UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, v. Plaintiff, DIONDRE MAURICE OTTO STATELY, Defendant.	)))))))))	Criminal No. 19-342(1) (ECT/LIB) **DEFENDANT'S OBJECTION TO REPORT AND RECOMMENDATION RE MOTION TO DISMISS FOR CONSTITUTIONAL VIOLATIONS**

INTRODUCTION

The underlying motion here is about fundamental fairness. Diondre Stately is being treated by the government in a manner that is fundamentally unfair. He is being prosecuted twice for the same offense. That's unfair. The United States Attorney's office has a policy which prohibits successive prosecutions that it does not apply in cases that originate from the Red Lake reservation. That's unfair. The United States Attorney's office policy against successive prosecution would otherwise prevent this subsequent prosecution had the prior prosecution originated in State court; because Mr. Stately's prior prosecution is from tribal court, the U.S. Attorney's office does not apply that policy and is proceeding forward with a case it otherwise would not pursue. That's unfair.

Mr. Stately filed a motion to dismiss this case to address the fundamental unfairness of this successive prosecution, couched in the intertwined doctrines of the double jeopardy clause, the equal protection clause, and the due process clause of the United States Constitution. However imprecise and nuanced the application of those constitutional constructs are to this case, the underlying issue here is one of fundamental

fairness, or, more precisely, lack thereof, in this successive prosecution. Neither the government in its brief filing nor the Report and Recommendation (hereinafter "R & R") address the issue of the underlying fundamental unfairness of this successive prosecution, instead relying on available but not particularly applicable precedent to dismiss Mr. Stately's underlying constitutional claims, without getting to the fundamental unfairness of what is going on here, or the fundamental unfairness of not applying a charging policy which would otherwise have prevented this prosecution if the prior conviction had originated in the State. Accordingly, for the reasons set forth here, the defense asks that the Court not adopt the Report and Recommendation and grant Defendant's Motion to Dismiss.

FACTS

The underlying facts here are not in dispute. This case was initiated as a joint FBI-Red Lake Police investigation after George White called the Red Lake Police Department around 2:00 a.m. on September 21, 2019, and complained that he had just been assaulted and had money stolen from him. The case thereafter became a joint Red Lake/FBI investigation, during which Mr. Stately was interviewed and explained that he had punched Mr. White in the face once and received $200 of the stolen gambling proceeds from his sister. (See Government Pretrial Exhibit 3, R & R at pp. 3-4). Red Lake formally charged Mr. Stately with robbery and other offenses in a complaint filed September 25, 2019, and Mr. Stately's case then proceeded through the Red Lake tribal court. On November 18, 2019, a plea agreement was signed (Government Pretrial Ex. 5), and on November 20, 2019, Mr. Stately was convicted in Red Lake Tribal Court of

several offenses, including robbery, and sentenced to serve a year in the Red Lake jail (the maximum tribal sentence). The United States Attorney's office then proceeded to indict Mr. Stately for that very same robbery in United States District Court on December 19, 2019.

Furthermore, it is undisputed that the United States Attorney's office has a policy against successive prosecutions (the Petite Policy) which it applies in cases previously prosecuted in state court that it does not apply in cases which were previously prosecuted in tribal court that would have barred this successive prosecution if the prior conviction had originated in State court. It is undisputed that the U.S Attorney's office did not apply the Petite Policy considerations in its decision to charge Mr. Stately in this case.

ARGUMENT

Prosecuting an individual twice for the same offense is fundamentally unfair. Although the practice has survived challenges under the double jeopardy clause's "dual sovereign" doctrine, this does not at all vitiate the basic unfairness of the practice, justify the practice or provide solace to the individual citizen being subjected to serialized prosecution. Successive prosecution of individuals has historically been recognized as unfair to the individual subject to the practice. As noted by the late Justice Ginsberg in *United States v. Gamble*, 587 U.S. ____, (2019), which upheld a successive State-Federal prosecution of an individual under the Court's "dual sovereign" doctrine:

> The Double Jeopardy Clause embodies a principle, "deeply ingrained" in our system of justice, "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the

> possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U. S. 184, 187–188 (1957). "Looked at from the standpoint of the individual who is being prosecuted," the liberty-denying potential of successive prosecutions, when Federal and State Governments prosecute in tandem, is the same as it is when either prosecutes twice. *Bartkus*, 359 U.S., at 155 (Black, J., dissenting).

United States v. Gamble, 587 U.S. ____, (2019)(Ginsberg, J., dissenting).

Justice Gorsuch also dissented in *Gamble*, and voiced his concerns that the Court's "dual sovereign" doctrine did not alleviate the fundamental unfairness which occurs when a person is prosecuted twice for the same offense:

> [I]magine trying to explain the Court's separate sovereigns rule to a criminal defendant, then or now. Yes, you were sentenced to state prison for being a felon in possession of a firearm. And don't worry—the State can't prosecute you again. But a federal prosecutor can send you to prison again for exactly the same thing. What's more, that federal prosecutor may work hand-in-hand with the same state prosecutor who already went after you. They can share evidence and discuss what worked and what didn't the first time around. And the federal prosecutor can pursue you even if you were acquitted in the state case. None of that offends the Constitution's plain words protecting a person from being placed "twice . . . in jeopardy of life or limb" for "the same offence." Really?

Gamble v. United States, 587 U.S. ___, (2019)(Gorsuch, J. dissenting). Justice Gorsuch, in his dissent, also cited the long historical abhorrence towards successive prosecutions, which he characterized as "deeply unjust" and an "affront to human freedom":

> "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization." Throughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked. To address the problem, the law in ancient Athens held that "[a] man could not be tried twice for the same offense." The Roman Republic and Empire incorporated a form of double jeopardy protection in their laws. The Old Testament and later church teachings endorsed the bar against double jeopardy too. And from the earliest days of the common law, courts

> recognized that to "punish a man twice over for one offence" would be deeply unjust.
>
> The rule against double jeopardy was firmly entrenched in both the American colonies and England at the time of our Revolution.6 And the Fifth Amendment, which prohibits placing a defendant "twice . . . in jeopardy of life or limb" for "the same offence" sought to carry the traditional common law rule into our Constitution. As Joseph Story put it, the Constitution's prohibition against double jeopardy grew from a "great privilege secured by the common law" and meant "that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him."

United States v. Gamble, 587 U. S. ____ (2019) (Gorsuch, J., dissenting) (footnotes omitted). Justice Gorsuch observed that it is "as much an affront to . . . human freedom for a man to be punished twice for the same offense by two parts of the people's government as it would be for one . . . to throw him in prison twice for the offense." *Gamble v. United States*, 587 U.S. ___ (2019) (Gorsuch, J., dissenting).

As noted, this motion is grounded in the notion that Diondre Stately is being treated unfairly. Separate and distinct from the equally important constitutional doctrines concerning double jeopardy and equal protection, is the basic notion of fair treatment from the government. The Due Process Clause bars government actions that are fundamentally unfair to our traditional sense of justice, or conduct that is "so outrageous" that common notions of fairness and decency are offended by certain government practices pursued in the course of obtaining a conviction against the accused. *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246, 80 S.Ct. at 303–04, 4 L.Ed.2d 268 (1960); *United States v. Russell,* 411 U.S. 423, 431–32, 93 S.Ct. 1637, 1642–43, 36 L.Ed.2d 366 (1973).

The government's successive prosecution under the facts presented here are indeed conscience shocking and outrageous, calling for the judicial remedy of dismissal. There is no rationale for this successive prosecution in light of Mr. Stately's conviction and one-year tribal sentence, which he has now already served. This continued prosecution advances no substantial federal interest that has not otherwise been fully vindicated by Mr. Stately's prosecution in the tribal court. The repeat prosecution of Diondre Stately in this rather menial case is unconscionable. The Office of the United States Attorney ought to have standards higher than "doing it because we can." This successive prosecution makes no sense. It's irrational. Diondre Stately deserves fairer treatment from the government than that.

Concerning Mr. Stately's equal protection argument, neither the government nor the R & R really grapple with the heart of the issue here. The U.S. Attorney's Office cannot have a charging policy designed to prevent injustice and unfairness and then apply it in a manner that is unjust, unfair, and discriminatory against a select group. The government's and the R & R's analysis in upholding this practice are essentially twofold: 1) the Petite Policy does not confer enforceable rights; and 2) it is acceptable to treat Indians and Indians tribes differently, a long-standing government practice that is not race based but reflect the unique status of Indians and tribal relations in this country. This analysis misses the point and dodges both the fundamental unfairness and discriminatory effect of the successive prosecution practice engaged in here. A charging practice which is both fundamentally unfair and discriminatory in effect to a select group (Red Lake Indians) should not pass through the courts unchecked; it should be curtailed. That

successive prosecutions of Indians have been approved by other courts in different circumstances does not make it just in this circumstance or justify the continued tolerance of what is an extremely unfair and discriminatory practice.

As to the argument that the Petite Policy is unenforceable, the U.S. Attorney's Office cannot create a fairness policy then apply it in a manner that is discriminatory and unfair and circumscribe the constitution by saying that this is acceptable because the policy is not enforceable. That is a jaded interpretation of the law. When the government adopts a policy designed to ensure fairness, it has to apply that policy in an even-handed and non-discriminatory fashion. That's what equal protection demands.

It is worth reviewing the policy itself. It is a fairness policy, a policy that embodies the notions of fundamental fairness described herein against successive prosecutions. The United States Department of Justice explicitly recognizes that succussive prosecutions are unfair and should not be undertaken except in rare circumstances involving several preconditions, none of which appear in the instant case. Accordingly, to curb and limit abuse of the practice, the United States Department of Justice has adopted a well-established "Dual and Successive Prosecution Policy," (known as the "Petite Policy"), which severely limits the practice of pursuing successive federal prosecutions. The Petite Policy, states:

> A. **Statement of Policy:** This policy establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding. *See Rinaldi v. United States*, 434 U.S. 22, 27, (1977); *Petite v. United States*, 361 U.S. 529 (1960). Although there is no general statutory bar to a federal prosecution where the defendant's conduct already has formed the basis for a state

> prosecution, Congress expressly has provided that, as to certain offenses, a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts. *See* 18 U.S.C. §§ 659, 660, 1992, 2101, 2117; *see also* 15 U.S.C. §§ 80a-36, 1282.
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> The purpose of this policy is to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.
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> This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General.

U.S Department of Justice, Justice Manual, Section 9-2.031 (updated January 2020). [1]

While the R & R is correct that the Petite Policy itself does not confer substantive rights, cf: *United States v. Lester*, 992 F.2d 174 (8th Cir. 1993), the failure of the U.S. Attorney's office to apply that policy evenhandedly to individuals previously prosecuted in the Red Lake tribal courts is judicially reviewable. In part, what distinguishes this case from the cases cited by the R & R and government is that this case would clearly not have been prosecuted by the United States Attorney's Office if the prior conviction was

1 The entire Petite Policy was reproduced in Defendant's Memorandum in Support of Motion to Dismiss and is worth reviewing in its entirety for its depth, scope, expressed limitations, and inclusion of severe sanctions for violations.

from State Court. That isn't even a close call. Indeed, it is difficult to rationalize this successive prosecution or call it anything but fundamentally unfair. It does not even begin to comport with the notions of fairness embedded in the Justice Department's Policy on Successive Prosecutions. This case does not involve any compelling federal interest that had not otherwise been fully vindicated by the prosecution in Red Lake tribal court. The case itself involves a dispute between boyfriend/girlfriend over their casino winnings and Mr. Stately is alleged to have punched Mr. White once in the face and been given $200 by his sister. This is not a case where some substantial federal interest was left unresolved by the prior tribal prosecution, or where the punishment imposed by the separate sovereign was manifestly inadequate. Certainly, the maximum sentence of a year in the Red Lake jail was a sufficient and a satisfactory sentence for Mr. Stately's wrongdoing in this case. In short, it is difficult to imagine an unfulfilled substantial federal interest not otherwise disposed of by the tribal court's handling of the case that warrants this additional federal prosecution. The Petite Policy, if applied, would have prevented this prosecution, so Mr. Stately is being treated unequally as compared to other citizens without the government having a rational basis for doing so. That's an equal protection violation.

More fundamentally, the U.S. Attorney's office does not engage in the practice of successive prosecution of cases that originate in State court; it is virtually unheard of in this district. Since the U.S. Attorney's office does apply the policy when considering cases coming from similar circumstances (the same offense has been prosecuted, convicted, and sentenced) in State Court, this results in a practice which has a

discriminatory effect on Mr. Stately as a Red Lake citizen, and he is being subject to the prejudice, unfairness, and harassment of successive prosecutions in a manner unique to him only because his prior conviction is from Red Lake tribal court. In sum, this case involves the disparate application of a policy which would otherwise prevent this prosecution in a manner that is discriminatory against a Red Lake citizen. Mr. Stately, as a citizen of this country and a Native American, deserves equal treatment and the same consideration as any other citizen in the State of Minnesota who is being considered by the U.S. Attorney's Office for prosecution twice for the same offense.

Mover, this unfair and discriminatory practice concerning the U.S. Attorney's charging policy is not insulated from judicial review, the government's prosecutorial discretion is broad, yet still "subject to constitutional constraints." *Wayte v. United States,* 470 U.S. 598, 608 (1985). For example, the equal protection component of the Fifth Amendment Due Process Clause precludes a prosecution decision based upon an arbitrary classification, such as race. *Id.* at 608-09. The claimant must demonstrate that the federal prosecutorial policy: (1) had a discriminatory effect; and (2) was motivated by a discriminatory purpose. *United States v. Armstrong,* 517 U.S. 456, 465 (1996). "To establish a discriminatory effect in a race case, the claiming must show that similarly situated individuals of a different race were not prosecuted." *Id.* This occurs, for example, where it is shown that a facially neutral criminal law is enforced against Chinese nationals, but not against others outside that class. *Id.* at 466. In this case, when a department policy is ignored in a case involving a Red Lake Indian, the effect is race based discrimination that should not be condoned.

Moreover, "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Romer v. Evans,* 517 U.S. 620, 633 (1996) (internal citations and punctuation omitted). Adherence to this principle means the United States Constitution will generally invalidate "laws singling out a certain class of citizens for disfavored legal status or general hardships." *Id.* The federal government's current prosecution practice—*i.e.,* carefully vetting prospective local-federal successive prosecutions through the Petite policy principles in all cases except those where the local jurisdiction is an Indian tribe—violates this principle. It places tribal defendants in the type of "disfavored legal status" that the Court in *Romer* held was unconstitutional. *See* 517 U.S. at 633. The practice thus violates the Equal Protection component of the Fifth Amendment Due Process Clause, and must be invalidated here.

Admittedly, Equal Protection Clause jurisprudence is somewhat complicated and nuanced regarding its the treatment of Indians, and courts have held in many instances that it is acceptable to afford them different treatment due to the unique status of tribes for federal legal purposes under various doctrines of government oversight and historical principles relating to sovereignty. *Cf. Morton v. Mancari*, 417 U.S. 535, 554-555 (1974) (preferential treatment upheld due to "unique obligations" afforded Indians historically); *U.S. v. Antelope*, 430 U.S. 641(1997) (upholding federal prosecution under federal laws harsher than state law, where Indians were subjected to the same treatment as any other individuals for crime committed on federal enclave). But those cases, cited in the R & R and government's briefing, upholding instances of disparate treatment, at least have an

arguably rational basis for the different treatment afforded Indians.[2] In this instance, there is none, and none is offered by the government or the R &R to justify the discriminatory practice here. In addition, the *Antelope* case, *supra*, cited prominently by both the government and in the R & R, is not dispositive because this case does not involve a case where an Indian (Mr. Stately), is being "subjected to the same body of law as any other individual" nor are the government's charging policies "evenhanded." *U.S. v. Antelope*, 430 U.S. 641, 649(1997). The government's policy prohibiting successive prosecutions is being applied unevenly, in a manner that is discriminatory and unfair.

Both the government and the R &R attempt to shield this clearly unfair and discriminatory practice from constitutional scrutiny under the veneer that this is not race based treatment prohibited by the equal protection clause because the constitution permits unequal and uneven treatment of Indian Tribes and its members due to their unique legal status. Concerning that argument, it does not matter here whether Diondre Stately is being treated differently and unfairly by the United States government because he is an Indian or Red Lake citizen. The group (those previously prosecuted and convicted in Red Lake tribal court) is being treated unfairly without rational. Take race out of the picture and the end result remains the same – an unfair and discriminatory government practice reserved for a select discreet group - and that is simply wrong. But to be clear here and not just sweep race aside, (which previous courts have seemingly been willing

2 Because this case involves a criminal prosecution, the court must apply a higher level of scrutiny than rational basis. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896). But whether analyzed under "strict scrutiny" or "rational basis" formulae the result is the same: this is a discriminatory charging practice without rational justification that has a discriminatory effect on Red Lake tribal members subject to successive tribal-federal prosecution in the District of Minnesota, and it is unconstitutional.

to do), it is a little hard to ignore the fact that the practice of pursuing successive prosecutions in this district is limited to citizens who just happen to be Indians, a group that has been cast aside and has had their rights trampled on by the United States government from the moment our United States government was formed. Moreover, if the practice at issue was favorable to Red Lake citizens or could be justified on the basis of tribal classification, we would not be in this position in this case. In this case, there is no argument or rationale even offered by the government or described in the R &R that this practice is fair in this case, or that this prosecution could or would proceed if the prior conviction originated in the State Court. The tribal/sovereign distinction should not protect this unfair charging practice from the limits imposed by the U.S. Constitution to treat all citizens equally and fairly. The argument that it is acceptable to have a charging policy designed to prevent unfairness and then apply it in a manner that is fundamentally unfair and discriminatory, is unacceptable. If that indeed is the law, then the law must be changed.

Finally, as to double jeopardy, the defense has, all along, acknowledged contrary precedent *Cf. United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Lara*, 541 U.S. 193 (2004); *Gamble, supra*. The defense nonetheless has moved to dismiss this case as a violation of the defendant's right against successive prosecution under the Double Jeopardy Clause of the United States Constitution to preserve a ruling and raise an objection to this practice. This practice must be brought to the attention of the Judges in this District, who have ultimate responsibility to oversee the fair administration of justice in this District. Moreover, the joint investigation involved here and the close working

relationship between the United States Attorney's Office, the F.B.I., the Red Lake Police and Tribal Court Prosecutors raises further questions about this practice which distinguishes Red Lake cases from the U.S. Supreme Court cases relying on the "Dual Sovereign" doctrine to justify this practice. At a certain point, the interrelationship between the prosecuting offices becomes so intertwined as to become indistinguishable such that the "Dual Sovereign" rationale becomes an abuse of power. *Cf*: *Bartkus v. Illinois*, 359 U. S. 121, 166-170 (1959) (Brennan, J., dissenting). As such, this issue will continue to be raised in these cases to bring the issue to the attention of the courts and to keep the issue alive for further review.

CONCLUSION

"When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is the poor and the weak, and the unpopular and controversial, who suffer first—and there is nothing to stop them from being the last." *United States v. Gamble*, 587 U. S. ____ (2019) (Gorsuch, J., dissenting) (quotation marks and footnote omitted). The fundamental unfairness of this subsequent federal prosecution for the same offense that was previously already fully adjudicated in Red Lake Tribal Court runs afoul of the Due Process Clause, the Equal Protection Clause, and the Double Jeopardy Clause of the United States Constitution. This case might create legal tension, and not snugly fit into existing constitutional analysis. When a situation presents itself that is fundamentally unfair, the parameters of existing law either need to be reworked, or new law created. The repeat prosecution here is manifestly unfair to Mr. Stately and the

indictment in this case should be dismissed. The Report and Recommendation should not be adopted.

Oral argument is requested to address this injustice, and we request an actual live court appearance before the court on this motion.

Dated: February 9, 2021

Respectfully submitted,

s/ Douglas Olson

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DOUGLAS OLSON
Attorney ID No. 169067
Attorney for Defendant
107 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415