# CHAPTER ELEVEN
# Speedy Trial
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# SPEEDY TRIAL

## I. CRIMINAL RULE 4

### A. IN GENERAL

#### 1. Purpose

Criminal Rule 4 exists to enforce the state constitutional guarantee of a speedy trial. A trial conducted in conformity with the rule meets state constitutional standard. Easton v. State, 258 Ind. 204, 280 N.E.2d 307 (1972).

> Fryback v. State, 272 Ind. 660, 400 N.E.2d 1128 (1980) (Indiana's CR 4 provides rights distinct from, and in addition to, the constitutional right to speedy trial).

The focus of the rule is not to attribute fault where the rule is violated but to impose on the justice system a duty to bring a defendant to trial within a set time. Carr v. State, 934 N.E.2d 1096 (Ind. 2010).

#### 2. Calculating Time

To calculate time:

(1) Determine when defendant was arrested, and date indictment or information was filed.
(2) Take the later of the two dates.
(3) Calculate the period of time between that date and the present.
(4) Deduct any delays because of continuances by the defense; continuances by the prosecution affirmatively acquiesced in, by the defense; delays caused by discovery motions, psychiatric exams, interlocutory appeals; or delays caused by other defense tactics. Be sure to include delays caused by a co-defendant to which you did not object.

**NOTE:** There is a distinction between not objecting to the State's motion for continuance and affirmatively acquiescing to that continuance. See Cook v. State, 810 N.E.2d 1064, 1068 n.3 (Ind. 2004) (observing that "a defendant's agreement to a continuance sought by the State is not chargeable to the defendant and does not extend the time period of Crim. R.4(C)").

> State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (trial court abused its discretion in granting defendant's motion for discharge, because the Crim. R. 4(C) deadline had not expired before defendant agreed to a trial date outside the deadline; trial court and Court of Appeals erroneously counted days while trial court proceedings were stayed for the purpose of defendant's interlocutory appeal as well as days while obtaining a special judge at defendant's request; trial court did not have jurisdiction until the interlocutory appeal was certified as final pursuant to Appellate Rule 65(E); further, the CR 4(C) time begins to run anew when the new judge qualifies and assumes jurisdiction).

Defendant is "brought to trial" when jury is selected and sworn. Lee v. State, 569 N.E.2d 717 (Ind. Ct. App. 1991).

Robinson v. State, 180 Ind. App. 555, 389 N.E.2d 371 (1979) (State's motion for continuance after jury selected and sworn not controlled by CR 4(B) (1)).

**3. Persons Protected**

**a. May Protect Persons Held in Indiana on Unrelated Charges - Rules 4(B) and (C)**

**(1) By filing request for speedy trial**

Robinson v. State, 825 N.E.2d 629 (Ind. Ct. App. 2009) (sheriff's failure to transport defendant to trial court for his initial hearing did not fall within one of the exceptions to C.R. 4(B) so to excuse State's failure to bring him to trial within 70 days).

**(2) By filing notice of surrender – multi-county cases**

A defendant whose case is midstream in one county and who is subsequently arrested on unrelated charges in another county must provide formal written notice of his incarceration to trial court and State to avoid tolling of Rule 4(C) clock. Werner v. State, 818 N.E.2d 26 (Ind. Ct. App. 2004). CR 4(C) does not apply until defendant is arrested while in jail on the charges for which he seeks a speedy trial. Wade v. State, 270 Ind. 549, 387 N.E.2d 1309 (1979). For purposes of Rule 4(C), "arrest" does not occur until return is ordered by the court wherein charges have been filed. Maxie v. State, 481 N.E.2d 1307 (Ind. 1985) and Landrum v. State, 428 N.E.2d 1228 (Ind. 1981). Filing a detainer or serving warrant on defendant does not cause him to be under arrest. Hinds v. State, 469 N.E.2d 31 (Ind. Ct. App. 1984).

Rust v. State, 792 N.E.2d 616 (Ind. Ct. App. 2003) (distinguishing Landrum, Maxie, and Helton (below), court noted that defendant had already appeared and had been "arrested" in County 2 prior to his incarceration in County 1; once trial court and State received defendant's "Notice of Surrender," State was obligated to proceed with case in a timely manner; State could not simply wait until County 1 sentence was served before moving forward with County 2 charges).

McCarthy v. State 176 N.E.3d 562 (Ind. Ct. App. 2021) (fleeing Johnson County, defendant injured and hospitalized in Marion County, with active Marion County warrant; calculation did not begin in Johnson County until transfer; unlike in Rust, Johnson County had not commenced proceedings against defendant while he was incarcerated in Marion County, so the one-year Crim. R. 4(C) clock for Johnson County had not been running during this time).

Arion v. State, 56 N.E.3d 71 (Ind. Ct. App. 2016) (trial court should have known defendant was being held on charges in another county when he moved for a speedy trial; Court was unconvinced by the State's argument that trial court "did not see" the warrant attached to his motion; delay in transporting defendant could not be used to penalize him when there was no explanation why any necessary paperwork was not completed).

State v. Helton, 625 N.E.2d 1277 (Ind. Ct. App. 1993) ("arrest" within meaning

of CR 4(C) occurred when trial court ordered transportation of defendant for initial hearing during prison term on unrelated charges in another county, even though arrest warrants for both counties were simultaneously read to defendant).

Feuston v. State, 953 N.E.2d 545 (Ind. Ct. App. 2011) (even if Jay County Jail was aware that defendant was incarcerated in Delaware County, knowledge of police or correctional officer should not be imputed to trial court or prosecutor because the court and prosecutor alone bear the burden of bringing D to trial in a timely manner).

Werner v. State, 818 N.E.2d 26 (Ind. Ct. App. 2004) (a defendant whose case in midstream in one county and who is subsequently arrested on unrelated charges in another county must provide formal written notice of his incarceration to the trial court and State to prevent the CR 4(C) clock from tolling).

Fuller v. State, 995 N.E.2d 661 (Ind. Ct. App. 2013) (trial court properly denied C.R. 4 (C) motion to discharge because one-year clock did not begin to run until trial court and prosecutor obtained actual knowledge of defendant's whereabouts).

McClellan v. State, 6 N.E.3d 1001 (Ind. Ct. App. 2014) (29-month delay was presumptively prejudicial where trial court issued summons to an outdated address but State had actual notice of defendant's address).

**b. Does Not Protect Person Not Held on Pending Charge for Which Speedy Trial Sought**

Criminal Rule 4(B) is available to a defendant only when the defendant is held on the pending charge for which he or she requests a speedy trial. If this is true, it does not matter that the defendant is also held on another charge.

Cundiff v. State, 967 N.E.2d 1026, 1031 (Ind. 2012) (after bonding out on an OWI charge, defendant filed a speedy trial motion while incarcerated for a probation revocation. Defendant was not tried within 70 days but was not entitled to discharge because he was not being held on the OWI charge).

**c. Does Not Protect Persons Held in Other Jurisdictions, or Held Here on Foreign Charges**

CR 4 does not apply to persons held in other jurisdictions on Indiana charges where the person has never been detained on the Indiana charge. State ex rel. Turner v. Hancock Circuit Court, 270 Ind. 320, 385 N.E.2d 447 (1979). However, CR 4 will apply if the State has brought the defendant into Indiana under a form of temporary custody but then voluntarily relinquishes control of that defendant to a foreign jurisdiction. See Sweeney v. State, 704 N.E.2d 86, 99-100 (Ind. 1998); and Spaulding v. State, 992 N.E.2d 881, 886-87 (Ind. Ct. App. 2013).

McCloud v. State, 959 N.E.2d 879 (Ind. Ct. App. 2011) (when the State has failed to file a detainer against a defendant in federal custody, IAD does not apply; where defendant was already charged in Indiana prior to being sent to federal prison, CR 4 and Sixth Amendment applied).

For defendants held in other jurisdictions seeking speedy trial on Indiana charges, and for defendants held in Indiana seeking speedy trial on charges from other jurisdictions, the usual remedy is the Uniform Interstate Agreement on Detainers, see § II below. Springer v. State, 175 Ind. App. 400, 372 N.E.2d 466 (1978).

**d. Does Not Protect Juveniles in Juvenile Proceedings**

Ind. Code § 31-37-11 sets time limits for juvenile proceedings. Although the juvenile court must hold a fact-finding hearing for a child who is not in detention within 60 days of filing of delinquency petition pursuant to Ind. Code § 31-37-11-2(b), dismissal of charges is not the proper remedy when the statutory deadline is not met. Continuances beyond the general 60-day limit are clearly contemplated. K.G. v. State, 67 N.E.3d 1147 (Ind. Ct. App. 2017).

**(1) One-Year Period**

In juvenile actions, time commences when the complaint alleging the delinquent act is filed.

State ex rel. Hirt v. Marion Superior Court, 451 N.E.2d 308 (Ind. 1983) (charges mistakenly filed against juvenile in criminal court were ordered transferred to juvenile court; one-year period begins to run when juvenile delinquency petition filed in court with juvenile jurisdiction).

**(2) Exceptions**

Ind. Code § 31-37-11-6(2) provides extension of speedy trial time periods for delay resulting from juvenile's act. Participation in informal adjustment program has been held to cause delay clearly for juvenile's benefit, thus chargeable to juvenile.

C.W. v. State, 643 N.E.2d 915 (Ind. Ct. App. 1994) (signing of informal adjustment contract and then failing to comply with its terms was act causing delay properly attributed to juvenile defendant).

**(3) Waiver Hearing**

Remedy for failing to grant speedy waiver hearing is release from custody, not divestiture of juvenile court jurisdiction. Ind. Code § 31-37-11-2. See Brown v. State, 448 N.E.2d 10 (Ind. 1983) and Spikes v. State, 460 N.E.2d 954 (Ind. 1984), *vacated on other grounds* 105 S. Ct. 1861, *on remand* 481 N.E.2d 1304.

Ind. Code § 31-37-11-4 provides: "If waiver is granted, the computation of time under Criminal Rule 4 commences on the date of the waiver order."

**e. Delay between Trial or Guilty Plea and Sentencing**

Neither CR 4 nor the Sixth Amendment Speedy Trial Clause apply to the delay between a defendant's trial or guilty plea and sentencing. Betterman v. Montana, 136 S.Ct. 1609 (2016). Instead, the Due Process Clause "serves as a backstop against exorbitant delay" at this post-conviction stage.

Barnett v. State, 637 N.E.2d 826 (Ind. Ct. App. 1994) (a guilty plea that trial court either accepts or takes under advisement waives speedy trial rights).

### 4. Preserving Error

#### a. Move for Release or Discharge

CR 4 is not self-executing. Defendants entitled to protection must move for release (CR 4(A)), or for discharge (CR 4(B) and 4(C)). Failure to do so in a timely manner waives right to a speedy trial.

Dunn v. State, 506 N.E.2d 822 (Ind. 1987) (CR 4(A)).

Vance v. State, 620 N.E.2d 687 (Ind. 1993) (CR 4(B)).

Defendant's failure to move for discharge constitutes waiver of any right to a speedy trial that defendant may have had, and a motion for discharge is a prerequisite to dismissal. Boyd v. State, 454 N.E.2d 401 (Ind. 1983); Banks v. State, 273 Ind. 99, 402 N.E.2d 1213 (1980).

Raber v. State, 622 N.E.2d 541 (Ind. Ct. App. 1993) (oral motion for discharge is sufficient for purposes of timely moving for discharge under CR 4(C)).

##### (1) *Pro se* motions

CR 4(C) requires only that *pro se* defendant raise speedy trial issue in a manner sufficiently definite to inform court that issue has been raised and requires ruling; defendant's oral assertions and repeated references to speedy trial deprivation at hearing to determine pauper counsel constituted motion for discharge. Raber v. State, 622 N.E.2d 541 (Ind. Ct. App. 1993).

##### (2) Burden

Defendant has burden to show that State has failed to bring her to trial within the applicable limitations period and that she was not responsible for delay. State ex rel. Shepphard v. Circuit Court of Clark County, 274 Ind. 602, 413 N.E.2d 258 (1980) and Martin v. State, 419 N.E.2d 256 (Ind. Ct. App. 1981).

#### b. Must Object When Court Sets Untimely Trial Date

##### (1) Date Set Before End of Speedy Trial Period

###### (a) Objection must be on proper basis

The objection must clearly state that the defendant objects on grounds that trial setting compromises her right to a speedy trial. Pasha v. State, 524 N.E.2d 310 (Ind. 1988). General objections to a continuance, which do not invoke the speedy trial rule, will not protect speedy trial rights. Failure to specify that objection is on constitutional, as well as CR 4 grounds, will not preserve the constitutional issue for appeal. Jacobs v. State, 454 N.E.2d 894 (Ind. Ct. App. 1983).

**(b) Objections must be made at the earliest opportunity**

To preserve right to discharge under CR 4, defendant must object at the earliest opportunity after defendant is or should be aware that delay effectively delays trial beyond speedy trial deadline. The defendant's duty to object "at the earliest opportunity" does not necessarily mean "immediately." Havvard v. State, 703 N.E.2d 1118 (Ind. Ct. App. 1999). See also State v. Myers, 101 N.E.3d 259 (Ind. Ct. App. 2018).

Diederich v. State, 702 N.E.2d 1074 (Ind. 1998) (defendant's use of first-class mail to object to trial setting was adequate).

Jacobs v. State, 454 N.E.2d 894 (Ind. Ct. App. 1983) (a three-day delay between setting of a trial date and objection is too long).

Black v. State, 947 N.E.2d 503 (Ind. Ct. App. 2011) (by sitting idly by and not objecting while there was still time for trial court to reset the trial in compliance with CR (4)(C), defendant waived right to be tried within one year).

**(2) No Duty to Object When No Notice of Trial Date or Time to Bring Defendant to Trial Has Expired**

When defendant receives no notice of trial, he has no duty to advise a court, or the prosecutor, that a speedy trial deadline is approaching.

Pillars v. State, 180 Ind. App. 679, 390 N.E.2d 679 (1979) (CR 4-time limit fell 8 days after court changed trial date with no attorney present; defense counsel filed objection upon obtaining docket sheet and discovering CR 4 violation 10 days after court's rescheduling; late notice under these circumstances made it unlikely that earlier objection would have enabled trial court to reschedule trial within statutorily proper period).

Butts v. State, 545 N.E.2d 1120 (Ind. Ct. App. 1989) (defendant's motion for discharge should be granted where docket entry states court's finding that defendant had never been notified of trial date).

Fink v. State, 471 N.E.2d 1161 (Ind. Ct. App. 1984) (prior to actual setting of trial, defendant was afforded ample notice of and opportunity to object to State's intention to try him beyond expiration of statutory period).

In addition, a defendant has no duty to object to setting of belated trial date when the act of setting such date occurred after time expires such that court cannot reset the trial date within time allotted by CR 4(C). Solomon v. State, 588 N.E.2d 1271, 1272 (Ind. Ct. App. 1992); Pelley v. State, 901 N.E.2d 494 (Ind. 2009); and Morrison v. State, 555 N.E.2d 458 (Ind. 1990), *overruled on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

Nance v. State, 630 N.E.2d 218 (Ind. Ct. App. 1994) (because obligation for defendant to be tried within one year under CR 4(C) rests with State, trial court erred in denying motion to dismiss. Defendant has no obligation to remind court

of duty, nor to take any affirmative steps to see he is tried; after year has passed, defendant's only duty is to object prior to trial). See also Young v. State, 765 N.E.2d 673 (Ind. Ct. App. 2002).

State v. Bondurant, 514 N.E.2d 301 (Ind. Ct. App. 1987) (no duty to object to late trial date set after statutory period had already run). See also State v. Black, 947 N.E.2d 503, 506-08 (Ind. Ct. App. 2011); and State v. Delph, 875 N.E.2d 416, 420 (Ind. Ct. App. 2007).

Woods v. State, 596 N.E.2d 919 (Ind. Ct. App. 1992) (although defendant waived the CR 4 issue by not objecting to trial setting outside one year, when trial court continued trial again at no fault of defendant, defendant only had to move for discharge, not object, to preserve issue).

Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008) (defendant waived speedy trial right under CR 4(C) by failing to object to trial date set outside one-year time limit).

But see:

State ex rel. O'Donnell v. Cass Superior Court, 468 N.E.2d 209 (Ind. 1984) (no waiver of CR 4(C) violation when defendant notified court of violation two days after court set trial date and three weeks before CR 4 period ran).

State v. Rehborg, 396 N.E.2d 953 (Ind. Ct. App. 1979) (no waiver of CR 4(C) where defendant not advised of trial setting until after period set by CR 4(C); in such situation, duty only to object prior to trial).

Havvard v. State, 703 N.E.2d 1118 (Ind. Ct. App. 1999) (defendant's duty to object "at earliest opportunity" does not necessarily mean "immediately").

**5. Standard of Review**

Questions of law are reviewed de novo and questions of fact are reviewed for clear error. Austin v. State, 997 N.E.2d 1027 (Ind. 2013). A denial of a motion for discharge for delay in a criminal trial is generally reviewed under the clearly erroneous standard. Smith v. State, 188 N.E.3d 63 (Ind. Ct. App. 2022).

**6. Time Limits on Retrial**

After an appellate remand, the relevant period is from the certification of the appellate decision to the time of the retrial; reasonableness of the time period is subject to the factors in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972). Lahr v. State, 615 N.E.2d 150 (Ind. Ct. App. 1993).

The 70-day rule of CR 4(B) applies after mistrials, but the speedy trial motion must be renewed. Young v. State, 482 N.E.2d 246 (Ind. 1985).

## B. CR 4(A) RELEASE

### 1. Rule - Release if Held Six Months Without Trial

CR 4(A) provides in relevant part:

> No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so detained shall be released on his own recognizance at the conclusion of the six-month period aforesaid and may be held to answer a criminal charge against him within the limitations provided for in subsection (C) of this rule.

#### a. Release, *Not* Discharge

The relief provided under CR 4(A) is a release from jail while awaiting trial. Any error in denying a request for an end to incarceration does not establish a right to discharge under CR 4(B). McQueen v. State, 711 N.E.2d 503, 505 (Ind. 1999); Keeby v. State, 511 N.E.2d 1005 (Ind. 1987).

> Drake v. State, 555 N.E.2d 1278 (Ind. 1990) (19-day delay in releasing defendant on his own recognizance after being detained over six months did not impair defendant's ability to prepare his defense with counsel).
>
> Battle v. State, 275 Ind. 70, 415 N.E.2d 39 (1981) (any alleged violation of CR 4(A) raised no question for review on appeal from conviction because period when defendant would have been entitled to be released has expired).

But see:

> Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (where conviction was reversed on other grounds, Court ordered defendant released pending retrial due to a CR 4(A) violation).

Release order cannot be rescinded by the court. Battle v. State, 275 Ind. 70, 415 N.E.2d 39 (1981).

#### b. Applies to Persons Detained

CR 4(A) applies only to persons detained in Indiana and does not apply to defendants

incarcerated on prior charges.

Ballentine v. State, 480 N.E.2d 957 (Ind. 1985) (defendant was detained in a state which was not a party to interstate agreement on detainers; per se time limits do not apply to persons incarcerated in other states).

Sweeney v. State, 704 N.E.2d 86 (Ind. 1998) (inapplicability of CR4 to defendants in foreign jurisdictions should not extend to defendants who are brought into Indiana under writs or other forms of temporary custody).

**c. CR 4(A) Right to Release Not Waived by Mere Acquiescence**

A pretrial detainee does not waive his right to release under CR 4(A) by failing to object to a trial date setting outside the 180-day time limit. "While the scheduling of a trial date beyond the time limits in [CR4(B) and CR4(C)] may be inconsistent with those rules and result in 'acquiescence' when the defendant does not object at the first opportunity, there is nothing about the scheduling of a trial for a date beyond the six-month period in Criminal Rule 4(A) that is inconsistent with a defendant's assertion of his right to release on his own recognizance once the six months pass." State ex rel. Bramley v. Tipton Circuit Ct., 835 N.E.2d 479 (Ind. 2005) (disapproving dicta in Mills v. State, 512 N.E.2d 846 (Ind. 1987) and Bowens v. State, 481 N.E.2d 1289 (Ind. 1985)).

**2. Appellate Review of CR 4(A) Denials**

CR 4(A) violations are not a basis for reversal of a conviction. If the trial court denies a motion for release under CR 4(A) after your client has been held pretrial for more than 180 days (not counting any delay caused by the defense), seek relief immediately by an interlocutory appeal or by an original action before the Supreme Court.

State ex rel. Bramley v. Tipton Circuit Ct., 835 N.E.2d 479 (Ind. 2005) (original action; Indiana Supreme Court ordered relator released on his own recognizance under CR 4(A)).

Dunn v. State, 506 N.E.2d 822 (Ind. 1987) (denial of defendant's motion for release on his own recognizance after 6 months in jail was not an issue for appeal after conviction; failure to bring defendant to trial within 6 months after arrest is not grounds for reversal of conviction).

However, a defendant may raise the CR 4(A) violation on appeal and request that he be released pending retrial. See, e.g., Joyner v. State, 678 N.E.2d 386 (Ind. 1997).

**3. No "special circumstances" exception to CR 4(A)**

Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (trial court erroneously believed that violation of Criminal Rule 4(A) was excused under "special circumstances of case;" trial court may not avoid CR 4(A) by finding its application unreasonable under special circumstances presented by particular case).

The delays excused under CR 4(A) are discussed in detail in subsection E.

## C. CR 4(B) EARLY TRIAL REQUEST

### 1. Violation of 70-Day Rule, Discharge Mandatory

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within 70 calendar days from the date of such motion. CR 4(B)(1); Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App. 1992); State v. Laslie, 178 Ind. App. 107, 381 N.E.2d 529 (1978). "The discretion to discharge is mandatory; nothing will prevent [Rule 4's] operation save its own exceptions." Jackson v. State, 663 N.E.2d 766, 770 (Ind. 1996) (quoting Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App. 1992)).

Poore v. State, 685 N.E.2d 36 (Ind. 1997) (time limits for speedy trial provided for in CR 4(B) apply to retrial of habitual offender enhancement).

#### a. Discharge and Dismissal

Discharge under CR 4(B) ends liability.

Defendant must:

- be held in jail,
- move for an early trial,
- object immediately to trial date outside 70-day period,
- not have taken any action inconsistent with motion for speedy trial,
- object to continuances or delays caused by state as to which he has notice which would delay trial to date, and
- after expiration of the 70-day period move for discharge and dismissal with prejudice.

**PRACTICE POINTER:** Beware of premature motions for discharge; defendant is chargeable with the time between the filing and court's ruling on the motion. See Stephenson v. State, 742 N.E.2d 463 (Ind. 2001) (when a CR 4 motion is made prematurely, it is properly denied).

#### b. Applies to Persons "Held in Jail"

CR 4(B) applies only to persons "held in jail" or other form of restraint, in Indiana.

Mork v. State, 912 N.E.2d 408 (Ind. Ct. App. 2009) (to be entitled to protection under Criminal Rule 4 for a defendant who requests a speedy trial on one charge while in jail on another, incarceration on present offense must be a reason that the defendant is in jail; see also State v. Kent, 700 N.E.2d 1187 (Ind. Ct. App. 1998)).

See also Poore v. State, 685 N.E.2d 36 (Ind. 1997) (incarceration due to pending charge at issue need not be the only reason defendant is in jail at time he requests a speedy trial under CR 4(B)).

Cf.

Upshaw v. State, 934 N.E.2d 178 (Ind. Ct. App. 2010) (where defendant was

properly released from incarceration under CR 4(B) but was later incarcerated because of a new unrelated charge, incarceration on new charge did not "tack onto" his initial incarceration for initial charge, so trial court properly denied defendant's motion to dismiss).

Williams v. State, 631 N.E.2d 485 (Ind. 1994) (defendant filed CR 4(B) speedy trial request and was not brought to trial within 70 days but was released from pre-trial detention; CR 4(B) no longer applies upon release from confinement); see also Bartley v. State, 800 N.E.2d 193 (Ind. Ct. App. 2003); State v. Kent, 700 N.E.2d 1187 (Ind. Ct. App. 1998).

Springer v. State, 175 Ind. App. 400, 372 N.E.2d 466 (1978) (CR 4(B) does not apply to out-of-state prisoner). See also Williams v. State, 533 N.E.2d 1193 (Ind. 1989).

**2. Defendant must request speedy trial**

**a. Written**

CR 4(B) does not require that a motion for early trial be in writing. However, Indiana Trial Rule 7(B) states that "unless made during a hearing or trial, or otherwise ordered by the court, an application to the court for an order shall be made by written motion." The trial court has discretion to require a written order but must be explicit and clear that an oral request is not effective.

McGown v. State, 599 N.E.2d 589 (Ind. 1992) (although rules do not require that motion for early trial be in writing, because trial court here so ordered, time began to run for CR 4(B) when written, not oral, motion was made).

Smith v. State, 943 N.E.2d 421, 425-26 (Ind. Ct. App. 2011) (time calculated from oral motion).

b. ***Pro se***

Motion for early trial filed *pro se* is not held to same standard of exactitude as those filed by counsel. State v. Laslie, 178 Ind. App. 107, 381 N.E.2d 529 (1978).

**c. Nullity When Filed in Court Lacking Jurisdiction**

Where an indictment or information is filed in a court that lacks jurisdiction over the charge, a CR 4(B) motion for early trial filed in that court is a nullity because grant of request is beyond the court's jurisdiction. Banks v. State, 273 Ind. 99, 402 N.E.2d 1213 (1980).

**d. Must Be Provided Opportunity to Assert Speedy Trial Rights**

Before defendant can request a speedy trial, he must be afforded opportunity to make that request; a denial of an opportunity to assert CR 4(B) rights is a denial of the right itself. State v. Roberts, 171 Ind.App. 537, 358 N.E.2d 181 (1976).

Poe v. State, 445 N.E.2d 94 (Ind. 1983) (appointment of counsel to defendant on 69th day of incarceration did not deny him opportunity to invoke CR 4(B); defendant filed

*pro se* motion for speedy trial 41 days after arrest).

**e. Invokes Speedy Trial Rights**

Service on the prosecutor alone invokes protection of speedy trial rule. Hart v. State, 260 Ind. 137, 292 N.E.2d 814 (1973).

Defect in perfecting service on the prosecutor is not material provided the court is served. Stokes v. State, 157 Ind. App. 273, 299 N.E.2d 647 (1973) (*citing* CR 18). However, where the defendant fails to file the motion in the court with jurisdiction over the case, the motion is ineffective to invoke the speedy trial rule. Banks v. State, 273 Ind. 99, 402 N.E.2d 1213 (1980); State ex rel. Wickliffe v. Judge, Crim. Court of Marion County, 263 Ind. 219, 328 N.E.2d 420 (1975).

**f. Must Renew Motion**

**(1) Additional Charges Filed**

Defendant should file motion for speedy trial on any subsequent charges which are separate and distinct from original charge that is already subject to CR4 (B) motion.

Burkes v. State, 617 N.E.2d 972 (Ind. Ct. App. 1993) (defendant, who filed a motion for speedy trial under CR 4(B) as to the original charge, but not on 5 additional charges filed after motion, was not entitled to dismissal of additional charges. Defendant's motion for discharge on original charge was granted, but he did not specifically move for speedy trial as to the other counts).

Fultz v. State, 849 N.E.2d 616 (Ind. Ct. App. 2006) (State was not trying to avoid CR 4(B) deadline by dismissing and re-filing arson charge along with additional murder charge in light of new evidence). See also Wingate v. State, 900 N.E.2d 468 (Ind. Ct. App. 2009).

**(2) After Mistral**

Defendant must renew motion for speedy trial after a mistrial is declared. State v. Roth, 585 N.E.2d 717 (Ind. Ct. App. 1992). Time limits that begin to run before defendant's initial trial do not continue after mistrial is declared; when defendant makes new speedy trial request after mistrial, 70-day limit comes back into operation. State v. Roth, 585 N.E.2d 717 (Ind. Ct. App. 1992).

**g. Waiver: Acting Inconsistent with Speedy Trial Motion**

Purpose of motion for speedy trial made pursuant to criminal rule is served when defendant makes motion and trial court takes action by setting cause for trial, and if defendant causes delay, he must file motion requesting immediate commencement of trial in order to invoke his rights under rule. Wright v. State, 593 N.E.2d 1192 (Ind. 1992).

**(1) Subsequent Motion for Early Trial Waives Original Motion**

When defendant files a motion for early trial, such filing constitutes an abandonment of previous motions for early trial filed by that defendant. Minneman v. State, 441

N.E.2d 673 (Ind. 1982).

Rutledge v. State, 426 N.E.2d 638 (Ind. 1981) (defendant filed motion for early trial and later filed motion for "fast and speedy trial"; second motion operated as abandonment of the first).

**(2) Action Inconsistent with Speedy Trial Motion**

A defendant who has made a motion for early trial under CR 4(B) must maintain a position reasonably consistent with his speedy trial request, or he will be considered to have abandoned the request.

(1) Fighting extradition and requesting continuance. Stone v. State, 531 N.E.2d 191 (Ind. 1988).

(2) Continuance sought by defendant waives CR 4(B) 70-day rule.

Howland v. State, 442 N.E.2d 1081 (Ind. 1982) (defendant must renew motion for speedy trial after seeking continuance).

(3) Motions to compel discovery and to suppress may be interpreted as inconsistent with speedy trial motion under CR 4(B). Taylor v. State, 468 N.E.2d 1378 (Ind. 1984); Minneman v. State, 441 N.E.2d 673 (Ind. 1982).

(4) Pursuing plea negotiations and making a subsequent speedy trial motion, rather than seeking discharge on basis of the earlier motion, abandons the initial speedy trial motion. Mickens v. State, 439 N.E.2d 591 (Ind. 1982) and Payne v. State, 658 N.E.2d 635 (Ind. Ct. App. 1995).

Barnett v. State, 637 N.E.2d 826 (Ind. Ct. App. 1994) (defendant's guilty plea constitutes abandonment of any previously asserted CR 4(B) request, regardless of whether trial court accepts or rejects plea; once defendant enters plea, new motion required to invoke speedy trial right).

**PRACTICE POINTER:** If the defendant causes delay, he must file a motion requesting immediate commencement of trial to invoke his rights under the rule. Wright v. State, 593 N.E.2d 1192 (Ind. 1992).

**3. Defendant Must Object to Trial or Pre-trial Setting**

Defendant must object to trial date set outside of the 70-day period at earliest opportunity, or she will be deemed to have acquiesced to later trial date. Trial court must be given an opportunity to reset the trial within the proper period. Vance v. State, 620 N.E.2d 687 (Ind. 1993); Johnston v. State, 578 N.E.2d 656 (Ind. 1991). Similarly, failure to object to the setting of a pre-trial conference beyond the 70-day period waives CR 4(B) rights, because it is construed as acquiescing in the late trial date. Sumner v. State, 453 N.E.2d 203 (Ind. 1983).

Pasha v. State, 524 N.E.2d 310 (Ind. 1988) (trial court properly denied motion for discharge where *pro se* defendant proceeded to trial without objection until motion was filed after 70-day period had expired).

Locke v. State, 461 N.E.2d 1090 (Ind. 1984) (defendant failed to raise CR 4(B) issue before the trial court or in his motion to correct errors; appellate court had nothing to

review).

Chambers v. State, 848 N.E.2d 298 (Ind. Ct. App. 2006) (although defense counsel did not use the word "objection" when the State requested a continuance of the trial date beyond the 70-day speedy trial limit, counsel's statement reminding the judge that defendant had filed a speedy trial request was in nature of objection and was sufficient to preserve the issue for appeal).

See also Smith v. State, 943 N.E.2d 421 (Ind. Ct. App. 2011) (where *pro se* defendant orally requested speedy trial at three separate hearings, before obtaining counsel, and trial court would not entertain motion until an attorney filed written motion for speedy trial, trial court abused its discretion in denying counsel's CR 4(B) motion to dismiss, even though defendant had not used words "I object to the trial setting"; defendant's oral requests made it clear he was not acquiescing to the original trial setting).

Defendant is not obliged to object to trial date if notice of setting of trial date is received only after the 70-day period has expired. State v. Bondurant, 514 N.E.2d 301 (Ind. Ct. App. 1987).

**4. Defendant Has No Duty to Remind Court about 70-Day Rule**

State has duty to bring defendant to trial within 70 days of a speedy trial claim. CR 4(B). The defendant has no duty to remind the court of the State's duty. Bondurant v. State, 514 N.E.2d 301 (Ind. Ct. App. 1987) and State v. Smith, 495 N.E.2d 539 (Ind. Ct. App. 1986).

**5. Court Congestion - Priority**

Upon an incarcerated defendant's request for speedy trial, Criminal Rule 4(B) requires particularized priority treatment. As a general rule, courts should prioritize criminal cases over civil cases, cases that have been pending longer over cases pending shorter, cases in which a defendant has moved for early trial under Rule 4(B) over cases where the defendant has not. Courts must assess the reasonableness of prioritization based on the specific circumstances of the situation, may take into account how long the trial will take, need to accommodate travel logistics of witnesses, etc. Austin v. State, 997 N.E.2d 1027, 1040-41 (Ind. 2013).

Clark v. State, 659 N.E.2d 548 (Ind. 1995) (it is essential for trial courts to develop and implement trial scheduling systems that comport with requirements of CR 4 and that grant relief when its speedy trial requirements are violated; here, declaration of congestion was clearly erroneous where defendant presented evidence that at time trial court postponed trial and entered order finding congestion, no conflicting jury trial was scheduled and no jurors had been summoned).

S.L. v. State, 16 N.E.3d 953 (Ind. 2014) (despite trial court's technical compliance with Criminal Rule 4(C), defendant experienced personal prejudice from serving nearly entire six-year sentence before trial began, and trial was continued seven times due to court congestion; although a congested court calendar weighs less heavily against the State, it still must be viewed as the responsibility of the government and an impediment to a defendant's constitutional right to a speedy trial).

For more on Court congestion and other excusable delays, see below, § I.E.6.

### 6. Computing Time

The 70-day period begins running on the date the motion is filed and will expire 70 days later. Where defendant seeks a continuance, he is charged with the time between the vacated trial date and the rescheduled trial date. Young v. State, 521 N.E.2d 671, 673 (Ind. 1988).

> Back v. Starke Circuit Court, 271 Ind. 82, 390 N.E.2d 643, 644 (1979) (delays chargeable to a defendant "act only to extend the time limitation by the amount of the delays").

Every day after the filing of motion for early trial shall be counted, including Saturday, Sunday, and holidays. However, if the 70th day falls upon a Saturday, Sunday, or holiday, then such trial may be commenced on the next day, which is not Saturday, Sunday, or a legal holiday. CR 4(B)(2).

### 7. Dismissal and Refiling

Indiana Court of Appeals opinions are in conflict regarding treatment of original early trial motion after State dismisses and refiles charge.

Where defendant has made a speedy trial motion, the 70-day time limit does not start anew when the State dismisses and refiles the charge.

> Fink v. State, 469 N.E.2d 466, 468-69 (Ind. Ct. App. 1984) ("an incarcerated defendant's invocation of the speedy trial rule may not be defeated by the simultaneous dismissal and refiling of related charges ... Otherwise, if the State may at any time within the year prescribed by C.R. 4(C) abrogate the defendant's speedy trial motion simply by dismissing and refiling identical or related charges, we fail to discern the value of C.R. 4(B).").
>
> Hornaday v. State, 639 N.E.2d 303 (Ind. Ct. App. 1994) (when identical charges are refiled, they are regarded for speedy trial purposes as if no dismissal occurred or as if subsequent charges were filed on date of first charges).

But see:

> Shields v. State, 456 N.E.2d 1033, 1037 (Ind. Ct. App. 1983) (when the State dismissed and refiled charges, "a whole new action began" and the 70-day period runs anew should defendant move for a speedy trial on the new charges).
>
> Fultz v. State, 849 N.E.2d 616 (Ind. Ct. App. 2006) (State was not trying to avoid the CR 4(B) deadline by dismissing and re-filing arson charge along with additional murder charge in light of new evidence). See also Wingate v. State, 900 N.E.2d 468 (Ind. Ct. App. 2009).

## D. CR 4(C) ONE YEAR RULE AND DISCHARGE

### 1. One-Year Time Limit on Pending Charges

Courts and prosecutors have the duty to bring defendant to trial within one year under the speedy trial rule and must act diligently and in good faith. Arion v. State, 56 N.E.3d 71 (Ind. Ct. App. 2016); Cundiff v. State, 967 N.E.2d 1026, 1028 (Ind. 2012). Defendant has no

obligation to remind court of State's duty nor to take any affirmative steps to see that he is brought to trial within the period. Nance v. State, 630 N.E.2d 218 (Ind. Ct. App. 1994), *overruled on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

Andrews v. State, 441 N.E.2d 194 (Ind. 1982) (no person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later).

Hinds v. State, 469 N.E.2d 31, 35 (Ind. Ct. App. 1984) (although county court lacked jurisdiction to try case, the one-year CR 4(C) period began when defendant was arrested and charged with robbery in county court, not when case was transferred to circuit court; filing Rule 4(B) motion for early trial, however, would have been nullity since grant of request would have been beyond court's jurisdiction).

**a. Discharge and Dismissal with Prejudice**

Defendant is to be discharged if held more than one year without a trial. Ewing v. State, 629 N.E.2d 1238 (Ind. 1994). "The discretion to discharge is mandatory; nothing will prevent [Rule 4's] operation save its own exceptions." Jackson v. State, 663 N.E.2d 766, 770 (Ind. 1996) (quoting Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App. 1992)). Discharge and dismissal under CR4(C) are with prejudice. Reluctance to discharge a defendant accused of serious charges is understandable, but the seriousness of the charges is legally irrelevant to the speedy trial analysis. Arion v. State, 56 N.E.3d 71 (Ind. Ct. App. 2016).

Gardner v. State, 591 N.E.2d 592 (Ind. Ct. App. 1992) (defendant was discharged from dealing in cocaine charge because setting of his trial date occurred after 1-year time limit expired).

**b. Tharp Rule - Precludes Charges Which Could Have Been Joined**

After a charge becomes time-barred by CR 4(C) and defendant has been discharged or is eligible for discharge, he cannot be subjected to a related charge growing out of the same transaction, incident, or set of facts, when charges could have been joined with the initial charge. State v. Tharp, 406 N.E.2d 1242, 1246 (Ind. Ct. App. 1980).

The Tharp rule does not bar later charges based on separate and distinct facts. Pruett v. State, 617 N.E.2d 980 (Ind. Ct. App. 1993); Hawkins v. State, 794 N.E.2d 1158 (Ind. Ct. App. 2003).

Justice v. State, 550 N.E.2d 809 (Ind. Ct. App. 1990) (dismissal of charges under speedy trial rule does not preclude admission of underlying facts to support probation revocation).

Wingate v. State, 900 N.E.2d 468 (Ind. Ct. App. 2009) (prosecutor's dismissal of three charges and addition of two new charges on the 69th day after a CR 4(B) request did not violate CR 4 because the new charges were factually distinct from the dismissed charges, although State discovered the basis for the new charges through the investigation of the dismissed charges).

Hawkins v. State, 794 N.E.2d 1158 (Ind. Ct. App. 2003) (receiving stolen property charge was based on facts separate and distinct from those in the auto theft charge; thus, Criminal Rule 4(C) was not violated).

**c. Application**

Rule 4(C) protects persons who have been arrested, regardless of whether they are being held for trial in jail or have been released on bail on their own recognizance.

**d. 90-Day Extension to One-Year Rule**

Ind. Crim. Rule 4(D) provides for a 90-day extension of the otherwise applicable one-year time limitation when, upon application for discharge of a defendant, the court is satisfied that the State's evidence is temporarily unavailable but can be had within 90 days. See E.1. The 90-day extension is added on to the original time period (it does not run from the time it is requested).

Littrell v. State, 15 N.E.3d 646, 650-51 (Ind. Ct. App. 2014) (where defendant filed motion for speedy trial, State's 90-day extension obtained through CR 4(D) to get drug analysis results began to run at expiration of CR 4(B) 70-day period, not the day trial court granted the State's extension request; thus, because defendant was tried 152 days after he filed his motion, his right to a speedy trial was not violated).

**2. Exceptions - Excusable Delays**

Exceptions are discussed in detail under Sub-section E, "Excusable Delays."

**3. When Time Begins to Run**

Under CR 4(C), time runs from the later of the date the charge is filed or the date of arrest. Caldwell v. State, 922 N.E.2d 1286 (Ind. Ct. App. 2010). Defendant's delays and delays because of court congestion are subtracted from the time period. Andrews v. State, 441 N.E.2d 194 (Ind. 1982) and Landrum v. State, 428 N.E.2d 1228 (Ind. 1981). The one-year period under CR 4(C) is initiated by the filing of charges or arrest even if the court lacks jurisdiction to try the case. Hinds v. State, 469 N.E.2d 31, 35 (Ind. Ct. App. 1984).

**a. Subsequent Indictment or Information**

Butts v. State, 545 N.E.2d 1120 (Ind. Ct. App. 1989) (three charges were filed against defendant on April 9, 1986; on May 28, 1986, a fourth charge was filed. When the rule period under CR 4(C) expired as to the original charges, defendant contended that the time period had commenced at the same time as to the fourth charge. Fourth charge not the same as one of the original charges or a refiling of an identical charge but was a separate and distinct charge; held time period commenced when the fourth charge was filed).

**b. Summons**

Johnson v. State, 708 N.E.2d 912 (Ind. Ct. App. 1999) (misdemeanor summons is the same as "arrest" for purposes of CR 4(C); here, timetable of CR 4(C) started on day summons ordered defendant to appear in court; that was the date that defendant's liberty

was truly restrained, as she was ordered to appear before court and was subject to arrest if she failed to appear).

**c. Arrest/Extradition**

CR 4(C) has been interpreted so the year runs from time of out-of-state arrest, not from completed extradition. Fuller v. State, 995 N.E.2d 661, 664 (Ind. Ct. App. 2013); see also Sweeney v. State, 704 N.E.2d 86, 100 (Ind. 1998).

Greengrass v. State, 542 N.E.2d 995 (Ind. 1989) (defendant's trial and conviction 6 years after initial out-of-state arrest violated CR 4(C) guaranteeing trial within one year; delay caused by State's failure to complete extradition cannot be charged to defendant).

But cf.

Blasko v. State, 920 N.E.2d 790 (Ind. Ct. App. 2010) (distinguishing Greengrass, court noted there was no evidence the State refused to move forward on defendant's extradition from Florida or that the State cancelled the extradition order).

Sickels v. State, 960 N.E.2d 205 (Ind. Ct. App. 2012) (unlike Greengrass, the State never refused to complete extradition proceedings once it learned of defendant's presence in Michigan and thrice issued governor's warrants in an attempt to have defendant returned to Indiana), *aff'd in relevant part by* 982 N.E.2d 1010 (Ind. 2013).

**d. Time between Mistrial and Refiling of Charges Not Included in One-Year Period**

The time between declaration of a mistrial and refiling of new charges is probably not includable in determining whether Rule 4(C) has been violated. See U.S. v. Loud Hawk, 474 U.S. 302, 106 S.Ct. 648 (1986) (no public accusation or restraint on liberty).

**4. Preservation of Error**

If the court proposes an untimely trial date before the one-year period has run, object immediately and ask for a trial date within the one year. If time has already run out, move for discharge and dismissal with prejudice under CR 4(C).

**a. Duty to Object**

Defendant has a duty to object at the earliest opportunity if she learns of an untimely trial date before expiration of the one-year period. Pasha v. State, 524 N.E.2d 310 (Ind. 1988).

Havvard v. State, 703 N.E.2d 1118 (Ind. Ct. App. 1999) (defendant's duty to object to trial setting "at earliest opportunity" does not necessarily mean "immediately," instead objection must be lodged in time to permit trial court to reset trial for date within the proper period).

Diederich v. State, 702 N.E.2d 1074 (Ind. 1998) (defendant's use of first-class mail to object to trial setting outside of one-year speedy trial period was adequate to enforce his rights under CR 4(C); although there was very little time left to conduct trial at

the moment when defendant tendered his objection, the real reason for shortness of time was not defendant's use of U.S. Mail but the prosecutor's decision much earlier to let the matter pend in another court for 215 days before dismissing without prejudice).

Black v. State, 947 N.E.2d 503 (Ind. Ct. App. 2011) (by sitting idly by and not objecting while there was still time for trial court to reset the trial in compliance with CR 4(C), defendant waived his right to be tried within one year).

Blair v. State, 877 N.E.2d 1225 (Ind. Ct. App. 2007) (no error in denying motion for discharge where State moved for a continuance of jury trial, to which defendant did not object).

State v. Delph, 875 N.E.2d 416 (Ind. Ct. App. 2007) (where defendant acquiesced to delay, there was no CR 4(C) violation).

Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008) (defendant waived his right to speedy trial under CR 4(C) when he failed to object to a trial date set outside the one-year time limit).

**b. Motion for Discharge**

As a prerequisite for discharge, defendant must file a motion for discharge when a trial date is set beyond the one-year limit provided by CR 4(C). Boyd v. State, 454 N.E.2d 401 (Ind. 1983).

Martin v. State, 419 N.E.2d 256, 259 (Ind. Ct. App. 1981) (if motion for discharge is filed prior to running of the year, it is premature).

Pearson v. State, 619 N.E.2d 590 (Ind. Ct. App. 1993) (defendant denied effective assistance of counsel for failing to move for discharge under CR 4(C), as the one-year period had already passed, and trial court could not set a date within the time allotted).

**5. Refiling of Dismissed Charges**

One-year period of Crim. R. 4(C) does not start anew with the refiling of dismissed charges. Bentley v. State, 462 N.E.2d 58 (Ind. 1984).

Young v. State, 521 N.E.2d 671 (Ind. 1988) (when identical charges are refiled, they are regarded as if no dismissal occurred, or as if the subsequent charges were filed on the date of the first charges).

**a. Tolling Rule**

The CR 4(C) clock is stopped between dismissal and refiling. Young v. State, 521 N.E.2d 671 (Ind. 1988).

Bentley v. State, 462 N.E.2d 58, 60 (Ind. 1984) (the clock begins running where it left off when new charges are filed).

Hornaday v. State, *supra* at 308-09 (no exception to the tolling rule would apply even

though defendant was not released after charges against him were dismissed prior to refiling; although defendant remained incarcerated after charges against him were filed, he was serving a sentence on a prior conviction).

Accord, Wilson v. State, 606 N.E.2d 1314 (Ind. Ct. App. 1993) and Stinson v. State, 797 N.E.2d 352 (Ind. Ct. App. 2003).

**b. May Not File Lesser Included Offense (LIO)**

When a court properly discharges defendant under CR 4(C), the discharge is equally effective as to any lesser included offense. Small v. State, 259 Ind. 349, 287 N.E.2d 334 (1972). The same is true for related charges growing out of the same transaction, incident, or set of facts, when charges could have been joined with the initial charge. State v. Tharp, 406 N.E.2d 1242, 1246 (Ind. Ct. App. 1980).

**6. Retrial - "Reasonable Time"**

The time limitations of CR 4(C) do not apply in retrial situations. Defendant must only be tried within a "reasonable" time based on his constitutional speedy trial rights. Nelson v. State, 542 N.E.2d 1336, 1338 (Ind. 1989). After an appellate remand, the relevant period is from the certification of the appellate decision to the time of the retrial; reasonableness of the time period is subject to the factors in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972)). Lahr v. State, 615 N.E.2d 150 (Ind. Ct. App. 1993). CR 4 does not specify how much time is reasonable following a mistrial by reason of a hung jury. Nelson v. State, 542 N.E.2d 1336 (Ind. 1989) and State ex rel. Brumfield v. Perry Circuit Court, 426 N.E.2d 692 (Ind. 1981).

Watson v. State, 155 N.E.3d 608 (Ind. 2020) (although CR 4(C) is inapplicable to retrials of habitual offender determinations, defendant's constitutional right to a speedy trial in this case was violated by the nearly 6.5-year delay in retrying the habitual enhancement).

Brumfield v. Perry Circuit Court, 426 N.E.2d 692, 695 (Ind. 1981) (CR 4(C) does not govern proceedings following declaration of a mistrial).

O'Neill v. State, 597 N.E.2d 379, 383 (Ind. Ct. App. 1992) (court did not abuse discretion in bringing defendant to trial approximately six months after declaration of mistrial; defendant failed to show any facts which suggested that a four-month delay after trial court vacated trial setting was not due to calendar congestion and offered no other facts showing that delay was unreasonable).

Young v. State, 482 N.E.2d 246 (Ind. 1985) (defendant not denied his right to speedy trial where first trial resulted in mistrial and he was held in jail 6 months until, on third try, he was convicted; time was reasonable).

## E. EXCUSABLE DELAYS UNDER CR 4

### 1. Criminal Rule 4(D) - Unavailability of State's Witness/Evidence

**a. Timing of Motion for Continuance**

CR 4(D) provides:

If when application is made for discharge of a defendant under this rule, the court be

satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety (90) days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety (90) days, he shall then be discharged.

Wiseman v. State, 600 N.E.2d 1375 (Ind. Ct. App. 1992) (State filed 4(D) motion before defendant moved for discharge; State's motion for continuance may be filed any time up to and including time of defendant's motion for discharge). See also Kindred v. State, 524 N.E.2d 279 (Ind. 1988); and Smith v. State, 502 N.E.2d 485 (Ind. 1987).

Otte v. State, 967 N.E.2d 540 (Ind. Ct. App. 2012) (two-week continuance was reasonable where essential State's witness was scheduled to be on vacation and out of the state on scheduled trial date).

Wooley v. State, 716 N.E.2d 919 (Ind. 1999) (it is reasonable for law enforcement officials to rely on witness's assurance that she will appear, especially after making specific transportation plans for witness).

**b. Type of evidence justifying delay**

"[Criminal] Rule 4(D) does not mandate the evidence be essential or unique, only that it be unavailable and that the State be entitled to present it." Smith v. State, 502 N.E.2d 485, 488 (Ind. 1987).

Mickens v. State, 439 N.E.2d 591 (Ind. 1982) (witness unavailable because he required surgery).

Wilhelmus v. State, 824 N.E.2d 405 (Ind. Ct. App. 2005) (given absence of key witnesses, trial court did not abuse discretion in granting State's request for 14-day continuance).

McGhee v. State,192 N.E.3d 1009 (Ind. Ct. App. 2022) (forensic scientist whose name was endorsed on information was unavailable to testify, even if State failed to comply with each technical aspect of statutory requirements for continuance; State described how scientist, who performed DNA analysis, was supposed to testify about DNA results and her method of DNA analysis or statistical calculation, which was fairly new, State showed that it did not procure scientist's absence, and State showed that scientist could be procured to testify within a reasonable time).

Smith v. State, 802 N.E.2d 948 (Ind. Ct. App. 2004) (continuance under CR 4(D) was justified where the father of a police officer who had been stalked and intimidated by defendant had died and the officer needed to attend to family matters).

**c. State Must Make Reasonable Efforts to Procure Evidence**

Before a trial court may properly deny a defendant's application for discharge under Crim.R. 4(D), the court must be satisfied that the State has made reasonable efforts to procure missing evidence and that there is just cause to believe that such evidence can be had within 90 days. Fortson v. State, 269 Ind. 161, 167-68, 379 N.E.2d 147, 152 (1978).

The "reasonable effort" requirement is satisfied where the State is not at fault for the absence of the witness. McGhee v. State,192 N.E.3d 1009 (Ind. Ct. App. 2022).

Ewing v. State, 629 N.E.2d 1238 (Ind. 1994) (defendant entitled to discharge under CR 4(C); state's request for continuance beyond one-year period due to temporary absence of witness unavailing; judge issued no findings of fact and law with respect to denial of defendants' motion for dismissal; examination of record reveals no factual basis to support denial; no evidence of reasonable efforts by State to procure the unavailable witness nor any basis for just cause to believe that the witness could be produced within 90 days).

Griffin v. State, 695 N.E.2d 1010 (Ind. Ct. App. 1998) (trial court's rescheduling of trial 28 days beyond 70-day period due to unavailability of State's witness was authorized by CR 4(D); although trial court was required to determine that witness was unavailable on date set for trial, it was not required to determine that witness was unavailable on any other date between date of motion for continuance and expiration of 70-day period).

Chambers v. State, 848 N.E.2d 298 (Ind. Ct. App. 2006) (where it was later discovered that lab tests were completed prior to state asking for CR 4(D) continuance to obtain lab results and State could have discovered the completion of the tests by simply calling the lab, trial court erred in denying defendant's motion for discharge); see also Dilley v. State, 134 N.E.3d 1046 (Ind. Ct. App. 2019); and Peele v. State, 136 N.E.3d 1155 (Ind. Ct. App. 2019).

**2. Delays Caused by Defendant**

"[W]hen a defendant takes action which delays the proceeding, that time is chargeable to the defendant and extends the one-year time limit, regardless of whether a trial date has been set at the time or not." Cook v. State, 810 N.E.2d 1064, 1066-67 (Ind. 2004) (disapproving cases to the contrary).

Payton v State, 905 N.E.2d 508 (Ind. Ct. App. 2009) (regardless of whether the State's witness's failure to attend depositions caused defendant's need to continue discovery, defendant's declining the prosecution's and the court's invitation to set a trial date while the discovery was continuing delayed the setting of the trial date which in turn delayed the trial).

**a. Defense action must actually cause delay**

Havvard v. State, 703 N.E.2d 1118 (Ind. Ct. App. 1999) (because defendant did not move to continue trial date when he waived jury trial, the trial was not delayed by his actions and trial court erred in calculating delay attributable to defendant under Criminal Rule 4(C)).

Gamblin v. State, 568 N.E.2d 1040 (Ind. Ct. App. 1991) (where defendant filed premature motion for discharge pursuant to CR 4(C) approximately one month prior to last trial setting but motion was not ruled on until almost two months after he should have been brought to trial, defendant was entitled to discharge because he was not timely brought to trial).

Harrington v. State, 588 N.E.2d 509 (Ind. Ct. App. 1992), (defendant was entitled to discharge for failure to be brought to trial within 365 days, because delay due to the defendant's motion for special prosecutor was caused by conflict arising from prosecutor's prior representation of defendant in a criminal matter), *disapproved on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004); Cf. State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (*citing* Cook court's disapproval of Harrington, Court finds delays caused by interlocutory appeal and conflict-based motion for change of judge attributable to the defendant; no Criminal Rule 4 discharge, as defendant agreed to trial date and change of judge triggered CR 4 reset).

Schwartz v. State, 708 N.E.2d 34 (Ind. Ct. App. 1999) (defendant's failure to appear at pre-trial conference did not cause a delay attributable to the defendant because the record was completely silent on whether pretrial conference was ever held; assuming pretrial conference was held and the defendant did not appear, the trial date could have been set in his absence). See also Isaacs v. State, 757 N.E.2d 166 (Ind. Ct. App. 2001).

Allen v. State, 51 N.E.3d 1202 (Ind. 2016) (regardless of whether defendant's non-appearance for trial while incarcerated might have been a delay attributable to him because he failed to prepare transport order, defendant was entitled to discharge because rescheduled trial date was beyond the time remaining under Rule 4(C) even without counting the disputed delay).

**b. Defense Continuances**

Under CR 4(A), (B), and (C), where a continuance is had on defendant's motion, the period of the delay will be attributed to the defendant, so that the time within which he may be brought to trial is extended.

Owens v. State, 168 N.E.3d 1036 (Ind. Ct. App. 2021) (CR 4(A) motion for release denied where continuance extending time in jail was attributable to defendant).

As with court congestion (see below), a defendant may demonstrate a docket entry attributing a continuance to the defendant as factually or legally inaccurate.

Gibson v. State, 910 N.E.2d 263, 267-68 (Ind. Ct. App. 2009) (although the Chronological Case Summary entries showed that defendant was granted several continuances, defendant demonstrated those entries were not correct; the "bench trial/stats" hearings scheduled throughout the period were merely pretrial conferences to allow for plea negotiations and never trial dates; at another hearing, the prosecutor was not even present).

**(1) Continuance Beyond Trial Deadline**

**(a) CR 4(C)**

Continuing a trial beyond the one-year period does not waive one's speedy trial rights indefinitely, but rather the State's time period to bring the defendant to trial is extended only by the period of the delay.

State ex rel. Henson v. Washington Circuit Court, 514 N.E.2d 838 (Ind. 1987) (defendant waived speedy trial right by failing to object to trial date set

9 days beyond 1-year deadline; however, defendant's failure to object did not waive his right to have trial on that specific date; Failure to try defendant on that date, without demonstration of why cause was not tried, required discharge of defendant).

James v. State, 622 N.E.2d 1303 (Ind. Ct. App. 1993) (when considering one-year period to bring to trial under CR 4(C), failure to object to trial setting outside one year only waives rights up to and including original late setting; in context of CR 4(B), acquiescence constitutes total abandonment of motion).

Cf. Wheeler v. State, 662 N.E.2d 192 (Ind. Ct. App. 1996) (when defendant requests indefinite continuance and later becomes dissatisfied that his trial has not been reset, he must take some affirmative action to notify court that he now desires to go to trial to reinstate running of time period). See also State v. Penwell, 875 N.E.2d 365, 367-68 (Ind. Ct. App. 2007); Rivers v. State, 777 N.E.2d 51, 55 (Ind. Ct. App. 2002); and State v. Powell, 755 N.E.2d 222, 225-26 (Ind. Ct. App. 2001).

**(b) CR 4(B) Continuance - Must Renew Speedy Trial Motion**

CR 4(B) requires that a person not take any action not "reasonably consistent" with a trial at or close to the 70-day deadline.

Rutledge v. State, 426 N.E.2d 638 (Ind. 1981) (announcing the reasonably consistent standard and finding abandonment of the speedy trial motion by defendant). See also Stone v. State, 531 N.E.2d 191 (1988).

Defendant must "renew" a motion for speedy trial when defendant's continuance delays a trial date which would otherwise have satisfied Rule 4(B). Wright v. State, 593 N.E.2d 1192 (Ind. 1992).

See also Saperito v. State, 490 N.E.2d 274 (Ind. 1986) (*citing* Parks v. State, 389 N.E.2d 286 (Ind. 1979)). Parks suggests "renew" means "refile."

Miller v. State, 563 N.E.2d 578 (Ind. 1990) (defendant can refile for a speedy trial contemporaneously with motion for continuance).

**(2) Co-Defendant's Continuance**

A defendant waives his CR 4(B) rights by failing to object to a co-defendant's motion for continuance when it delays the trial beyond the 70-day period. Williams v. State, 533 N.E.2d 1193 (Ind. 1989) (*citing* Wright v. State, 363 N.E.2d 1221 (Ind. 1977) Cody v. State, 259 Ind. 570, 290 N.E.2d 38 (1972)) and Nicholson/Baker v. State, 768 N.E.2d 1043 (Ind. Ct. App. 2002)).

**(3) Exception - when defense continuance counts towards State**

The delay caused by the defendant’s continuance, which was necessitated by a discovery violation by the State, is attributable to the State. Marshall v. State, 759 N.E.2d 665 (Ind. Ct. App. 2001); Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App.

1992); and Dillard v. State, 102 N.E.3d 310 (Ind. Ct. App. 2018); but see Cole v. State, 780 N.E.2d 394 (Ind. Ct. App. 2002).

**c. Acts of Attorney**

For purposes of CR 4, the acts of the attorney with regard to delay are acts of the defendant. Faulisi v. State, 602 N.E.2d 1032 (Ind. Ct. App. 1992). Once counsel has been appointed, even if counsel has not yet entered an appearance, a defendant speaks to the court through counsel. When a defendant files a pro se motion after counsel has been appointed to represent him—such as a *pro se* request for an early trial under Indiana Criminal Rule 4(B)—the trial court is not required to consider the *pro se* request. See, Underwood v. State 722 N.E.2d 828, 832 (Ind. 2000). Before counsel's appointment, a trial court must consider a defendant's pro se motion, like a request for an early trial. But after counsel's appointment, this consideration is left to the trial court's discretion. Anderson v. State, 160 N.E.3d 1102 (Ind. 2021).

Vermont v. Brillon, 129 S. Ct. 1283 (2009) (public defenders are not state actors for purposes of the sixth amendment right to a speedy trial).

Boyer v. Louisiana, 133 S.Ct. 1702 (2013) ("delay resulting from a systemic breakdown in the public defender system could be charged to the State." Dismissal, here, is "especially regrettable" because this case illustrates "larger, systemic problems . . . in Louisiana's indigent defense system.").

Vance v. State, 620 N.E.2d 687 (Ind. 1993) (trial court can strike *pro se* motion of defendant in favor of actions of counsel); see also Anderson v. State,160 N.E.3d 1102 (Ind. 2021), *supra*.

Andrews v. State, 441 N.E.2d 194 (Ind. 1982) (counsel's unavailability for trial causes delay chargeable to defendant).

Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008) (when public defender's withdrawal is not caused by defendant, delay from withdrawal not attributable to defendant).

Schepers v. State, 980 N.E.2d 883 (Ind. Ct. App. 2012) (trial court did not err in denying defendant's motion to dismiss for failure to try him within 70 days of his *pro se* demand for early trial pursuant to Criminal Rule 4(B)(1) because defendant was represented by counsel at the time of the request; defendant did not clearly and unequivocally assert his right to self-representation, so trial court properly denied the motion to dismiss on that basis).

Jenkins v. State, 809 N.E.2d 361 (Ind. Ct. App. 2004) (court rejected argument that by filing *pro se* request for speedy trial before his new attorney entered an appearance, defendant had asserted his constitutional right to represent himself or to proceed with hybrid representation; time counsel was appointed controlled rather than when counsel entered his appearance). See also Black v. State, 7 N.E.3d 333 (Ind. Ct. App. 2014).

But see Fletcher v. State, 959 N.E.2d 922 (Ind. Ct. App. 2012) (defendant's *pro se* request for speedy trial, made after counsel was appointed but before counsel

appeared - and that trial court did not strike - was effective to invoke speedy trial rights).

Hill v. State, 773 N.E.2d 336 (Ind. Ct. App. 2002) (defendant was charged with delay even though he personally objected to continuance; counsel did not object and therefore waived issue), *aff'd on reh'g*, 777 NE.2d 795.

**d. Defense Motions**

**1. Delay Usually Chargeable to Defendant**

Delays caused by defendant's motions are chargeable to defendant, whatever their length. Battle v. State, 275 Ind. 70, 73, 415 N.E.2d 39, 41 (1981). Where a defendant makes a motion, the time attributable to the State runs from the judge's ruling on the motion or from the date the motion is deemed denied, generally thirty days from hearing.

O'Neill v. State, 597 N.E.2d 379 (Ind. Ct. App. 1992) (entire delay in trial caused by defendant's motion for psychiatric evaluation was defendant's responsibility, for speedy trial purposes, even though secretarial error prevented initial examination, necessitating appointment of another psychiatrist, which caused additional delay).

State v. Delph, 875 N.E.2d 416 (Ind. Ct. App. 2007) (delay attributable to defendant for motion to continue commences on date of motion, not on date of vacated trial).

But see State v. Stacy, 752 N.E.2d 220 (Ind. Ct. App. 2001) (where defendant makes motion, time attributable to State runs from judge's ruling on motion or from date motion is deemed denied, generally 30 days from hearing; it was proper to attribute to State time from which State filed Trial Rule 53.1(A) praecipe for withdrawal of jurisdiction and transfer to Indiana Supreme Court and time trial court received Supreme Court's order appointing a special judge).

Haston v. State, 695 N.E.2d 1042 (Ind. Ct. App. 1998) (defendant's failure to perfect an interlocutory appeal resulted in 30 days of the delay being attributed to the defendant, not all of the three additional years it took the State to bring him to trial).

Delay caused by a premature motion for discharge is chargeable to defendant. State ex rel. Cox v. Superior Court, Madison County, 445 N.E.2d 1367 (Ind. 1983) (CR 4(C) period tolled until court rules on matter).

When judges delay ruling on such motions, defendant's only remedy is the "lazy judge" rule, TR 53.1(B). The merits of defendant's motion, or the provocation offered by the State, is immaterial. Bradberry v. State, 266 Ind. 530, 364 N.E.2d 1183 (1977).

**2. Delays from Motions to Suppress Not Always Charged to Defendant**

Motions to suppress are not automatically considered a delay attributable to a defendant under Rule 4(C). Curtis v. State, 948 N.E.2d 1143, 1150 (Ind. 2011); Moreno v. State, 166 Ind. App. 441, 455 n.10, 336 N.E.2d 675, 684 n.10 (1975).

West v. State, 976 N.E.2d 721 (Ind. Ct. App. 2012) (the year that defendant's motion to suppress was pending was not attributable to defendant so he was entitled to discharge; State could have filed a praecipe to withdraw submission and ask the Supreme Court to appoint a special judge during that year but did not).

Cf. Bloate v. United States, 130 S.Ct. 1345 (2010) (under federal Speedy Trial Act, 18 U.S.C. § 3161, days not counted in 70-day period to bring a defendant to trial include delays "resulting from pre-trial motions" except where trial court makes specific finding that delay would serve interests of justice).

**e. Defendant's Interlocutory Appeal**

Where defendant sets in motion the chain of events that causes delay, he is not entitled to discharge. Martin v. State, 245 Ind. 224, 229-30, 194 N.E.2d 721, 724 (1963). When the trial or appellate court stays an appeal, the Criminal Rule 4(C) clock is stayed. Pelley v. State, 901 N.E.2d 494 (Ind. 2009).

State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (State's appeal; trial court and Court of Appeals erroneously counted days while trial court proceedings were stayed for the purpose of defendant's interlocutory appeal as well as days while obtaining a special judge at defendant's request; trial court did not have jurisdiction until the interlocutory appeal was certified as final pursuant to Appellate Rule 65(E); further, the CR 4(C) time begins to run anew when the new judge qualifies and assumes jurisdiction, State ex rel. Brown v. Hancock County Superior Court, 372 N.E.2d 169 (Ind. 1978)).

Vance v. State, 620 N.E.2d 687 (Ind. 1993) (where defendant requested stay of proceedings and preparation of interlocutory appeal after denial of motion to dismiss due to speedy trial violation, court justified in delaying next trial setting and charging delay to defendant).

State ex rel. Cox v. Superior Court of Madison County, Div. III, 445 N.E.2d 1367, 1369 (Ind. 1983) (State's interlocutory appeal of order on defendant's motion *in limine* was attributed to defendant because defendant's motion caused the appeal).

Haston v. State, 695 N.E.2d 1042 (Ind. Ct. App. 1998) (because defendant failed to petition appellate court to entertain jurisdiction within thirty days, only delay attributable to defendant was thirty days and not remaining three years it took State to bring defendant to trial).

CR 4(B)'s 70-day period again commences to run upon issuance of appellate opinion on the interlocutory appeal.

Even interlocutory appeals taken by the State in which the defendant did not participate may be counted against the defendant. See Pelley v. State, 901 N.E.2d 494 (Ind. 2009). See also IPDC Pretrial Manual, Chapter 11 § I.E.4.

**f. Defendant's Petition for Certiorari**

Trial court erred in charging the delay resulting from a stay pending defendant's petition for certiorari to U.S. Supreme Court to the State. State v. Penwell, 875 N.E.2d 365 (Ind. Ct. App. 2007).

**g. Change of Venue**

Delay from filing motion for change of venue is chargeable to defendant. Lyons v. State, 431 N.E.2d 78 (Ind. 1982). However, the 70-day time period begins anew when the court to which the venue is changed receives the transcript and original papers and assumes jurisdiction. State v. Jackson, 857 N.E.2d 378 (Ind. Ct. App. 2006).

State v. Jackson, 857 N.E.2d 378 (Ind. Ct. App. 2006) (where new county's Circuit Court judge and prosecutor were never notified of the filing of documents establishing venue and seventy days passed, defendant was entitled to discharge under speedy trial request filed with his change of venue motion).

Cf. Johnson v. State, 578 N.E.2d 656 (Ind. 1991) (defendant's speedy trial request in Whitley County did not carry over when charges were dismissed in that county and defendant was prosecuted in Allen County).

**h. Change of Judge**

State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (CR 4(C) time begins to run anew when the new judge qualifies and assumes jurisdiction). See also State ex rel. Brown v. Hancock County Superior Court, 372 N.E.2d 169 (Ind. 1978)).

**i. Defendant Incorrectly Concedes Period Chargeable to Him**

Morrison v. State, 555 N.E.2d 458, 461 (Ind. 1990) (delay which would not otherwise have been attributed to the defendant was charged to defendant because he conceded it was attributable to him), *overruled in part on other grounds by* Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004).

Nance v. State, 630 N.E.2d 218 (Ind. Ct. App. 1994) (defendant conceded, mistakenly, that certain delays were chargeable to him).

**j. Objection to Special Judge**

Delay caused by defendant's objection to special judge is attributable to defendant. French v. State, 521 N.E.2d 346 (Ind. 1988). CR 4(C) time period tolled until new judge qualifies and assumes jurisdiction. State v. Tomes, 466 N.E.2d 66 (Ind. Ct. App. 1984). However, when delay caused by the need for a special judge is extended due to a trial court's failure to follow the rules and properly list qualified judges, the delay is attributed to the State. Morrison v. State, 555 N.E.2d 458 (Ind. 1990) (need for and lengthy process of obtaining special judge was not emergency contemplated by CR 4), *overruled in part on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

**k. Defendant's Failure to Appear**

The dispositive fact is whether a defendant's action or failure to appear actually caused a delay in holding the trial.

Schwartz v. State, 708 N.E.2d 34 (Ind. Ct. App. 1999) (delay from defendant's failure to appear for pretrial conference was not attributable to defendant because record was completely silent on whether pretrial conference was ever held; further, assuming pretrial conference was held and defendant did not appear, trial date could have been set in his absence).

Isaacs v. State, 757 N.E.2d 166 (Ind. Ct. App. 2001) (where defendant came into court ten days late because he was mistaken about trial date and where he filed immediate motion for continuance for specific reason, time was not attributable to him for purposes of Criminal Rule 4(C); at most, defendant remained out of court's jurisdiction for only ten days and that is all that can be attributed to him).

Feuston v. State, 953 N.E.2d 545 (Ind. Ct. App. 2011) (Court's statements in Schwartz, *supra*, about setting trial date in defendant's absence were merely dicta; trial court should not set trial date in defendant's absence).

**l. Change of Counsel**

Delay from change of defense counsel is chargeable to defendant only if:

- the defendant had some part in causing change in attorneys, and
- to the extent actual delay occurs.

Burdine v. State, 515 N.E.2d 1085 (Ind. 1987); O'Neill v. State, 597 N.E.2d 379 (Ind. Ct. App. 1992); and Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008).

Young v. State, 521 N.E.2d 671 (Ind. 1988) (public defender's resignation was not due to defendant's actions and delay was not attributable to him).

McGowan v. State, 599 N.E.2d 589 (Ind. 1992) (when original counsel withdrew because of defendant's conduct 7 days before trial, defendant personally objected to resetting trial date; record did not indicate newly appointed counsel joined in objection, and it was within trial court's discretion to decide that 7 days was not sufficient time for new counsel to adequately prepare; defendant properly charged with delay).

Biggs v. State, 546 N.E.2d 1271 (Ind. Ct. App. 1989) (defendant's change of counsel did not result in any delay and could not be used to extend speedy trial period).

**NOTE**: For purposes of the Sixth Amendment, the delay caused by an attorney's withdrawal is generally attributable to the defendant. Because the attorney is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant. The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic breakdown in the public defender system could be charged to the State. Moreover, time gaps resulting from the trial court's failure to appoint

replacement counsel with dispatch may be attributable to the State. Vermont v. Brillon, 129 S. Ct. 1283 (2009).

**m. Plea Negotiations**

**(1) CR4(B) Early Trial Request Waived by Participation in Plea Negotiations**

A CR 4 movant must maintain a position reasonably consistent with the speedy trial request. Participation in plea negotiation, and subsequently filing a new motion for speedy trial, has been held to constitute abandonment of a CR 4(B) speedy trial request. Mickens v. State, 439 N.E.2d 591 (Ind. 1982).

Vaughan v. State, 470 N.E.2d 374 (Ind. Ct. App. 1984) (where trial date set after defendant requests early trial, defendant abandons request for early trial by participating in plea negotiations).

**(2) CR 4(C) One-Year Rule Not Waived by Participation in Plea Negotiations**

State v. Smith, 495 N.E.2d 539, 541-42 (Ind. Ct. App. 1986) (defendant does not abandon right to be tried within one year by engaging in informal plea negotiations with State unless defendant's acts caused actual delay in scheduling of trial).

Leek v. State, 878 N.E.2d 276 (Ind. Ct. App. 2007) (11-month delay after defendant moved to enter guilty plea was attributable to State; CR4(C) requires State to be mindful of one-year deadline when engaging in plea negotiations).

State v. Huber, 843 N.E.2d 571 (Ind. Ct. App. 2006) (defense counsel's request for another status hearing coupled with statement "then at that time we'll decide if we're either going to resolve the case without a trial or we will be asking for a trial date" did not make delay attributable to defense; court noted "if the State [is] dissatisfied with the progress of negotiations, it could have simply requested the court to set a timely trial date and required [defendant] to obtain a continuance to pursue the negotiations.").

Lindauer v. State, 105 N.E.3d 211 (Ind. Ct. App. 2018) (defendant cannot habitually move to reset preliminary hearing at which trial date is to be set and then claim that his right to trial within a year was violated; here, defendant charged with 9-month delay resulting from his multiple requests for continuances to pursue plea negotiations with the State before trial date was set).

**(3) Withdrawal of Guilty Plea**

Where defendant pleads guilty, then withdraws the plea, that period of delay is chargeable to the defense. Burdine v. State, 515 N.E.2d 1085 (Ind. 1987) and Nance v. State, 630 N.E.2d 218 (Ind. Ct. App. 1994).

**n. Insanity Defense**

Delay caused by appointment and examination of court psychiatrists is charged to defendant who files notice of insanity defense. Thomas v. State, 491 N.E.2d 529 (Ind. 1986); Graham v. State, 464 N.E.2d 1, 9 (Ind. 1984).

**o. Requesting Determination of Indigency**

Terry v. State, 602 N.E.2d 535 (Ind. Ct. App. 1992) (period of 77 days required to determine indigency was chargeable to defendant for speedy trial purposes; defendant had delayed for three months in requesting indigency determination).

**3. Delays to Which Defendant Acquiesces**

Delays sought by prosecutor or court are attributed to defendant if she acquiesces in them. Action taken by a defendant may show acquiescence in a delay.

Nance v. State, 630 N.E.2d 218 (Ind. Ct. App. 1994) (incorrectly conceding delays were attributable to him meant defendant could be charged with those delays), *overruled on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

State v. Tomes, 466 N.E.2d 66 (Ind. Ct. App. 1984) (no acquiescence found).

Eguia v. State, 468 N.E.2d 559 (Ind. Ct. App. 1984) (indefinite continuance requested by defendant and tardiness in asserting speedy trial right shows acquiescence).

Sturgeon v. State, 683 N.E.2d 612 (Ind. Ct. App. 1997) (court rejected defendant's argument that State's negligence caused entire delay following his arrest and incarceration; although defendant may very well have been justified in agreeing to continuances in hopes of obtaining exculpatory evidence, his actions had effect of postponing his trial and one-year time period under CR 4(C) was extended accordingly).

**a. Exception: Belated Setting of Trial**

Defendant has no obligation to remind court of affirmative duty to bring defendant to trial within CR 4's time limits. Nor is a defendant required to take affirmative action to obtain a trial date. Huffman v. State, 502 N.E.2d 906 (Ind. 1987).

Morrison v. State, 555 N.E.2d 458 (Ind. 1990) (no duty to object to setting of belated trial date when act of setting trial occurs after time period expires such that court cannot reset trial within time of speedy trial rule), *overruled on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

State v. Rehborg, 396 N.E.2d 953 (Ind. Ct. App. 1979) (defendant not advised of the trial setting until after the period set by CR 4(C). It was not necessary for defendant to object at earliest opportunity when notice of trial date was given after speedy trial deadline; he was obligated to object prior to trial only).

**b. Effect of Acquiescing**

Simply because a defendant acquiesces to a continuance by not objecting, the defendant does not waive the Criminal Rule 4 issue if the State subsequently moves for a continuance.

Woods v. State, 596 N.E.2d 919 (Ind. Ct. App. 1992) (although defendant waived the CR 4 issue by not objecting to a trial setting outside one year, when trial court again continued trial to no fault of defendant's, defendant only had to move for discharge

and not object in order to preserve issue).

State ex rel Henson v. Washington Circuit Court, 514 N.E.2d 838 (Ind. 1987) (by not objecting to a continuance that places the trial outside of the CR 4 time limits, the defendant acquiesces to that delay; however, the defendant does not forever waive his protections and rights under CR 4(C); here, defendant had a right to assume the trial would be held on the date it was scheduled; the delay beyond that period was caused by the State and was clearly outside the one-year limit).

**4. State's Interlocutory Appeal**

If the State seeks an interlocutory appeal, it must seek a stay of the proceeding to toll Criminal Rule 4(C)'s one-year limitation. Battering v. State, 150 N.E.3d 597 (Ind. 2020). The CR 4(C) period does not include the time for the State's interlocutory appeal when the trial court proceedings have been stayed. However, the trial court and the Court of Appeals have discretion to deny a motion to stay if it appears that the State is seeking a stay for improper purposes, or if the appeal presents issues that are not critical to the case. The State should alert the appellate court when it pursues an interlocutory appeal not chargeable to the defendant so the appellate court can be sensitive to the defendant's interest in avoiding delay. Pelley v. State, 901 N.E.2d 494 (Ind. 2009).

State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (trial court and Court of Appeals erroneously counted days trial court proceedings were stayed for the purpose of defendant's interlocutory appeal as well as days while obtaining a special judge at defendant's request; trial court did not have jurisdiction until the interlocutory appeal was certified as final pursuant to Appellate Rule 65(E); further, the CR 4(C) time begins to run anew when the new judge qualifies and assumes jurisdiction, State ex rel. Brown v. Hancock County Superior Court, 372 N.E.2d 169 (Ind. 1978)).

**5. Emergency Delays**

Criminal Rule 4(A), (B) and (C) each include an emergency exception providing that "a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time."

**a. Examples of Emergency**

Any exigent circumstances may warrant a reasonable delay beyond the limitations of CR 4, due deference being given to the defendant's speedy trial rights under the rule. Reasonableness of such delay must be judged in the context of the particular case. The judge's decision will be reviewed for an abuse of discretion. Loyd v. State, 272 Ind. 404, 398 N.E.2d 1260, 1265 (1980).

Lowrimore v. State, 728 N.E.2d 860 (Ind. 2000) (as long as constitutional speedy trial standards are met, CR 4 values must yield to exigencies created by death penalty charge if two cannot be reconciled).

State v. Love, 576 N.E.2d 623 (Ind. Ct. App. 1991) (emergency continuance for 14 days beyond the seventy-day limit, to allow recently appointed counsel preparation

time was a reasonable measure to protect defendant's interest in effective counsel. But when a different new attorney (defendant's fourth) also needed time to prepare for trial, a trial date 79 days after seventy-day limit was "an unreasonable delay").

Baumgartner v. State, 891 N.E.2d 1131 (Ind. Ct. App. 2008) (when public defender's withdrawal is not caused by the defendant, it is not attributable to defendant).

Paul v. State, 799 N.E.2d 1194 (Ind. Ct. App. 2003) (specific circumstances of this case justified trial court's emergency finding under CR 4(B) (1), as prosecutor provided discovery shortly after taking office and did so within the time limits of Ind. Trial Rule 34. Further, while defendant filed his speedy trial request early in case, he waited 48 days to file a discovery request for a murder trial to begin within 70 days).

Blake v. State, 176 N.E.3d 989 (Ind. Ct. App. 2021) (reasonable for trial court to find COVID-19 pandemic constituted an emergency under Criminal Rule 4); see also Smith v. State, 188 N.E.3d 63 (Ind. Ct. App. 2022).

Lyons v. State, 431 N.E.2d 78 (Ind. 1982) (court refused to accept defendant's argument that any delay beyond the 70-day period was *per se* violation of rule necessitating discharge; exigent circumstances may support delay; State moved for continuance because two days before trial, trial prosecutor learned that his father had suffered a massive heart attack and his mother had terminal cancer. He was also sole attorney for State who was familiar with case. Because of these events, trial court properly granted State a continuance for a period of less than one month).

Morrison v. State, 555 N.E.2d 458 (Ind. 1990) (need for and lengthy process of obtaining a special judge was not an emergency contemplated by CR 4), *overruled on other grounds by* Cook v. State, 810 N.E.2d 1064 (Ind. 2004).

**b. Need Timely Court Order**

Trial court may take note of an emergency and order a continuance. CR 4(B)(1). Such a finding must be made on the record prior to the expiration of the Rule period and not after-the-fact.

Crosby v. State, 597 N.E.2d 984, 989 (Ind. Ct. App. 1992) (court must make factual determination of cause for delay; record must support finding of emergency).

Alter v. State, 860 N.E.2d 874, 877-79 (Ind. Ct. App. 2007) (where, as here, docket entries are absent or missing regarding reason for delay, the delay is not chargeable to defendant; the State did not seek a continuance prior to the trial date to any claimed congestion or emergency, and court will not consider explanations developed in hearing on defendant's motion for discharge).

**c. Acts of God**

Although not mentioned in Criminal Rule 4, acts of God are a basis for charging delays to the defendant.

Dunville v. State, 271 Ind. 393, 393 N.E.2d 143 (1979) (blizzard of 1978 delayed trial; defendant failed to object immediately upon learning of new trial date).

### 6. Congested Calendar

Criminal Rule 4(A), (B) and (C) include a court congestion exception of their respective time limits "where there was not sufficient time to try him during such period because of congestion of the court calendar."

Court calendar may be congested by a variety of circumstances, among them the unavailability of essential personnel or physical facilities. Loyd v. State, 272 Ind. 404, 398 N.E.2d 1260 (1980). It is essential for trial courts to develop and implement trial scheduling systems which comport with the requirements of CR 4 and which grant relief when its speedy trial requirements are violated. Clark v. State, 659 N.E.2d 548 (Ind. 1995).

S.L. v. State, 16 N.E.3d 953 (Ind. 2014) (despite trial court's technical compliance with CR 4(C), defendant experienced personal prejudice as a result of serving nearly entire six-year sentence before trial began, and trial was continued seven times due to court congestion; although a congested court calendar weighs less heavily against the State, it still must be viewed as the responsibility of the government and an impediment to a defendant's constitutional right to a speedy trial).

#### a. Must Have Timely Court Order Rescheduling trial

Any continuance due to a congested court calendar or emergency shall be reduced to an order which shall also set the case for trial within a reasonable time. CR 4(C). Bradford v. State, 453 N.E.2d 250 (Ind. 1983); Alter v. State, 860 N.E.2d 874, 877 (Ind. Ct. App. 2007). A finding of congestion by the court, or ruling on the prosecutor's motion, must occur prior to the speedy trial deadline, not after-the-fact.

Huffman v. State, 502 N.E.2d 906 (Ind. 1987) (late finding ineffective to prevent violation of CR 4(C)).

Woods v. State, 596 N.E.2d 919 (Ind. Ct. App. 1992) (where trial set beyond one year was continued without docket entry explaining delay, subsequent entry explaining delay caused by congested court calendar was not sufficient to remedy delay).

#### b. Request for Continuance

##### (1) Prosecutor's Motion

Prosecuting attorney "shall make a statement [as to court congestion] in a motion for continuance not later than 10 days prior to the date set for trial or if the motion is filed less than 10 days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor." CR 4(A), (B), (C). Failing to do so puts at risk that delay will be charged toward the Rule period (if trial court has not found court congestion *sua sponte*). Marshall v. State, 759 N.E.2d 665, 671 (Ind. Ct. App. 2001).

Jacobs v. State, 454 N.E. 2d 894 (Ind. Ct. App. 1983) (requirement that a written motion be filed by the prosecutor as the condition for continuance was effectively eliminated by Loyd v. State, 272 Ind. 404, 398 N.E.2d 1260 (1980)).

**(2) Court's Own Motion**

The trial court may on its own motion schedule the trial beyond the 70-day period due to congested calendar. CR 4(B)(1). Wray v. State, 547 N.E.2d 1062 (Ind. 1989). When a trial is continued due to a congested calendar, there is no requirement that the court analyze the arrest dates of all the other "speedy trial" defendants whose trial dates are on the court calendar to be sure that the defendant with the earliest arrest date has a trial date earlier than the trial dates of the other defendants. Bowers v. State, 717 N.E.2d 242, 244-45 (Ind. Ct. App. 1999); King v. State, 61 N.E.3d 1275 (Ind. Ct. App. 2016).

Sholar v. State, 626 N.E.2d 547 (Ind. Ct. App. 1993) (continuance due to congested calendar and necessity of attending annual judicial conference).

**c. Challenging Court's Order of Congestion**

Upon appellate review, a trial court's finding of court congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. However, a defendant may challenge the finding, either at the time of his Motion for Discharge or upon Motion to Correct Error, by demonstrating that, at the time the trial court made its decision to postpone trial, the finding of "congestion" was factually or legally inaccurate. Clark v. State, 659 N.E.2d 548 (Ind. 1995).

S.L. v. State, 16 N.E.3d 953 (Ind. 2014) (despite trial court's technical compliance with CR 4(C), defendant experienced personal prejudice as a result of serving nearly entire six-year sentence before trial began, and trial was continued seven times due to court congestion; although a congested court calendar weighs less heavily against the State, it still must be viewed as the responsibility of the government and an impediment to a defendant's constitutional right to a speedy trial).

Clark v. State, 659 N.E.2d 548 (Ind. 1995) (declaration of congestion was clearly erroneous where defendant presented evidence that at time trial court postponed trial and entered order finding congestion, no conflicting jury trial was scheduled, and no jurors had been summoned).

Morrison v. State, 555 N.E.2d 458 (Ind. 1990) (delay from improper naming of special judge panel did not qualify as court congestion), *overruled in part on other grounds by* Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004).

Loyd v. State, 272 Ind. 404, 409, 398 N.E.2d 1260 (1980) (court proceeded to consider the "reasons for the continuance" as stated by the trial court in the record).

Raber v. State, 626 N.E.2d 506 (Ind. Ct. App. 1993) (when trial continued under CR 4(C) due to congested calendar, order continuing trial date cannot be conclusory and devoid of supporting information); but see Clark v. State, 659 N.E.2d 548 (Ind. 1995) (upon appellate review, trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by trial court).

Pillars v. State, 180 Ind. App. 679, 390 N.E.2d 679, 683 (1979) (appellate court unable to assume that trial court acted according to mandate of Rule 4).

Gill v. State, 267 Ind. 160, 368 N.E.2d 1159 (1977) (having moved for speedy trial, defendant unable to obtain trial date initially because at time of his motion, no available date on court's calendar).

Collins v. State, 730 N.E.2d 181 (Ind. Ct. App. 2000) (court's calendar was clearly congested at time defense counsel made her inquiry to determine whether she needed to prepare for defendant's trial scheduled for following week).

Vaillancourt v. State, 695 N.E.2d 606 (Ind. Ct. App. 1998) (because defendant presented no evidence of lack of court congestion, congestion was presumed valid reason for delay).

State v. Bondurant, 514 N.E.2d 301, 305 (Ind. Ct. App. 1987) (court congestion was not real reason for delay of defendant's trial; State filed four continuances on cases scheduled for trial on same day, and had another defendant released on his own recognizance, thereby nullifying his early trial request; as a result, no criminal case was tried on originally scheduled day; time period involved chargeable to State).

Wilkins v. State, 901 N.E.2d 535 (Ind. Ct. App. 2009) (defendant failed to demonstrate that trial court erred in delaying trial due to court congestion).

**PRACTICE POINTER:** One Court of Appeals case held that a defendant must object to the setting of a trial outside of the seventy-day period when the trial court makes a congestion finding in order to preserve the issue for appeal. Dean v. State, 901 N.E.2d 648 (Ind. Ct. App. 2009). However, the Indiana Supreme Court, in Clark v. State, 659 N.E.2d 548 (Ind. 1995), never stated such an objection was necessary. Moreover, in many situations, the Defendant does not learn that the trial court's congestion finding was inaccurate until after the date upon which his trial was originally scheduled passes without another jury being heard in the court.

**d. Challenging Docket Entry Attributing Continuance to Defendant**

A defendant may challenge a docket entry attributing a continuance to defendant as factually or legally inaccurate. Alter v. State, 860 N.E.2d 874, 877 (Ind. Ct. App. 2007); see also Gibson v. State, 910 N.E.2d 263 (Ind. Ct. App. 2009).

**e. Delay Chargeable to Defendant**

Delay caused by court congestion is chargeable to the defendant. Andrews v. State, 441 N.E.2d 194 (Ind. 1982).

**7. Effect of Delays Attributed to Defendant**

**a. Time for Bringing Defendant to Trial is Extended**

When a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in Rule 4 shall be extended by the amount of the resulting period of such delay caused thereby. CR 4(F). Bradberry v. State, 266 Ind. 530, 364 N.E.2d 1183 (1977).

**b. Delay by Defendant in the Last 30 Days**

If defendant causes delay during the last 30 days of any period of time set by operation of this rule, the State may petition the trial court for an extension of such period for an additional 30 days. CR 4(F).

**c. Case-by-Case Determination**

Determination of what amount of delay in bringing defendant to trial is attributable to a defendant's action must be decided on a case-by-case basis. Curtis v. State, 948 N.E.2d 1143, 1150 (Ind. 2011); Wagner v. State, 474 N.E.2d 476 (Ind. 1985).

## F. DELAY NOT ATTRIBUTABLE TO THE DEFENDANT

### 1. Dismissal and Refiling of Charges

For purposes of a defendant's right to speedy trial, dismissal, and refiling of charges prior to jeopardy attaching does not extend the time within which the defendant may be brought to trial. Instead, time is measured from the first filing. Burdine v. State, 515 N.E.2d 1085 (Ind. 1987); Hughes v. State, 473 N.E.2d 630 (Ind. Ct. App. 1985).

Pruett v. State, 617 N.E.2d 980 (Ind. Ct. App.1993) (filing of separate but factually related charges is viewed as one continuous prosecution, and time is measured from date first charge was filed).

Fink v. State, 469 N.E.2d 466, 468-9 (Ind. Ct. App. 1984) (incarcerated defendant's invocation of CR 4(B) may not be defeated by the simultaneous dismissal and refiling of related charges).

Hornaday v. State, 639 N.E.2d 303 (Ind. Ct. App. 1994) (when identical charges are refiled, they are regarded for speedy trial purposes as if no dismissal occurred or as if subsequent charges were filed on date of first charges).

But see

Shields v. State, 456 N.E.2d 1033 (Ind. Ct. App.1983) (70-day period begins to run anew should defendant move for speedy trial on new charges when State dismissed and refiled charges).

### 2. Fraudulent "Court Congestion" Claim

Period of delay premised on misleading court congestion claim is includable in speedy trial period calculation under Rule 4(C). State v. Bondurant, 514 N.E.2d 301 (Ind. Ct. App. 1987); Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App. 1992).

### 3. Failure to Comply with Discovery Requests

When the State's failure to respond to discovery requests put defendants in position where they must go to trial without being adequately prepared or waive speedy trial rights, defendants will not be charged with delay.

Martin v. State, 984 N.E.2d 1281 (Ind. Ct. App. 2013) (defendant entitled to CR 4(C)

discharge where 182-day delay was caused by State's witness, who twice failed to appear at deposition even though counsel properly subpoenaed her).

State v. Montgomery, 901 N.E.2d 515 (Ind. Ct. App. 2009) (in retrial, discharge for State's 3½-year delay in providing discovery was not erroneous but trial court incorrectly grounded discharge in CR4(C) violation; CR4(C) does not apply to retrials but discharge was appropriate under 6th Amendment because defendant was not retried within a "reasonable" time), *aff'd on reh'g*, 907 N.E.2d 1057.

Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App. 1992) (defendant filed speedy trial request under CR 4(B) but eventually had to request continuance because of State's failure to provide discovery and extremely late amendment of charges; defendant's motion for discharge was properly granted because calendar was not congested when originally set for trial, and delay was due to State's actions).

Miller v. State, 570 N.E.2d 943 (Ind. Ct. App. 1991) (defendant could not obtain discharge under CR 4(C) by sending informal discovery request to State cloaked in form of letter; 70-day delay caused by defendant's motion to continue trial for failure to comply with informal discovery request properly chargeable to defendant).

Biggs v. State, 546 N.E.2d 1271 (Ind. Ct. App. 1989) (defendant's motion for continuance requested only that trial be continued until State complied with request to depose confidential informant; motion was never ruled upon by trial court. One-year delay between motion and State's compliance with discovery request chargeable to State).

Dillard v. State, 102 N.E.3d 310 (Ind. Ct. App. 2018) (delay not attributable to defendant where State failed to comply with discovery request).

Marshall v. State, 759 N.E.2d 665 (Ind. Ct. App. 2001) (delay not attributable to defendant where State failed to comply with discovery requests and defendant actively pursued State's evidence).

**4. Defendant's Consent to Continuance Before Trial Date Set**

A defendant's agreement to a continuance sought by the State before a trial date is set is not chargeable to the defendant and does not extend the time period of CR 4(C). Cook v. State, 810 N.E.2d 1064 (Ind. 2004). However, continuances sought by defendant are attributable to him or her. Id.

State ex rel. O'Donnell v. Cass Superior Court., 468 N.E.2d 209 (Ind. 1984) (defendant discharged pursuant to CR 4(C), even though defendant had agreed to continuance sought by the State, continuance had been agreed to before setting of trial date, and after trial date was set beyond limits of rule defendant notified court two days after setting and three weeks before running of period).

**5. Prosecutor's Conflict of Interest**

Any delay resulting from a prosecutor's conflict, even if the delay technically results from a defendant's motion to continue, is arguably not chargeable to the defense. A defendant should not be forced to choose between a speedy trial and a fair trial as a result of the prosecutor's failure to identify and cure his conflicts.

Harrington v. State, 588 N.E.2d 509 (Ind. Ct. App. 1992) (delay not attributable to defendant because prosecutor had conflict arising from his prior representation of defendant in criminal matter and this conflict made appointment of special prosecutor necessary. To charge defendant with delay occasioned by prosecutor's conflict would force defendant to choose between speedy trial and fair trial).

But see State v. Larkin, 100 N.E.3d 700 (Ind. 2018) (declining to apply Harrington and instead applying Cook, Court finds delays caused by interlocutory appeal and conflict-based motion for change of judge attributable to the defendant; no Criminal Rule 4 discharge, as defendant agreed to trial date and change of judge triggered CR 4 reset).

### G. SILENT RECORD

Defendant has a duty to object if trial is set outside one-year period so trial court can correct situation. However, the period of delay attributable to a missed trial date cannot be charged to defendant where the record is devoid of any continuance or reason for no trial being held. Curtis v. State, 948 N.E.2d 1143, 1151 (Ind. 2011). The courts cannot presume that the record is incomplete, or that defendant waived an issue by failing to provide a complete record. Huffman v. State, 502 N.E.2d 906 (Ind. 1987); Morrison v. State, 555 N.E.2d 458 (Ind. 1990), *overruled in part on other grounds by* Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004).

Tinker v. State, 53 N.E.3d 498 (Ind. Ct. App. 2016) (multiple trial dates passed with no trial, no explanation in docket; Court was unwilling to remand to allow trial court to provide explanation after-the-fact for the delay, or to consider anything not set out in record).

Nance v. State, 630 N.E.2d 218 (Ind. Ct. App. 1994) (when record silent concerning reason for delay, not attributable to defendant under speedy trial rule).

Schwartz v. State, 708 N.E.2d 34 (Ind. Ct. App. 1999) (delay from defendant's failure to appear for pretrial conference was not attributable to defendant because record was completely silent on whether pretrial conference was ever held; further, assuming pretrial conference was held and defendant did not appear, trial date could have been set in his absence).

Alter v. State, 860 N.E.2d 874 (Ind. Ct. App. 2007) (where docket entries are absent or missing regarding reason for delay, the delay is not chargeable to defendant).

## II. SPEEDY TRIAL RIGHTS FOR PRISONERS IN ANOTHER JURISDICTION - INTERSTATE AGREEMENT ON DETAINERS (IAD)

### A. IN GENERAL

#### 1. Procedural IAD rights

Defendant must be brought to trial within 180 days. Time limitation begins when defendant causes to be delivered to the court and prosecutor written notice of his place of imprisonment and a request for final disposition of pending state charges. Ind. Code § 35-33-10-4. Scrivener v. State, 441 N.E.2d 954 (Ind. 1982).

Pallet v. State, 269 Ind. 396, 381 N.E.2d 452 (1978) (Ind. Code § 35-33-10-4 is intended to secure the constitutional guarantees of the right to speedy trial for prisoners held in one

state who have criminal charges outstanding against them in other states).

Daher v. State, 572 N.E.2d 1304 (Ind. Ct. App. 1991) (inmate who was subject of proceeding under Interstate Agreement on Detainers received all procedural protections to which he was entitled where inmate was informed of demand for his surrender, crime with which he was charged, his right to have attorney, and his right to have hearing).

**2. Interplay with other speedy trial provisions**

**a. Sixth Amendment**

As a constitutional matter, states bringing charges against prisoners held by other sovereignties must make a diligent, good faith effort to bring the prisoner to trial when the prisoner requests a speedy trial. Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575 (1969); Ballentine v. State, 480 N.E.2d 957 (Ind. 1985).

**PRACTICE POINTER:** Where the IAD does not apply, or where defendant did not file a notice under the Act, or an IAD claim otherwise fails because of technical defects, a constitutional challenge under the Sixth Amendment Speedy Trial Clause may be appropriate. Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575 (1969) and Ballentine v. State, 480 N.E.2d 957 (Ind. 1985).

**b. Criminal Rule 4**

CR 4 does not apply to persons when the IAD statute is applicable. Williams v. State, 533 N.E.2d 1193 (Ind. 1989). However, the inapplicability of CR 4 to defendants in foreign jurisdictions does not extend to defendants who are brought into Indiana under writs or other forms of temporary custody. Sweeney v. State, 704 N.E.2d 86 (Ind. 1998).

Brown v. State, 497 N.E.2d 1049 (Ind. 1986) (IAD, rather than criminal rule 4(C), governs speedy trial rights of defendant incarcerated in another jurisdiction). See also Howard v. State, 755 N.E.2d 242 (Ind. Ct. App. 2001); Spalding v. State, 992 N.E.2d 881 (Ind. Ct. App. 2013).

Where the arrest on Indiana charges occurred prior to the prisoner's transport to another state, argue that CR 4 applies.

**B. APPLICABILITY**

**1. To Persons Convicted and Serving Time in Prison**

The IAD applies only to defendants who have been convicted and are serving sentences in a prison in sending state. It does not apply to defendants who are imprisoned awaiting trial. Daher v. State, 572 N.E.2d 1304 (Ind. Ct. App. 1991).

Dorsey v. State, 490 N.E.2d 260 (Ind. 1986) (IAD does not apply to defendant held for trial and serving a sentence while in jail in Michigan), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995).

**2. Not to Persons Held by Non-Signatory States**

To be entitled to protection of the IAD, the state seeking custody of the prisoner must be a

signatory to the Interstate Agreement on Detainers.

Ballentine v. State, 480 N.E.2d 957 (Ind. 1985) (a list of such states is kept in the Uniform Laws Annotated, under the Uniform Interstate Agreement on Detainers Act).

**3. Not to Defendant in Federal Custody**

State ex. rel. Kindred v. Hamilton Superior Court Room 2, 525 N.E.2d 339 (Ind. 1988) (IAD does not apply to defendant in federal custody awaiting probation violation hearing).

Cozart v. Wolf, 185 Ind. 505, 112 N.E. 241 (1916) (one in actual custody of the officers of either a state or federal court is not subject to extradition and to arrest by the officers of another court, except in an urgent case, in the absence of waiver by the first court of its jurisdiction).

**4. Not to Persons Who Are Mentally Ill**

See Art. 6(b) and Ind. Code § 35-33-10-4.

**5. Not to Probation Violations**

Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401 (1985) (interstate agreement on detainers giving person incarcerated in one state the right to demand a speedy trial on matters that are the basis of detainers lodged against him by another state does not apply to probation violations).

**C. TIME**

**1. 180-Days from Demanding Trial on Outstanding Charges**

Where the prisoner has served a notice on the authorities, she shall be brought to trial within 180 days after delivery of the notice to the prosecuting attorney and court, except that "for good cause shown in open court, the prisoner or his counsel being present," the court having jurisdiction may grant "any necessary or reasonable continuance." Art. 3(a) and Ind. Code § 35-33-10-4.

Fex v. Michigan, 507 U.S. 43, 113 S.Ct. 1085 (1993) (180 days within which a prisoner who is subject to detainer by another state must be brought to trial begins to run when his request is actually delivered to the court and the prosecutor and not when he puts it in the mail). See also Bowling v. State, 918 N.E.2d 701 (Ind. Ct. App. 2009).

Conn v. State, 831 N.E.2d 828 (Ind. Ct. App. 2005) (the IAD requires reversal of conviction and dismissal when continuances beyond the 180-day period are not conducted in presence of defendant or his attorney; here, trial court's failure to inform defendant of its continuance hearing and trial setting deprived defendant of his right to be present when reasonableness or necessity of length of continuance was determined).

**2. 120-Days from Receiving Custody of Accused**

Where the prisoner's presence is secured by a detainer filed against the prisoner, the receiving state has 120 days from the date of the prisoner's return to that state to bring him to trial,

except that "for good cause shown in open court, the prisoner or his counsel being present," the court having jurisdiction may grant "any necessary or reasonable" continuance. Art. 4(c) and Ind. Code § 35-33-10-4.

**3. Tolling of Time Periods**

Time periods are tolled for as long as the court determines a prisoner is "unable to stand trial." Art. 6(a).

## D. PROCEDURE WHEN PRISONER INITIATES TRANSFER

Prisoner may initiate transfer proceedings. See Art. 3.

**1. Filing of Request for Final Disposition**

Prisoners must file a written request for final disposition, naming the place of his/her imprisonment, with the prosecutor and court. The usual procedure is to first file it with the warden or other official having custody over him/her, who affixes a certificate detailing the term of the latter's commitment, the time served, the time remaining to be served, good time credit and parole eligibility, and any decisions of the parole agency regarding the prisoner. Art. 3(b) and Ind. Code § 35-33-10-4.

Warden is obliged to promptly inform the prisoner of detainers, and rights under the IAD. The advisement shall include notice of the prisoner's right to make a request for final disposition. Art. 3(c) and Ind. Code § 35-33-10-4.

**a. Must Be After Detainer for Indictment or Information is Filed**

State v. Robinson, 863 N.E.2d 894 (Ind. Ct. App. 2007) (an arrest warrant that is not based on an untried indictment, information, or complaint is not a "detainer" for purposes of IAD; here, arrest warrant was based on a failure to appear and not an indictment or information). See also Crawford v. State, 669 N.E.2d 141 (Ind. 1996).

**b. Operates as Wavier of Extradition Proceedings**

Waiver is effective not only with regard to extradition to be tried, but also with regard to extradition (after any sentence served after that trial) to return the prisoner to the original State where he/she was serving time. Art. 3(e) and Ind. Code § 35-33-10-4.

**c. Operates on All Indictments or Informations That are Subject of Detainer: Anti-shuffling Provision**

Notice of request for final disposition to one prosecuting attorney operates as to all charges which have been the subject of detainers filed by that State. All pending charges in any proceeding that have not been tried prior to the prisoners return "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Art. 3(d) and Ind. Code § 35-33-10-4. Plain language of Indiana Code § 35-33-10-4 and Art. 3(d), requires dismissal with prejudice if prisoner is returned to original place of imprisonment prior to trial. State v. Greenwood, 665 N.E.2d 579 (Ind. 1996).

State v. Greenwood, 665 N.E.2d 579 (Ind. 1996) (although defendant's *pro se*

demand for speedy trial did not comply with requirements of IAD, and trial court erred in dismissing charges, anti-shuffling provision of IAD barred subsequent prosecution; because trial court dismissed charges with prejudice and ordered defendant returned to Illinois, defendant could not be returned to Indiana for subsequent prosecution).

## E. PROCEDURE WHEN STATE INITIATES TRANSFER

State may initiate transfer proceedings of a prisoner serving time in prison. See Art. 4.

### 1. Right to Contest Custody\Notice Requirements

Detainer is filed with prison authorities by the appropriate state officer, after which the prisoner has 30 days within which to contest the transfer of custody. Art. 4(a). Prisoners have a right to notice of the right to contest transfer, and to notice of the right to counsel. Art. 9(7).

Warden shall file notice with all other officers and courts in the receiving state who have lodged detainers against a prisoner. Art. 4(b).

### 2. Trial Must Begin Within 120 Days of Arrival

Trial must be commenced within 120 days of arrival in receiving state, subject to necessary and reasonable continuances. Art. 4(c).

#### a. Trial on All Outstanding Detainers is Barred if Not Commenced Prior to Return: Anti-shuffling Provision

Trial is barred if not had prior to return of prisoner to sending state on all indictments or informations that are the subject of detainer.

Alabama v. Bozeman, 533 U.S. 146, 121 S. Ct. 2079 (2001) (literal language of Article 4 of the IAD barred trial against defendant who was returned to the sending state before being tried by the receiving state, even though his imprisonment was interrupted for only one day).

But see Gilbert v. State, 982 N.E.2d 1087 (Ind. Ct. App. 2013) (denying defendant's motion to dismiss did not violate the anti-shuffling provision of IAD when defendant was returned to state of origin, Kentucky, after pleading guilty but before trial court entered judgment and sentenced defendant).

#### b. Trial on Charge Not Subject of Detainer is Questionable

Trial for offenses which are not subject of detainer may or may not violate the IAD.

Ramirez v. State, 455 N.E.2d 609 (Ind. Ct. App. 1983) (failure to comply with IAD neither affected jurisdiction of Indiana courts over defendant nor warranted dismissal of charge not subject to detainer; where the U.S. Supreme Court is equally divided on whether to affirm or reverse a lower court decision, the decision stands, but could be considered suspect).

### F. WAIVER AND EXCUSABLE DELAY

Indiana courts treat the issue of delays chargeable to the defendant and waiver much as they would delays under CR 4.

Hood v. State, 561 N.E.2d 494 (Ind. 1990) (defendant was precluded from claiming that delay in bringing defendant to trial required transfer of defendant to another state which had filed detainer pursuant to IAD; defendant failed to raise point at trial).

New York v. Hill, 528 U.S. 110, 120 S.Ct. 659 (2000) (defense counsel's agreement to a trial date outside the time period required by Article III of the Interstate Agreement on Detainers waived defendant's speedy trial rights under the IAD).

Williams v. State, 533 N.E.2d 1193 (Ind. 1989) (failure to object to setting of trial date beyond the applicable 180-day limitation period waived rights under IAD). See also Bostic v. State, 980 N.E.2d 335 (Ind. Ct. App. 2012).

Reed v. State, 491 N.E.2d 182 (Ind. 1986) (defendant's motions alleging IAD violations and his affidavit of emergency did not qualify as timely objection to preserve his rights; defendant failed to raise objection on dates trial was set and reset beyond the requisite 120-day period).

Pethtel v. State, 427 N.E.2d 891 (Ind. Ct. App. 1982) (failure to object to continuance by co-defendant is chargeable to a defendant and may constitute waiver).

## III. CONSTITUTIONAL RIGHT TO SPEEDY TRIAL

The Sixth Amendment to the United States Constitution, which applies to the states via the 14th Amendment, guarantees criminal defendants "the right to a speedy and public trial[.]" Article 1, Section 12 of the Indiana Constitution states: "Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay." Indiana Criminal Rule 4 also establishes procedural time limits after a defendant has been arrested and charged.

Blake v. State, 176 N.E.3d 989 (Ind. Ct. App. 2021) (while the intent of CR 4 is to effectuate speedy-trial rights guaranteed by federal and state Constitutions, constitutional claims must be asserted separately and distinctly from rule-based claims; constitutional claims present much more complex question that involves balancing of multiple factors, whereas violation of rule involves simple, calculated deadlines).

### A. IN GENERAL

#### 1. Federal Law Used to Interpret Indiana's Constitution

Federal Sixth Amendment rules and case law have been applied by Indiana courts in interpreting Ind. Const., Art.1, § 12 (speedy trial clause). The Federal Speedy Trial Act, upon which Indiana's rule is patterned, "is designed to minimize the possibility of lengthy incarceration prior to trial.'" United States v. MacDonald, 456 U.S. 1, 7, 102 S.Ct. 1497, 1501 (1982).

Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967) (Sixth Amendment applicable to states).

Scott v. State, 461 N.E.2d 141 (Ind. Ct. App. 1984) (applying balancing test in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972), assessments of claims that right was denied require balancing factors and interests).

Springer v. State, 175 Ind. App. 400, 372 N.E.2d 466 n.2 (1978) (Sixth Amendment standard regarding defendant's right to speedy trial applied in analyzing Indiana's constitutional guarantee). See also S.L. v. State, 16 N.E.3d 953 (Ind. 2014); and Fisher v. State, 933 N.E.2d 526, 530 (Ind. Ct. App. 2010).

**2. Separate Indiana Constitutional Analysis**

In Watson v. State, 155 N.E.3d 608 (Ind. 2020), the Indiana Supreme Court appeared to send a strong signal that defendants should argue Article 1, Section 12 is more protective than the Sixth Amendment under Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 1972). The Court implied that the Indiana constitutional analysis for speedy trial claims is different from the federal analysis in that Article 1, Section 12 is a "directive" rather than a "right." Thus, a defendant need not assert his right to a speedy trial in making a claim under the Indiana Constitution because "the speedy trial demand is effectively made for him." Id. at 614.

**3. When Right Attaches**

The constitutional right to speedy trial arises when a person becomes "accused," i.e., when prosecution is initiated either through formal indictment or information, or by actual restraints imposed by arrest. Terry v. Duckworth, 715 F.2d 1217 (7th Cir. 1983).

See also U.S. v. Marion, 404 U.S. 307, 92 S. Ct. 455 (1971) and Harrell v. State, 614 N.E.2d 959 (Ind. Ct. App. 1993).

See IPDC Pretrial Manual, Chapter 11 § I.B. on page 47 for discussion of balancing test.

**4. Discharge / Waiver**

Absolute discharge is only remedy for violations of constitutional right to speedy trial.

Strunk v. U.S., 412 U.S. 434, 93 S. Ct. 2260 (1973) (offset to sentence, equal to delay in being brought to trial, is inadequate remedy).

It is improper for defendant to wait until day of trial to raise constitutional grounds for discharge.

Randall v. State, 474 N.E.2d 76 (Ind. 1985) (defendant who failed to voice objection until day of trial deemed to have waived speedy trial argument).

**5. Violation Does Not Preclude Exercise of Jurisdiction**

Speedy trial right under Indiana Constitution is procedural requirement and not one which precludes exercise of jurisdiction.

Hornaday v. State, 639 N.E.2d 303 (Ind. Ct. App. 1994) (violation of time constraints which implement defendant's constitutional right to speedy trial do not deprive court of power to enter guilty plea conviction).

### 6. Distinctions between CR 4

Williams v. State, 265 Ind. 190, 352 N.E.2d 733 (1976) (the constitutional right to speedy trial is not limited to the provisions of CR 4 and may in some instances provide relief in situations not covered by the rule.

Bryant v. State, 261 Ind. 172, 301 N.E.2d 179, 180 (1973) (violation of CR 4(B) not *per se* violation of defendant's constitutional rights). But see Joyner v. State, 678 N.E.2d 386 (Ind. 1997).

O'Neill v. State, 597 N.E.2d 379 (Ind. Ct. App. 1992) (CR 4(C) is intended to give effect to the right to speedy trial guaranteed by federal and state constitutions; however, the time limits of CR 4 are not coextensive with and are more rigorous than constitutional requirements).

State v. Laslie, 178 Ind. App. 107, 381 N.E.2d 529, 531 (1978) (CR 4 establishes a more stringent standard by specifying concrete time limits within which the State must act).

### 7. Policy Considerations

#### a. Defendant's Interests

The right to a speedy trial protects defendant against undue disruption of employment, disruption of family life, public scorn, restriction on freedom of association, anxiety to defendant, defendant's family and friends, and drain on her financial resources. Prejudice is weighed with respect to these factors. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972); Scott v. State, 461 N.E.2d 141 (Ind. Ct. App. 1984).

#### b. Society's Interest

Society has a number of interests in speedy trials. Delay in trial may have detrimental effect on rehabilitation, cause overcrowding of jails, impose costs of dependents of detainees on State, cause court congestion, and can leave persons accused of crime free to commit others. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972).

## B. BARKER BALANCING TEST

Courts analyze federal constitutional speedy trial claims using the following factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972).

- Length of delay;
- Reason for delay;
- Defendant's assertion of his speedy trial right; and
- Prejudice to defendant.

"We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Barker v. Wingo, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193 (1972).

**1. Length of Delay - Triggering Mechanism**

Length of delay operates a as triggering mechanism for inquiry into other factors. Length of delay that will provoke such inquiry is necessarily dependent upon peculiar circumstances of each case. Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 2192 (1972). However, as a general rule, delay of one year or more will be deemed presumptively prejudicial so as to trigger the rest of the inquiry. McClellan v. State, 6 N.E.3d 1001, 1005 (Ind. Ct. App. 2014); Doggett, *infra*; and Barker, 407 U.S. at 530-31.

> Doggett v. U.S., 505 U.S. 647, 112 S. Ct. 2686, 2690 (1992) (to trigger speedy trial analysis, accused must allege that interval between accusation and trial has crossed the threshold which divides ordinary from presumptively prejudicial delay; when delay resulting from inexcusable governmental neglect so far exceeds threshold necessary to state speedy trial claim (one year), and when presumption of prejudice, albeit it unspecified, is neither extenuated nor persuasively rebutted, the defendant is entitled to relief).

The following were found to be sufficient delays to require further inquiry as to whether there was a violation of the constitutional right:

> Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972) (five years).
>
> Wade v. State, 270 Ind. 549, 387 N.E.2d 1309 (1979) (15 months).
>
> Scott v. State, 461 N.E.2d 141 (Ind. Ct. App. 1984) (seven years).
>
> Terry v. State, 400 N.E.2d 1158 (Ind. Ct. App. 1980) (30 months).

The filing of a charging information tolls the statute of limitations, but a delay between charge and arrest that exceeds the limitations period for the offense is presumptively prejudicial, and the State has the burden of showing no prejudice to defendant was caused by the delay. Scott v. State, 461 N.E.2d 141 (Ind. Ct. App. 1984), *citing* Toussie v. U.S., 397 U.S. 112, 90 S. Ct. 858 (1970); Stewart v. State, 170 Ind. App. 696, 354 N.E.2d 749 (1976).

> Doggett v. U.S., 505 U.S. 647, 112 S. Ct. 2686 (1992) (Court presumed prejudice to defendant's ability to defend against criminal charges from 8½ year delay between indictment and arrest; excessive delay presumptively compromises reliability of trial in ways that cannot, and therefore need not, be proved).
>
> Douglas v. State, 517 N.E.2d 116 (Ind. Ct. App. 1987) (State failed to rebut presumption of prejudice to defendant's ability to present defense, for speedy trial purposes, resulting from delay, in excess of statute of limitations, between filing of information charging the defendant with battery and the defendant's arrest, particularly in light of the defendant's claim that he could have produced additional witnesses to support alibi defense had trial been held earlier).
>
> Kristek v. State, 535 N.E.2d 144 (Ind. Ct. App. 1989) (delay of nearly eight years between time information was filed and time the defendant was arrested required dismissal of robbery charge on speedy trial grounds; period of limitations for robbery was five years, and the State offered no evidence to rebut presumption of prejudice, which occurs when delay exceeds applicable period of limitations for offense; Indiana will consider a speedy trial claim based upon delay between filing of information and arrest of accused by applying balancing test set forth in Barker).

Cf.

Douglas v. State, 517 N.E.2d 114 (Ind. Ct. App. 1987) (defendant's admission that he would not have been able to produce any witness or establish an alibi, even without lapse of time, was sufficient to rebut the presumption of prejudice).

**2. Reason for Delay**

The State's intent affects analysis under the Speedy Trial rule. Negligence of court or prosecution is weighed less heavily than deliberate delays. Scott v. State, 461 N.E.2d 141 (Ind. Ct. App. 1984). With respect to the State's efforts to bring the case to trial, can classify as diligent prosecution, official negligence, or bad faith; bad faith weighs more heavily in favor of a violation than does official negligence. Danks v. State, 733 N.E.2d 474, 481 (Ind. Ct. App. 2000); Davis v. State, 819 N.E.2d 91, 97 (Ind. Ct. App. 2004).

**a. Valid reasons for delay**

- a missing witness,
- illness of major witness,
- a complex case (e.g., conspiracy case),
- incompetency of the defendant,
- the unavailability of a co-defendant in joint trial, and
- an interlocutory appeal by the prosecution.

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 2192 (1972). See also, LaFave and Israel, *Criminal Procedure*, §18.2.

Harrell v. State, 614 N.E.2d 959, 964 (Ind. Ct. App. 1993) (State claimed it was unable to serve arrest warrant because defendant had moved around and was absent from the state for considerable periods of time; this did not appear to be a deliberate, bad faith attempt on the State's part to delay trial in order to hamper the defense; but it also did not appear to be a "valid reason" for delay, such as a missing witness; government was more to blame than defendant for the delay).

Bowman v. State, 884 N.E.2d 917 (Ind. Ct. App. 2008) (where defendant moved in the five months between OWI arrest and State filing charges and did not update address with BMV, a 4.5- year delay in finding defendant was attributable to defendant and did not violate the Sixth Amendment; Kirsch, J., dissenting on basis that the State did virtually nothing to find defendant).

**b. Delay caused by defense attorney**

When considering the reason for a delay, assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent. Because the attorney is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant. Assigned counsel are generally not state actors for purposes of a speedy-trial claim. The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systemic breakdown in the public defender system could be charged to the State. Moreover, time gaps

resulting from the trial court's failure to appoint replacement counsel with dispatch may be attributable to the State**.** Vermont v. Brillon, 129 S.Ct. 1283 (2009).

**c. Delay caused by State's blanket policy of waiting for completion of sentence in foreign jurisdiction before bringing defendant to trial**

Length of delay and reason for delay weighed against State. State's policy of waiting for completion of sentence in foreign jurisdiction before bringing defendant to trial resulted in unacceptable delay; Court refused to condone State's "egregious persistence" in failing to prosecute defendant. State's affirmative duty to diligently prosecute Ds trumps the State's policy. Right to speedy trial is a "fundamental principle of constitutional law." Fisher v. State, 933 N.E.2d 526 (Ind. Ct. App. 2010).

**d. Delay in transporting defendant - incarceration in another county**

Allen v. State, 51 N.E.3d 1202 (Ind. 2016) (trial court abused its discretion in denying defendant's motion for discharge, where neither the State nor the trial court took any action for 518 days after his non-appearance due to incarceration and failure to transport. Even if defendant's failure to appear for trial contributed to a delay, "such delay extended only for a reasonable period of time within which the court could take action to reschedule a new trial date and secure transportation of the incarcerated defendant for trial." Although "reasonable period" was not defined, the court made clear it "certainly did not extend for more than 306 days as would have been required for the defendant's trial to comply with Rule 4(C))."

Arion v. State, 56 N.E.3d 71 (Ind. Ct. App. 2016) (trial court should have known defendant was being held on charges in another county when he moved for a speedy trial; Court was unconvinced by the State's argument that the trial court "did not see" the warrant attached to his motion; delay in transporting defendant could not be used to penalize him when there was no explanation why any necessary paperwork was not completed).

**3. Asserting the Speedy Trial Right**

**a. Not Absolutely Necessary, at least for claims under Indiana Constitution**

A defendant need not assert his right to a speedy trial in making a claim under the Indiana Constitution because "the speedy trial demand is effectively made for him." Watson v. State, 155 N.E.3d 608 (Ind. 2020).

Failure to assert the right at the trial stage makes it difficult for a defendant to prove that he was denied a speedy trial, but failure to move for speedy trial after arrest or to object to a continuance does not necessarily waive any claim. Courts should review the following factors in weighing failure to assert speedy trial claim:

- Was waiver made with defendant's assent?
- Was waiver made in effort to gain trial advantage or to avoid trial altogether?
- Was defendant represented by counsel?
- Was objection forceful or *pro forma*?

Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972).

This factor considers what point in the proceedings the defendant first asserted his speedy trial rights and how frequently he asserted them. Failing to assert the right promptly suggests that the defendant did not desire to go to trial quickly or was seeking a strategic advantage by not going to trial. Barker, 407 U.S. at 531-32, 534-35; Davis, 819 N.E.2d at 97; Sweeney, 704 N.E.2d at 102 and S.L., 16 N.E.3d 953.

The fact that defendant is represented by counsel does not mean his pro se assertion of speedy trial rights should be ignored when evaluating whether he asserted his personal right to a speedy trial. See Watson v. State, 155 N.E.3d 608 (Ind. 2020); United States v. Tigano, 880 F.3d 602, 618 (2d Cir. 2018) (recognizing that, in the context of a constitutional speedy trial claim, a defendant's assertion of their own right - regardless of actions by counsel - is the relevant consideration).

**b. Waiver**

Waiver of right to trial impliedly waives speedy trial claim. Gosnell v. State, 439 N.E.2d 1153 (Ind. 1982).

A guilty plea accepted by trial court waives speedy trial rights. Wright v. State, 496 N.E.2d 60 (Ind. 1986); Branham v. State, 813 N.E.2d 809 (Ind. Ct. App. 2004). A guilty plea that is not accepted by the court also waives speedy trial rights. Barnett v. State, 637 N.E.2d 826 (Ind. Ct. App. 1994).

> Lawson v. State, 498 N.E.2d 1212 (Ind. 1986) (defendant objected to speedy trial violation before pleading guilty, defendant had choice of pursuing speedy trial challenge or disposing of case on its merits; by entering guilty plea defendant waived speedy trial objection).

Submission to trial without raising speedy trial claim waives right. See Lafave and Israel, *Criminal Procedure*, §18.1.

**4. Prejudice to Defendant**

Courts should assess prejudice to the defendant in light of the interests which the speedy trial right was designed to protect, such as to prevent oppressive pretrial incarceration, to minimize anxiety and concern of accused, and to limit the possibility that the defense will be impaired. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182 (1972).

S.L. v. State, 16 N.E.3d 953 (Ind. 2014) (despite trial court's technical compliance with Criminal Rule 4(C), defendant experienced personal prejudice as a result of serving nearly entire six-year sentence before trial began, and trial was continued seven times due to court congestion; although a congested court calendar weighs less heavily against the State, it still must be viewed as the responsibility of the government and an impediment to a defendant's constitutional right to a speedy trial).

**a. Burden on Defendant**

Defendant has burden to show actual prejudice caused by the delay. Wade v. State, 270 Ind. 549, 387 N.E.2d 1309 (1979)

Logan v. State, 16 N.E.3d 953 (Ind. 2014) (though defendant did not point to particular prejudice as the result of delay, he experienced personal prejudice as a result of his oppressive pretrial incarceration).

Particularized prejudice is not essential to every speedy trial claim. Doggett v. United States, 505 U.S. 647, 655 (1992). "Presumptively prejudicial" delay for purposes of Barker's first factor does not automatically equate to prejudice for purposes of the fourth factor. Danks v. State, 733 N.E.2d 474, 481 (Ind. Ct. App. 2000).

**b. Rebuttable Presumption if Delay Exceeds Statute**

When the period of delay exceeds the applicable statute of limitations for the offense, a rebuttable presumption of prejudice does arise and the burden of going forward with evidence to rebut the presumption shifts to the state. Kristek v. State, 535 N.E.2d 144 (Ind. Ct. App. 1989).

Douglas v. State, 517 N.E.2d 114 (Ind. Ct. App. 1987) (defendant's admission, that even without the lapse of time he would not have been able to produce any witnesses or establish an alibi, rebutted the presumption of prejudice).

Although in the context of a due process argument, at least one Indiana court has recognized that it may be impossible to show prejudice due to a delay.

Barnett v. State, 867 N.E.2d 184 (Ind. Ct. App. 2007) (defendant was prejudiced by the delay because many of the witnesses were missing or deceased by trial; to require a more specific prejudice than this would place an impossible burden on the defendant; more prejudice can only be demonstrated by showing what the testimony of those witnesses would have been; it is precisely the lack of this opportunity that prejudices the defendant).

Logan v. State, 16 N.E.3d 953 (Ind. 2014) (despite trial court's technical compliance with CR 4(C), defendant experienced personal prejudice as a result of serving nearly entire six-year sentence before trial began, and trial was continued seven times due to court congestion; although a congested court calendar weighs less heavily against the State, it still must be viewed as the responsibility of the government and an impediment to a D's constitutional right to a speedy trial).

**5. Appellate procedure**

**a. Taking an interlocutory appeal**

The Indiana Supreme Court does not favor pretrial appeals in criminal cases. Engle v. State, 467 N.E.2d 712, 715 (Ind. 1984).

However, under what is now Indiana Appellate Rule 14(B) (1) (c), a defendant is allowed an interlocutory appeal from the denial of his pretrial motion to dismiss on speedy trial grounds. Harrell v. State, 614 N.E.2d 959, 962 (Ind. Ct. App. 1993).

Kristek v. State, 535 N.E.2d 144 (Ind. Ct. App. 1989) (interlocutory appeal; denying defendant's motion to dismiss was error; nearly 8-year delay between filing of robbery information and defendant's arrest; defendant asserted speedy trial as soon as

he became aware of charge following arrest, and state offered no evidence of a diligent effort to locate defendant).

**b. Direct Appeal After Trial**

If trial shows that defendant's Sixth Amendment right to speedy trial was infringed, he would have remedy through direct appeal following entry of final judgment. United States v. MacDonald, 435 U.S. 850, 858, 98 S.Ct. 1547, 1551 (1978) and Harrell v. State, 614 N.E.2d 959, 967 n.2 (Ind. Ct. App. 1993).

**6. Remand for Failure to Apply Four-Factor Test**

McClellan v. State, 6 N.E.3d 1001 (Ind. Ct. App. 2014) (Court found delay of two years and five months presumptively prejudicial where delay was attributable to the State because while trial court issued summons to an outdated address, State had actual notice of defendant's address; on remand State would have opportunity to rebut presumption of prejudice).

## IV. PRE-INDICTMENT DELAY - DUE PROCESS

The Due Process Clause of the Fifth Amendment protects defendants against excessive pre-indictment delay. Schiro v. State, 888 N.E.2d 828 (Ind. Ct. App. 2008). To be granted relief due to pre-indictment delay, a defendant must demonstrate: (1) he suffered actual and substantial prejudice to his right to a fair trial; and (2) the State had no justification for the delay. Barnett v. State, 867 N.E.2d 184 (Ind. Ct. App. 2007).

Barnett v. State, 867 N.E.2d 184 (Ind. Ct. App. 2007) (trial court erred in denying defendant's motion to dismiss based on 12-year-delay in bringing charges; while there was no direct evidence that the delay was intentional, there is no evidence that the delay was justified; defendant was prejudiced by the delay because many of the witnesses were missing or deceased; to require defendant to show more specific prejudice than this would place an impossible burden on the defendant).

Schiro v. State, 888 N.E.2d 828 (Ind. Ct. App. 2008) (in contrast to Barnett, *supra*, defendant did not suffer prejudice to his right to a fair trial and 25-year pre-indictment delay was justified).

Ackerman v. State, 51 N.E.3d 171 (Ind. 2016) (distinguishing Barnett, 36-year delay, between homicide and charges being filed, did not violate due process; sole eyewitness available, so no prejudice, and no intentional delay).

Williams v. State, 188 N.E.3d 472 (Ind. Ct. App. 2022) (defendant not prejudiced by 35-year delay in filing of rape and criminal deviate conduct charges; no showing how ability to question deceased accomplice and employee of state forensic lab would have helped his defense).