IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
	)	Case No.
Defendant.	)	

MOTION TO DISMISS ON GROUNDS OF VIOLATION OF THE RIGHT TO A SPEEDY TRIAL AND DUE PROCESS OF LAW

Comes now the Defendant above, by and through this counsel of record, Glen R. Graham, and does hereby move this court to dismiss the above styled matter upon the grounds that the Defendant's rights have been violated under due process of law and the right to a speedy trial under both the Oklahoma, Art. 2, §20, and the United States Constitution, 14th Amendment right to due process of law, and 6th Amendment right to a speedy trial. Defendant demands his rights to a speedy trial. Defendant objects to any continuance. In the alternative, defendant requests any kind of relief that might be reasonable under the circumstances of this case.

Further, defendant moves this court to dismiss this case for violation of the right to due process of law and upon the grounds of double jeopardy, as guaranteed under both the Oklahoma Constitution, and the U.S. Constitution (5th Am), and under statutory law and case law thereunder.

Further, defendant moves this court to dismiss this case for violation of title 21 O.S. Section 11, which prohibits multiple punishments for the same act or ommission under **State law** and states further "…. but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence

under one section of law, bars the prosecution for the same act or omission **under any other section of law**." See, Title 21 O.S. Section 11.

Wherefore, premises considered, Defendant gives notice of additional facts, and moves the court to dismiss this case.

Respectfully submitted,

Glen R. Graham OBA 12110
Attorney for Defendant
1612 S. Cincinnati Ave
Tulsa, OK 74119 (918) 583-4621

2. BRIEF AND AUTHORITIES IN SUPPORT

In *Grace v. Harris*, 1971 OK CR 219, 485 P.2d 757, Decided: 05/19/1971, Oklahoma Court of Criminal Appeals, wherein it was held that:

> Where the state knows of the commission of a crime, its apparent perpetrator, knows of the accused's location and even has custody of him on another charge, and fails to file a charge for nine months without showing good cause, the prosecution must be dismissed as a denial of the right to a speedy trial and due process of law.

It has been held that when reviewing a claim of the denial of the constitutional right to a speedy trial, the court should apply the four balancing factors established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972): (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his right, and (4) prejudice to the defendant. These are not absolute factors, but are balanced with other relevant circumstances in making a determination. *Rainey v. State,* 1988 OK CR 65, 755 P.2d 89, 90.

In *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971), the Supreme Court articulated the interests served by the Sixth Amendment Speedy Trial Clause. The Court asserted that the speedy trial provision is:

> . . . an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.
> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. (citations omitted)

In *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), the Supreme Court stated that a due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. The delay in the present case could be argued to be a "tactical" delay designed to impair the ability of the defendant to mount an effective defense. In *Santobello v. New York,* 404 U.S. 257, 92 [814 P.2d 1047] S.Ct. 495, 30 L.Ed.2d 427 (1971), the Supreme Court considered the ramifications to which followed a prosecutor's failure to abide by the terms of a bargained plea. There, the Court held:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. "Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id., 404 U.S. at 262, 92 S.Ct. at 499.

The State is never under any legal obligation to plea bargain with any defendant; for there is no constitutional right to plea bargaining. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). Provided the prosecutor has probable cause to believe that the accused committed an offense, the decision of whether to prosecute and of what charge to bring rests generally within the prosecutor's discretion.

Prosecutorial discretion, however, is not unbridled. The Supreme Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 364-365, 98 S.Ct. 663, 668-669, 54 L.Ed.2d 604, (1978), quoting *Oyler v. Boles,* 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962), reiterated that "'[T]he conscious exercise of some selectivity in enforcement is not in itself a [650 P.2d 883] federal constitutional violation' so long as `the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (Emphasis added.)

In *Bordenkircher*, the Court further stated that "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." Supra, 434 U.S. at 365, 98 S.Ct. at 669. (Footnote omitted.)

The landmark decision applying equal protection to the discriminatory enforcement of a law by administrative or executive officials is *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). There the Supreme Court declared: "though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal protection is still within the prohibition of the Constitution." (Emphasis added.)

It is this counsel’s belief that there is a general policy that charges based upon the same facts will be prosecuted either in federal court or state court but not both barring some unusual set of circumstances or if the charges are different or there is a substantial

public policy interest in multiple prosecutions. Also, I think the Tulsa District Attorney's Office and the U.S. Attorney's office have some kind of general understanding of how they will prosecute on drug cases. I have observed several State court drugs cases being dismissed after notice of disposition in Federal Court. However, this is not a absolute rule as exhibited by the *Nichols case* and similar cases. In this case, defendant plea guilty in federal court to the same facts as stated in this case and received five (5) years probation. Now the State of Oklahoma seeks to pursue prosecution in state court for the same offense that was disposed of in federal court.

In *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), plea bargaining was recognized as an "essential component" of the administration of criminal justice:

> Disposition of charges after plea discussion is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. [Citations omitted.] 404 U.S. at 261, 92 S.Ct. at 498.

However, one issue which must be mentioned has been noted in *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971):

> "[I]t is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth [589 P.2d 688] Amendment would require dismissal of the indictment if it were shown at trial that the preindictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. . . ." 404 U.S. at 324, 92 S.Ct. at 465. (Citations omitted, footnote omitted)

Oklahoma follows the "same evidence" test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), to determine whether two prosecutions violate the double jeopardy clause. The *Blockburger* "same evidence" test "provides that offenses charged are identical in law and fact only if the facts alleged in one would sustain a conviction if offered in support of the other."

The dual sovereignty doctrine holds that although a defendant may not be prosecuted twice by the same sovereignty for the same acts, a subsequent prosecution by a separate sovereign does not violate the Constitution. See, *Bartkus v. Illionois*, 359 U.S. 121, 123-24 (1959)
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The *Bartkus* court in dicta sugested that if a subsequent state prosecution is a "sham and cover" and that if the state prosecutors were merely "tools" of the federal government; i.e., if the state prosecution was a de facto second federal prosecution, that this may violate the Double Jeopardy Clause. See, *Bartkus v. Illinois*, 359 U.S. at 123-24.

The Petite policy is an internal Department of Justice policy that prohibits a federal prosecution of a defendant who has been convicted in state court for the same conduct unless the subsequent federal prosecution is specifically authorized by the Attorney General. This policy was named after the Supreme Court case that first described it. See, *Petite v. U.S.*, 361 U.S. 529 (1960) (per curiam).

Judge Lumpkin, once wrote in qouting, Justice William Rehnquist who wrote:

> While the [Double Jeopardy] Clause itself simply states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," the decisional law in the area is a veritable *Sargasso Sea* which could not fail to challenge the most intrepid judicial navigator. See, *Albernaz v. United States*, 450 U.S. 333, 343, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981). This Court itself has more than once floundered on the constitutional hazards hidden beneath that same sea's surface, *seemingly veering from reef to reef guided not by any fixed judicial principles, but by the whim of whichever judge was in control of the helm*. (Emphasis added) In trying to reconcile our earlier cases, I empathize with what was undoubtedly a frustrating moment for our now Chief Justice. See, Judge Lumpkin, concurring opinion in *Hale v. State*, 1995 OK CR 7.

Wherefore, Defendant prays that the court dismiss this case and/or grant some reasonable relief under the circumstances of this case, and that the prosecutor recognize the need for plea bargaining reconsider the facts of this case and dismiss the charges as previously disposed of in federal court.

Respectively submitted,

Glen R. Graham OBA 12110
Attorney for Defendant
1612 S. Cincinnati Ave
Tulsa, OK 74119 (918) 583-4621

VERIFICATION

STATE OF OKLAHOMA)
COUNTY OF) ss.

The undersigned upon oath duly sworn do hereby state that I have read the above and foregoing motion (motion to quash the arrest and to suppress evidence) and the matters stated therein are true and correct to the best of my information.

____
GLEN R. GRAHAM

Subscribed and sworn to before the undersigned notary public on the ____ day of ________________, 200___.

My commission expires: ________________________________
Notary Public

Certificate of Service

This is to certify that the undersigned hand delivered a true and correct copy of the above and foregoing motion to the Tulsa County District Attorney, 9th Floor, 500 S. Denver, Tulsa, OK, on the same day it was filed with the Tulsa County Criminal Court Clerk.

By:________________________
Glen R. Graham