroneous trial court ruling. Webster v. State, 274 Ind. 668, 413 N.E.2d 898 (1980) (after prosecutor presented evidence, the trial judge gave an erroneous final instruction, unduly restricting the use of the evidence; the trial court's ruling rendered the State's substantive evidence insufficient to convict as a matter of law; state was not given a fair opportunity to present its case; retrial ordered) (distinguishing Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141 (1978)), *appeal after remand* 442 N.E.2d 1034, *habeas corpus granted* 767 F.2d 1206,

cert. den. 475 U.S. 1032.

Morgan v. State, 440 N.E.2d 1087 (Ind. 1982) (retrial rather than discharge of defendant warranted where prosecution relied on judge's erroneous legal ruling that oral evidence standing alone was sufficient to support sentence enhancement; prosecution not given fair opportunity to offer whatever proof it could assemble).

d. Verdict "Against Weight of Evidence"

Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211 (1982) (reversal on the basis that verdict was against weight of the evidence as opposed to insufficiency of evidence does not bar retrial).

e. Invalid or Fraudulently Procured Prosecution

Ind. Code § 35-41-4-6 provides:

A former prosecution is not a bar under section 3, 4, or 5 of this chapter [Ind. Code § 35-41-4-3, 4, or 5] if:

(1) it was before a court that lacked jurisdiction over the defendant or the offense;

(2) it was procured by the defendant without the knowledge of the prosecuting authority and with intent to avoid a more severe sentence that might otherwise have been imposed; or

(3) it resulted in a conviction that was set aside, reversed, vacated, or held invalid in a subsequent proceeding, unless the defendant was adjudged not guilty or ordered discharged.

(1) Lack of Jurisdiction/Invalid Judgments

Majors v. State, 252 Ind. 672, 251 N.E.2d 571 (1969) (finding of not guilty entered in municipal court which did not have jurisdiction over felony charge would not preclude identical charge being made in criminal court).

Slack v. Grigsby, 229 Ind. 335, 97 N.E.2d 145 (1951) (accused was not put in jeopardy by a judgment of conviction which was void for lack of jurisdiction; when accused was discharged under writ of habeas corpus, he could again be arrested and prosecuted on the original indictment).

State v. Gurecki, 233 Ind. 383, 119 N.E.2d 895 (1954) (trial court can vacate original judgment of conviction and retry defendant only if original judgment of conviction has been previously adjudged void, and if defendant has been released by court having jurisdiction to do so).

Todd v. State, 229 Ind. 664, 101 N.E.2d 45 (1951) (where federal court decided that judgment of conviction in state court was void for want of due process, proceedings subsequent to time due process was denied were void in fact, and defendant was not placed in double jeopardy by retrial).

(2) Collusion or Fraud

Brackney v. State, 182 Ind. 343, 106 N.E. 532 (1914) (where accused was acquitted in a prosecution before a justice, such acquittal does not bar further prosecution if there was collusion between defendant and justice of the peace, or defendant procured his own prosecution, or there was any fraud).

(3) Withdrawal of Guilty Plea

Ledgerwood v. State, 134 Ind. 81, 33 N.E. 631 (1893) (where, on trial for arson, it appears that before return of indictment defendant had pleaded guilty to information charging him with the same offense, and that to this information a nolle prosequi had been entered, defendant having withdrawn his plea of guilty with consent of court, defendant's motion to be discharged on ground of being twice put in jeopardy was properly *overruled*, as by withdrawing his plea in prosecution under information he waived such defense to subsequent prosecution).

f. Retrial of Habitual Count

Habitual charge retrial is not barred by conviction and sentencing on the predicate offenses, nor by the fact defendant begins serving the lesser sentences.

Jackson v. State, 521 N.E.2d 339 (Ind. 1988) (double jeopardy clause protects only "legitimate expectations of finality" - defendant knew at retrial/resentencing of likelihood of enhancement and did not object).

Hicks v. Duckworth, 922 F.2d 409 (7th Cir. 1991) (defendant who pled guilty did not have legitimate expectation of finality in sentence, so double jeopardy rights were not violated when state successfully pursued appeal of dismissal of habitual offender charge after defendant had already begun serving sentence; prosecutor stated in open court at time of entry of defendant's plea that habitual offender allegation would be added to pending charges, and dismissal of habitual offender charge prior to sentencing gave state basis to pursue appeal under state law).

Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005) (in light of Monge v. California, 524 U.S. 721 (1988), Double Jeopardy Clause of U.S. Constitution does not bar retrial of a habitual offender enhancement set aside on appeal for insufficient evidence); see also Moore v. State, 769 N.E.2d 1141 (Ind. Ct. App. 2002) (Article 1, section 14 of Indiana Constitution does not bar retrial of habitual offender charge when enhancement was earlier reversed on basis of insufficient evidence); Dexter v. State, 959 N.E.2d 235 (Ind. Ct. App. 2012) (holding same).

Cf.

Burks v. United States, 437 U.S. 1 98 S. Ct. 2141 (1978) (double jeopardy forbids second trial for purpose of affording prosecution another opportunity to offer evidence which it failed to assemble in first proceeding).

g. Judge Stops Trial

Trial judge may stop trial on his own motion, without thereby barring future proceedings,

when indictment is so defective in form as to entitle defendant to reversal of any judgment entered thereon against him or judge discovers any defect which would render verdict against defendant void or voidable after commencement of trial. Marsh v. State, 104 Ind. App. 377, 8 N.E.2d 121 (1937).

h. Void Judgment

Defendant not put in jeopardy by void judgment and may be re-prosecuted on the charge. Slack v. Grigsby, 97 N.E.2d 145 (Ind. 1951); Roe v. State, 598 N.E.2d 586, 588 (Ind. Ct. App. 1992).

i. Severed Charges

Where defendant agrees to a severance of charges, the defendant waives any double jeopardy claims in the resulting convictions. Currier v. Virginia, 138 S. Ct. 2144 (2018).

5. Related Doctrines

a. Collateral Estoppel

Collateral estoppel is embodied in the Double Jeopardy Clause. It does not generally bar subsequent prosecution but is an integral part of protection against double jeopardy guaranteed by Fifth and Fourteenth Amendments, such that when State has received adverse decision of critical issue of fact in trial, that adverse decision prevents later re-litigation of the same issue in later prosecution.

Bravo-Hernandez, et al. v. United States, 137 S. Ct. 352 (2016) (collateral estoppel/issue preclusion part of Double Jeopardy Clause does not bar retrial of vacated bribery conviction where same jury acquitted defendant of conspiracy to commit bribery; burden lies on defendant to show that issue he seeks to shield from reconsideration by retrial was actually decided by prior jury's verdict of acquittal).

Harris v. State, 992 N.E.2d 887 (Ind. Ct. App. 2013) (defendant's acquittal on rape charge did not preclude re-litigation of sexual misconduct with minor charge; because jury may have acquitted defendant of rape because it found lack of force, acquittal did not necessarily mean jury found that sexual intercourse did not occur).

Buggs v. State, 844 N.E.2d 195 (Ind. Ct. App. 2006) (doctrine of collateral estoppel did not bar retrying defendant on murder and attempted robbery charge where jury hung on those two charges and acquitted defendant of felony robbery and conspiracy to commit robbery; nonetheless, defendant could not be convicted of attempting to rob victim after killing victim; it is impossible to commit all elements of attempted robbery on person who is already dead, distinguishing Robinson v. State, 693 N.E.2d 548 (Ind. 1998)).

Coleman v. State, 946 N.E.2d 1160 (Ind. Ct. App. 2011) (double jeopardy does not bar State from retrying Defendant where in first trial jury acquitted defendant of murder with respect to one victim but failed to return verdict on charge of attempted murder with respect to another victim; whether defendant acted in self-defense when he shot first man was not necessarily decided in first trial by jury's acquittal as to death of second man).

Townsend v. State, 632 N.E.2d 727 (Ind. 1994) (double jeopardy barred retrial upon single count indictment charging defendant with battery against two children; any retrial upon charge in indictment would require re-litigation of same factual issue; error requiring reversal was verdict form instruction which allowed jury to find that defendant was guilty of battery upon only one of those children, jury's verdict of not guilty of crime of battery against one of two children specified in indictment resolved factual issue against State of whether that child had been touched in rude manner, and any retrial upon charge in indictment would require re-litigation of this same factual issue).

Little v. State, 501 N.E.2d 412, 414 (Ind. 1986) (forbids government from re-litigating certain facts in order to establish the fact of the crime; acquittal of crime may preclude its use in a future trial as Rule 404(b) evidence). See also Little v. State, 580 N.E.2d 675 (Ind. 1991).

Boles v. State, 595 N.E.2d 272, 274 (Ind. Ct. App. 1992) (defendant was acquitted of dealing cocaine; whether the defendant did deal in cocaine need not be established at his trial for conspiracy to deal cocaine; thus, the State amended its conspiracy information to delete all allegations concerning the transaction; no basis for claiming collateral estoppel bars conspiracy prosecution).

Segovia v. State, 666 N.E.2d 105 (Ind. Ct. App. 1996) (prosecution for conspiracy to commit arson was barred by defendant's acquittal of felony murder in prior proceeding; because fact that defendant was not involved in arson was necessarily decided in first trial, State was estopped from attempting to prove he was involved in arson in second trial).

McWhorter v. State, 993 N.E.2d 1141 (Ind. 2013) (after grant of post-conviction relief on voluntary manslaughter conviction due to flawed jury instruction, it was permissible on remand to retry defendant on either voluntary manslaughter charge or reckless homicide charge); but see McWhorter v. State, 117 N.E.3d 614 (Ind. Ct. App. 2018) (Bailey, J., dissenting, would find double jeopardy violation where after being acquitted of murder, trial on voluntary manslaughter was classic example of double jeopardy because under Brantley v. State, 91 N.E.3d 566 (2018), voluntary manslaughter is standalone charge that required defendant to again defend against elements of murder).

Griffin v. State,717 N.E.2d 73 (Ind. 1999) (collateral estoppel did not bar retrial on robbery charge because acquittal on felony murder charge could have been based on issue other than jury finding defendant did not commit robbery).

Smith v. State, 670 N.E.2d 360 (Ind. Ct. App. 1996) (although defendant was previously acquitted in one county on charges arising from same drug sting operation, collateral estoppel did not bar prosecution in second county; evidence did not demonstrate that defendant was entrapped during entire series of drug transactions).

Wood v. State, 988 N.E.2d 374 (Ind. Ct. App. 2013) (collateral estoppel precluded guilty plea for possession of firearm by SVF after acquittal in first phase of bifurcated trial).

Davis v. State, 691 N.E.2d 1285 (Ind. Ct. App. 1998) (defendant's prior acquittal of murder of first victim did not preclude retrial and conviction of murder of second victim even though both murders may have been part of same criminal episode; at first trial, jury found that defendant acted in self-defense when he shot first victim, but could not come to determination concerning shooting of second victim).

Griffin v. State, 717 N.E.2d 73 (Ind. 1999) (collateral estoppel did not bar retrial on robbery charge because acquittal on felony murder charge could have been based on issue other than jury finding defendant did not commit robbery).

Stephens v. State, 874 N.E.2d 1027 (Ind. Ct. App. 2007) (defendant was collaterally estopped from attacking the validity of former child support proceedings in non-support prosecution despite fact that defendant was not represented in the child-support proceedings).

Berkman v. State, 976 N.E.2d 68 (Ind. Ct. App. 2012) (refusing to apply Richardson to successive prosecutions).

See also

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970) (bars the re-introduction or re-litigation of **facts** already established against the government).

(1) Elements

In most jurisdictions the following four elements must exist for collateral estoppel to apply:

(1) the issue was actually litigated in the first proceeding,
(2) the first proceeding resulted in a valid and final judgment,
(3) resolution of the issue was essential to the judgment rendered in the first proceeding, and
(4) the issue in the second proceeding must be identical to the issue in the first proceeding.

Where a previous acquittal was based upon a general verdict, the Court must "examine the record . . . taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the party asserting collateral estoppel seeks to foreclose from consideration."

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 1195 (1970) (six men were playing poker when they were robbed by three or four masked men; defendant and three others were charged with six counts of armed robbery; defendant was brought to trial on one armed robbery counts and was acquitted on general verdict; Court held trial on five other charges was barred and found that "the single rationally conceivable issue in dispute before the jury was whether petitioner had been one of the robbers. And the jury, by its verdict, found that he had not.").

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979) (no longer

necessary that parties in both proceedings be the same).

There is a conflict in Indiana law as to whether non-mutual collateral estoppel will be applied in criminal proceedings, i.e., whether the State can be collaterally estopped from re-litigating the same issue on the same facts that it lost in a co-defendant's case.

Jennings v. State, 714 N.E.2d 730 (Ind. Ct. App. 1999) (applying non-mutual estoppel).

Perez-Grahovac v. State, 894 N.E.2d 578 (Ind. Ct. App. 2008) (distinguishing Jennings because Court did not have adequate record to determine basis of trial court's ruling in co-Defendant's case – transcript was not provided, and trial court made no findings of fact and conclusions of law).

But see

Reid v. State, 719 N.E.2d 451 (Ind. Ct. App. 1999) (declining to apply non-mutual estoppel in criminal cases).

Martin v. State, 740 N.E.2d 137 (Ind. Ct. App. 2001) (following Reid, *supra*).

b. Res Judicata

Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999) (to prove re-litigation is barred by res judicata, four elements must be satisfied: (1) former judgment must have been rendered by court of competent jurisdiction; (2) former judgment must have been rendered on merits; (3) matter now in issue was or could have been determined in prior action; and (4) controversy adjudicated in former action must have been between same parties to present suit or their privies).

Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999) (res judicata, not double jeopardy, barred second probation revocation following reversal of first revocation due to insufficient evidence; res judicata bars re-litigation of claim after final judgment has been rendered, when subsequent action involves same claim between same parties).

Dexter v. State, 991 N.E.2d 171 (Ind. Ct. App. 2013) (even if four-pronged test from Shumate applies, Supreme Court's decision reversing defendant's habitual offender enhancement was not final judgment on merits, so doctrine of res judicata did not bar State retrying him).

Arthur v. State, 663 N.E.2d 529 (Ind. 1996) (issue previously raised and decided adverse to appellant is barred by doctrine of res judicata, but on appeal of denial of second PCR, Court of Appeals reversed; Supreme Court granted transfer, ruling that although court may revisit prior decision, it should be loath to do so in absence of extraordinary circumstances such as where initial decision was clearly erroneous; here, Court of Appeals prior decision on instruction issue was not clearly erroneous).

Becker v. State, 992 N.E.2d 697 (Ind. 2013) (principles of res judicata barred State from re-litigating defendant's Sex Offender Registry requirements).

Moody v. State, 749 N.E.2d 65 (Ind. Ct. App. 2001) (res judicata barred defendant from re-litigating his claim of ineffective assistance of counsel on post-conviction appeal).

Maxey v. State, 596 N.E.2d 908 (Ind. Ct. App. 1992) (petitioner for post-conviction relief cannot escape effect of claim preclusion merely by using different language to phrase issue and define alleged error).

c. "Dual Sovereignty" Doctrine

(1) No constitutional violation

"When a defendant in single act violates the (peace and dignity) of two sovereigns by breaking the laws of each, he has committed two distinct offenses." Heath v. Alabama, 474 U.S. 82, 106 S. Ct. 433 (1985) (double jeopardy clause does not prohibit successive criminal prosecutions by different states for same offense, where conduct complained of violates the laws of both states). The U.S. Supreme Court reaffirmed this "separate sovereigns" doctrine in Gamble v. U.S., 139 S. Ct. 1960 (2019).

Gamble v. United States, 139 S. Ct. 1960 (2019) (crime against two sovereigns constitutes two offenses because each sovereign has interest to vindicate).

Puerto Rico v. Sanchez Valle, 136 S.Ct. 1863 (2016) (federal double jeopardy clause bars Puerto Rico from prosecuting defendant for illegally selling firearms after he pled guilty in federal court for same transactions under analogous federal statute; dual sovereignty exception to double jeopardy prohibition does not apply here because the source of Puerto Rico's authority to impose punishment for criminal offenses is Congress, not source of law independent of Congress).

The same rule applies for successive prosecutions by a State and the United States. Abbate v. U.S., 359 U.S. 187, 79 S. Ct. 666 (1959).

Jackson v. State, 563 N.E.2d 1310 (Ind. Ct. App. 1990) (prosecution for possession of librium with intent to deliver was not barred by double jeopardy clause due to defendant's earlier prosecution and conviction by federal government on charges of illegal use of telephone and possession of cocaine with intent to deliver arising out of same incident).

(2) Statutory violation

Where the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution is a bar to a subsequent prosecution for the same conduct in Indiana, if the former prosecution resulted in an acquittal, conviction, or an improper termination under Ind. Code § 35-41-4-3. See Ind. Code § 35-41-4-5.

Statutory bar extends to prior federal prosecutions. Fadell v. State, 450 N.E.2d 109 (Ind. Ct. App. 1983) (finding, however, that federal proceeding was not "improperly terminated").

d. Parallel Actions; Civil Sanctions

Under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent the second sanction may not fairly be characterized as remedial but only as deterrent or retribution. A civil penalty counts as "punishment" for double jeopardy purposes when it "bears no rational relationship to the goal of compensating the government for its losses."

State v. Hurst, 688 N.E.2d 402 (Ind. 1997) (judgment on failure to yield right-of-way infraction was not sufficiently punitive to bar subsequent prosecution for reckless homicide based on same conduct), *overruled on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

State v. Klein, 702 N.E.2d 771 (Ind. Ct. App. 1998) (Double Jeopardy principles prohibited criminal prosecution of defendant for attempted rape and criminal confinement following civil forfeiture of his car based on same conduct).

O'Connor v. State, 789 N.E.2d 504 (Ind. Ct. App. 2003) (finding no double jeopardy violation, Court of Appeals questioned viability of Klein, *supra*).

The Double Jeopardy Clause protects only against the imposition of multiple *criminal* punishments for the same offense. Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction, but even where the legislature has indicated an intention to establish a civil penalty, the statutory scheme may be so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. Hudson v. U.S., 522 U.S. 93, 118 S. Ct. 488 (1997).

U.S. v. Hanahan, 798 F.2d 187, 189-90 (7th Cir. 1986) (subjecting defendant to both parole revocation and separate criminal punishment for same offense does not violate Double Jeopardy Clause).

Garrity v. Fiedler, 41 F.3d 1150 (7th Cir. 1994) (Fifth Amendment's Double Jeopardy Clause permits criminal prosecution for conduct that served as basis for prison discipline; prison disciplinary process determines whether defendant has violated conditions of incarceration and is designed to maintain institutional security and order; criminal prosecution is designed to punish the defendant for a violation of the criminal laws), *cert. denied*. See also Brown v. State, 172 N.E.3d 1273 (Ind. Ct. App. 2021).

I. STATUTE OF LIMITATIONS - UNTIMELY PROSECUTION

1. Authority/Time

Statute of limitations exists primarily to ensure against inevitable prejudice and injustice to defendant that a delay in prosecution creates. Charge filed within statutory limitations period considered timely. Heitman v. State, 627 N.E.2d 1307, 1309 (Ind. Ct. App. 1994). **NOTE:** For instances when delay in prosecution violates defendant's due process rights see Section II.M.3.

Upon motion of defendant, court may dismiss indictment or information if prosecution is untimely brought. Ind. Code § 35-34-1-4(a) (8). Motion may be made or renewed any time

before or during trial. Ind. Code § 35-34-1-4(b).

Criminal Rule 3 requires a memorandum to be filed along with motion stating specifically grounds for dismissal.

Ind. Code § 35-34-1-8 requires:

- motion to dismiss be in writing;
- reasonable notice to prosecutor;
- affidavits containing sworn allegations of facts;
- memorandum of law stating specific legal question in issue.

The defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

2. Prosecution Barred - Statute of Limitations - Ind. Code § 35-41-4-2

a. Cannot Revive Time-barred Claims

A state may not amend its statute of limitations to revive a previously time-barred criminal prosecution. Stogner v. California, 123 S. Ct. 2446 (2003).

The Indiana Legislature has amended the statute of limitations in criminal cases, Ind. Code § 35-41-4-2, repeatedly, often including a non-code provision in the public law specifying that the amended version applies only to offenses occurring after a certain date.

b. Failure to Raise at Trial Does Not Waive

Even though defendant does not raise statute of limitations defense at trial, State remains barred from prosecuting where State files information for count after expiration of limitations period. Jewell v. State, 877 N.E.2d 864 (Ind. Ct. App. 2007), *summarily aff'd by* 887 N.E.2d 939 (2008).

c. Felonies - Five Years for Class B, C, D; Levels 3, 4, 5, and 6

Generally, a prosecution for a Class B, C, or D felony (crimes committed before July 1, 2014) or a Level 3, Level 4, Level 5, or Level 6 felony (crimes committed after June 30, 2014) must be commenced within five years after the commission of the crime. Ind. Code § 35-41-4-2(a) (1).

State v. Lindsay, 862 N.E.2d 314 (Ind. Ct. App. 2007) (charge of corrupt business influence properly dismissed; State's attempt to characterize defendant's actions as an ongoing RICO offense rejected; defendant's alleged false statements concerning murders were not related to his performance of official duties as a federal officer, which is required to constitute offense of official misconduct).

d. Exception - Newly Discovered DNA Evidence

A prosecution for a class B or C felony (crimes committed before July 1, 2014) or a Level 3, Level 4, or Level 5 felony (crimes committed after June 30, 2014) that would

otherwise be barred under Indiana Code § 35-41-4-2 may be commenced within one year after the earlier of the date on which the state (1) first discovers the identity of the offender with DNA evidence, or (2) could have discovered the identity of the offender with DNA evidence by the exercise of due diligence. See Ind. Code § 35-41-4-2(b).

PRACTICE POINTER: In old cases based on DNA evidence, check carefully to ensure that the prosecution has not been time-barred at some point in the past, and revived by an amendment to the statute of limitations. If the prosecution was ever time-barred, it may not be revived by a change in the statute of limitations. See Stogner v. California, 123 S. Ct. 2446 (2003).

e. Misdemeanors - 2 years

Unless commenced within 2 years after commission. Ind. Code § 35-41-4-2(a)(2).

f. Forgery of Instrument, or Uttering Forged Instrument - 5 years

Unless commenced within 5 years after maturity of instrument. Ind. Code § 35-41-4-2(f).

g. Child Molest (for Offenses after June 30, 1988)

Child molesting involving sexual intercourse or deviate sexual conduct (or, after June 30, 2014, "other sexual conduct" instead of "deviate sexual conduct") under Ind. Code § 35-42-4-3(a), vicarious sexual gratification, child solicitation, child seduction, and incest may be brought up to time alleged victim reaches age of 31. Ind. Code § 35-41-4-2(e). Child molesting under Ind. Code § 35-42-4-3(b) (fondling or touching) is subject to the normal statute of limitations.

Wallace v. State, 753 N.E.2d 568 (Ind. 2001) (child molesting convictions first charged in 1998 for alleged acts done in 1988-89 were barred by five-year statute of limitations that was in effect in 1998).

Baumholser v. State, 186 N.E.3d 684 (Ind. Ct. App. 2022) (trial counsel ineffective for not moving to dismiss child molesting charges when victim's testimony at trial showed allegations occurred more than five years before charges were filed).

A state may not amend its statute of limitations to revive a previously time-barred criminal prosecution. Stogner v. California, 123 S.Ct. 2446 (2003). P.L. 232-1993, §4 provides: "Ind. Code § 35-41-4-2, as amended by this act, only applies to crimes committed after June 30, 1988."

Amendment to statute of limitations applies to offenses for which original statute of limitations had not yet expired when amendment took place.

Swopshire v. State, 177 N.E.3d 98 (Ind. Ct. App. 2021) (prosecution on 2019 charge for sexual misconduct with minor, which allegedly occurred in 2009, did not violate SOL because 2013 statutory amendment expanding limitations period to ten years passed before original five-year SOL expired).

3. Prosecution Not Barred

a. Murder

Prosecution may be commenced at any time, regardless of the amount of time that passes between the date of commission and the day the alleged victim of the murder dies. (The 'year and a day' rule is abolished.) Ind. Code § 35-41-4-2(d).

See Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693 (2001) (abolishing the common law 'year and a day' rule after the date of the offense, and prosecuting defendant under the new rule, was not an *ex post facto* or due process violation).

b. Class A Felony; Level 1 or Level 2 Felony

A prosecution for a Class A felony (for a crime committed before July 1, 2014) or a Level 1 felony or Level 2 felony (for a crime committed after June 30, 2014) may be commenced at any time. Ind. Code 35-41-4-2(c).

c. After Dismissal (90-Day Reprieve)

Ind. Code § 35-41-4-2(g) provides:

If a complaint, indictment, or information is dismissed because of an error, defect, insufficiency, or irregularity, a new prosecution may be commenced within ninety (90) days after the dismissal even if the period of limitation has expired at the time of dismissal or will expire within ninety (90) days after the dismissal.

d. Entry of Guilty Plea

Ind. Code § 35-41-4-2(j) provides: "A prosecution is considered timely commenced for any offense to which the defendant enters a plea of guilty, notwithstanding that the period of limitation has expired."

e. Incest

Pavan v. State, 64 N.E.3d 231 (Ind. Ct. App. 2016) (trial counsel was not ineffective for failing to pursue statute-of-limitations defense to incest charge involving defendant's thirty-four-year-old biological aunt; charges were filed within five-year statute of limitations, but I.C. 35-41-4-2(e) provides that prosecution for incest barred unless commenced before date alleged victim reaches age of thirty-one; purpose of this statute is to extend statute of limitations to allow victims of certain sex crimes to report their abuse upon reaching adulthood, not to shorten applicable statute for any crime or wholly decriminalize an otherwise illegal sex act based on age of other party).

f. Child Molesting

Quinn v. State, 45 N.E.3d 39 (Ind. Ct. App. 2015) (in an issue of first impression, Court held that defendant was not entitled to dismissal on statute of limitations grounds, even though he was charged 25 years after he committed his crimes, because the State acted with due diligence in discovering DNA evidence that tied defendant to his crimes; see Ind. Code § 35-41-4-2(b)).

g. Rape

Pursuant to Ind. Code § 35-41-4-2(n), a prosecution for rape (Ind. Code § 35-42-4-1) as a Class B or Level 3 felony that would otherwise be barred under this section may be commenced not later than five years after the earlier of the date on which:

(1) the state first discovers evidence sufficient to charge the offender with the offense through DNA analysis;
(2) the state becomes aware of the existence of a recording (as defined in Ind. Code § 35-31.5-2-273) that provides evidence sufficient to charge the offender with the offense; or
(3) a person confesses to the offense.

h. Criminal Deviate Conduct

Pursuant to Ind. Code § 35-41-4-2(o), a prosecution for criminal deviate conduct (Ind. Code § 35-42-4-2) (repealed) as a Class B felony, that would otherwise be barred under this section may be commenced not later than five years after the earliest of the date on which:

(1) the state first discovers evidence sufficient to charge the offender with the offense through DNA analysis;
(2) the state becomes aware of the existence of a recording (as defined in Ind. Code § 35-31.5-2-273) that provides evidence sufficient to charge the offender with the offense; or
(3) a person confesses to the offense.

4. Tolling Statute

Ind. Code § 35-41-4-2(h) provides:

The period within which a prosecution must be commenced does not include any period in which:

(1) the accused person is not usually and publicly resident in Indiana or so conceals himself or herself that process cannot be served;
(2) the accused person conceals evidence of the offense, and evidence sufficient to charge him with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence; or
(3) the accused person is a person elected or appointed to office under statute or constitution if the offense charged is theft or conversion of public funds or bribery while in public office.

a. Tolled When Not Amenable to Process

Ind. Code § 35-41-4-2(h)(1) tolls the criminal statute of limitations only when the suspect is not amenable to process, whether he is in or out of Indiana. The statute of limitations is not tolled if the suspect has left the state and cooperates fully and returns voluntarily to face the charges.

Heitman v. State, 627 N.E.2d 1307 (Ind. Ct. App. 1994) (statute of limitations not

tolled where defendant resided in Pennsylvania, remained in constant contact with Indiana authorities, paid for detective to travel to Pennsylvania, and no evidence State had difficulty in locating or investigating him).

Willner v. State, 602 N.E.2d 507 (Ind. 1992) (when State relies on exception to statute of limitations which tolls running of limitation period if defendant conceals himself or leaves jurisdiction of Indiana courts, State required to plead those circumstances so defendant apprised of facts upon which State intends to rely so he may be prepared to meet that proof at trial), *on remand,* 612 N.E.2d 162.

Lebo v. State, 977 N.E.2d 1031 (Ind. Ct. App. 2012) (statute of limitation properly tolled where defendant, a coach, concealed crime by telling her players not to discuss sexual abuse of one of their teammates).

Gilliland v. State, 979 N.E. 2d 1049 (Ind. Ct. App. 2012) (statute of limitation properly tolled where athletic director concealed the fact that he had duty to report alleged misconduct between volleyball coach and player).

Woods v. State, 980 N.E.2d 439 (Ind. Ct. App. 2012) (probable cause affidavit, taken together with charging information, contained sufficient facts to allege concealment to toll running of statute of limitation).

Reeves v. State, 938 N.E.2d 10 (Ind. Ct. App. 2010) (where State failed to allege in charging information facts that supported the concealment of evidence exception to statute, trial court abused its discretion by denying defendant's motion to dismiss).

b. Concealment

Tolling of the statute of limitations is triggered by concealment. For example, if a suspect leaves the state and evades extradition or otherwise avoids authorities, the statute of limitations begins to run when concealment ends.

Study v. State, 24 N.E.3d 947 (Ind. 2015) (tolling requires positive act of concealment where defendant conceals evidence that crime was actually committed, not just effort to conceal evidence of guilt; thus, where State charged defendant with multiple bank robberies and claimed he concealed crime by wearing mask and hiding in getaway car, defendant did not conceal fact that crime had actually been committed, so statute of limitations was not tolled).

Dvorak v. State, 78 N.E.3d 25 (Ind. Ct. App. 2017) (trial court erred by denying defendant's motion to dismiss counts of offer or sale of unregistered security and acting as an unregistered agent because charges were outside five-year statute of limitations; defendant did not engage in any positive act calculated to conceal fact he was not registered and security was not registered with Secretary of State).

But see Amos v. State, 83 N.E.3d 1221 (Ind. Ct. App. 2017) (distinguishing Dvorak, Court held that defendant's regular communications with his investors constituted attempt to delay or prevent discovery of alleged commission of crimes of securities fraud and offer or sale of unregistered security, and thus constituted positive acts of concealment for purpose of tolling the statute of limitations).

Sloan v. State, 947 N.E.2d 917 (Ind. 2011) (tolling of limitations period ends and begins to run when prosecutor becomes aware or should have become aware of sufficient evidence to file charges, not when defendant stopped threatening complaining witness she would go to jail if she reported acts of molestation).

Thakkar v. State, 613 N.E.2d 453, 458 (Ind. Ct. App. 1993) (court erred by not dismissing count; State did not bring charges against defendant in timely manner; assuming concealment of crime, the concealment ceased in January of 1984 and statute of limitations then began to run; but charges not filed until more than five years later).

But see Sloan v. State, 947 N.E.2d 917 (Ind. 2011) (to extent that Thakkar may be interpreted as contrary to Court's holding in Sloan, it is disapproved; Sloan held that when defendant conceals evidence, statute of limitations under I.C. 35-41-4-2(h) is tolled until State becomes aware, or should have been aware, of sufficient evidence to charge defendant)

Kifer v. State, 740 N.E.2d 586 (Ind. Ct. App. 2000) (defendant's alteration and disposal of his car did not amount to concealment of fact that crime had been committed but was only concealment of his guilt).

State v. Lindsay, 862 N.E.2d 314 (Ind. Ct. App. 2007) (simple fact that defendant moved to Florida in 1996 is not indicative of an intent to avoid service of process and did not constitute an act of concealment so as to toll the statute of limitations).

State v. Barnett, 176 N.E.3d 542 (Ind. Ct. App. 2021) (no positive act to conceal alleged criminal neglect of dependent occurred by defendants changing dependent's birth year from 2003 to 1989, instructing dependent to tell others she was age 22, moving to Canada where dependent had no previous contacts, or by objecting to modification of dependent's age change, because acts did not prevent State from discovering that defendants allegedly committed neglect of dependent).

State required to plead circumstances in information.

Willner v. State, 602 N.E.2d 507 (Ind. 1992) (when State relies on exception to statute of limitations which tolls running of limitation period if defendant conceals himself or leaves jurisdiction of Indiana courts, defendant must be apprised of facts upon which state intends to rely, so he may be prepared to meet that proof at trial), *on remand* 612 N.E.2d 162.

(1) Threat Made to Child Molest Victim May Amount to Concealment

The statute of limitations is tolled when accused has some coercive influence over a child sex offense victim.

Sloan v. State, 947 N.E.2d 917 (Ind. 2011) (when defendant conceals evidence, statute of limitations under Ind. Code § 35-41-4-2(h) is tolled until State becomes aware, or should have been aware, of sufficient evidence to charge defendant).

Crider v. State, 531 N.E.2d 1151 (Ind. 1988) (statute of limitations did not run until victim made disclosure to authorities; both victim and her sister testified

they did not tell anyone of the repeated attacks by their father because he threatened to "put them in the hospital" if they told anyone; defendant successfully concealed fact of his crimes by positive acts of intimidation of victims) (**NOTE:** Sloan and Umfleet, infra, predate the 1993 change to statute of limitations which ties the time limit for prosecution to the victim's 31st birthday).

Umfleet v. State, 556 N.E.2d 339 (Ind. Ct. App. 1990) (statute not tolled for child molestation charge on concealment grounds; victim stated she was afraid to report alleged abuse but testified defendant never told her not to tell anyone; unreasonable to infer that victim's statement was attributable to any positive acts of intimidation by defendant), *trans. denied, disapproved of on other grounds by* Sloan v. State, 947 N.E.2d 917, 921 n.7 (Ind. 2011).

Baumholser v. State, 186 N.E.3d 684 (Ind. Ct. App. 2022) (analogizing Umfleet, Court held child molest victim's testimony she was afraid of defendant was not evidence that he took positive step to conceal fact that crime occurred and thus statute of limitations not tolled for positive concealment).

(2) Threats Made to Adult — Undecided

Undecided whether tolling of criminal statute of limitations extends to situation where victim is adult. Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993), *disapproved of on other grounds by* Sloan v. State, 947 N.E.2d 917, 921 n.7 (Ind. 2011) (holding that when defendant conceals evidence, statute of limitations under I.C. 35-41-4-2(h) is tolled until State becomes aware, or should have been aware, of sufficient evidence to charge defendant).

c. Bribery or Theft by Public Officer

Stuckey v. State, 560 N.E.2d 88 (Ind. Ct. App. 1990) (statute of limitations not tolled where defendant who worked for State Fair Board as superintendent of buildings was employee, not "public officer").

Willner v. State, 602 N.E.2d 507 (Ind. 1992) (information adequately advised defendant that State intended to rely on his status as office holder to extend statute of limitations).

d. When Prosecution "Commenced" for Purposes of Tolling

Ind. Code § 35-41-4-2(i) provides:

> For purposes of tolling the period of limitation only, a prosecution is considered commenced on the earliest of these dates:
>
> (1) The date of filing of an indictment, information, or complaint before a court having jurisdiction.
> (2) The date of issuance of a valid arrest warrant.
> (3) The date of arrest of the accused person by a law enforcement officer without a warrant, if the officer has authority to make the arrest.

J. SPEEDY TRIAL VIOLATIONS

Ind. Code § 35-34-1-4(a)(9) provides that court may, upon motion of defendant, dismiss indictment or information if defendant has been denied right to speedy trial.

Motion may be made or renewed at any time before or during trial. Ind. Code § 35-34-1-4(b).

- Ind. Code § 35-34-1-8 requires:
- motion to dismiss be in writing;
- reasonable notice to prosecutor;
- affidavits containing sworn allegations of facts;
- memorandum of law stating specific legal question in issue.

See also Criminal Rule 3 requiring memorandum be filed along with motion stating specifically grounds for dismissal.

To determine speedy trial violations, see discussion in Chapter 11, Section I.1.

For violations of the Interstate Agreement on Detainers (IAD) see "Speedy Trial," Chapter 11, Section III.

K. LACK OF JURISDICTION

Motion to dismiss may be made if the court lacks jurisdiction on either of following grounds:

Ind. Code § 35-34-1-6(a)(2) (dismissal because indictment or information defective - allegations demonstrate court does not have jurisdiction of offense charged).

Ind. Code § 35-34-1-4(a)(10) (jurisdictional impediment to conviction of defendant for offense charged).

1. When to Make Motion

a. Prior to Omnibus - When Allegations Show No Jurisdiction

Motion to dismiss must be made prior to omnibus date (20 days for felonies or 10 days for misdemeanors). Motion made thereafter may be summarily denied. Ind. Code § 35-34-1-4(b)).

b. Before or During Trial - When Jurisdictional Impediment

Motion may be made or renewed before or during trial. Ind. Code § 35-34-1-4(b).

Defendant required to prove "by preponderance of the evidence every fact essential to support the motion." Ind. Code § 35-34-1-8(f).

> Benham v. State, 637 N.E.2d 133, 138 (Ind. 1994) (denial of defendant's motion to dismiss not erroneous; defendant failed to establish that all charged criminal conduct necessarily occurred on Kentucky side of Indiana's southern territorial boundary so as to demonstrate jurisdictional impediment to conviction).

c. Any Time - When Lack of Subject Matter Jurisdiction

Motion to dismiss based upon lack of jurisdiction over subject matter may be made at any time. Ind. Code § 35-34-1-4(b). See Trial Rule 12(b) (1).

For jurisdiction of various Indiana courts see Section II.K.6, below.12

PRACTICE POINTER: Subject matter jurisdiction is power of court to hear and to determine general class of cases to which proceedings before it belong. The relevant inquiry in determining whether court has subject matter jurisdiction is whether the kind of claim plaintiff advances falls within the general scope of authority conferred upon such court by constitution or statute. Twyman v. State, 459 N.E.2d 705, 707 (Ind. 1984); Harp v. Indiana Dept. of Highways, 585 N.E.2d 652 (Ind. Ct. App. 1992).

d. Filing Requirements

Criminal Rule 3 requires memorandum be filed along with motion stating specifically grounds for dismissal.

Ind. Code § 35-34-1-8 requires:

- motion to dismiss be in writing;
- reasonable notice to prosecutor;
- affidavits containing sworn allegations of facts;
- memorandum of law stating specific legal question in issue.

Defendant has burden of proving by a preponderance of the evidence every fact essential to support the motion.

2. Territorial Jurisdiction

Authority of the State of Indiana to institute a criminal prosecution is determined by Ind. Code § 35-41-1-1(b) which provides:

A person may be convicted under Indiana law of an offense if:

(1) either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana;
(2) conduct occurring outside Indiana is sufficient under Indiana law to constitute an attempt to commit an offense in Indiana;
(3) conduct occurring outside Indiana is sufficient under Indiana law to constitute a conspiracy to commit an offense in Indiana, and an overt act in furtherance of the conspiracy occurs in Indiana;
(4) conduct occurring in Indiana establishes complicity in the commission of, or an attempt or conspiracy to commit, an offense in another jurisdiction that also is an offense under Indiana law.
(5) the offense consists of the omission to perform a duty imposed by Indiana law with respect to domicile, residence, or a relationship to a person, thing, or transaction in Indiana.
(6) conduct that is an element of the offense or the result of conduct that is an element of

the offense, or both, involve the use of the Internet or another computer network (as defined in Ind. Code § 35-43-2-3) and access to the Internet or other computer network occurs in Indiana; or

(7) conduct:

(A) involves the use of:

(i) the Internet or another computer network (as defined in Ind. Code § 35-43-2-3); or

(ii) another form of electronic communication;

(B) occurs outside Indiana and the victim of the offense resides in Indiana at the time of the offense; and

(C) is sufficient under Indiana law to constitute an offense in Indiana.

a. "In Indiana"

For purposes of Ind. Code 35-41-1-1, the term "in 'Indiana'" is defined in Indiana Code § 35-41-1-1(a). See Benham v. State, 637 N.E.2d 133, 137 (Ind. 1994); Brehm v. State, 558 N.E.2d 906 (Ind. Ct. App. 1990); State v. Abrahamson, 516 N.E.2d 87 (Ind. Ct. App. 1987).

Sundling v. State, 679 N.E.2d 988 (Ind. Ct. App. 1997) (State failed to prove territorial jurisdiction beyond reasonable doubt in child molesting prosecution, where there was no evidence that complaining witnesses was molested in Indiana).

b. Commenced in Indiana and Completed Out of State

Indiana courts have held that Indiana's jurisdiction is extended to crimes commenced in Indiana and completed out of state if it is shown that the out-of-state crime was integrally related to the crimes in Indiana.

Pollard v. State, 270 Ind. 599, 388 N.E.2d 496, 504 (1979) (count charged defendants with premeditated murder by means of stabbing victim while in Vanderburgh County and then transporting him to Kentucky where fatal gunshot wound was inflicted; wording of charge intended to show integral relationship between assault, abduction and murder of victim. Assault and abduction provide adequate jurisdictional basis for conviction of murder in Indiana).

Conrad v. State, 262 Ind. 446, 317 N.E.2d 789 (1974) (assault and abduction in Indiana provided jurisdiction for murder conviction, even if fatal blows to victim were inflicted in Ohio; jury instructed to acquit if intent to kill was arrived at outside Indiana, and fatal blow resulting in death originated in Ohio and was separate and independent from kidnaping in Indiana, and not part of one continuous course of action by defendant).

c. Commenced Out of State and Completed in Indiana

An-Hung Yao v. State, 975 N.E.2d 1273 (Ind. 2012) (trial court correctly denied motion to dismiss alleging that Indiana lacked jurisdiction, where defendants, who ran company in Texas, sold toy airsoft guns via internet to investigators in Indiana, which were designed like the rifles sold and trademarked by H & K).

d. Omission to Perform Duty (Ind. Code § 35-41-1-1(b)(5))

State v. Taylor, 625 N.E.2d 1334 (Ind. Ct. App. 1993) (Indiana criminal jurisdiction allows nonresident parent to be prosecuted in Indiana for criminal offense of nonsupport of his children living in Indiana even though there had been no support order issued by Indiana court and parent had never visited his children living in state; support of child is duty to be performed in county where child resides and nonsupport is omission occurring in county where child resides).

e. Conspiracy to Commit Offense in Another Jurisdiction

Sowers v. State, 546 N.E.2d 1230 (Ind. Ct. App. 1989) (Indiana court had jurisdiction under Ind. Code § 35-41-1-1(a) (4) (now (b)(4)) to determine charges against defendant and to convict him of forgery under Indiana law, even though forged check uttered in Illinois; defendant's conduct in Indiana, in conspiring to utter forged check in Illinois, was offense in both states, and defendant and accomplice's action in furtherance of conspiracy to commit forgery and defendant's theft of checks were all actions in Indiana integrally related to defendant's uttering of check in Illinois).

f. Homicide

Ind. Code § 35-41-1-1(c) provides:

When the offense is homicide, either the death of the victim or bodily impact causing death constitutes a result under subdivision (b) (1) of this section. If the body of a homicide victim is found in Indiana, it is presumed that the result occurred in Indiana.

McKinney v. State, 553 N.E.2d 860 (Ind. Ct. App. 1990) (presumption that victim whose body is found in State of Indiana was killed in Indiana is constitutional; for purposes of motion to dismiss, Indiana had territorial jurisdiction to prosecute defendant for murder of Ohio resident whose body was found in State of Indiana, even though victim was not killed where body was found, where there was no evidence other than hearsay to indicate that victim died or was wounded in Ohio).

g. Identity Deception

Ind. Code § 35-41-1-1(d) provides:

If the offense is identity deception or synthetic identity deception, the lack of the victim's consent constitutes conduct that is an element of the offense under subsection (b)(1). If a victim of identity deception or synthetic identity deception resides in Indiana when a person knowingly or intentionally obtains, possesses, transfers, or uses the victim's identifying information, it is presumed that the conduct that is the lack of the victim's consent occurred in Indiana.

3. Improper Method of Bringing Defendant within Jurisdiction

Jurisdiction in criminal proceeding is not affected by any impropriety in an out-of-state arrest and subsequent transportation into Indiana. Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509 (1952); Johnson v. State, 271 Ind. 145, 390 N.E.2d 1005, 1007 (1979).

However, defendant may challenge admissibility of any evidence which was obtained as a result of arrest and improper extradition procedure.

4. Jurisdiction after Judgment

Continuing jurisdiction of trial court after judgment limited to that expressly provided for in judgment itself, or by statute or rule.

Coble v. State, 523 N.E.2d 228 (Ind. 1988) (after supreme court had vacated habitual offender enhancement and remanded for resentencing, trial court exceeded jurisdiction in vacating previous sentence on count not directly affected by habitual offender status).

State ex rel. Kelley v. Marion County Criminal Court, Div. III, 269 Ind. 46, 378 N.E.2d 833 (1978) (once 60 days had passed following entry of judgment of sentence and ruling had been made on motion to correct errors, trial court had no jurisdiction to grant new trial or correct errors on its own motion).

Pettiford v. State, 504 N.E.2d 324 (Ind. C. App. 1987) (vacating judgment granting PCR petition after 90 days was error because court no longer had jurisdiction over matter).

Until appellate decision remanding a case is certified, trial court generally has no jurisdiction.

Wilson v. State, 472 N.E.2d 932 (Ind. Ct. App. 1984) (attempt to reset case for trial only five days after reversal was void).

5. Concurrent JurisdictionFederal and State

Where an act constitutes violation of both federal and state law, both can proscribe act and have concurrent jurisdiction over it.

Freeman v. Robinson, 7 Ind. 321 (1855) (in cases of concurrent authority, where laws of the state and of Union are in direct and manifest collision on same subject, those of Union, being the supreme law of the land, are of paramount authority, and state laws so far, but so far only, as such incompatibility exists, must yield).

Adams v. State, 575 N.E.2d 625 (Ind. 1991) (State retained concurrent jurisdiction over land ceded to United States under Flood Control Act and had jurisdiction to prosecute murder committed on land).

See Ind. Const. Art. 14, §2.

a. On Rivers

Concurrent jurisdiction on rivers is jurisdiction of two powers over one and the same place. Nielsen v. State of Oregon, 212 U.S. 315, 317, 29 S. Ct. 383, 384 (1909).

The State of Indiana is authorized by its Constitution, Article 14, § 2, and by statute, to exercise concurrent criminal jurisdiction over portions of the Ohio and Wabash Rivers. See Ind. Code § 35-41-1-1(a)(2) & (3).

Indiana's southernmost territorial boundary along the Ohio River is established by the low-water line on the northern side of the river in 1792, the year Kentucky became a

state. See Indiana v. Kentucky, 163 U.S. 520, 16 S. Ct. 1162 (1896), and Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820).

6. Jurisdiction of Indiana Courts

Indiana courts have only such jurisdiction as is granted to them by the state constitution and statutes. Benham v. State, 637 N.E.2d 133, 136 (Ind. 1994).

a. Circuit Courts

Constitution of Indiana Art. 7, § 8 states: "The Circuit Courts shall have such civil and criminal jurisdiction as may be prescribed by law."

Ind. Code § 33-28-1-2 provides:

(a) All circuit courts have:

(1) original and concurrent jurisdiction in all civil cases and in all criminal cases;

(2) de novo appellate jurisdiction of appeals from city and town courts; and

(3) in Marion County, de novo appellate jurisdiction of appeals from township small claims courts established under Ind. Code § 33-34.

(b) The circuit court also has the appellate jurisdiction that may be conferred by law upon it.

b. Superior Courts

Superior courts, since created by legislature, have only such jurisdiction as is granted by statute. Wedmore v. State, 233 Ind. 545, 550, 122 N.E.2d 1, 3-4 (1954).

Generally, superior courts have concurrent jurisdiction over all criminal matters with circuit courts. See Ind. Code § 33-33 for the jurisdiction of individual superior courts.

Ind. Code § 33-29-2-8 provides:

(a) The minor offenses and violations docket has jurisdiction over the following:

(1) All Level 6 felony cases.

(2) All misdemeanor cases.

(3) All infraction cases.

(4) All ordinance violation cases.

(b) The court shall establish a traffic violations bureau in the manner prescribed by Ind. Code § 34-28-5-7 through Ind. Code § 34-28-5-13.

c. City Courts

(1) Jurisdiction over Misdemeanors and Infractions

Mareksa v. State, 534 N.E.2d 246 (Ind. Ct. App. 1989) (pursuant to Ind. Code § 33-10.1-2-2, city court have count-wide jurisdiction over misdemeanors and infractions).

L. UNCONSTITUTIONAL STATUTE

1. Authority/Timing

Information or indictment is subject to motion to dismiss if statute defining offense charged is unconstitutional or otherwise invalid. Ind. Code § 35-34-1-6(a)(3); Ind. Code § 35-34-1-4(a)(1).

a. Waived if Not Made Before Omnibus Date

Motion to dismiss shall be made prior to omnibus date (20 days for felonies or 10 days for misdemeanors). Motion made thereafter may be summarily denied. Ind. Code § 35-34-1-4(b) (1) and (2).

Newton v. State, 456 N.E.2d 736 (Ind. Ct. App. 1983) (defendant who fails to raise challenges to constitutionality of a statute by motion to dismiss prior to arraignment and plea waives any right to subsequently challenge statute on those grounds) (*citing* Marchand v. State, 435 N.E.2d 284 (Ind. Ct. App. 1982), and Salrin v. State, 419 N.E.2d 1351 (Ind. Ct. App. 1981)); see also Layman v. State, 42 N.E.3d 972 (Ind. 2015); Chapman v. State, 186 N.E.3d 123 (Ind. Ct. App. 2022); Bostic v. State, 980 N.E.2d 335 (Ind. Ct. App. 2012).

But see

Plank v. Community Hospitals of Indiana, Inc., 981 N.E.2d 49 (Ind. 2013) (appellate courts not prohibited from considering constitutionality of statute even though issue has otherwise been waived and indeed reviewing court may exercise discretion to review constitutional claim *sua sponte*). Accord Morse v. State, 593 N.E.2d 194 (Ind. 1992); Breda v. State, 142 N.E.3d 482 (Ind. Ct. App. 2020); Pava v. State, 142 N.E.3d 1071 (Ind. Ct. App. 2020); Coleman v. State, 149 N.E.2d 313 (Ind. Ct. App. 2020); Akers v. State, 963 N.E.2d 615 (Ind. Ct. App. 2012); Burke v. State, 943 N.E.2d 870 (Ind. Ct. App. 2011); Tooley v. State, 911 N.E.2d 721 (Ind. Ct. App. 2009); Poling v. State, 853 N.E.2d 1270 (Ind. Ct. App. 2006).

b. Filing Procedure

Criminal Rule 3 requires memorandum be filed along with motion stating specifically grounds for dismissal.

Ind. Code § 35-34-1-8 requires:

- motion to dismiss be in writing;
- reasonable notice to prosecutor;
- affidavits containing sworn allegations of facts;
- memorandum of law stating specific legal question in issue.

Defendant has burden of proving by preponderance every fact essential to support motion.

2. Grounds

a. Vagueness

Penal statutes must define criminal offense with sufficient clarity and definiteness that ordinary people may reasonably understand what conduct is prohibited. Statutes must be worded in manner which does not encourage arbitrary and discriminatory enforcement. Payne v. State, 484 N.E.2d 16 (Ind. 1985). Vague laws "also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect" because they "threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." United States v. Davis, 139 S.Ct. 2319 (2019).

Johnson v. United States, 135 S. Ct. 2551 (2015) (finding void for vagueness residual clause sentencing enhancement in Armed Career Criminal Act).

Plummer v. Columbus, 414 U.S. 2, 94 S. Ct. 17 (1973) (ordinance penalizing use of "fighting words" vague; invalid on face).

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839 (1972) (vagrancy ordinance void for vagueness).

Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849 (1999) (anti-loitering ordinance "failed to give the ordinary citizen notice of what is forbidden and what is permitted" and failed to provide even minimal standards to guide law enforcement; opinion discusses at length standards for facial challenge to statute on vagueness grounds).

Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (definition of "crime of violence" for purposes of mandatory removal of an immigrant who commits an aggravated felony is unconstitutionally vague).

Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (neither First Amendment nor any other provision of Constitution violated by statute that permits government to block speech supporting foreign organization officially labeled as terroristic, even though aim of group is to support group's peaceful or humanitarian actions; law's application is narrow).

Morgan v. State, 22 N.E.3d 570 (Ind. 2014) (use of word "annoy" in public intoxication statute not unconstitutionally vague as long as reasonable person standard read into statute; applying that standard, Court reversed conviction because no reasonable person would have found defendant's conduct annoying).

Tiplick v. State, 43 N.E.3d 1259 (Ind. 2015) (Indiana's synthetic and look-alike drug laws are neither unconstitutionally vague nor unconstitutional delegation of legislative authority).

Armes v. State, 191 N.E.3d 942 (Ind. Ct. App. 2022) (emergency rule adding drug compound identified as MDMB-4en-PINACA (MDMB) to the list of Schedule I controlled substances void for vagueness when it failed to explicitly identify

substances listed as synthetic drugs or provide chemical composition of MDMB), *aff'd on reh'g*, 194 N.E.3d 1220.

State v. Sturman, 56 N.E.3d 1187 (Ind. Ct. App. 2016) (in issue of first impression, Court held that the "legitimate medical purpose" restriction for legend drug prescriptions is not void for vagueness because it enables ordinary people to understanding what conduct is prohibited).

Wood v. State, 999 N.E.2d 1054 (Ind. Ct. App. 2013) (Ind. Code § 14-15-4-1, which requires motorboat operator involved in accident resulting in injury or death to remain at scene until he has provided assistance and information about his identity, was not void for vagueness).

Kaur v. State, 987 N.E.2d 164 (Ind. Ct. App. 2013) (defendant failed to demonstrate statute was vague as applied to her; defendant may not raise hypothetical situations to demonstrate vagueness).

Lee v. State, 973 N.E.2d 1207 (Ind. Ct. App. 2012) (defendant failed to show that the word "attends" in Ind. Code § 35-46-3-10, which forbids a person from attending an animal fight, is unconstitutionally vague).

Tooley v. State, 911 N.E.2d 721 (Ind. Ct. App. 2009) (rejecting argument that terms "unnecessarily" and "cruelly" in statute defining "beat" are highly subjective terms that invite "arbitrary arrests and prosecutions" and fail to provide notice as to what conduct is prohibited).

Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008) (statute criminalizing performing sexual conduct in presence of minor is not unconstitutionally vague).

Wells v. State, 848 N.E.2d 1133 (Ind. Ct. App. 2006) (OWI statutes were not rendered unconstitutionally vague by 2001 amendments despite claim that amendments do not precisely define amount of alcohol consumption that could lead to finding of impairment).

Szpunar v. State, 783 N.E.2d 1213 (Ind. Ct. App. 2003) (statute prohibiting sale of unregistered security is not unconstitutionally vague).

Haggard v. State, 771 N.E.2d 668 (Ind. Ct. App. 2002) (unlawful use of body armor statute is not unconstitutionally vague).

Vaillancourt v. State, App., 695 N.E.2d 606 (Ind. Ct. App. 1998) (statute (now I.C. 35-31.5-2-92) defining "serious bodily injury" not unconstitutionally vague).

Helton v. State, 624 N.E.2d 499 (Ind. Ct. App. 1993) (Criminal Gang Statute, I.C. 35-45-9, which forbids knowingly and actively participating in group of five or more that participates in and requires as condition of membership commission of battery, is not vague).

Klein v. State, 698 N.E.2d 296 (Ind. 1993) (Indiana criminal gang activity statute not void for vagueness).

Vaughn v. State, 782 N.E.2d 417 (Ind. Ct. App. 2003) (I.C. 35-42-2-1.3(2), defining domestic battery as "a person who knowingly or intentionally touches a person who…is or was living as a spouse of the other person in a rude, insolent, or angry manner that results in bodily injury" unconstitutionally vague as applied to defendant), *superseded by statute as stated in* Plank v. Community Hospitals of Indiana, Inc., 981 N.E.2d 49 (Ind. 2013).

Bozarth v. State, 520 N.E.2d 460 (Ind. Ct. App. 1988) (concept of "mentally disabled or deficient" does not render rape statute unconstitutionally vague; language not so esoteric as to avoid consensus of meaning among persons of ordinary intelligence).

Shuger v. State, 859 N.E.2d 1226 (Ind. Ct. App. 2007) (Indiana's Hunter Harassment Act is not overbroad or vague).

Brown v. State, 868 N.E.2d 464 (Ind. 2007) (Indiana's criminal confinement statute, I.C. 35-42-3-3, as to the inclusion of the words "fraud" and "enticement" is void for vagueness and cannot be a basis for defendant's convictions, but is not invalidated as a whole; there must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur).

Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008) (statute criminalizing performing sexual conduct in presence of minor is not unconstitutionally vague). Chiszar v. State, 936 N.E.2d 816 (Ind. Ct. App. 2010) (defendant failed to show that voyeurism statute is unconstitutionally vague as applied).

b. Overbreadth

Overbreadth arguments are available only in First Amendment cases. Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403 (1984); Plummer v. Columbus, 414 U.S. 2, 94 S. Ct. 17 (1973). An overbreadth challenge asserts that the statute is not drawn in sufficiently narrow terms and foreseeably prohibits legitimate conduct. McIntosh v. State, 638 N.E.2d 1269, 1277 (Ind. Ct. App. 1994).

Price v. State, 622 N.E.2d 954 (Ind. 1993) (disorderly conduct statute prohibiting "unreasonable noise" not overbroad in violation of First Amendment free speech rights).

State v. Katz, 179 N.E.3d 431 (Ind. 2022) (statute criminalizing the non-consensual distribution of an intimate image, under which defendant was charged based on alleged circulation of cell phone video of sex act performed on him, not overbroad under speech clause of First Amendment).

United States v. Stevens, 130 S.Ct. 1577 (2010) (prohibition of depictions of animal cruelty was overbroad under First Amendment because statutory definition of animal cruelty: a) did not even require that depicted conduct be cruel, b) included depictions of unlawful conduct unrelated to cruelty, and c) banned depictions of conduct lawful in one state but not in another state).

c. Ex Post Facto Laws

Efforts to charge defendant for conduct which occurred prior to enactment of statute relied upon violates constitutional proscription against ex post facto laws. Phillips v. State, 518 N.E.2d 1129 (Ind. Ct. App. 1988).

d. Freedom of speech

In order to determine whether a statute regulating speech violates the First Amendment, the court must determine whether the statute is content-neutral regulation of speech, and if so, whether the statute is a valid time, place, and manner regulation that is "narrowly tailored" to serve a significant interest. Shuger v. State, 859 N.E.2d 1226 (Ind. Ct. App. 2007) (Indiana's Hunter Harassment Act does not violate freedom of speech).

e. Right Materially Burdened

Lacy v. State, 903 N.E.2d 486 (Ind. Ct. App. 2009) (prohibition of switchblades under I.C. 35-47-5-2 did not materially burden state constitutional right to bear arms under Article 1, § 32 of Indiana Constitution. Statute did not ban class of weapons, i.e., knives, but only types of knives primarily used by criminals. Further, statute was valid exercise of state police power to advance public good).

f. Equal Protection

C.T. v. State, 939 N.E.2d 626 (Ind. Ct. App. 2010) (Indiana's public nudity statute does not violate Equal Protection Clause by criminalizing public display of female, but not male, nipples; legislature permitted to protect interest in order and morality; it cannot be disputed that Hoosiers consider female breast an erogenous zone but do not consider male breasts to be one).

3. Right of Attorney General to Intervene

In any proceeding in which a statute or ordinance is alleged to be unconstitutional, the court shall certify this fact to the attorney general, who shall be permitted to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for arguments on the question of constitutionality. See Ind. Code § 34-14-1-11; Ind. Code § 34-33.1-1-1.

M. ANY OTHER GROUND AS A MATTER OF LAW

Court may, upon motion of defendant, dismiss indictment or information upon "[a]ny other ground that is a basis for dismissal as a matter of law." Ind. Code § 35-34-1-4(a)(11). This open-ended catchall provision in Indiana Code § 35-34-1-4(a)(11) is recognition that there may be additional reasons for dismissal of criminal charges. A violation of a defendant's constitutional right to due process certainly fits in that category. State v. Davis, 898 N.E.2d 281 (Ind. 2008).

Motions to dismiss based on Ind. Code § 35-34-1-4(a)(11) may be made or renewed at any time before or during trial. Ind. Code § 35-34-1-4(b).

See Criminal Rule 3 requiring memorandum to be filed along with motion stating specifically grounds for dismissal.

Ind. Code § 35-34-1-8 requires:

- motion to dismiss be in writing;
- reasonable notice to prosecutor;
- affidavits containing sworn allegations of facts;
- memorandum of law stating specific legal question in issue.

Defendant has burden of proving by preponderance every fact essential to support motion.

Prosecutorial vindictiveness is presumed where more serious charges are brought against a defendant after he has successfully exercised his rights to an appeal or moved for a mistrial. Warner v. State, 773 N.E.2d 239 (Ind. 2002); Owens v. State, 822 N.E.2d 1075 (Ind. Ct. App. 2005) (court will apply the Warner presumption on remand after successful appeal).

1. Incurable Incompetency

It is a violation of basic notions of fundamental fairness as embodied in Due Process Clause of Fourteenth Amendment to hold criminal charges over head of incompetent Defendant who will never be able to stand trial.

State v. Davis, 898 N.E.2d 281 (Ind. 2008) (motion to dismiss properly granted where defendant's pretrial confinement that extended beyond the maximum period of any sentence the trial court could have imposed for defendant's alleged crime and State advanced no argument that its interests outweigh defendant's substantial liberty interest). See also Gross v. State, 41 N.E.3d 1043 (Ind. Ct. App. 2015).

Matlock v. State, 944 N.E.2d 936 (Ind. Ct. App. 2011) (trial court did not abuse its discretion by denying defendant's motion to dismiss, even though time defendant was detained while incompetent exceeded the maximum sentence he could receive for class A misdemeanor OWI; the State has substantial interest in determining guilt or innocence of someone who may drive again after regaining competency).

J.S. v. State, 937 N.E.2d 831 (Ind. Ct. App. 2010) (where it was clear that juvenile was not going to regain competency before turning 18 and juvenile court lost jurisdiction, juvenile court did not abuse its discretion by dismissing case even though mental health expert did not make a finding that he would never be restored to competency).

Denzell v. State, 948 N.E.2d 808 (Ind. 2011) (when record reflects that defendant can be restored to competency but purposely decompensates, he may not assert due process violation).

Jones v. State, 918 N.E. 2d 436 (Ind. Ct. App. 2009) (where misdemeanor sentences would have had to run consecutively because crimes were committed while defendant was released on own recognizance, 756 days defendant spent either in jail or in DMH had not exceeded the maximum sentence and motion to dismiss should have been denied).

Habibzadah v. State, 904 N.E.2d 367 (Ind. Ct. App. 2009) (trial court properly denied motion to dismiss attempted murder charge against incompetent defendant because it was possible for defendant to be restored to competency and he had not been confined for longer than the potential maximum sentence he faced).

2. Willful Misconduct by StateState Eavesdropping on Attorney-Client Consultation

State v. Larkin, 100 N.E. 3d 700 (Ind. 2018) (in voluntary manslaughter prosecution, trial court abused discretion in granting defendant's motion to dismiss for pattern of pretrial government misconduct; defendant submitted to questioning by police regarding wife's death; during break in questioning, police recorded privileged communications between defendant and his attorney, and recording was transcribed and distributed to prosecutor and others; although State committed misconduct, remedy is not outright dismissal, but suppression of tainted evidence for which State cannot rebut presumption of prejudice pursuant to State v. Taylor, 49 N.E.3d 1019 (Ind. 2016); for constitutional violations committed by government, "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence' gained from the violation." U.S. v. Morrison, 449 U.S. 361, 365 (1981)).

a. Vindictive Prosecution - B.10.l

(1) Pretrial Conduct

Courts generally allow prosecutors greater latitude in pretrial decision making which impacts negatively on defendants.

U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982) (presumption of vindictiveness not warranted by decision to charge misdemeanor defendant with a felony after demand for a jury trial).

U.S. v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480 (1996) (in order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary; standards for selective-prosecution claims discussed).

Penley v. State, 506 N.E.2d 806, 811 (Ind. 1987) (prosecutorial vindictiveness not shown by decision to dismiss one count of rape in superior court and to refile that count in circuit court, together with burglary charge, after unsuccessful prosecution of defendant in superior court on two other rape charges and after defendant received a bond reduction in superior court; decision to dismiss and refile was made before bond reduction; defendant failed to show that addition of burglary charge was a direct, unjustifiable, or vindictive penalty for his exercise of a procedural right).

(a) Vindictive When Defendant Punished for Lawful Acts and Strategies

Defendant may show vindictiveness by showing charging decision was made to punish defendant for lawful acts or trial strategies.

State v. Selva, 444 N.E.2d 329 (Ind. Ct. App. 1983) (vindictiveness where prosecutor filed additional counts after prosecutor's motion to revoke bail and to consolidate charges was denied).

Johnson v. State, 959 N.E.2d 334 (Ind. Ct. App. 2011) (defendant's claim of prosecutorial vindictiveness rested only on circumstantial inferences, not direct evidence; thus, he failed to show State added class A felony neglect of

dependent charge after trial court rejected plea agreement for class B felony neglect of dependent to punish defendant for his successful motion to dismiss the first indictment).

(b) Filing Additional Charges

Filing additional charges before trial not presumptively vindictive. State v. Selva, 444 N.E.2d 329 (Ind. Ct. App.1983).

Kenney v. State, 549 N.E.2d 1074 (Ind. Ct. App. 1990) (not prosecutorial vindictiveness when State amended information to add count for dealing in cocaine to pending possession count, after defense motion to suppress).

Hughes v. State, 473 N.E.2d 630 (Ind. Ct. App. 1985) (allowing State to dismiss charges and then refile them in different court not subject to presumption of vindictiveness, although it followed on discovery sanctions against state; defendant failed to prove actual vindictiveness).

However, if the State dismisses and refiles in another court to avoid an adverse trial court ruling, the new charges may be subjected to dismissal with prejudice. Johnson v. State, 740 N.E.2d 118 (Ind. 2001).

See also Davenport v. State, 689 N.E.2d 1226 (Ind. 1997) (After charging information dismissed on State's motion under Ind. Code § 35-34-1-13(a), State may not refile charges if doing so prejudices substantial rights of Defendant; State received adverse ruling in original trial court on motion to amend information, dismissed case, and then filed second information which contained three additional counts and moved to transfer case to another court; State crossed boundary of fair play and prejudiced substantial rights of Defendant; by sleight of hand, State tried to escape ruling of original court and pursue case on charges State had sought to add belatedly).

See also Klein v. State, 702 N.E.2d 771 (Ind. Ct. App. 1998) (prosecutor's dismissal of original charges followed by refiling to add attempted murder charge 3 weeks prior to trial was improper and prejudiced defendant's right to prepare defense).

But see

Casady v. State, 934 N.E.2d 1181 (Ind. Ct. App. 2010) (State not attempting to avoid adverse ruling when it dismissed original two charges and chose to pursue only 16 additional charges).

Wingate v. State, 900 N.E.2d 468 (Ind. Ct. App. 2009) (where nothing in record suggested State's actions were purposefully taken to deprive defendant of his substantial rights or evade adverse ruling, State's dismissal of charges and addition of new, factually distinct charges on 69th day after defendant's speedy trial request was proper).

Fultz v. State, 849 N.E.2d 616 (Ind. Ct. App. 2006) (State's dismissal of arson charge and re-filing along with murder not in bad faith to avoid CR

4(B) motion, but rather motivated by newly discovered evidence).

Hollowell v. State, 773 N.E.2d 326 (Ind. Ct. App. 2002) (when State dismissed charges against defendant, it was not trying to circumvent adverse ruling or trying to punish defendant by piling on more charges; honest mistake or oversight in original decision will excuse re-filing different counts). See also Cobbs v. State, 987 N.E.2d 186 (Ind. Ct. App. 2013).

Jones v. State, 701 N.E.2d 863 (Ind. Ct. App. 1998) (defendant's substantial rights not prejudiced by State's re-filing of neglect charge and addition of murder charge 32 weeks before trial).

Malone v. State, 702 N.E.2d 1102 (Ind. Ct. App. 1998) (defendant's rights not prejudiced when State dismissed criminal recklessness charge after omnibus date and re-filed charge as attempted murder).

(c) Defendant's Refusal to Plead

Prosecutor has virtually unlimited discretion in bringing increased charges if defendant declines to plead guilty.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663 (1978) (threat of additional charges during plea negotiations does not violate due process).

Huffman v. State, 543 N.E.2d 360 (Ind. 1989) (filing of death penalty request did not amount to vindictive prosecution, despite defendant's claim that request was filed after he rejected plea agreement; defense counsel was notified that defendant was being considered as candidate for death penalty and that death penalty request had already been filed against co-defendant as soon as case was filed), *overruled in part on other grounds by* Street v. State, 567 N.E.2d 102, 105 (Ind. 1991).

Reynolds v. State, 625 N.E.2d 1319 (Ind. Ct. App.1993) (prosecutor did not act vindictively by charging defendant with class C felony forgery after presenting defendant with alternative of pleading guilty to class D felony theft charges or facing trial on forgery charge, and defendant elected to proceed to trial).

(2) For Exercise of Rights after Pretrial Proceedings

Accused should not be faced with prospect of retaliation if he exercises his legal right to a fair trial or appeals his conviction. E.g., attempts to amend indictment or information to increase in number or severity possible penalties defendant faces after: grant of motion for mistrial, grant of motion to correct error, appeal, or other exercise of statutory or constitutional rights. 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.

Thigpen v. Roberts, 468 U.S. 27, 104 S. Ct. 2916 (1984) (prosecution for manslaughter after appeal of conviction of misdemeanor traffic offenses raised presumption of vindictiveness).

Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098 (1974) (defendant convicted on misdemeanor assault, defendant exercised statutory right to demand trial *de novo* on appeal, prosecutor then obtained felony assault indictment based upon same conduct; held, prosecutor's unexplained filing of increased charge violated defendant's due process rights).

Murphy v. State, 453 N.E.2d 219 (Ind. 1983) (reversible error to deny defendant's motion to dismiss habitual offender count; defendant's motion for mistrial granted on first day of trial; next day State filed additional count charging Defendant as habitual offender; action constituted attempt to punish defendant for exercising his right to a fair trial).

Sisson v. State, 985 N.E.2d 1 (Ind. Ct. App. 2012) (no presumption of vindictiveness where prosecutor re-filed previously dismissed SVF and habitual charges after mistrial due to hung jury).

Warner v. State, 773 N.E.2d 239 (Ind. 2002) (it is central to theory regarding vindictive prosecution in Murphy, *supra*, that if State discovers new evidence, it must contribute to State's case against defendant; here trial court erred in permitting State to add felony murder and attempted robbery charges after mistrial).

Harris v. State, 481 N.E.2d 382 (Ind. 1985) (prosecutor's amendment of information following hung jury, charging Class A rather than Class C robbery, was not vindictive where prosecutor learned 2 weeks prior to first trial that facts supported Class A charge but chose not to amend at that time).

Owens v. State, 822 N.E.2d 1075 (Ind. Ct. App. 2005) (trial court erred in allowing State to file additional charge following defendant's first successful appeal; rationale for protecting a defendant's right to fair trial, which justifies presumption of prosecutorial vindictiveness, is even more compelling in case of successful appeal than successful motion for mistrial).

Cherry v. State, 414 N.E.2d 301, 306 (Ind. 1981) (State refiled charges, previously dismissed at its behest, after court granted defendant's motion to correct error; found refiling of charges to have been motivated by prosecutorial vindictiveness).

Bates v. State, 426 N.E.2d 404, 406 n.1 (Ind. 1981) (Cherry interpreted to apply only to prosecution's power to refile charges previously dismissed at its behest).

Cf.

Harris v. State, 481 N.E.2d 382, 385 (Ind. 1985) (defendant exercised no legal right, not faced with dilemma of deciding whether to exercise legal right at risk of retaliation by prosecutor; mistrial resulted from a hung jury, not from any action undertaken by defendant).

b. Selective Prosecution

Absent showing of bad faith, racial discrimination, or evil design, decision to prosecute A

and not to prosecute B is not a defense. Proper resolution is to raise issue at pretrial stage. Defendant has burden of showing discriminatory prosecution on the basis of some suspect classification (race, sex, religion, etc.). Claimant must show: 1) other similarly situated violators are generally not prosecuted; 2) selection of claimant for prosecution was intentional and purposeful; and 3) selection of claimant was pursuant to arbitrary classification. Pruitt v. State, 557 N.E.2d 684 (Ind. Ct. App. 1990).

Greene v. State, 515 N.E.2d 1376 (Ind. 1987) (notwithstanding fact that both black and white inmates participated in uprising, and that State only prosecuted six black inmates, three of whom initially rushed guard office, inmate who threatened to kill guard and one other black inmate failed to establish selective prosecution as basis for dismissal of charge of kidnapping), *overruled in part on other grounds by* Myers v. State, 532 N.E.2d 1158, 1159 (Ind. 1989).

Love v. State, 468 N.E.2d 519 (Ind. 1984) (prosecutor had no information on race of those involved in prison riot when he made charging decisions).

Young v. State, 446 N.E.2d 624 (Ind. Ct. App. 1983) (no discrimination against women shown in filing prostitution charges and failing to prosecute patrons under patronizing statute).

Dix v. State, 639 N.E.2d 363 (Ind. Ct. App. 1994) (State did not engage in improper selective prosecution in charging defendant with professional gambling and theft).

c. Due Process and Delay in Prosecution

(1) Delay When Charged Within Statute of Limitations

Even where a charge is brought within the statute of limitations, the particulars of the case may reveal that undue delay and resultant prejudice constitute a violation of due process. Patterson v. State, 495 N.E.2d 714 (Ind. 1986); Koke v. State, 498 N.E.2d 1326 (Ind. Ct. App. 1986), *trans. denied*.

Worthington v. State, 409 N.E.2d 1261, 1269 (Ind. Ct. App. 1980) (if prosecution deliberately utilizes delay to strengthen its position by weakening that of defense or otherwise impairs defendant's right to a fair trial, inordinate pre-indictment delay may be found to violate defendant’s due process rights).

Johnson v. State, 810 N.E.2d 772 (Ind. Ct. App. 2004) (court rejected claim defendant was constitutionally denied due process by being charged with Class A felony burglary thirteen years after alleged offense; even if defendant proved actual prejudice, his due process claim would fail because he failed to show delay was without justification).

(2) Test

Defendant has burden of proving prejudice from pre-arrest, pre-indictment delay. Prejudice must be more than generalized allegation that witnesses' memories dimmed, or that evidence was lost. U.S. v. Marion, 404 U.S. 307, 92 S. Ct. 455 (1971); Patterson v. State, 495 N.E.2d 714 (Ind. 1986).

Lusher v. State, 181 Ind. App. 63, 390 N.E.2d 702, 704 (1979) (to successfully raise due process challenge, defendant required to demonstrate both that he suffered actual prejudice and that there was no justification for the delay).

Burress v. State, 173 Ind. App. 286, 363 N.E.2d 1036 (1977) (230-day delay between drug sale and filing of information; no prejudice shown by defendant).

Williams v. State, 188 N.E.3d 472 (Ind. Ct. App. 2022) (defendant did not show he was denied due process by 35-year delay in rape and criminal confinement charges; defendant did not establish deceased witnesses would aid his defense or that remaining witnesses were unavailable and thus could not prove actual and substantial prejudice).

d. Removal of Witness from the Jurisdiction of Court

When State takes steps to remove a defense witness from jurisdiction of court, dismissal may be appropriate. Denial of guarantee to fair trial where witness unavailable because of negligence or bad faith of State.

Boyd v. State, 454 N.E.2d 401 (Ind. 1983) (dismissal denied; failure of proof that State procured witness' absence by any overt or covert act).

Ortez v. State, 165 Ind. App. 678, 333 N. E.2d 838 (1975) (dismissal granted; evidence undisputed that State encouraged and provided informant with means to travel to California to make him unavailable to defense).

e. Prosecutor's Repudiation of Agreement

Agreement not to prosecute in return for testimony or other assistance to prosecution is enforceable against State.

Bowers v. State, 500 N.E.2d 203 (Ind. 1986) (deputy prosecutor entered into oral agreement to "dismiss" charges against accused in exchange for information sufficient to obtain search warrant. Contrary to terms of agreement, State filed information 2 days later; prosecutor's breach warranted equitable enforcement. “[B]y reneging on his promise to abate criminal proceedings, the prosecutor's conduct impaired the reliability and usefulness of an important prosecutorial tool and tended to undermine the integrity and credibility of the criminal justice system to an extent compelling reversal in this case.”).

Kilgore v. State, 922 N.E.2d 114 (Ind. Ct. App. 2010) (charging defendant with escape instead of unauthorized absence from home detention did not violate his due process rights, even though pretrial home detention agreement said he would be charged with unauthorized absence if outside his residence without prior approval).

Wright v. State, 700 N.E.2d 1153 (Ind. Ct. App. 1998) (defendant met his burden of proving that he was entitled to have circuit court case dismissed pursuant to plain language of superior court plea agreement). See also Griffin v. State, 756 N.E.2d 572 (Ind. Ct. App. 2001).

Epperson v. State, 530 N.E.2d 743 (Ind. Ct. App. 1988) (trial court erred by allowing

State to withdraw plea agreement and reinstate charge against defendant; although criminal defendant has no constitutional right to plea bargain, or to have agreement specifically enforced, contract principles and due process rights must be considered; here, defendant's decision to plead guilty to burglary and theft rested on prosecutor's promise to dismiss criminal recklessness charge).

III. MOTIONS TO DISMISS BY PROSECUTOR

A. MANDATORY DISMISSAL

Ind. Code § 35-34-1-13 provides:

(a) Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information. The motion may be made at any time before sentencing and may be made on the record or in writing. The motion shall state the reason for the dismissal.

(b) In any case where an order sustaining a motion to dismiss would otherwise constitute a bar to further prosecution of the crime charged, unless the defendant objects to dismissal, the granting of the motion does not bar a subsequent trial of the defendant on the offense charged.

1. Procedures

a. Motion Must State Reason

To ensure some degree of public accountability in instance of blatant prosecutorial malfeasance, prosecutor's motion to dismiss charges must state reason for dismissal. Rhoton v. State, 491 N.E.2d 577 (Ind. Ct. App. 1986).

b. Court Shall Order Dismissal

Trial court has no discretion under statute but to grant prosecuting attorney's motion to dismiss charge. Holifield v. State, 572 N.E.2d 490 (Ind. 1991).

c. To Bar Retrial Defendant Must Object

To gain benefit of double jeopardy bar, or any other bar to retrial, defendant must object to dismissal. Ind. Code § 35-34-1-13 (b).

State v. Keith, 482 N.E.2d 751, 755 n.8 (Ind. Ct. App. 1985) (although defendant waived his jeopardy defense by failing to object to State's second motion to dismiss, State had not raised issue of whether defendant preserved his jeopardy defense either before trial court or on appeal. Appellate procedure requires litigants to present claims of error to trial court; failure to do so results in waiver of error).

2. Re-filing

a. Prior to Jeopardy

Dismissal of original charges prior to attachment of jeopardy did not preclude State from re-filing information charging same offense in identical terms. Burdine v. State, 515

N.E.2d 1085 (Ind. 1987), *superseded by statute on other grounds as recognized in* Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997).

Davenport v. State, 689 N.E.2d 1226 (Ind. 1997) (after charging information has been dismissed on State's motion pursuant to Ind. Code § 35-34-1-13(a), State may not refile charges if doing so will prejudice defendant's substantial rights; on rehearing, while court offered no opinion had State attempted this maneuver at earlier stage when defendant had not yet finished significant preparation for trial, court held it cannot be allowed to happen on eve of trial), *op. on reh'g*, 696 N.E.2d 870. See also Johnson v. State, 740 N.E.2d 118 (Ind. 2001).

See Section II.H.1.c. - "When Jeopardy Attaches."

b. Vindictive

Prosecutorial motion to dismiss may be shown to be vindictive and a violation of due process.

Cherry v. State, 275 Ind. 14, 414 N.E.2d 301 (1981) (State failed to meet its burden of proving that timing of re-filing two charges after third charge was overturned was not motivated by vindictiveness).

However, defendants have not fared well before Indiana courts on challenges to exercise of prosecutorial discretion.

Hughes v. State, 473 N.E.2d 630 (Ind. Ct. App 1985) (no vindictiveness in filing motion to dismiss following discovery order adverse to the prosecution; defendant could seek similar sanctions in court where charges were re-filed).

3. Dismissal with Prejudice

Dismissal of charge will not bar renewal of proceedings unless substantial rights of accused have been prejudiced, as where speedy trial is found to have been denied or jeopardy has attached in the first prosecution, or statute of limitations has run. Dennis v. State, 412 N.E.2d 303 (Ind. Ct. App. 1980).

State v. Lynn, 625 N.E.2d 499, 500 (Ind. Ct. App. 1993) (on day trial was scheduled, State filed motion to dismiss charge because a witness not present; defendant objected on grounds his substantial rights would be prejudiced by dismissal; State's motion granted, but charge dismissed with prejudice. State filed identical charge; defendant successfully moved to dismiss new charge based upon prior dismissal with prejudice; held, State failed to file timely appeal when it did not appeal initial dismissal).

State v. Joyner, 482 N.E.2d 1377 (Ind. Ct. App. 1985) (error in dismissing information with prejudice; no prejudice by dismissal of charges on day trial scheduled to begin; defendant objected he had prepared a great deal for trial, subpoenaed a number of witnesses, and unfair to dismiss information; no evidence in record that fair trial would be impossible and no evidence to suggest that witnesses would not be available for trial).

Johnson v. State, 740 N.E.2d 118 (Ind. 2001) (trial court abused its discretion by allowing prosecutor to dismiss and refile as tactic to circumvent proper evidentiary ruling

and to punish defendant for exercising procedural rights by piling on additional charges).

4. Does Not Extend to Revocation of Probation Proceedings

Statute mandating dismissal of indictment or information upon prosecutor's motion does not extend to motion to dismiss revocation of probation proceedings. Isaac v. State, 605 N.E.2d 144 (Ind. 1992).