

[CAPTION]

**MOTION TO DISMISS INDICTMENT BASED ON DEFECTIVE GRAND
JURY PROCEEDINGS**

The Defendant, by counsel, respectfully requests this Court, pursuant to Ind. Code 35-34-1-4(a)(3) and Ind. Code 35-34-1-7, to dismiss the Indictment. In support of this Motion, the Defendant states the following:

1. On [insert date], an Indictment was filed charging the Defendant with the offenses of [insert offense(s)].
2. The Grand Jury proceeding which returned the Indictment in this cause was defective for the following reasons: [specify grounds/see Ind. Code 35-34-2 et. seq. For example:
 - a. The presence of unauthorized persons in the grand jury room. Ind. Code 35-34-2-4.
 - b. Less than five members of the grand jury were present. Ind. Code 35-34-2-4(a).
 - c. The alternate juror participated in deliberations, thus violating Ind. Code 35-34-2-2(d).
3. Pursuant to Ind. Code 35-34-1-7, an indictment shall be dismissed upon motion when the grand jury proceeding which resulted in the indictment was conducted in violation of Ind. Code 35-34-2-1 et. seq.
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 that this Court dismiss the Indictment, and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK B.10.c

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(b) (a motion to dismiss shall be made no later than twenty (20) days prior to the omnibus date if the Defendant is charged with a felony; or ten (10) days prior to the omnibus date if the Defendant is charged only with one (1) or more misdemeanors; thereafter, a motion to dismiss the indictment or information because the grand jury proceeding was defective may be summarily denied).

Ind. Code 35-34-1-4(e) (if the court grants a motion to dismiss because of defective grand jury proceeding, and the prosecuting attorney informs the court on the record that the charges will be refiled within seventy-two (72) hours by information: (1) the court may not discharge the defendant; and (2) any prior order concerning release pending trial remains in force unless it is modified or removed by the court).

Ind. Code 35-34-1-7 (grand jury proceedings; violation of Ind. Code 35-34-2; dismissal).

Ind. Code 35-34-2-1 et seq. (summoning and selection of grand jury).

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

CASE LAW

State v. Hardy, 406 N.E.2d 313 (Ind.Ct.App. 1980) (presence and participation of unauthorized person in grand jury room is not, per se, ground for dismissal of indictment and the Defendant must show prejudice to his substantial rights because such prejudice is not presumed).

Brown v. State, 434 N.E.2d 144 (Ind.Ct.App. 1982) (unauthorized presence and participation by investigating police officer during grand jury proceeding prejudiced the Defendant's substantial rights and warranted dismissal of indictment).

Snyder v. State, 182 Ind.App. 24, 393 N.E.2d 802 (1979) (although subpoena issued by grand jury was defective because it did not inform the Defendant of the nature of investigation and did not inform him that he was the target of investigation and thus, was subject to a motion to dismiss, trial court's denial of motion to dismiss constituted harmless error in light of fact that the Defendant was well aware of general nature of investigation and was also aware that he was subject under investigation).

U.S. v. Gillespie, 773 F.Supp. 1154 (N.D. Ind. 1991) (Defendant who was not provided warnings of his constitutional rights before testifying before grand jury pursuant to subpoena was not entitled to dismissal of charges he under-reported income on federal tax return even though his testimony before grand jury led Government to suspect that he had derived unreported taxable income from his participation in municipal contracts; indictment was plainly valid on its face, and even if Defendant's Fifth Amendment rights had been violated, Government would remain entitled to trial on the merits).

State ex rel. Pollard v. Criminal Court of Marion County, Division One, 329 N.E.2d 573 (Ind. 1975) (if foreman or prosecutor intentionally fails to advise target of target status, indictment is subject to dismissal).

Ajabu v. State, 677 N.E.2d 1035 (Ind.Ct.App. 1997) (erroneous instruction will not invalidate indictment absent showing of prejudice; to show prejudice, instructions in their entirety must be so misleading or deficient that fundamental integrity of indictment process is compromised).