

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA	CR 19-50163 & 22-50066
Plaintiff,	
vs.	DEFENDANT'S
	MOTION TO DISMISS
DONALD KILLS WARRIOR,	AND
Defendant.	REQUEST FOR HEARING

Defendant Donald Kills Warrior, through his attorney, John R. Murphy, moves this Court to dismiss the charge of Failure to Register as a Sex Offender in File 22-50066 (DCD 1), and Failure to Register as a Sex Offender in File 19-50163 (DCD 1). He also moves to vacate all convictions and other forms of adjudication in files 12-50167 and 16-50058. His motion is made pursuant to Federal Rule of Criminal Procedure 12(b)(2) (motion to dismiss for lack of jurisdiction) and 12(b)(3) (motion to dismiss based on defects in the institution of the prosecution and defects in the charging documents).

PRELIMINARY STATEMENT & REQUEST FOR HEARING

This motion is not meant to be a complete recitation of the facts, authority, and argument supporting Defendant's request for relief. Defendant is asking the Court for an opportunity to be heard so that he may personally identify for the Court the legal and factual grounds for granting his motion to dismiss.

Defendant's request for a hearing is made because he wants to personally make sure that all possible grounds are set forth so that his claims in regard to these matters are preserved for appellate review. He has had multiple prior attorneys assigned to his case in this file and others. He has repeatedly asked for his double jeopardy claim to be raised, but has not been able to get his counsel to file such a motion or present his arguments. Accordingly he asks for a hearing of not more than 30 minutes so that he may set forth the authority for his request and make a clear record for the Court and for the Eighth Circuit Court of Appeals, if necessary.

FACTS

On September 16, 2007, Defendant was alleged to have had sexual contact with a child under 12 years old. Exh. 1. He was taken in to tribal custody on that date. Exh. 1.

The event was alleged to have occurred on the Pine Ridge Reservation. Defendant is a member of the Oglala Sioux Tribe (OST), as was the alleged victim, and the event is alleged to have occurred on territory controlled by the OST.

Defendant was prosecuted for the tribal crime of Sexual Assault in the OST's tribal court. Exh. 1, 2.¹ Defendant pled guilty and was sentenced to six months of incarceration on September 17, 2007. Exh. 2.

On November 20, 2007, Defendant was indicted federally for the same conduct. File 07-50116, DCD 2. On December 20, 2007, Defendant was released from tribal custody and taken in to federal custody. Defendant pled guilty to a federal superseding indictment alleging Abusive Sexual Contact and was sentenced in federal court on April 28, 2009. File No. 07-50116, DCD 65.

Since the date of his release from federal custody, Defendant has been repeatedly prosecuted for failing to register as a sex offender. He presently has the two above-captioned matters pending. Both are for failing to register, with the underlying registry offense being Defendant's 2008 federal conviction.

AUTHORITY AND ARGUMENT

Defendant's primary argument is as follows: (1) his federal prosecution in 2007 was obtained in violation of his constitutional protection from subsequent prosecutions, as articulated by the Double Jeopardy Clause of the Fifth

¹Defendant has subpoenaed his tribal court records. The tribal court has yet to comply. However, through a subpoena to the Tribe's Department of Corrections, Defendant has obtained his contact information sheet (showing his incarceration date of September 16, 2007, for the crime of Sexual Assault), and his Parole Order (showing the date of his conviction and sentence).

Amendment to the United States Constitution; (2) as a result of this illegality, Defendant's conviction in federal court should be vacated; (3) because his underlying conviction was illegal and should be vacated, Defendant has no legal obligation to register as a sex offender; (4) as a result, his two pending cases should be dismissed because he legally and factually has no obligation to register as a sex offender and, thus, this Court lacks jurisdiction over him; and, (5) his prior convictions for failing to register as a sex offender should be vacated as having been obtained in contravention of his constitutional rights and were prosecuted in a Court that had no jurisdiction over him.

A partial summary of the legal basis upon which Defendant relies follows:

1. The Double Jeopardy Clause, provides that no person may be tried more than once for the same offence. "This guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Currier v. Virginia*, 201 L. Ed. 2d 650, 138 S. Ct. 2144, 2149 (2018).
2. Generally, these protections do not apply if a subsequent prosecution is pursued by a "separate sovereign," even if the offenses are identical. *Denezpi v. United States*, 213 L. Ed. 2d 141, 142 S. Ct. 1838, 1844–45

(2022).

3. In the context of successive criminal prosecutions by federal authorities after a tribal court conviction, the critical inquiry is whether a tribe's authority to prosecute the matter came from its inherent authority to address crimes by tribal members on tribal land, or whether this prosecution was based on authority delegated to it by the federal government. *United States v. Lara*, 541 U.S. 193, 199, 124 S. Ct. 1628, 1632, 158 L. Ed. 2d 420 (2004). If a tribal prosecution is premised in its inherent authority, then a subsequent federal prosecution does not offend the protections within the Double Jeopardy Clause. *Id.* If, however, a tribe's authority to prosecute an action was delegated to it by the federal government, then a tribal conviction bars the federal government from re-prosecuting the defendant for the same conduct. *Id.*
4. In this case, Defendant argues that the OST was acting pursuant to authority delegated to it by the federal government when it prosecuted him for sexual assault. Thus, the United States Department of Justice and the OST Tribal Court acted pursuant to authority delegated to them from the same source: the United States' government.

5. Accordingly, the separate sovereigns doctrine did not apply to Defendant's case, and his initial federal prosecution, and all subsequent prosecutions of him, have been in violation of his constitutional right to be protected from double jeopardy. The district court that proceeded over his case in 2007 lacked jurisdiction to adjudicate his case. All subsequent prosecutions of him have been invalid based on this foundational error.
6. Defendant is aware of a number of cases that have held that crimes prosecuted under the Major Crimes Act are not barred by the Double Jeopardy Clause if there has been a prior tribal conviction for the same conduct. However, Defendant maintains that the defendants in these cases have failed to properly argue the claim, and that the facts and circumstances of his case distinguish it from other cases. Defendant maintains that other federal legislation demonstrates that the OST was acting pursuant to delegated federal authority when it prosecuted and incarcerated him for the same conduct that was later prosecuted in federal court.²

²Defendant is asking for a hearing so that he can articulate this portion of his argument and cite to the Court the exact provisions within various pieces of federal legislation that establish his claim.

WHEREFORE, Defendant asks the Court to permit him a hearing in order to articulate his claims and make a complete record of his position, and he asks that based upon his arguments and the facts in his case that the pending cases be dismissed and all of his prior adjudications related to this matter be vacated.

Dated January 24, 2023.

MURPHY LAW OFFICE, P.C.

/s/ John R. Murphy

John R. Murphy

Attorney for Defendant

328 East New York Street, Suite 1

Rapid City, SD 57701

(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below, by electronically delivering the same at his/her/their last known address(es), to wit:

HEATHER SAZAMA, ASSISTANT US ATTORNEY

Dated January 24, 2023.

/s/ John R. Murphy

John R. Murphy