

[CAPTION]

**MOTION TO DISMISS (BARRED BY PRIOR PROSECUTION/FAILURE
TO JOIN)**

The Defendant, by counsel, respectfully requests this Court, pursuant to Ind. Code 35-34-1-4 and Ind. Code 35-34-1-10(c), to dismiss the [indictment/information]. In support of this Motion, the Defendant states the following:

1. On [insert date], an [indictment/information] was filed, charging the Defendant with [insert offense(s)].
2. The Defendant was previously charged in the [insert court] in [insert cause number] with [insert offense(s)] which resulted in a(n) [acquittal/conviction] after jeopardy attached for [insert offense(s)].
3. Because the charged offense is based on the same conduct and/or on part of a single scheme or plan as the offenses previously charged in [insert previous cause number], the offense alleged in the [indictment/information] in this cause could and, therefore, should have been joined with the offenses alleged in [insert previous cause number] under Ind. Code 35-34-1-9.
4. The prosecution in this cause is barred by Ind. Code 35-41-4-4.
5. 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 [indictment/information], and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK B.10.b; D.6.b

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

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

Ind. Code 35-34-1-10(c) (motions; joinder of offenses; dismissal of offense joinable for trial or of related offense; requisites; orders)

Ind. Code 35-34-1-10(c) (“a defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution.”)

Ind. Code 35-34-1-9 (joinder of offense or defendants)

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

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

CASE LAW

Williams v. State, 762 N.E.2d 1216 (Ind. 2002) (court interpreted statutes to mean that the State must join all offenses that are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, or the subsequent prosecution is barred; because charges in two courts were based on a series of acts so connected that they constituted part of a single scheme or plan, they should have been charged in a single prosecution). See also Wiggins v. State, 661 N.E.2d 878 (Ind.Ct.App. 1996).

Thomas v. State, 764 N.E.2d 306 (Ind.Ct.App. 2002) (trial court erred in denying the Defendant’s motion to dismiss dealing in cocaine charge after he previously pled guilty to and was sentenced for conspiracy to deliver cocaine upon the same evidence in another county).

D.T.A. v. State, 956 N.E.2d 195 (Ind.Ct.App. 2011) (Defendant does not waive challenge under successive prosecution statute (IC 35-41-4-4) by failing to request joinder before pleading guilty in the first matter. Express language of IC 35-34-1-10(c) contemplates that dismissal of a subsequent matter is still available after resolution of first matter so long as Defendant requests the dismissal before the beginning of the second trial).

Hamer v. State, 771 N.E.2d 109 (Ind.Ct.App. 2002) (successive prosecution upheld because the Defendant did not object prior to the start of the second trial, but at close of the evidence).

State v. Burke, 443 N.E.2d 859 (Ind. 1983) (if a court orders joinder of offenses and the State elects to dismiss one of the offenses, the State is barred from subsequently attempting to re-prosecute for that offense).

Evans v. State, 542 N.E.2d 546 (Ind. 1989) (theft of a car during a robbery and burglary three days later were not entirely separate and distinct offenses and could be joined for trial).

Thompson v. State, 966 N.E.2d 112 (Ind.Ct.App. 2012) (trial court did not abuse its discretion in denying Defendant's motion to dismiss the drug charges against him under successive prosecution statute, where there was no evidence that Defendant's DWS offense in prior prosecution was part of a single scheme or plan with drug offenses at issue).

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).

State v. McDonald, 954 N.E.2d 1031 (Ind. Ct. App. 2011) (where new evidence that Defendant molested his son was discovered after Defendant had been investigated for molesting all of his children, charged with neglect of all the children and molest of his daughter and pled guilty to a lesser charge, the subsequent prosecution of Defendant for molest of his son was not prohibited; because probable cause of molestation of Defendant's son did not exist at time of original charges, such charge should not have been joined).

Honeycutt v. State, 974 N.E.2d 525 (Ind.Ct.App. 2012) (prosecution of Defendant for OWI and operating a vehicle with a controlled substance in his body, after Defendant pled guilty to possession of marijuana and traffic infraction in first prosecution, violated successive prosecution statute, where all charges were connected by scheme or plan, and State had probable cause to charge Defendant with operating offenses at same time Defendant was charged with possession of marijuana and traffic infraction).