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 REPLY TO GOVERNMENT'S RESPONSE REGARDING OBJECTION TO REPORT AND RECOMMENDATION**

Neither the Report and Recommendation nor the Government's Response address the two key issues raised by the defendant's Motion to Dismiss: the fundamental unfairness of this successive prosecution in this specific case, and the fundamental unfairness, injustice and inequality of proceeding to prosecute Mr. Stately twice for the same offense when this would never happen if his prior prosecution had originated in State court. Official government policy, even a discretionary policy, once adopted, cannot be exercised in a manner that is unjust, unfair, and discriminatory without running afoul of the Due Process Clause of the United States Constitution, which prohibits unfair, unjust, and discriminatory government practices. And that is exactly what is happening in this specific case.

What distinguishes this case from all other cases cited by both the government and the R & R, is that this specific case (not some other hypothetical case) would not be prosecuted by the United States Attorney's Office for the District of Minnesota if Mr. Stately's previous prosecution, conviction, and sentence been imposed in State Court as opposed to Tribal Court due to the application of the official United States Department of

Justice Policy which prohibits successive prosecutions under the specific fact situation presented in this specific case. Neither the government or the R & R address the fundamental unfairness of the government pursuing a successive prosecution for an 18-year-old who has already been sentenced and served a year in the Red Lake jail for the very same offense he is now being prosecuted for by the federal government, when this situation would never happen if he had previously been convicted and sentenced in State court. The government relies on generalizations to the effect that: one, the Petite Policy does not create enforceable rights; and two, the Equal Protection Clause does not prohibit the United States government from treating Indian Tribal matters differently, even unequally. But the Government's Response does not address the fundamental issue presented here: this specific successive prosecution is fundamentally unfair and the government does not have a right to engage in actions that are fundamentally unfair and discriminatory.

Critical to this analysis, and critical to the facts of the specific case presented here, is that the government does not dispute (and cannot dispute) the two facts which make this case unique: First, the United States Attorney's Office for the District of Minnesota has an official charging policy which prohibits proceeding forward with successive prosecution of cases, like this one, which have already been prosecuted, convicted, and sentenced in the State courts (i.e. the United States Attorney's Office for the District of Minnesota does not engage in successive prosecution of State cases under the circumstances presented here). Two, the United States Attorney's Office for the District of Minnesota does not apply that same policy against successive prosecutions to cases

that are prosecuted, convicted, and sentenced in tribal court, even in cases such as this, where application of the policy to a state court case would prohibit the United States Attorney's Office from proceeding with the successive prosecution.[1] As such, there is no question but that Diondre Stately is being treated differently and unequally, only because his prior conviction is from tribal court rather than State court. This situation can only happen because he is an Indian; this successive prosecution cannot (and does not) happen to any other groups of citizens in this State of Minnesota, only Indians.

With that scenario laid out in crystal clear terms, the question whether the practice passes constructional muster becomes clear. It does not. For Mr. Stately to undergo a repeat prosecution after having been sentenced and having served a one-year sentence in tribal court for this same offense is fundamentally unfair. Moreover, the government's decision to prosecute him twice is discriminatory, because this can only happen to him because he is an Indian. The only people that are subject to successive prosecution by the U.S. Attorney's Office are Native Americans, and as a group, they are subjected to unfair and disparate treatment. However, in this motion we are addressing Mr. Stately's specific case here, not other cases involving other situations or other more serious crimes, where the year-long sentence he has served might arguably be insufficient to vindicate some greater federal interest. That is not the case here by any means. This specific case,

1 The government does not dispute the accuracy of these factual characterizations in any of its responses to the defendant's motion.

had it presented itself for prosecution from State court, would not be pursued by the U.S. Attorney's Office for the District of Minnesota.

The government's response does not address this fundamental basic issue here. The government argues that the Petite policy does not create enforceable rights. That is not the argument here. The government cannot have an official charging policy and apply it in a manner that is fundamentally unfair and discriminatory. There are constitutional limits to the government's exercise of discretionary policies. Both the R&R and government disregard Mr. Stately's Due Process challenge to this federal prosecution, *i.e.,* that the official DOJ *Petite* policy of successive-prosecution forbearance is applied to persons convicted and sentenced for state offenses but not Indian tribal offenses. It is claimed that "treatment of Indian defendants and non-Indian defendants differently in a prosecution" does not offend Due Process. (ECF 153 at 6). That statement is apparently referring to the well-established system by which Congress is empowered to enact general police-powers legislation to proscribe certain acts that occur on federally-regulated Indian reservations, (*id.*), even though Congress lacks such power over the states, *United States v. Lopez,* 514 U.S. 549, 567-68 (1995), and to the R&R's broader assertion that the government's *Petite* policy is exempt from any Due Process scrutiny whatever. (ECF 142 at 29-30).

The constitutional challenge here does not question federal police power over Indian reservations, but it respectfully disagrees with the R&R's and government's assertion that governmental implementation of the *Petite* policy is beyond the reach of the Due Process Clause. On perhaps the most fundamental level, the prosecutorial

discretion encapsulated within the official policy is "subject to constitutional constraints," including the Due Process requirement "that the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong,* 517 U.S. 456, 464-65 (1996) (edited). Beyond this, it is well-established that the Due Process Clause forbids "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (edited). In this context, unconstitutional "discrimination" does not need to have a racial or other protected-class component; rather, Due Process may be violated when the government takes some detrimental action against a person that is "irrational and wholly arbitrary." *Id.* at 565; *see also, e.g., Dep't of Homeland Security v. Regents of Univ. of Calif.,* 140 S. Ct. 1891, 1915 (2020) (invalidating DHS decision to rescind Deferred Action of Childhood Arrivals forbearance program as "arbitrary and capricious" under the Administrative Procedure Act). Accordingly, the Due Process Clause does place limitations on the government's charging practices when they result in treatment of an individual which is fundamentally unfair, irrational and arbitrary, as well as discriminatory. All of which are present in the current case.

Second, while the equal protection clause may permit the federal government to treat Indians and tribal matters differently, that is not a global rule broad enough to justify the government's practice in this case– equal protection does apply to Mr. Stately as a United States citizen and protects him from unfair and discriminatory government practices; and the court, not the government, gets to determine if he is being treated

unfairly by the government because he belongs to a select group whose prior prosecutions are not recognized by the United States Attorney's Office for the District of Minnesota as barring successive prosecution of a case that otherwise would not be permitted to be prosecuted a second time. The government cannot insulate its discriminatory and unfair practices from judicial review by announcing that it only applies its "fairness policy" of limiting successive prosecution to certain cases while excluding others; courts determine whether the government is behaving in a manner that is constitutional, not the government by self-declared pronouncement. 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 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. In addition, Mr. Stately is not 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.

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.

Dated: March 4, 2021

Respectfully submitted,

s/ Douglas Olson

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