

[CAPTION]

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO
DISMISS (VINDICTIVE PROSECUTION)**

FACTS

[Insert relevant facts]

ARGUMENT

The State is unable to overcome its heavy constitutional burden of showing its pursuit of an increased sentence against the Defendant is not based on vindictiveness.

The State’s pursuit of an increased sentence in a five-year-old case at the State’s first appearance in front of the Court after the Defendant’s successful Petition for Writ of Mandamus violates the Defendant’s due process right in that it creates, at least, a realistic apprehension of vindictiveness. “[I]t is clear that when the prosecution has occasion to file more numerous or more severe charges for the same basic criminal conduct against an accused after the accused has successfully exercised his statutory or constitutional rights to an appeal, the prosecution bears a heavy burden of proving that the increase in the number or severity of the charges was not motivated by a vindictive purpose.” Cherry v. State, 414 N.E.2d 301, 305 (Ind. 1981) (citing to Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)); see also Warner v. State, 773 N.E.2d 239, 243 n.2 (Ind. 2002); North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); Owens v. State, 822 N.E.2d 1075, 1077 (Ind.Ct.App. 2005). But cf. Alabama v. Smith, 490 U.S. 794, 802, 109 S.Ct. 2201, 2206-07 (1989).

“[U]nless there is new evidence or information discovered to warrant additional charges, the potential for prosecutorial vindictiveness is too great for courts to allow the State to bring additional charges against a defendant who successfully moves for a mistrial.” Owens, 822 N.E.2d at 1077 (quoting Warner v. State, 773 N.E.2d 239, 243 (Ind. 2002)). “The rationale of protecting a defendant’s right to a fair trial, which justifies the presumption of prosecutorial vindictiveness, is even more compelling in the case of a successful appeal than in the case of a successful motion for mistrial.” Id. “[A]ctual vindictiveness is not required; rather the ‘realistic apprehension of vindictiveness controls.’”

State v. Selva, 444 N.E.2d 329, 330 (Ind.Ct.App. 1983) (quoting Cherry, 414 N.E.2d at 306).¹ As far back as 1977, Courts have held that the filing of a habitual criminal charge on re-trial that was available prior to the successful appeal violates the due process clause. Murphy v. State, 453 N.E.2d 219, 227 (Ind. 1983) (quoting James v. Rodriguez, 553 F.2d 59 (10th Cir. 1977) and People v. Ivery, 44 Colo.App. 511, 514-115, 615 P.2d 80, 83 (1980)). In Murphy, the State's assertion that it did not file the habitual offender status at the first trial because the State was unprepared or unable to prove the status did not justify the prosecutor's filing of the habitual offender status on re-trial. Id.

[INSERT FACTS: FOR EXAMPLE - Here, the State had evidence of the first three alleged aggravators since October 2, 2000, when the Defendant was originally charged. The State knew two of the victims were under twelve, and the State's theory was the Defendant killed more than one person. But, the State elected not to file these aggravators in support of life without parole. The State does not have the right "to reopen a previously completed exercise of discretion involving the same basic criminal acts." Cherry, 414 N.E.2d at 306. Thus, these aggravators, filed at the State's first Court appearance since the Defendant's successful Petition for Writ of Mandamus, must be dismissed on grounds of prosecutorial vindictiveness.

The State cannot justify its filing of the last aggravator, i.e., that the Defendant hired the co-Defendant to commit the murders, based on handpicked statements of the co-Defendant implicating the Defendant in the murders. In Selva, *supra*, new evidence that existed months before the filing of additional charges could not justify the new charges filed only after the prosecutor lost a Motion for Joinder. Selva, 444 N.E.2d at 331. Here, the State knew of the co-Defendant's statements when it joined the Defendant with the co-Defendant. At that time, the State exercised its discretion to add a conspiracy charge, but not to pursue life without parole. Just as the prosecutor in Selva could not allege "new

¹ Any argument that a Petition for Writ of Mandamus is not an appeal for purposes of vindictive prosecution analysis is without merit. First, the Courts have held that a successful motion for mistrial should be treated similar to a successful appeal and invoke the presumption of vindictiveness. Warner v. State, 773 N.E.2d 239, 243 (Ind. 2002). Moreover, in order to be successful in a Petition for a Writ, one has to prove not only that he would be successful on appeal on the same issue, but is also placed in a position of extreme hardship, that the remedy on appeal would be inadequate and that the judge has a clear duty to act. Original Action Rule 3. Thus, a successful Petition for a Writ has more potential to create vindictiveness, by its very nature as a remedy for extreme abuses, than a successful appeal or mistrial.

evidence” to justify the filing of additional charges after losing a Motion for Joinder, the State cannot use co-Defendant’s statements, which they have had for over four months, to justify pursuing life without parole at the prosecutor’s first appearance in Court after losing its effort to join the Defendant with the co-Defendant in the original County.

Overall, the State’s newly filed life without parole aggravators arise out of the same conduct, indeed the same offense, the murders of the Defendant’s family, for which the State has been prosecuting the Defendant for five years. See Selva, 444 N.E.2d at 331 (because, in part, the new charges arose out of the same conduct as the four original ones, the new six counts which were filed after the prosecutor lost a Motion for Joinder were vindictive). The State has had ample opportunity to file life without parole for these murders. “Vindictiveness issues are only present after the state has had ample opportunity to exercise its discretion.” Cherry, 414 N.E.2d at 306.]

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to dismiss the LWOP charge filed in this cause.

(Signature)