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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR-11-08074-PCT-JAT
)	
Plaintiff,)	ORDER
)	UNDER SEAL
vs.)	
)	
Jefferson Gatewood,)	
)	
Defendant.)	

Pending before the Court is Defendant Jefferson Gatewood's Motion to Dismiss Counts One and Two of the Superseding Indictment (Motion). (Doc. 137). Defendant is charged in Counts I and II with sexually abusing a minor. Defendant was previously tried in tribal court for sexually abusing this same minor. Defendant now argues that this re-prosecution violates his Constitutional rights.

Specifically, Defendant argues that re-prosecution violates his Constitutional rights because the Dual Sovereignty Doctrine, which allows two prosecutions for the same offense by independent sovereigns,¹ violates the Double Jeopardy Clause of the Fifth Amendment. In addition, Defendant argues that the *Bartkus*² exception to the Dual Sovereignty Doctrine

¹ See generally *U. S. v. Wheeler*, 435 U.S. 313 (1978).

² *Bartkus v. People of State of Ill.*, 359 U.S. 121 (1959) (holding that an exception to the Dual Sovereignty Doctrine exists when an initial prosecution is brought only as a tool or sham for subsequent federal prosecution).

1 applies here because of law enforcement and institutional collusion between the federal
 2 government and the White Mountain Apache Tribe (Tribe). Defendant also requests an
 3 evidentiary hearing at which Bureau of Indian Affairs (BIA) Special Agent Daniel Hawkins
 4 and other witnesses can testify on the nature and extent of BIA assistance during the White
 5 Mountain Apache Tribal Police investigations.

6 The Government has filed a response contending that the Tribe is a separate
 7 sovereign, and that the actions of neither the federal government nor Special Agent Hawkins
 8 is sufficient to satisfy the *Bartkus* exception to the Dual Sovereignty Doctrine. (Doc. 145).
 9 Defendant has filed a reply in support of the Motion. (Doc. 150). The Court now rules on the
 10 Motion and holds that the *Bartkus* exception does not bar re-prosecution by the federal
 11 government. Defendant's request for an evidentiary hearing will be denied.

13 **I. Legal Standard**

14 The Double Jeopardy Clause provides that no person shall "be subject for the same
 15 offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double
 16 Jeopardy Clause is not offended, however, when two sovereignties have denounced an act
 17 as a crime and each can punish that crime. *United States v. Lanza*, 260 U.S. 377, 382 (1922)
 18 (This principle, which generally allows two prosecutions for the same conduct, is the Dual
 19 Sovereignty Doctrine). The relationship between states and the federal government is
 20 considered analogous to that of tribal authorities and the federal government. *Wheeler*, 435
 21 U.S. at 319. Generally, Indian tribes retain their "sovereign power to punish tribal offenders
 22 . . . tribal exercise of that power today is therefore the continued exercise of retained tribal
 23 sovereignty." *Id.* at 323-24.³ But the Dual Sovereignty Doctrine does not always apply when

25 ³ The threshold question for determining tribal sovereignty is whether the source of
 26 power to punish crimes falls within "inherent tribal sovereignty, or an aspect of the
 27 sovereignty of the Federal Government which has been delegated to the tribes by
 28 Congress[.]" *Wheeler*, 435 U.S. at 322. It is well-established that Indian tribes retain the right
 to internal self-government, having the "power to enforce their criminal laws against tribe
 members." *Id.*

1 successive cases are prosecuted by tribal and federal entities.

2 For a Double Jeopardy claim to be colorable, “it must have some possible validity.”
3 *Lanza*, 260 U.S. at 382 (internal quotations omitted). While the Supreme Court recognizes
4 that cooperation between prosecutors and sovereign authorities is conventional practice,
5 consecutive prosecutions might be barred by the Double Jeopardy Clause where federal
6 authorities commandeer another sovereign’s prosecutorial machinery, turning its prosecution
7 into “a sham and a cover for a federal prosecution,” and essentially making it “another
8 federal prosecution.” *Bartkus*, 359 U.S. at 123-24. Importantly, *Bartkus* does not prohibit
9 “very close coordination in the prosecutions, in the employment of agents of one sovereign
10 to help the other sovereign in its prosecution, and in the timing of the court proceedings so
11 that the maximum assistance is mutually rendered by the sovereigns. . . . No constitutional
12 barrier exists to this norm of cooperative effort.” *United States v. Figueroa-Soto*, 938 F.2d
13 1015, 1020 (9th Cir. 1991) (internal citations omitted); *see also United States v. Bernhardt*,
14 831 F.2d 181, 182 (9th Cir. 1987) (“It is clear that the *Bartkus* exception does not bar
15 cooperation between prosecuting sovereignties.”).

16 Finally, an evidentiary hearing may be granted at the discretion of the district court
17 when the factual record is unclear or does not support dismissal on double jeopardy grounds
18 and a hearing would “aid in the factfinding process.” *Bernhardt*, 831 F.2d at 183. To obtain
19 an evidentiary hearing to aid in the factfinding process, “evidence of undue coercion or
20 collusion by federal authorities” must be presented. *U.S. v. Zone*, 403 F.3d 1101, 1106 (9th
21 Cir. 2005). To qualify for an evidentiary hearing, a defendant must, at the very least, “make
22 more than ‘conclusory allegations’ of collusion.” *United States v. Koon*, 34 F.3d 1416, 1439
23 (9th Cir. 1994) (citing *United States v. Russotti*, 717 F.2d 27, 31 (2d Cir. 1983)).

24 25 **II. Analysis**

26 Defendant begins by arguing that successive prosecutions for the same conduct violate
27 the Double Jeopardy Clause. The Court finds, however, that successive prosecutions are
28 permissible, in certain circumstances, under the Dual Sovereignty Doctrine. Thus, the Court

1 will first consider whether the Tribe and the federal government are dual sovereigns.
2 Defendant argues that because the Tribe receives federal funding, regulatory oversight, and
3 law enforcement assistance from the BIA, “it no longer makes sense to maintain the fiction
4 that federal and tribal governments are so separate in their interests that the dual sovereignty
5 doctrine is universally needed to protect one from the other.” (Doc. 137 at 7). Defendant
6 further contends that this cooperation transforms the Tribe from a “dependant sovereign
7 power” into a “political subdivision” of the federal government. *Id.* at 6.

8 Although the financial and regulatory relationship between tribal authorities and the
9 federal government may be significant, this mutual cooperation does not create a “de facto
10 divestiture of tribal sovereignty” or rise to the level of collusion necessary to meet the
11 *Bartkus* exception. The burden of establishing sufficient federal manipulation or control is
12 “substantial; the [defendant] must demonstrate that the state officials had little or no
13 independent volition in the state proceedings.” *Zone*, 403 F.3d at 1105 (quoting *United States*
14 *v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976)). Here, the central funding and pooling of
15 investigatory power is not unique. As the Government notably argues, cooperation between
16 the Tribe and the federal government “does not subject tribal law enforcement to BIA’s chain
17 of command in day-to-day investigations of criminal cases.” (Doc. 145 at 3). The Tribe
18 continues to operate independently of the federal government and remains its own separate
19 sovereign despite Defendant’s contention that “the current evolution of the institutional
20 relationship between the federal government” and the Tribe has eliminated the issue of dual
21 sovereignty and created one central government entity. (Doc. 150 at 3). Additionally, the
22 Tribe’s power to prosecute crimes committed by and against its own tribe members falls
23 within its inherent tribal sovereignty. *Wheeler*, 435 U.S. at 328. The Ninth Circuit Court of
24 Appeals has affirmed a conviction for sexual abuse of a minor in a case prosecuted by both
25 a tribal authority and the federal government. *See, e.g., United States v. Tsinnijinnie*, 91 F.3d
26 1285 (9th Cir. 1996) (Navajo defendant’s conviction for sexually abusing a minor upheld in
27 federal court after defendant pled guilty in tribal court for engaging in the same conduct).

28 Based on the foregoing, the Court concludes that the Tribe and the federal government

1 are dual sovereigns. Thus, successive prosecutions are generally permissible under the Dual
2 Sovereignty Doctrine. However, as discussed above, under the *Bartkus* exception, successive
3 prosecutions, even by independent sovereigns, can violate the Double Jeopardy Clause when
4 one prosecution is a sham or cover for the other prosecution. Accordingly, the Court will next
5 consider whether the *Bartkus* exception applies on the facts of this case.

6 Cooperation between a tribal entity and the federal government does not automatically
7 make one a “tool” of the other. *See generally Figueroa-Soto*, 938 F.2d 1015. Defendant
8 claims that “the tribal court trial allowed Special Agent Hawkins to obtain sworn evidence
9 from the defendant that could later be used to incriminate him in the federal case. As a
10 consequence, this tribal prosecution was a ‘sham’ and ‘cover’ in that it was an attempt to use
11 the defendant’s tribal court sworn testimony to bolster the pending federal prosecution.”
12 (Doc. 137 at 5). But “the Double Jeopardy Clause does not prevent federal prosecutors from
13 . . . taking advantage of the evidentiary record developed in connection with a defendant’s
14 previous state conviction.” *Zone*, 403 F.3d at 1104.

15 Additionally, nothing in Defendant’s request for an evidentiary hearing impacts the
16 Court’s Double Jeopardy analysis. Notably, Defendant fails to identify, with adequate
17 specificity, evidence of undue coercion or collusion and instead makes only “conclusory
18 allegations.” (Doc. 137 at 2). The closest Defendant comes to providing such specific
19 evidence of collusion is found in a statement made by Tribal Court Presiding Chief Judge
20 Lewis, which was that “Criminal Investigator Dan Hawkins played a major role in the case.”
21 (Doc. 150-1 at 8). However, Agent Hawkins was never even called to the stand in the tribal
22 court case, which belies any assertion that the federal government and federal agents were
23 controlling the tribal prosecution.

24 Defendant also claims that “Agent Hawkins assisted the White Mountain Apache
25 Tribal Prosecutor John Major in securing information about the case,” citing activities by
26 Agent Hawkins such as faxing Defendant’s criminal history to the White Mountain Apache
27 Tribal Prosecutor’s Office and his presence at nearly all investigation and interviews after
28 being notified of the allegations. (Doc. 137 at 2). Mere assistance and the sharing of records,

1 however, is insufficient proof of manipulation or undue coercion by federal authorities. Since
2 Defendant has not provided the Court with specific allegations of coercion or collusion that
3 would justify an evidentiary hearing, Defendant's request for a hearing is denied.

4 This Court therefore finds that the Tribe is a sovereign entity and that successive
5 prosecutions in tribal court and federal court are permissible under the Dual Sovereignty
6 Doctrine. Further, the Court finds that this case does not fall within the *Bartkus* exception to
7 the Dual Sovereignty Doctrine, thus, this federal prosecution does not violate the Double
8 Jeopardy Clause. Defendant's Motion to Dismiss Counts One and Two is denied.

9
10 **III. CONCLUSION**

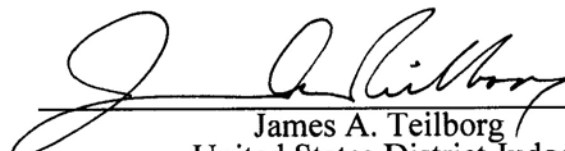
11 Accordingly,

12 **IT IS ORDERED** that Defendant's Motion to Dismiss Counts One and Two (Doc.
13 139) is denied.

14 **IT IS FURTHER ORDERED** that Defendant's request for an evidentiary hearing
15 (Doc. 139) is denied.

16 **IT IS FINALLY ORDERED** that the Court has issued this Order under seal out of
17 an abundance of caution because the Motion was filed under seal. However, the Court does
18 not believe this Order needs to be sealed. Thus, within 10 days the Government shall file
19 either a motion to unseal this Order or a motion to maintain it under seal stating the reasons
20 why the Order should be sealed.

21 DATED this 18th day of June, 2012.

22
23
24 
25 James A. Teilborg
United States District Judge

26 **COPIES TO ONLY**

27 Counsel for the Government and Counsel for Defendant
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