MEMORANDUM OF LAW

I. THE INDIVIDUAL FACTORS INVOLVED IN THIS CASE DEMONSTRATE AN INFRINGEMENT OF THE DEFENDANT'S RIGHT TO SPEEDY TRIAL AND THEREFORE THE CHARGES MUST BE DISMISSED.

The federal right of an Accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution which in its relevant part guarantees "the right to a speedy and public trial". The amendment is made applicable to the States by the Fourteenth Amendment *Klopfer v. State of N. C.*, 386 U.S. 213 (1967). The right is also preserved by Article I, §12 of the Indiana Constitution which, in its relevant part, states that "justice shall be administered . . . speedily and without delay". The right to speedy trial is "fundamental" and has been "zealously guarded" by Indiana Courts. *Klopfer* at 222-3; *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995).

The right is triggered by the filing of a charge or an arrest whichever occurs first. *United States v. Marion*, 404 U.S. 307 (1971); *Harrell v. State*, 614 N.E.2d 959, 963; *Scott v. State, 461 N.E.2d 141,* 142 (Ind. Ct. App. 1984). Relevant to the case at bar, an unreasonable delay between the filing of a charge and the arrest of the Accused gives rise to a speedy trial claim. *Kristek* v. State, 535 N.E.2d 144, 145 (Ind. Ct. App. 1989).

"When this court considers a speedy trial claim based upon the delay between the filing of the information and the arrest of the accused, it applies the balancing test set forth in *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101." *Harrell* at 963 (*citing, Kristek* at 145); under the Sixth Amendment.

The recent Indiana Supreme Court case of *Watson v. State* (decided October 21, 2020 Case No, 20S-CR-64) held that an analysis distinct from *Barker* may be more suitable under the Indiana Constitution for a speedy trial claim:

> "Since *Fortson (v. State*, 379 N.E.2d 147 (1978) added)—the first time this Court confronted a speedy trial claim brought under both constitutions—Indiana courts have used the federal *Barker* factors when evaluating a defendant's state constitutional claim. *See, e.g.*, *Sweeney v. State*, 704 N.E.2d 86, 102 (Ind. 1998). But these factors—particularly, the defendant's

assertion of the speedy trial right—may not account for the difference in language between the Sixth Amendment and Article 1, Section 12. The former states a **right**, "[T]he accused shall enjoy the right to a speedy and public trial," U.S. Const. amend. VI, but the latter gives a **directive**, "Justice shall be administered . . . speedily, and without delay," Ind. Const. art. 1, § 12. So, while the Sixth Amendment invites analysis into whether and how defendants assert their right to a speedy trial, Article 1, Section 12 seemingly does not. In fact, prior to *Fortson*, this Court recognized that Article 1, Section 12 "casts no burden upon the defendant, but does cast an imperative duty upon the state and its officers, the trial courts and prosecuting attorneys, to see that a defendant" receives a speedy trial. *Zehrlaut v. State*, 230 Ind. 175, 183–84, 102 N.E.2d 203, 207 (1951). Therefore, under our state constitution, a defendant's speedy trial "demand is effectively made for him." *Id.* at 184, 102 N.E.3d. at 207; *see also Barker*, 407 U.S. at 524 & n.21 (citing *Zehrlaut* in recognizing Indiana as one of eight states to reject a demand rule). Yet, in *Fortson*, there was no reference to *Zehrlaut* or to the disparity in language between the two provisions. *See Fortson*, 269 Ind. at 169, 379 N.E.2d at 152. And thus, for a speedy trial claim brought under Article 1, Section 12, an analysis distinct from *Barker* may be more suitable. *Cf. State v. Harberts*, 11 P.3d 641, 648, 650–51 (Or. 2000) (rejecting the *Barker* factors for analyzing speedy trial claims brought under the Oregon Constitution, which was modeled after Indiana's)." (Slip. Op pg. 6 FN.2)

Barker's test suggests consideration of four factors:

1. The length of delay;

2. The reason for the delay;

3. The Accused's assertion of the right; and

4. The prejudice to the Accused. *Barker* at 530.

However, the foregoing considerations are only "some of the factors" which may be considered and "none of the four factors . . . [is] either a necessary or sufficient condition to finding a deprivation of the right of speedy trial." *Id*. at 530, 533. Also, analysis of the factors must be undertaken "with full recognition" that this court is "dealing with a fundamental right of the accused . . . [which] is specifically affirmed in the Constitution". *Id*. at 533.

In this case, an analysis of the factors outlined in *Barker*, require this Court to discharge the Defendant from further prosecution.

Factor 1: The length of the delay was significant. Pursuant to Criminal Rule 4(C), he had a right to be tried within one year, a right that now is completely lost.

Factor 2: No valid reason existed for the delay.

Factor 3: This factor is irrelevant since the Accused could not have previously asserted his right to a trial since he is not required to assert his right until he has been formally brought before the Court and he did not know of the pending action and also because he is asserting this right at this time with the filing of this motion. Further, under the independent state constitution analysis suggested by *Watson*, this factor is inapplicable under the Indiana Constitution

Factor 4: He is no doubt prejudiced as any attempt to recreate his movements or otherwise prepare his defense, either by his own recollection or that of other witnesses is now lost. Further, under the independent state constitution analysis suggested by *Watson* where justice is to administered without delay, a delay of over a decade should be either be determined immaterial or considered presumptively prejudicial to the defendant.

A. <u>The "length of the delay" factor weighs against the State.</u>

In *Barker*, the court determined that the length of the delay would act as triggering mechanism for inquiry into other factors. *Barker* at 531. A delay exceeding one year between the issuance of a charge and arrest is deemed **"PRESUMPTIVELY PREJUDICIAL**". *U.S. v. Cardona*, 302 F.3d 494, 497 (5th Cir. 2002); *Hampton v. State*, 754 N.E.2d 1037, 1040 (Ind. Ct. App. 2001). *See*, also, *Sturgeon v. State*, 683 N.E.2d 612 (Ind. Ct. App. 1997) (*eighteen-month delay sufficient*); *Wade v. State*, 387 N.E.2d 1309 (Ind. 1979) (*fifteen month delay sufficient*); *Terry v. State*, 400 N.E.2d 1158 (Ind. Ct. App. 1980) (*two and one half years sufficient*). Therefore, a delay in excess of thirteen (13) years prior to the Defendant's arrest weighs heavily against the State and triggers the *Barker* analysis.

When the delay is **PRESUMPTIVELY PREJUDICIAL**, the burden switches to the State to show that there is no prejudice. <u>Kristek v. State</u>, 535 N.E.2d 144 (Ind. Ct. App. 1989); see also, <u>Douglas v. State</u>, 517 N.E.2d 116 (Ind. Ct. App. 1987). Since the Defendant has been **PRESUMPTIVELY PREJUDICED** as a result of this arbitrary and unreasonable delay, the State has the burden to show there is no prejudice.

B. <u>The factor concerning the reason for the delay weighs against the State.</u>

As outlined in *Barker*, the next step of the analysis requires this Court to consider the reason for the delay. *Barker* at 351. **It is the State's burden of demonstrating the reason for the delay.** *United States v. Brown*, 169 F. 3d 344, 349, (6th Cir. 1999) ("the burden is on the prosecution to explain the cause of the pretrial delay") (*quoting, United States v. Graham*, 128 F.3d 372, 374 (6th Cir. 1997)). The "State's efforts to bring a defendant to trial can be characterized as on one of the following:

1. Diligent prosecution;
2. Official negligence; or
3. Bad faith.

" *Davis v. State*, 819 N.E.2d 91, 97 (Ind. Ct. App. 2005).

In this case, the State can offer no evidence showing diligent prosecution and, therefore, this factor must weigh against the State.

The evidence the Defendant will present at the hearing to be held in this matter will show that he has been a resident of Tippecanoe County continuously from the date of the alleged offenses to his arrest and had been employed by the Lafayette Walmart as a dairy manager for almost 3 years at the time of his arrest. While residing in Tippecanoe County, the defendant obtained a marriage license, registered to vote and obtained an Indiana identification card.

"Even though negligence or inadvertence is weighted less heavily against the State in the Barker balancing test than is purposeful delay, nevertheless, such must be considered in the equation since the ultimate responsibility for affording speedy trial rights rests with the government rather than with the defendant. *Harrell* at 944 (*citing Barker* at 531).

C. <u>The factor as to whether the Defendant timely asserted his right to speedy trial weighs heavily against the State.</u>

The third factor requires this Court to consider whether the Accused asserted his right to a speedy trial in a timely manner. A Motion to Dismiss based upon violation of the right to speedy trial may be brought "any time before or during trial". I.C. 35-34-1-4(A)(9); 35-34-1-4(b)(2). In *Crawford v. State*, 669 N.E.2d 141, 146 (Ind. 1996) the Court, in applying the Barker analysis, held:

> We next consider defendant's assertion of his right to speedy trial and find that he unequivocally did so by filing a motion to dismiss in which he alleged that his rights to speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution had been violated. Accordingly, **this factor weighs in defendant's favor**. (*emphasis added*).

As the Defendant has filed his motion to dismiss on speedy trial grounds, within 30 days after his arrest, this fact alone requires that this factor weigh against the State.

Further, under the independent state constitution analysis suggested by *Watson*, this factor is inapplicable under the Indiana Constitution. Under our state constitution, a defendant's speedy trial "demand is effectively made for him." *Zehrlaut* at 184, 102 N.E.3d. at 207 The requirement that a defendant be brought to trial without delay is a mandatory directive to the state. Accordingly, the burden to proceed promptly is on the state.

D. <u>The issue of prejudice is immaterial.</u>

As noted before, any delay beyond one (1) year, is presumptively prejudicial. Also, in *Moore v. Arizona*, 414 U.S. 25 (1973), the Court held that prejudice need not always be established to demonstrate an infringement of the right to speedy trial. Whereas here, the first three factors weigh in the Defendant's favor, the issue of prejudice need not be examined.

Any inquiry concerning prejudice:

> "**is immaterial** where consideration of the first three factors – length of the delay, defendant's assertion of his right, and reasons for the delay - coalesce in the defendant's favor. *Prince* v. Alabama, 507 F. 2d 693, 706-7 (5th Cir. 1975) (*emphasis added*).

Therefore, as the analysis of the first three factors weigh in the Defendant's favor this Court should discharge the Defendant's from further prosecution.

Further, under the independent state constitution analysis suggested by *Watson* where justice is to be administered without delay, a delay of over a decade caused by the State should always be considered an infringement of the right to a speedy trial.

E. <u>If the issue of prejudice is material, the Defendant has been prejudiced by the delay</u>

The United Supreme Court has noted the difficulty of showing prejudice to the Accused's defense caused by lengthy delay: "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown". *Doggett* v. *U.S.*, 505 U.S. 647, 655 (1992). However, even faced with such difficulty the Accused can demonstrate extreme prejudice caused by the delay.

In this case, the Defendant has been prejudiced because his defense has been impaired. The "most serious" type of prejudice occurs where a delay creates the "possibility that the defense will be impaired". *Barker* at 532. *See also, Harrell* at 964 (*"the inability of the Accused to prepare his case skews the fairness of the entire system"*). Moreover, in *Scott v. State*, 461 N.E.2d 141, the Court stated that the Accused's lack of knowledge of charges during delay deprived him of the opportunity to preserve testimony and conduct investigation.

The Court also stated that a delay may be so prolonged that the general presumption that the mere passage of time does not prejudice the defendant must fail and be replaced by a presumption of prejudice. "The basis for this contrary presumption of prejudice is the prolonged delay itself deprives the defendant of the ability to prove prejudice.

If an accused's trial does not begin until years after the crime, not only may a memory fade, it may be entirely lost, neither of which is susceptible to proof other than a statement to the effect, "I do not remember." *Id* at 144. Directly on point, the Defendant was unaware of the charges for over thirteen (13) years. Because of the delay, he had no reason to try to locate and maintain or preserve witnesses' testimony or evidence supporting his defense until such witnesses or testimony was long gone.

Further, under the independent state constitution analysis suggested by *Watson* where justice is to be administered without delay, a delay of over a decade caused by the State should be considered presumptively prejudicial to the defendant.

CONCLUSION

The only remedy for violation of the right to speedy trial is dismissal of the charges. *Strunk v. U.S.*, 412 U.S. 434, 439-40 (1973); *Harrell* at 967. Therefore, this Court should issue an order discharging the Defendant from further prosecution.

Respectfully submitted,