

[CAPTION]

**MOTION TO DISMISS (BARRED BY PRIOR PROSECUTION/DOUBLE
JEOPARDY)**

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

1. An [indictment/information] was filed on [insert date], charging the Defendant with [insert offense(s)].

2. The [indictment/information] filed in this cause alleges the commission of the following facts: [specify facts]

3. A prosecution in this cause is barred by Ind. Code 35-41-4-3 and Article 1, Sec. 14 of the Indiana Constitution and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution because the Defendant was previously prosecuted in [insert court] in [insert cause number] for the same acts specified in paragraph two (2), which prosecution resulted in: [specify reason for termination]

a. An acquittal;

b. A conviction for the lesser offense of [insert offense];.

c. A mistrial after jeopardy attached and the Defendant: [select appropriate statements]

(1) did not consent to a mistrial;

(2) objected to the granting of a mistrial;

(3) did not in any way cause the mistrial;

(4) there was no manifest necessity existing which justified the termination of the former prosecution;

(5) the mistrial was caused by the Prosecuting Attorney/State.

d. A reversal on insufficient evidence.

4. Pursuant to Criminal Rule 3, a memorandum stating specifically the grounds for dismissal is filed herewith and incorporated by reference as Exhibit A.

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

(Signature)

REFERENCES

CASEBANK B.10.g; J.10

U.S. Constitution 5th Amendment

Indiana Constitution Article 1, Section 14

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

Ind. Code 35-34-1-4(c) (“upon the motion to dismiss, a defendant who is in a position adequately to raise more than one (1) ground in support thereof shall raise every ground upon which he intends to challenge the indictment or information. A subsequent motion based upon a ground not properly raised may be summarily denied. However, the court, in the interest of justice and for good cause shown, may entertain and dispose of such a motion on the merits”).

Ind. Code 35-34-1-4(b) (a motion to dismiss based upon Ind. Code 35-34-1-4(a)(7) (the prosecution is barred by reason of a previous prosecution), may be made or renewed at any time before or during trial).

Ind. Code 35-41-4-3 (when prosecution barred for same offense).

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

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

Ind. Code 35-31.5-2-168 (definition of included offense).

Ind. Code 35-41-4-5 (former prosecution in another jurisdiction a bar to subsequent prosecution for the same offense in Indiana)

Ind. Code 35-41-4-6 (invalid or fraudulently procured prosecution not a bar under Ind. Code 35-41-4-3, 35-41-4-4 and 35-41-4-5).

CASE LAW

Cuto v. State, 709 N.E.2d 356 (Ind.Ct.App. 1999) (double jeopardy statute does not encompass all of the law on double jeopardy; instead, it is subject to delineation through case law to determine its proper interpretation and use).

Butler v. State, 724 N.E.2d 600 (Ind. 2000) (court would consider murder Defendant’s claim that his retrial following mistrial violated double jeopardy principles solely under the Fifth Amendment where the Defendant offered no authority or independent analysis under the state constitution and cited applicable statute only to suggest that it codified state and federal constitutional prohibitions against double jeopardy).

Evans v. Michigan, 133 S.Ct. 1069, 185 L.E.2d 124 (2013) (an acquittal precludes retrial under double jeopardy clause, even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a misconstruction of the statute defining the requirements to convict).

DOUBLE JEOPARDY TEST

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (when same act violates two statutes the test whether there are two offenses or one is whether each provision requires proof of a fact which the other does not).

Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (Indiana constitutional double jeopardy test is more expansive than the U.S. constitutional test; if there is a reasonable possibility that two offenses are based on the same facts, convictions for the two offenses violate double jeopardy).

Smith v. Massachusetts, 543 U.S. 462, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005) (Fifth Amendment double jeopardy clause prohibits a trial judge, who has previously dismissed a count against Defendant on grounds of evidentiary insufficiency, from later reversing that ruling and allowing the charge to go to the jury).

Thomas v. State, 764 N.E.2d 306 (Ind.Ct.App. 2002) (Indiana Double Jeopardy Clause protects against second prosecution for same offense after conviction; a version of the actual evidence test is used to determine whether double jeopardy bars the subsequent prosecution: Defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense).

Swenson v. State, 868 N.E.2d 540 (Ind.Ct.App. 2007) (IC 35-41-4-5 provides that a former conviction in any other jurisdiction bars subsequent prosecution by Indiana for the “same conduct”; in Indiana, a person may not be convicted of both theft and receiving stolen property with regard to property appropriated in the same transaction or series of transactions).

Berry v. State, 725 N.E.2d 939 (Ind.Ct.App. 2000) (where the overt act for conspiracy charge to which the Defendant pled guilty was used to support subsequent conspiracy charge, trial court should have granted motion to dismiss).

State v. Keith, 482 N.E.2d 751 (Ind.Ct.App. 1985) (subsequent felony charges brought by State based on same conduct as was misdemeanor charges to which the Defendant pled were barred by double jeopardy).

Carter v. State, 956 N.E.2d 167 (Ind.Ct.App. 2011) (courts consider the statutes, charging instruments, evidence, and arguments of counsel in order to determine whether the facts establishing one crime are the same as the facts establishing one or more of another for double jeopardy purposes).

Chavez v. State, 988 N.E.2d 1226 (Ind.Ct.App. 2013) (while Indiana’s double jeopardy clause prohibits convicting Defendant of two or more distinct chargeable crimes when they constitute the same offense, it also prohibits charging Defendant multiple times for the same continuous offense).

Porter v. State, 935 N.E.2d 1228 (Ind.Ct.App. 2010) (under Indiana constitution, categories of double jeopardy bar conviction for a crime which consists of the very same act as another crime for which Defendant has been convicted, as well as conviction for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which Defendant has been convicted).

Garrett v. State, 992 N.E.2d 710 (Ind. 2013) (the Indiana double jeopardy “actual evidence” test applies to cases in which a jury acquits a defendant of one charge but cannot reach a verdict on a second charge, and where the defendant is subsequently convicted of the second charge on retrial).

Montgomery v. State, 14 N.E.3d 76 (Ind.Ct.App. 2014) (I.C. 35-34-1-4(a)(7) (motion to dismiss on

grounds that prosecution was barred by previous prosecution) does not require dismissal of charge for failure to register as sex offender based on Defendant's failure to register with appropriate law enforcement agency in county where he moved, within 72 hours of move, after he entered guilty plea to failure to register based on his failure to reside at address where he had registered).

IMPLIED ACQUITTAL

Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 1999 (1957) (when charged with distinct offenses and asked to choose between the offenses, absence of a verdict on any of the offenses is an implied acquittal of those offense; thus, conviction on a lesser offense bars retrial on a greater offense).

Boze v. State, 514 N.E.2d 275 (Ind. 1987) (under Indiana law, a Defendant waives a double jeopardy claim if he has an active hand in arranging the disposition of the causes so he might benefit from the results). But see Richardson v. State, 456 N.E.2d 1063 (Ind.Ct.App. 1983) (when a prosecutor secures a guilty plea by agreeing not to prosecute one or more related offenses, guilty plea statute requires that court dismiss any subsequent prosecution for such related offenses).

Moore v. State, 882 N.E.2d 788 (Ind.Ct.App. 2008) (trial court's decision to not allow enhanced offenses to be submitted to a jury granted a judgment to Defendant and thus acted as an acquittal on those enhanced offenses, such that retrial for those enhanced offenses was barred by double jeopardy).

CONVICTION OF A LESSER OFFENSE

Hoover v. State, 918 N.E.2d 724 (Ind.Ct.App. 2009) (even when double jeopardy does not bar retrial, under Ind. Code 35-41-4-3(a), the State is barred from retrying a defendant on a greater charge on which the jury deadlocked when the defendant was convicted of a lesser offense). But see Cleary v. State, 23 N.E.3d 664 (Ind. 2015) (jury's express statement when it returns a guilty verdict on a lesser included offense that it could not agree on a verdict as to the greater offense precludes the inference that there was an implied acquittal on the greater offense, for purposes of Ind. Code 35-41-4-3(a); the court will not infer from jury's verdict that it believed Defendant was innocent).

McWhorter v. State, 993 N.E.2d 1141 (Ind. 2013) (under principles of double jeopardy, a conviction of a greater offense precludes the conviction of a lesser-included offense, but a defendant may be retried for a lesser offense, of which he was convicted at the first trial, after that conviction is reversed on appeal, and this is true even though the first trial also resulted in a verdict of acquittal on a greater offense).

INSUFFICIENCY/ COLLATERAL ESTOPPEL

Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (when a conviction is reversed on insufficient evidence, double jeopardy bars re-trial).

Jarmillio v. State, 823 N.E.2d 1187 (Ind. 2005) (double jeopardy does not bar re-trial of a habitual offender enhancement after reversal on insufficiency of evidence).

Shumate v. State, 718 N.E.2d 1133 (Ind.Ct.App. 1999) (although double jeopardy does not bar re-trial on probation revocation based on insufficient evidence, res judicata does).

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 496 (1970) (bars the reintroduction or relitigation of facts already established against the government). See also Little v. State, 501 N.E.2d 412 (Ind. 1986) (collateral estoppel prohibits the State from relitigating, for any purpose, an issue which was

determined in a prior prosecution of the same party; both relitigation of an ultimate fact and relitigation of an evidentiary fact are prohibited).

Townsend v. State, 632 N.E.2d 727 (Ind. 1994) (collateral estoppel in criminal trials is an integral part of protection against double jeopardy guaranteed by Fifth and Fourteenth Amendments).

Neff v. State, 915 N.E.2d 1026 (Ind.Ct.App. 2009) (if an appellate court reverses a conviction due to insufficient evidence, it amounts to an acquittal for double jeopardy purposes; conversely, if an appellate court reverses a conviction due to legal error in the proceedings, there is no double jeopardy bar on a retrial).

Coleman v. State, 946 N.E.2d 1160 (Ind. 2011) (to decipher what a jury necessarily decided in a prior trial for purposes of application of collateral estoppel, courts should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the Defendant seeks to foreclose from consideration).

Herron v. State, 10 N.E.3d 552 (Ind.Ct.App. 2014) (because there was evidence—albeit inadmissible—to establish that Defendant committed the charged crimes, the State could retry Defendant, even though jury improperly used prosecution witness’s pretrial statement as substantive evidence against Defendant when it was admitted solely for impeachment).

SUBSEQUENT PUNISHMENT OTHER THAN CONVICTION

Bryant v. State, 660 N.E.2d 290 (Ind. 1995) (CSET is a punishment and thus a jeopardy for double jeopardy purposes; a Defendant cannot be prosecuted for a crime after being assessed CSET).

Hoffman v. State, 957 N.E.2d 992 (Ind.Ct.App. 2011) (OWI conviction was not barred on double jeopardy grounds despite Defendant’s contention that he had already been tried and punished for same conduct in military court, absent clear evidence to establish that the type of punishment that Defendant received from Army, which was a reduction in rank, was equivalent to a prosecution and was a consequence of the same conduct).

Tuan Chu v. State, 991 N.E.2d 142 (Ind.Ct.App. 2013) (nonpayment penalties that Department of Revenue had assessed to Defendant for failing to pay taxes were not “punishments” for double jeopardy purposes).

MISTRIAL

Corley v. State, 455 N.E.2d 945 (Ind. 1983) (where no manifest necessity existed for granting motion of prosecutor to take deposition of surprise witness and discharging jury, subsequent trial of the Defendant on same charges violates double jeopardy); see also Domangue v. State, 654 N.E.2d 1 (Ind.Ct.App. 1995); Hall v. State, 722 N.E.2d 1280 (Ind.Ct.App. 2000); Glasscock v. State, 759 N.E.2d 1170 (Ind.Ct.App. 2001). But see Brown v. State, 703 N.E.2d 1010 (Ind. 1998) (requirement that there must be “manifest necessity” for grant of mistrial over Defendant’s objection in order for retrial of Defendant to be permissible for double jeopardy purposes is not to be interpreted literally, and there need be only a high degree of necessity before concluding that mistrial is appropriate).

Brock v. State, 955 N.E.2d 195 (Ind. 2011) (determination of whether State is permitted to retry Defendant after his first trial ended in a mistrial involves a multi-step analysis: the court first considers whether Defendant consented to trial judge’s declaration of a mistrial; if so, then the court considers

whether the State goaded him into consenting; and if Defendant did not consent to mistrial, the court considers whether it was justified by “manifest necessity”).

Jackson v. State, 925 N.E.2d 269 (Ind. 2010) (many different factors may bear on the need for a mistrial; first, it is significant whether the reason for the mistrial is attributable to the prosecution, and if so, the State must demonstrate a much higher degree of necessity for the mistrial; the necessity of a mistrial is evaluated in light of the steps taken by the trial court to avoid a mistrial).

Calvert v. State, 14 N.E.3d 818 (Ind.Ct.App. 2014) (retrial of Defendant would not violate double jeopardy, even though Defendant alleged prosecutor committed misconduct by making misrepresentations to court regarding Defendant’s enlistment in the Army and the date of a motion for continuance, where conviction was reversed on ground that trial court erred when it tried Defendant in absentia, and prosecutor’s alleged misrepresentations were made before trial and could not be construed as intending to goad Defendant into moving for a mistrial).