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| STATE OF INDIANA |) | IN THE XXXXXX CIRCUIT COURT |
| |)SS | |
| COUNTY OF XXXXXX |) | CAUSE NO. XXC01-0000-FC-000 |
| |) | |
| STATE OF INDIANA, |) | |
| Plaintiff |) | |
| vs. |) | |
| |) | |
| JOHN E. DOE, |) | |
| Defendant |) | |

RESPONSE TO DEFENDANT’S MOTION TO DISMISS

COMES NOW the Plaintiff, State of Indiana, by and through XXXXXX XXX, Prosecuting Attorney for XXXXXX County Indiana, in response to the above named Defendant’s Motion to Dismiss.

The Defendant’s reliance upon Ind. Code §§ 35-41-4-4 and 5 for dismissal of the information filed in this cause is misplaced and Defendant’s Motion to Dismiss should be overruled. The fact that Defendant’s conduct violated federal as well as state statutes does not give him a “pass” on the state charges. Like the venue argument previously used by Defendant to delay the trial of this case, there is no substance to Defendant’s current Motion.

BACKGROUND

The Defendant is charged with Thirty Nine (39) counts of the offer or sale of unregistered securities (Ind. Code § 23-2-1-3); Thirty Nine (39) counts of transacting business as an unregistered broker-dealer or agent (Ind. Code § 23-2-1-8); and Twenty Four (24) counts of securities fraud (Ind. Code § 23-2-1-12). Each offense is a class C Felony (Ind. Code § 23-2-1-18.1). These charges have been pending in this court since January 5, 2004. On October 21, 2005, over 21 months after the filing of these charges, Defendant waived indictment and plead guilty in The United States District Court,

Southern District of Ohio, Western Division, to violating 18 U.S.C. § 1341 (Mail Fraud); 18 U.S.C. § 1343 (Wire Fraud); and 18 U.S.C. § 1957 (Money Laundering). Sentencing in the federal case is currently set for June 7, 2006. Based upon Exhibit A attached to Defendant's Motion, the Mail Fraud count was based upon a letter and certificate sent from Cincinnati, Ohio to an individual in Belvidere, Illinois; the Wire Fraud was based upon a facsimile cover sheet, buy direction letter and wire transfer instructions sent ("faxed") from Ohio to California; and the Money Laundering count was based upon a check drawn on funds fraudulently obtained and issued to an automobile dealership located somewhere in the Southern District of Ohio. None of the federal charges relate to any Indiana victims of the Defendant's scam!

On March 29, 2006, the Defendant, by counsel moved this Court to dismiss the state charges pursuant to Ind. Code § 35-41-4-4 and Ind. Code § 35-41-4-5. No authority was cited in support of the Motion and the state has been unable to find any. In fact, case law is squarely against Defendant's contention.

REQUIRED JOINDER

Ind. Code § 35-41-4-4, provides that:

- (a) A prosecution is barred if all of the following exist:
- (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
 - (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 [IC 35-41-4-3] of this chapter.
 - (3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

A court does not presume that the legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result. State v. Lake Superior Court, 500 N.E.2d 737 (Ind. 1986). Ind. Code § 35-41-4-4 is addressing the issue of joinder and

must be read in conjunction with Indiana's joinder statute, Ind. Code § 35-34-1-9, which is permissive and does not necessarily require the State to join all offenses from the same time period in one information or indictment. Sharp v. State, 569 N.E.2d 962 (Ind. App. 1991), quoting State v. Burke, 443 N.E.2d 859 (Ind. App. 1983). Further, to provide that the “instant prosecution is for an offense ... which should have been charged in the former prosecution” clearly requires the legal ability to have charged the present offense in the previous prosecution. Put differently, the current charging jurisdiction must have had the ability to do what the statute requires, i.e. including the current offense in the previous prosecution. It is illogical to assume that the legislature intended the state be required to dismiss charges against a defendant because they “should” have been joined in the prior prosecution when both the current and the prior jurisdiction were forbidden to take the required action.

The Indiana Court of Appeals analyzed the issue of successive prosecutions against a challenge under Ind. Code § 35-41-4-4 in Johnson v. State, 774 N.E.2d 1012 (Ind. Ct. App. 2002). In Johnson, the defendant resisted law enforcement in Madison County by fleeing from a police officer that was attempting to stop him for traffic violations. Johnson was able to elude the officers in Madison County and drove into the adjacent Hamilton County. Johnson was observed some time later by a Hamilton County officer who attempted to stop him. Johnson again attempted to elude officers but was finally stopped and taken into custody. Johnson was charged and convicted in Hamilton County with resisting law enforcement and driving while intoxicated. Johnson was charged in Madison County with resisting law enforcement and driving while suspended. Johnson moved to dismiss the Madison County Charges alleging, among other things, that the charges violated Indiana’s successive prosecution statute, Ind. Code § 35-41-4-4. The Madison County Court held that the Hamilton and Madison County charges

were separate offenses and prosecution for both did not violate Ind. Code §35-41-4-4. The Appellate Court affirmed the ruling holding that the Madison County charges could not have been charged in the Hamilton County prosecution. Criminal actions must be tried in the county where the offense was committed, Ind. Code § 35-32-2-1; Hamilton County had no jurisdiction over crimes occurring in Madison County and vice versa.

The State of Indiana and the United States Government are “separate” or “dual” sovereign entities. Wilson v. State, 270 Ind. 67, 68 (Ind. 1978). The Federal Government can not enforce statutes enacted by the State of Indiana, and barring statutory exceptions, the State of Indiana can not enforce federal statutes. In the case at bar the former prosecution of the Defendant in federal court could not have included the state charges because the federal court had no jurisdiction over the state securities violations. Following the Appellate Court’s analysis in Johnson, if a defendant is charged in one jurisdiction with offenses that should not, and could not have been joined with prior charges, Ind. Code § 35-41-4-4 does not apply. Johnson is dispositive of Defendant’s Ind. Code § 35-41-4-4 claim.

DOUBLE JEOPARDY

Defendant’s second argument is based on Ind. Code. § 35-41-4-5, which provides as follows:

In a case in which the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution in any other jurisdiction is a bar to a subsequent prosecution for the same conduct in Indiana, if the former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 [IC 35-41-4-3] of this chapter.

The Indiana and United States Constitutions provide no double jeopardy protection from federal and state prosecutions. Hence the only double jeopardy protection with regard to federal and state prosecutions for the same conduct is derived from this statute. State v. Allen, 646

N.E. 2d 965, 968 (Ind. Ct. App. 1995). This issue of successive prosecutions by different jurisdictions for the “same conduct” is actually one of statutory construction rather than a double jeopardy question involving constitutional construction. Allen at 968. In Allen, the Indiana Court of Appeals also addressed the issue of what constitutes the “same conduct” under Ind. Code § 35-41-4-5. The defendants in Allen were convicted on federal charges of conspiracy to possess and distribute cocaine. The defendants were later charged in state court with conspiracy to distribute cocaine and violating the Indiana Racketeer Influenced and Corrupt Organizations Act (Indiana RICO) with respect to the same event and arrest. The trial court dismissed the state charges on the grounds that the prosecution would violate Ind. Code § 35-41-4-5. The State appealed the dismissal and the Court of Appeals affirmed the order dismissing the cocaine charges but reversed the order dismissing the RICO charge. The Appellate Court determined that the RICO charge was a separate offense from the predicate offense of conspiring to possess cocaine. See also, Dellenbach v. State, 508 NE2d 1309 at 1316(Ind. Ct. App. 1987). Essentially the court in both Allen and Dellenbach interpreted Ind. Code § 35-41-4-5 to bar subsequent prosecution for the same crime. However, where the conduct constituted multiple crimes the statute does not prohibit prosecution by different sovereigns of different crimes.

While the question of analogous offenses may have been a close call in Allen and Dellenbach, the same can not be said of the instant case. The instant case involves federal charges resulting from a mailing from Ohio to Illinois, faxing information from Ohio to California and issuing a check drawn on the Bank of America in Ohio. The federal charges are a result of actions that occurred in Ohio, Illinois and California and do not address or involve any Indiana investors or conduct that occurred in Indiana. Under Doe’s argument a subject who comes up with a scheme to raise funds through a series of armed robberies and executes that

scheme by holding up federally insured banks in Greenfield, Newcastle and Richmond, Indiana as he heads east through the state could waive indictment, plead guilty in federal court to robbing a federally insured institution in Newcastle thereby barring state prosecution for armed robbery in not just Henry County but Hancock and Wayne as well! Neither the language of the statute, case law nor common sense supports such a result.

CONCLUSION

The first statute raised by the Defendant, Ind. Code. § 35-41-4-4, concerns joinder of offenses and is not even remotely applicable to the instant case. It would be illogical to prevent a prosecution on the grounds the charges “should have been charged in the former prosecution” where they could not legally have been included in such former prosecution because it was by another sovereign. Johnson v. State, supra is dispositive on this issue.

Ind. Code § 35-41-4-5, prohibits successive prosecutions by authorities having concurrent jurisdiction for the same conduct and offenses. In the instant case the Defendant was charged and (when judgment is entered will be) convicted in federal court of violations and for conduct that occurred outside the state of Indiana and which did not involve Indiana victims. The Indiana Appellate Court held in Allen v. State, supra, that the state may charge a defendant with offenses that, while springing from the same fact pattern, are not the same offenses as a prior federal prosecution without violating Ind. § Code 35-41-4-5.

The Defendant's Motion To Dismiss should be denied.

RESPECTFULLY SUBMITTED
XXXXXX COUNTY PROSECUTOR

By: _____
Prosecuting Attorney, Atty. No. _____

