

[CAPTION]

**MOTION TO DISMISS**  
**(Pre-indictment Delay)**

The Defendant, by counsel, respectfully requests this Court to dismiss the [indictment/information] in this cause pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, Article I, Section 12 of the Indiana Constitution and I.C. 35-34-1-4(a)(8). In support of this Motion, the Defendant states the following:

1. The Defendant is charged with [insert offense(s)] which are alleged to have occurred on [insert date].
2. An [indictment/information] was filed on [insert date], charging the Defendant with commission of [insert offense(s)].
3. The Defendant was arrested for these offenses on [insert date].
4. Substantial and actual prejudice to the Defendant has resulted from the delay between the date of the alleged offense and the filing of the [indictment/information] in that: [set out actual prejudice]
5. Pursuant to Criminal Rule 3, a memorandum stating specifically the grounds for dismissal is filed herewith and incorporated by reference as Exhibit A.
6. The pre-charge delay has prejudiced the Defendant's right to a fair trial and due process of law guaranteed by Article 1, Sec. 12 of the Indiana Constitution and the Fourteenth Amendment to the United States Constitution.

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 B.5.a

U.S. Constitution, 14th Amendment

Indiana Constitution, Article 1 §12

I.C. 35-34-1-4 (grounds, requisites, disposition; effect of order)

I.C. 35-41-4-2 (statute of limitations)

I.C. 35-34-1-4(b) (motion to dismiss based upon 35-34-1-4(a) (8) may be made or renewed at any time before or during trial)

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

Indiana Rules of Criminal Procedure, Rule 3 (memorandum to be filed with Motion to Dismiss)

## CASE LAW

Koke v. State, 498 N.E.2d 1326 (Ind.Ct.App. 1986) (timeliness of the prosecution must be raised in motion to dismiss prior to conclusion of trial or issue is waived (IC 35-34-1-4(a) (8) and (b))).

Crawford v. State, 669 N.E.2d 141 (Ind. 1996) (speedy trial rights did not attach until State filed charging information).

Barnett v. State, 867 N.E.2d 184 (Ind.Ct.App. 2007) (a twelve-year delay in filing charges violated the Defendant's due process right to a fair trial; regardless of whether the delay was intentional or negligent, the Defendant was prejudiced by the delay because many of the witnesses were missing or deceased by trial; to require that the Defendant show 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). But see Glenn v. State, 884 N.E.2d 347 (Ind.Ct.App. 2008).

McMorris v. State, 392 N.E.2d 820 (Ind.Ct.App. 1979) (due process considerations may require dismissal where prejudice attaches to the Defendant due to the delay in charging; delay of seven months between alleged offense and indictment did not violate the Defendant's right to due process).

Schiro v. State, 888 N.E.2d 828 (Ind.Ct.App. 2008) (twenty-five-year delay in bringing rape charges against Defendant did not violate Defendant's right to due process under the Fifth Amendment and did not constitute prosecutorial vindictiveness; the State only pursued charges after the Defendant successfully appealed a death sentence and would soon be released).

Johnson v. State, 810 N.E.2d 772 (Ind.Ct.App. 2004) (rejecting the Defendant's claim that he was constitutionally denied due process by being charged with a Class A felony burglary thirteen years after the alleged offense; the Defendant failed to show how he was prejudiced by the delay and that the delay was unjustified). See also Harris v. State, 824 N.E.2d 432 (Ind.Ct.App. 2005); Allen v. State, 813 N.E.2d 349 (Ind.Ct.App. 2004).

Woods v. State, 583 N.E.2d 1211 (Ind. 1992) (“an American citizen is entitled to live without a Damocles sword dangling over his head”; out of the principles of fairness, a five-and-one-half-year delay between the court of appeals affirming a conviction and sentencing divest the court of jurisdiction).

Fisher v. State, 933 N.E.2d 526 (Ind.Ct.App. 2010) (approximately eight-year delay in prosecuting Defendant violated the Sixth Amendment; the State’s blanket policy of waiting for a defendant to complete sentence in foreign jurisdiction before bringing a defendant to trial here did not justify delay; the State’s affirmative duty to diligently prosecute defendants trumps the reasons underlying the State’s policy).