

[CAPTION]

MOTION TO DISMISS FOR STATE MISCONDUCT (GENERAL)

The Defendant, by counsel, respectfully requests this Court, pursuant to Ind. Code 35-34-1-4, to dismiss the [information/ indictment] filed in the above-captioned cause. In support of the Motion, the Defendant states the following:

1. On [insert date], the State charged the Defendant with [insert offense(s)] .
2. Since the filing of the charges, the State, either through the prosecutor or law enforcement, has committed multiple instances of misconduct.

[LIST MISCONDUCT, FOR EXAMPLE:]

- a. The prosecutor has failed to provide material evidence to the Defendant, as ordered by the Court on [insert date].
 - b. The prosecutor has obstructed the Defendant's access to witness by threatening to charge the witnesses with a crime if they testified or instructing the witnesses not to talk with the agents of the Defendant.
 - c. The State has engaged in outrageous conduct.
3. This conduct rises to the level that dismissal of the cause is an appropriate remedy.
 4. Pursuant to Criminal Rule 3, a memorandum stating specifically the grounds for dismissal is filed with this Motion.

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to dismiss the [information/indictment], and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK D.15.g

Ind. Code 35-34-1-4 (motion to dismiss by defendant; grounds; requisites; disposition; effect of order).

Ind. Code 35-34-1-8 (motion to dismiss by defendant; requisites; affidavits; documentary evidence; hearing; disposition; procedures).

Ind. Code 35-34-1-4(a)(11) (Court may dismiss an indictment or information upon “any other ground that is a basis for dismissal as a matter of law.”)

Trial Rule 37(B)(2)(c) (providing dismissal of an action as an appropriate sanction available to a trial court when a party refuses to comply with a discovery order).

CASE LAW

Johnson v. State, 740 N.E.2d 118, 121 (Ind. 2001) (it is misconduct for a prosecutor to circumvent an adverse ruling by simply dismissing and re-filing the original charge, and also to pile on additional charges after a defendant’s successful procedural challenge, because “defendants will as a practical matter be unable to avail themselves of legitimate procedural rights”; trial court abused its discretion in denying motion to dismiss).

Davenport v. State, 689 N.E.2d 1226, 1230 (Ind. 1997) (“[w]hile courts have allowed the State significant latitude in filing a second information, the State cannot go so far as to abuse its power and prejudice a defendant’s substantial rights”), *modified on reh’g*, 696 N.E.2d 870 (Ind. 1998).

Osborne v. State, 805 N.E.2d 435 (Ind.Ct.App. 2004) (police officer encouraged a person on home detention to speed through an inhabited area while under influence of alcohol and cocaine in order to effectuate a pretextual stop to allow officers to search and detain the Defendant, who was a passenger in vehicle; given compelling public policy concern to prevent impaired driving and accidents caused by intoxicated drivers, the police officers’ conduct was outrageously dangerous; evidence found in stop of vehicle must be suppressed).

U.S. v. Omni Inter. Corp., 634 F. Supp. 1414, 1436 (D.Md. 1986) (in determining the proper remedy, “the relief chosen should be directly related to the seriousness of the misconduct”; the Defendant does not need to show actual and specific prejudice to warrant dismissal when conduct is egregious; indictment dismissed due to the Government’s continued misconduct, including alteration and creation of documents, and a lack of candor in colloquies with and testimony before the Court).

People v. Auld, 815 P.2d 956 (Colo.Ct.App. 1991) (dismissal for outrageous government conduct in drafting fictitious criminal complaint and suborning perjury, even though no actual prejudice was shown).

State v. Lively, 130 Wash.2d 1, 921 P.2d 1035 (Wash. 1996) (police informer’s conduct in attending Alcoholics/Narcotics Anonymous meetings “trolling for targets” and developing romantic relationship with lovelorn, alcoholic Defendant led to finding that State’s conduct was so objectively outrageous as to violate due process clause).

Collins v. State, 822 N.E.2d 214 (Ind.Ct.App. 2005) (a prosecutor may not prevent or discourage a defense witness from testifying; prosecutor admitted that he told one of defense witnesses that he would arrest her on three charges if she testified that guns found in house belonged to her; although harmless, prosecutor’s threat was inappropriate and led to witness’s refusal to testify at trial).

Hood v. G.D.H. by Elliott, 599 N.E.2d 237, 241 (Ind.Ct.App. 1992) (T.R. 37 provides that when a party fails to comply with a discovery order, the trial court may issue an order “dismissing the action or proceeding or any part thereof”; “Indiana does not require trial courts to impose lesser sanctions before applying the ultimate sanction of . . . dismissal”).

State v. Montgomery, 901 N.E.2d 515 (Ind.Ct.App. 2009) (trial court had discretion to issue discharge as a remedy for the State’s three-year, five-month delay in responding to the Defendant’s discovery request).

State v. Schmitt, 915 N.E.2d 520 (Ind.Ct.App. 2009) (trial court did not abuse its discretion in dismissing OWI charges because the State’s refusal to respond to Defendant’s Request for Production, as trial court ordered, constituted bad faith).

Reed v. State, 748 N.E.2d 381 (Ind. 2001) (although Defendant has no due process right to compel the immunization of either defense or prosecution witnesses, the State cannot use its immunization power to interfere with the defense’s presentation of its case).