IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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TIMOTHY G. WHITEAGLE,

Petitioner-Defendant,

v.

Case Nos. 15-cv-00449-wmc
11-cr-00065-wmc

UNITED STATES OF AMERICA,

Respondent-Plaintiff

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BRIEF OF UNITED STATES IN OPPOSITION
TO SECTION 2255 MOTION

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The United States of America, by John W. Vaudreuil, United States Attorney for the Western District of Wisconsin, by Stephen P. Sinnott, First Assistant U.S. Attorney for that district, submits this brief in opposition to Timothy G. Whiteagle's motion to vacate his sentence under 28 U.S.C. § 2255.

## Introduction

Whiteagle has filed a pro se Section 2255 motion to vacate his sentence in *United States v. Whiteagle*, Case No. 11-cr-65-wmc (Western District of Wisconsin). He contends that the federal prosecutors in the case:

(a) violated the "tribal exhaustion doctrine;"

(b) misled this Court and the jury at trial regarding the Ho-Chunk Nation's Code of Ethics Act;

(c) selectively prosecuted Whiteagle because he is a tribal member; and

(d) vindictively prosecuted Whiteagle "in hopes of saving face" following an earlier acquittal of a defendant in a bribery case in the District of Minnesota.

As set forth below, none of Whiteagle's arguments has any basis in fact or law, and his motion should be denied.

## Procedural History

On July 23, 2012, a jury trial commenced against Whiteagle on bribery, tax, and obstruction charges, based on his bribery of a Ho–Chunk Nation legislator in order to secure favorable treatment for three different vendors wishing to do business with the Nation.[1] On August 1, 2012, the jury returned guilty verdicts against Whiteagle on all charges. (11-cr-00065-wmc, R. 169, R. 170).

This Court imposed an aggregate sentence of 120 months. (11-cr-00065-wmc, R. 211). Whiteagle appealed his convictions on the bribery counts and his sentence; he did not appeal his tax convictions or the witness tampering conviction. He argued on appeal that the evidence was insufficient to support convictions on the bribery charges, that this Court erred in admitting false invoices in evidence, and that this Court erred in applying the bribery guideline at sentencing. On July 21, 2014, the Seventh Circuit issued an opinion rejecting Whiteagle's arguments and affirming his conviction and sentence. *United States v. Whiteagle*, 759 F.3d 734 (7th Cir. 2014).

[1] The superseding indictment charged Whiteagle with bribery conspiracy in violation of 18 U.S.C. § 371, substantive bribery violations of 18 U.S.C. § 666, tax-related crimes in violation of 26 U.S.C. §§ 7201 and 7206, and witness tampering in violation of 18 U.S.C. § 1512(b)(3). (11-cr-00065-wmc, R. 50; R. 152).

Applicable Law

Under 28 U.S.C. § 2255, a federal prisoner may move the sentencing court to vacate or set aside his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Section 2255 is "an extraordinary remedy" because it "asks the district court essentially to reopen the criminal process to a person who already has had an opportunity for full process. *See Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). Relief under the statute is limited to "an error of law that is jurisdictional, constitutional, or constitutes a 'fundamental defect that inherently results in a complete miscarriage of justice.'" *Harris v. United States,* 366 F.3d 593, 594 (7th Cir. 2004) (internal quotation marks omitted). Collateral relief under 28 U.S.C. § 2255 is not a substitute for direct appeal. *Fountain v. United States*, 211 F.3d 429, 433 (7th Cir. 2000).

Because a § 2255 motion is neither an opportunity to repeat an earlier unsuccessful argument nor a substitute for a direct appeal, there are three types of issues that cannot be raised in a § 2255 petition: (1) issues that were raised on direct appeal, absent a showing of changed circumstances; (2) non-constitutional issues that could have been raised but were not raised on direct appeal; and (3) constitutional issues that were not raised on direct appeal, unless the § 2255 petitioner demonstrates cause for the procedural default as well as actual prejudice from the failure to appeal. *Belford v. United States,* 975 F.2d 310, 313 (7th Cir. 1992), overruled on other grounds by

*Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994). Showing "cause" means establishing the defendant was impeded by "some objective factor external to the defense," such as showing official interference making compliance with a procedural rule impracticable, showing a factual or legal basis for a claim was not reasonably available to counsel, or showing ineffective assistance of counsel. *See McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991). To show "prejudice," a defendant must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error…" *Frady*, 456 U.S. at 170 (emphasis in original).

A criminal defendant may raise an "ineffective assistance of counsel" claim for the first time during a Section 2255 proceeding. *See Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986) ("federal courts have habeas jurisdiction" over all ineffective assistance claims and "may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error"). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was objectively deficient, and that the deficient representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 680, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Only those "who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . ." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US. at 687.

Assertions that are unsupported by evidence will not entitle the petitioner to relief, or to an evidentiary hearing. *Galbraith v. United States*, 313 F.3d 1001, 1008-10 (7th Cir. 2002). For a hearing to be granted, "the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions." *Prewitt v. United States,* 83 F.3d 812, 819 (7th Cir. 1996)(citations omitted). A court may deny an evidentiary hearing "if the allegations in the motion are unreasonably vague, conclusory, or incredible, or if the factual matters raised by the motion may be resolved on the record before the district court." *Rodriguez v. United States*, 286 F. 3d 972, 986 (7th Cir. 2002)(citations omitted). See also *Lafuente v. United States,* 617 F.3d 944, 946 (7th Cir. 2010)(hearing not required when the files and records of the case conclusively show that the prisoner is entitled to no relief).

## Argument

### The Tribal Exhaustion Doctrine & The Code of Ethics Act

Whiteagle's primary argument is that this court had no jurisdiction in the federal prosecution because – he claims – under the "tribal exhaustion doctrine" the Ho-Chunk Nation was not first afforded the opportunity to seek a civil penalty against him under its Code of Ethics Act. Whiteagle's argument is misplaced for several fundamental reasons.

As an initial matter, it should be noted that Whiteagle misconstrues the tribal exhaustion doctrine. According to Whiteagle, the doctrine gives tribal courts the right to exhaust "all remedies available under tribal law, prior to any federal government

involvement" and requires that "exhaustion absolutely must take place prior to any federal involvement with tribal issues." (15-cv-00449-wmc, R. 1, p. 5). Contrary to Whiteagle's contention, the doctrine places no such condition of the ability of the United States to bring federal criminal cases. Instead,

> [t]he doctrine of tribal exhaustion is a judicially created rule, dictated by comity rather than jurisdictional concerns, which requires federal courts to defer to the tribal courts whenever federal and tribal courts have concurrent jurisdiction over a claim, in order to encourage tribal self-government. It generally provides that the parties to any case arising on Indian land or involving Indians must exhaust their tribal remedies before turning to the federal courts for relief. Several exceptions to the rule have developed, including …. violations of express jurisdictional prohibitions, futility, and lack of tribal jurisdiction.

*Construction and Application of Federal Tribal Exhaustion Doctrine*, Deborah F. Buckman, 86 A.L.R. Fed. 71. Thus, Whiteagle's claim under the tribal exhaustion doctrine raises neither a constitutional nor a jurisdictional issue. And, as noted below in more detail, the fact that the alleged applicability of the doctrine was not raised earlier did not result in any miscarriage of justice. The issue is, therefore, not cognizable on collateral review.

Assuming -- only for the sake of argument -- that the applicability of the tribal exhaustion doctrine is a cognizable issue, Whiteagle cannot point to any case in which the tribal exhaustion doctrine has been construed to prohibit a federal criminal prosecution, and for good reason. The United States, as a party, cannot bring felony charges in a tribal court. In fact, no one can bring criminal bribery, obstruction, or tax charges in a Ho-Chunk tribal court. In other words, the Ho-Chunk Nation could not

have asserted criminal jurisdiction over Whiteagle's conduct. There was, therefore, never any remedy to exhaust in tribal court.

Moreover, the law that Whiteagle cites as implicating the doctrine in his case -- the Ho-Chunk Nation's Code of Ethics Act -- *does not even apply to him*. By its own terms, the Act only applies to the Nation's public officials; it does not apply to tribal members – like Whiteagle – who are not public officials within the Nation. See the Code of Ethics Act, a copy of which is attached to Whiteagle's Section 2255 motion. (15-cv-00449-wmc, R. 1-6, p. 24, et seq).

As a side argument, Whiteagle claims that the prosecution somehow misled the jury at the trial of *United States v. Whiteagle* by introducing only portions of the Code of Ethics Act. He conveniently fails to note, however, that this Court allowed Whiteagle to introduce in evidence his own excerpts of the Act. (11-cr-00065-wmc, R. 151, p. 2).

Whiteagle's argument can be liberally construed as a claim of ineffective assistance of counsel, in that Whiteagle claims in the motion that his counsel (who represented Whiteagle both at trial and on direct appeal) was not aware of the existence of the tribal exhaustion doctrine.[2] To prevail on a claim of ineffective assistance of counsel, Whiteagle would have to show both that his counsel's performance in failing to raise the doctrine as a bar to federal prosecution was objectively deficient, and that the deficient representation prejudiced Whiteagle. *Strickland*, 466 U.S. at 687-88 (1984).

[2] This Court expressly rejected a related argument that Whiteagle made before trial -- that he should be able to present a defense that the Ho-Chunk Nation's Code of Ethics Act "supersedes" the federal bribery statute charged in the federal prosecution. (11-cr-00065-wmc, R. 151, p. 3). Whiteagle did not appeal that ruling.

Because the tribal exhaustion doctrine could never have been applied to thwart the federal prosecution, however, Whiteagle cannot satisfy either prong.

Vindictive Prosecution & Selective Prosecution

Whiteagle also argues that the prosecutors in this case both vindictively and selectively prosecuted him. Prior to trial, Whiteagle and his counsel had a full opportunity to present any evidence supporting any complaint of selective or vindictive prosecution. The United States filed a pretrial motion in limine, seeking to preclude and evidence or argument on the following points: "The fact that others have not been charged, except – if supported by facts – to support an argument that a particular witness may have received a benefit by not being charged" and "[a]ny argument of prosecutorial misconduct, including any argument that the prosecution is unfairly targeting any defendant or protecting any unindicted person." (11-cr-00065-wmc, R. 71, p. 3). The government specifically argued that such arguments of prosecutorial misconduct present legal issues to be decided by the Court, not by the jury, and the government put Whiteagle on notice that he could file a motion to dismiss the indictment based on any alleged prosecutorial misconduct. (11-cr-00065-wmc, R. 105, pp. 6 to 9).[3] Whiteagle did not do so. Instead, defense counsel for Whiteagle objected to

[3] The government argued: "The question of whether a defendant has been the victim of selective prosecution is not a jury question; it is an issue for the Court. A defendant can file a motion to dismiss the indictment based on selective prosecution. To succeed on such a motion, a defendant would have to show the Court -- not a jury -- that he or she was both singled out for prosecution when others were not and that the selection was based on an impermissible ground, such as race or religion. *United States v. Fletcher*, 634 F.3d 395, 406 (7th Cir. 2011), citing *United States v. Darif*, 446 F.3d 701, 708 (7th Cir. 2006)." (11-cr-00065-wmc R. 105, p. 7). The government further argued: "Similarly, arguments of prosecutorial misconduct present legal issues to be decided by the Court, not the jury. See *United States v. Valona*, 834 F.2d 1334, 1343 (7th Cir. 1987); *United States v. Swiatek*, 819 F.2d 721, 726 (7th Cir. 1987)… Evidence of others not being charged would only support jury nullification arguments -- that the defendants should

the government's motion in limine, arguing that he should be able to present evidence that the real culprits were not charged and that Whiteagle was "only being used as a pawn in their game of cheating their way to the top." (11-cr-00065-wmc, R. 100, p. 5). He also argued that he should be able to argue to the jury that "the government unfairly targeted Whiteagle." Id. This Court rejected Whiteagle's arguments and granted the government's motion in limine. (11-cr-00065-wmc, R. 148, p. 6).

A defendant waives the defense of selective prosecution by not properly raising it before trial. See *United States v. Westmoreland*, 122 F.3d 431, 434 (7th Cir. 1997). Whiteagle had a full and fair opportunity to present any evidence of selective prosecution to the trial court, and he failed to do so. He also had a full opportunity to appeal this Court's granting of the motion in limine, and he failed to do so. Accordingly, his arguments are procedurally barred based on his failure to pursue them at trial or on direct appeal.

Assuming, only for the sake of argument, that Whiteagle's selective prosecution argument is not procedurally barred, it should be rejected on the merits. A claim of selective prosecution is judged according to "ordinary equal protection standards," meaning that a defendant must show both a discriminatory purpose and a discriminatory effect. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The standard for proving selective prosecution is "particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor

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be acquitted because they were unfairly targeted or that it is somehow inequitable that the others have not been charged. Any such unfairness in the prosecution is a question for the Court, not the jury, and the defendants should be precluded from introducing such evidence or making such arguments." (11-cr-00065-wmc, R. 105, pp. 8, 9).

has acted lawfully." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). Whiteagle has failed to meet this burden; he cites no facts in support of his arguments, relying only on his own unsupported speculation that prosecutors indicted him because he is a tribal member. He is, therefore, entitled to no relief.

In addition to claiming that the government "selectively" prosecuted him because of his status as a tribal member, Whiteagle also makes the bizarre and unsupported assertion that the U.S. Attorney's Office "vindictively" prosecuted him to "save face" after an acquittal in a different bribery case brought by a different office in a different district. This purely speculative claim also lacks any merit.

Vindictive prosecution is a Due Process violation; the Due Process Clause prohibits a prosecutor from bringing criminal charges in an attempt to penalize a defendant's valid exercise of a legal right. *See United States v. Pittman*, 642 F.3d 583, 586 (7th Cir. 2011). Whiteagle does not allege that his prosecution was an attempt to penalize him for his valid exercise of a right. He only alleges that the government prosecuted him to somehow "save face" for an earlier acquittal of someone else in the District of Minnesota. Whiteagle has presented no evidence to support his odd speculation. Even if one were to assume – only for the sake of argument – that Whiteagle's assertion is true, it is inadequate, as a matter of law, to support a claim of vindictive prosecution because Whiteagle does not allege that his prosecution was to punish him for his exercising a legal right. A court "must begin from a presumption that the government has properly exercised its constitutional responsibilities to enforce

the nation's law." *United States v. Jarrett*, 447 F.3d 520, 525 (7th Cir. 2006). Whiteagle has provided no evidence to rebut that presumption.

Finally, in support of his Section 2255 motion, Whiteagle filed copies of various briefs and orders filed in his criminal case, annotated with Whiteagle's margin notes, as well as various news articles regarding allegations of prosecutorial abuses in other cases and lower sentences meted out in other white collar cases. Those materials are completely irrelevant and have no bearing on the legal questions presented by Whiteagle's 2255 motion.

## CONCLUSION

For all of these reasons, Whiteagle's Section 2255 motion should be denied without an evidentiary hearing.

Dated this 15th day of September 2015.

Respectfully Submitted,

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By: /s/
STEPHEN P. SINNOTT
First Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be mailed by first class mail, postage paid, to the following non-ECF participants.

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