No. 09-5696

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

DALE MARDIS,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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STATEMENT REGARDING ORAL ARGUMENT

Defendant has requested oral argument. The United States does not believe that oral argument is necessary in this case.

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JURISDICTION

This is an interlocutory appeal from the denial of a motion to dismiss a federal indictment on Double Jeopardy grounds. The district court's order denying the motion was entered June 3, 2009. RE 166, Order Denying Def's Motion to Dismiss (June 3 Order).[1] Defendant filed a timely notice of appeal on

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[1] Citations to "RE __" refer to documents in the district court's electronic record, as numbered on the district court docket sheet. Citations to the transcript of the May 27-28, 2009, evidentiary hearing, where appropriate, include the name

(continued...)

June 9, 2009. RE 168, Notice of Appeal. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291. See *Abney* v. *United States*, 431 U.S. 651, 658-662 (1977).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether defendant's prosecution by the United States is barred by the Double Jeopardy Clause of the Fifth Amendment where defendant previously was prosecuted by the State of Tennessee on a state charge arising from the same conduct.

STATEMENT OF THE CASE

Defendant Dale Mardis was indicted by a federal grand jury on January 31, 2008. RE 4, Indictment. Count One of the Indictment charged that Mardis "did by force and threat of force, willfully injure, intimidate, and interfere with, and attempted to injure, intimidate, and interfere with, Mickey Wright by shooting him with a firearm * * * because of his race and color and because Mickey Wright had

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[1](...continued)
of the witness in parentheses. Jennfer Webber (Webber) is an Assistant United States Attorney. Howard Wagerman (Wagerman) was defendant's counsel in the state prosecution. Thomas Henderson (Henderson) was the state prosecutor. James Paris (Paris) and Joe Everson (Everson) were Shelby County Sheriff's Deputies who participated in the investigation of Wright's disappearance. Citations to "App." refer to pages in the Appendix filed with the clerk in this appeal. Citations to "Def. Br." refer to defendant's opening brief in this appeal.

been enjoying employment * * * resulting in the death of Mickey Wright" in violation of 18 U.S.C. 245(b)(2)(C) and 18 U.S.C. 2. RE 4, Indictment, p. 1. Count Two charged that Mardis "did knowingly carry, use and discharge a firearm during and in relation to a crime of violence," in violation of 18 U.S.C. 924(c)(1), causing the death of Mickey Wright, in violation of 18 U.S.C. 924(j) and 18 U.S.C. 2. RE 4, Indictment, p. 2.

Defendant moved to dismiss the Indictment on November 12, 2008. RE 84, Motion and Memorandum of Law in Support of Motion to Dismiss (Motion). He contended that the United States's "successive prosecution" violated the Double Jeopardy Clause of the Fifth Amendment because he previously had been prosecuted by the State of Tennessee for the same conduct, pled *nolo contendere* to the state charges, and was sentenced to 15 years imprisonment. RE 84, Motion, pp. 1-5. In support of his motion, defendant argued (1) that the district court should disregard the Dual Sovereignty doctrine, RE 84, Motion, pp. 6-27; (2) that even if the Dual Sovereignty doctrine is valid, it should not be applied to this case, RE 84, Motion, pp. 27-36; and (3) that the Indictment was barred by the Department of Justice's *Petite* policy, RE 84, Motion, pp. 36-42.

The district court held an evidentiary hearing on May 27 and 28, 2009. RE 176-178, Transcripts. The court denied defendant's motion to dismiss on June 3,

2009, RE 166, June 3 Order, and issued an opinion on June 24, 2009. RE 171, Order Denying Def's Motion to Dismiss (June 24 Order).

1. Facts

Mickey Wright, a Memphis and Shelby County, Tennessee, Codes Enforcement Officer, disappeared on April 17, 2001. RE 171, June 24 Order, p. 1. Wright was last seen on property owned by defendant Dale Mardis. RE 171, June 24 Order, pp. 1-2. Wright's burned-out truck, badge, and identification card were found in Mississippi, but his body was never recovered. App. 18-21, U.S. Exh. 1, Shelby County Criminal Court Transcript, April 5, 2007, (Plea Hearing Tr.), pp. 18-21.

a. The Investigation

Wright's disappearance was investigated by the Shelby County Sheriff's Office and the Safe Streets Task Force for the Western District of Tennessee. RE 177, May 27, 2009, Transcript (afternoon) (May 27 Tr. (aft.)), pp. 200-203 (Paris), 276-277 (Henderson). The Safe Streets Task Force is organized to conduct investigations of "serious Federal and State crimes," including kidnapping and murder. App. 29, U.S. Exh. 4, Memorandum of Understanding (MOU), p. 1. It includes representatives of the FBI, the Shelby County Sheriff's Office, and the Memphis Police Department. App. 29, U.S. Exh. 4, MOU, p. 1. State and local

officers assigned to the Task Force are deputized as federal agents during the course of their work for the Task Force. RE 176, May 27, 2009 Transcript (May 27 Tr. (morn.)), p. 157 (Webber). While the personnel assigned to the Task Force are supervised by an FBI Supervisory Special Agent, the "policy and direction" of the Task Force is "the joint responsibility of the" Sheriff's Office, the Memphis Police Department, and the FBI. App. 30, U.S. Exh. 4, MOU, p. 2. Task Force participation facilitated the investigation of Wright's disappearance because Shelby County law enforcement personnel had no authority to investigate outside the State of Tennessee. RE 177, May 27 Tr. (aft.), pp. 276-277 (Everson).

A federal grand jury convened in 2001 to investigate Wright's disappearance, but it returned no charges. RE 171, June 24 Order, p. 2. The grand jury did not hear evidence regarding racial motivation for the offense, RE 177, May 27 Tr. (aft.), pp. 157-158 (Webber), and, as of April 2007, the only federal charges contemplated against defendant were arson of a motor vehicle, interstate transportation of a vehicle, and a firearms charge involving a machine gun seized when defendant's property was searched at the time of his arrest in July 2004, RE 176, May 27 Tr. (morn.), p. 160 (Webber). Assistant United States Attorney (Assistant U.S. Attorney) Jennifer Webber, who was assigned to the grand jury investigation, never closed the investigation into Wright's disappearance. RE 176,

May 27 Tr. (morn.), pp. 114-115 (Webber); RE 177, May 27 Tr. (aft.), pp. 178-179 (Webber).

Early in 2004, Shelby County Sheriff's Deputy Joe Everson became lead investigator for the Safe Streets Task Force and took a fresh look at the investigation. RE 177, May 27 Tr. (aft.), p. 246 (Everson). Within a short time, defendant emerged as the prime suspect. RE 177, May 27 Tr. (aft.), pp. 247, 250-251 (Everson). In addition to being supervised by the FBI agent on the Safe Streets Task Force, Everson worked "hand-in-hand" with the investigator assigned to the case by the Sheriff's Office, and "would also have to answer" to his supervisors in the Sheriff's Office. RE 177, May 27 Tr. (aft.), pp. 247-248 (Everson). Everson testified that he spoke to Assistant U.S. Attorney Jennifer Webber about six times during the course of the investigation and that two of those conversations probably referred to Mardis. RE 177, May 27 Tr. (aft.), pp. 248-251. But Everson was not supervised by and did not report to anyone at the United States Attorney's Office (U.S. Attorney's Office). RE 177, May 27 Tr. (aft.), p. 248 (Everson).

Defendant was arrested in July 2004 on a state warrant for murder. RE 176, May 27 Tr. (morn.) p. 47 (Wagerman); RE 177, May 27 Tr. (aft.), pp. 210 (Henderson), 278-279 (Everson). After defendant's arrest, Everson produced a

prosecution report regarding Wright's disappearance that he presented both to the U.S. Attorney's Office and to the state prosecutor. RE 177, May 27 Tr. (aft.), pp. 252-254 (Everson). This report recommended only a state prosecution of Mardis for first degree murder. RE 177, May 27 Tr. (aft.), pp. 270-271 (Everson). According to Everson, there had been no significant investigation of racial motivation at that time. RE 177, May 27 Tr. (aft.), pp. 269-270, 280.

b. The State Prosecution

The State of Tennessee charged Mardis with first degree murder and indicted him on that charge in September 2004. RE 171, June 24 Order, p. 2; RE 176, May 27 Tr. (morn.), p. 47 (Wagerman); RE 177, May 27 Tr. (aft.), p. 254 (Everson). Mardis faced the possibility of the death penalty if convicted on the state charges. RE 177, May 27 Tr. (aft.), p. 210 (Henderson). There was some discussion around the time of Mardis's arrest of a global plea agreement that would have resolved both federal and state charges, but the defendant declined. RE 176, May 27 Tr. (morn.), pp. 159-160, 192-193 (Webber).

c. The Plea Negotiations

In April 2007, a few days before trial was scheduled to begin, state prosecutor Tom Henderson and Mardis's attorney, Howard Wagerman, began discussions of a possible plea bargain. RE 176, May 27 Tr. (morn.), p. 56

(Wagerman); RE 177, May 27 Tr. (aft.), p. 218 (Henderson). With defendant's authorization, Wagerman proposed a plea of *nolo contendere* to second degree murder, with a sentence of 13 and a half years imprisonment. RE 176, May 27 Tr. (morn.), pp. 56-60 (Wagerman). Henderson also insisted that the defense provide information about the disposition of Wright's body, which had not been recovered, and Wagerman offered his own hand-written statement "as an attorney based upon [his] investigation," not from his client. RE 176, May 27 Tr. (morn.), pp. 60, 90 (Wagerman). Wagerman testified that the statement merely reported what had happened to Wright's body and did not purport to be a statement by the defendant or constitute an admission by the defendant. RE 176, May 27 Tr. (morn.), pp. 90-91, 94-96.

After reaching agreement with Henderson, Wagerman called Assistant U.S. Attorney Webber. RE 176, May 27 Tr. (morn.), pp. 61-62 (Wagerman). Webber testified that Wagerman asked her if there were any pending cases against the defendant in federal court. RE 176, May 27 Tr. (morn.), pp. 133-134. She said that Wagerman told her he had called the clerk's office with the same inquiry and that this reinforced her understanding that he was seeking information about sealed or unsealed indictments. RE 176, May 27 Tr. (morn.), pp. 134-135. Webber told Wagerman that there were no cases filed against his client but that

she had a case report involving a machine gun that had been seized from Mardis's property at the time of his arrest. RE 176, May 27 Tr. (morn.), pp. 135-136, 139, 145 (Webber).

Wagerman testified that, in the past, when handling cases involving possible federal as well as state charges, he had been "surprised" to discover, after resolving a case in one jurisdiction, that there was a sealed indictment in the other jurisdiction. RE 176, May 27 Tr. (morn.), p. 54. He said that he did not want "to get blindsided" and find a sealed federal indictment in Mardis's case after entering a plea in the state case. RE 176, May 27 Tr. (morn.), p. 62. Wagerman could not recall exactly what he asked Webber when he called her, but he testified that he "basically" told Webber about the state plea negotiations and asked her whether there was "anything over there * * * that's going to come up and bite me if we resolve this." RE 176, May 27 Tr. (morn.), p. 63. When Webber told him she had an open investigation concerning a machine gun seized during a search incident to defendant's arrest, Wagerman proposed resolving that potential charge along with the state offenses. RE 176, May 27 Tr. (morn.), pp. 63-64 (Wagerman). Wagerman did not speak to Webber again, but Henderson later told him that Webber had agreed to dispose of the federal machine gun charge if the penalty in the plea agreement was increased to 15 years. RE 176, May 27 Tr. (morn.), pp.

65-66 (Wagerman). Thus, Wagerman said, when he discussed the plea with the defendant, he believed that the state plea would resolve any potential criminal charges. RE 176, May 27 Tr. (morn.), pp. 65-67.

Wagerman did not ask Webber about any possible federal kidnapping, murder, or civil rights charges that might be brought against his client. RE 176, May 27 Tr. (morn.), pp. 161-162 (Webber). They did not discuss the possibility of a global plea or a non-prosecution agreement that would resolve all potential federal as well as state charges. RE 176, May 27 Tr. (morn.), pp. 70-71 (Wagerman), 144, 158-159 (Webber). Nor did Webber promise that the federal government would not re-investigate the case from a different angle if new information arose. RE 176, May 27 Tr. (morn.), pp. 76-80 (Wagerman). Wagerman testified that he and Webber "didn't go into that at all," and that he "wasn't concerned" about a new investigation because the case had been open since 2001 and he did not know about any new developments. RE 176, May 27 Tr. (morn.), p. 76. In particular, Wagerman testified that he had convinced himself that race was not a factor in Wright's disappearance, and thus he did not anticipate that the federal government might bring civil rights charges against his client. RE 176, May 27 Tr. (morn.), p. 77. Wagerman said that he believed that Webber

contemplated only the machine gun charge at the time of their conversation in April 2007, and that was why she did not mention any other potential charges:

> Q: Are you saying that Ms. Webber lied to you?
>
> A: I am not.
>
> * * * * *
>
> A: I firmly believe that that [the machine gun charge was] the only thing that Ms. Webber knew of and anticipated in the criminal arena that would involve Mr. Mardis, that's what I believe, and that's why [that's] the only thing she told me about.

RE 176, May 27 Tr. (morn.), pp. 85-86.

Similarly, at the time of the plea negotiations, state prosecutor Thomas Henderson did not discuss with Webber any federal charges other than that involving the machine gun. RE 177, May 27 Tr. (aft.), pp. 226, 234-235 (Henderson). Webber neither said nor implied, Henderson testified, that the United States was promising not to re-open its investigation into Wright's disappearance. RE 177, May 27 Tr. (aft.), pp. 235-236. Nor did Henderson convey any such promise to Wagerman. RE 177, May 27 Tr. (aft.), p. 236 (Henderson).

At the time of her conversation with Wagerman, Webber was supervisor of the Firearms Unit in the U.S. Attorney's Office, which reviews all seizures of

guns, bullets, and shell casings in Shelby County for possible federal charges. RE 176, May 27 Tr. (morn.), pp. 71-72 (Wagerman), 135-136, 152 (Webber). Webber and a representative of the District Attorney's Office meet periodically to consider such charges and determine whether they should be pursued in a state or federal forum. RE 176, May 27 Tr. (morn.), pp. 152-153 (Webber). This procedure is used only for charges involving firearms. RE 176, May 27 Tr. (morn.), p. 154 (Webber). Defense attorneys in Shelby County, including Wagerman, are aware of this procedure and will contact Webber or the representative of the State to propose a resolution of the state and/or federal firearms charges. RE 176, May 27 Tr. (morn.), pp. 71-72 (Wagerman), 153-154 (Webber).

In this instance, Webber had the case report on the machine gun because of her previous involvement in the investigation of Wright's disappearance, rather than her position in the Gun Unit, and her discussions of the machine gun charge against defendant were not handled in the same way that a typical gun charge would have been handled by the Gun Unit. RE 176, May 27 Tr. (morn.), pp. 139-141 (Webber). Nonetheless, the result was the same; the federal charge was resolved in the course of the state plea negotiations. RE 176, May 27 Tr. (morn.), p. 143 (Webber).

On April 5, 2007, defendant Mardis pled *nolo contendere* to a state charge of second degree murder and was sentenced to 15 years imprisonment. App. 27-28, Def. Exh. 3, Shelby County Criminal Court Judgment. At the plea hearing in Shelby County Criminal Court, prosecutor Tom Henderson explained that the sentence proposed in the plea agreement included additional time to account for the federal charge stemming from the seizure of the machine gun on defendant's property. App. 4-5, U.S. Exh. 1, Plea Hearing Tr., pp. 4-5. Henderson reported to the court that Assistant United States Attorney Webber had stated that the United States would not proceed on the automatic weapon charge if the plea was accepted. App. 5, U.S. Exh. 1, Plea Hearing Tr., p. 5.

Under questioning by the state court, defendant said that no promises had been made to him in connection with the plea except the length of the sentence spelled out in the plea agreement:

> THE COURT: Any promises been made to you?
>
> DEFENDANT MARDIS: Nothing except what is spelled out in the – in the forms.
>
> THE COURT: Well, the only promise I see is 15 years at 100 percent?
>
> DEFENDANT MARDIS: That's it , sir.

App. 14, U.S. Exh. 1, Plea Hearing Tr., p.14.

Henderson testified that he did not assist or work with the federal prosecutors in their case against the defendant; nor did the federal prosecutors assist Henderson in his prosecution. RE 177, May 27 Tr. (aft.), p. 233. He denied that there was any conspiracy among the prosecutors, that the federal prosecutors had asked him to use the state case to obtain information for them, or that he had influenced the federal prosecutors to bring the present case against Mardis. RE 177, May 27 Tr. (aft.), pp. 238-239. Asked if anyone had asked him to use his case to gather information for a future federal prosecution, Henderson said, "No. If they had, I would have punched them out and turned them in in that order." RE 177, May 27 Tr. (aft.), p. 238.

d. The Federal Prosecution

After Mardis's plea in state court, the United States reopened its investigation, with the U.S. Attorney's Office joined by the Civil Rights Division of the Justice Department. RE 87, United States's Response to Def. Motion to Dismiss, p. 5. Henderson turned over his files on the Mardis case to the U.S. Attorney's Office, and Everson was assigned as a liaison to the U.S. Attorney's Office to assist in its investigation. RE 177, May 27 Tr. (aft.), pp. 227-228 (Henderson), 244-245 (Everson). Henderson had no further discussions about the

case with the U.S. Attorney's Office except with regard to preparation for the May 27, 2009, hearing. RE 177, May 27 Tr. (aft.), pp. 229-230 (Henderson).

On January 31, 2008, a federal grand jury returned the indictment in this case. RE 4, Indictment.

2. The District Court Decision

The district court denied the defendant's motion to dismiss the indictment on Double Jeopardy grounds. As the district court explained, under the Dual Sovereignty doctrine, a State and the federal government "may prosecute a defendant for the same act without violating the Double Jeopardy Clause" because "a defendant who commits 'a single act that violates the peace and dignity of two sovereigns by breaking the laws of each . . . has committed two distinct offenses.'" RE 171, June 24 Order, p. 4 (quoting *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985)) (internal quotation marks omitted).

The court first declined defendant's invitation to reconsider the validity of the Dual Sovereignty doctrine. RE 171, June 24 Order, pp. 4-5. The district court concluded that the doctrine "is well-established in federal case law, and federal courts have repeatedly recognized its validity." RE 171, June 24 Order, p. 5 (citing *United States* v. *Lara*, 541 U.S. 193, 198 (2004); *United States* v. *Ross*, 300 F. App'x 386, 389 (6th Cir. 2008), available at 2008 WL 4888993, cert. denied,

2009 WL 2134394 (Oct. 5, 2009); *United States* v. *A Parcel of Land, Etc.*, 884 F.2d 41, 43 (1st Cir. 1989)).

The court next rejected the defendant's contention that the Dual Sovereignty doctrine should not apply in this case because of the United States's involvement in the state investigation and the state plea negotiations. RE 171, June 24 Order, pp. 5-8. The court found that it was defendant's counsel who had involved the U.S. Attorney's Office in the plea negotiations, and that the federal government had not entered into a non-prosecution agreement. RE 171, June 24 Order, p. 7. The court then concluded that the "sham" exception to the Dual Sovereignty doctrine did not apply here. RE 171, June 24 Order, pp. 6-7. As the court explained, the Dual Sovereignty doctrine is inapplicable "when the cooperation between the state and federal governments is so closely bound that the second prosecution amounts to a sham," that is, "when 'one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.'" RE 171, June 24 Order, p. 6 (quoting *United States* v. *Guzman*, 85 F.3d 823, 827 (1st Cir.), cert. denied, 519 U.S. 1020 (1996)). In this case, the court found, "the federal government did not intervene into the state's prosecution to such an extent as to make the state's prosecution of Defendant a sham." RE 171, June 24 Order, p. 7. Cooperation

between state and federal authorities, the court wrote, "is to be encouraged," and cooperation in reaching plea agreements "does not necessarily amount to one sovereign using the other as a tool." RE 171, June 24 Order, p. 7. Here, the court concluded, the federal prosecutor's "involvement in disposing of a federal charge in the state plea agreement negotiations was not so substantial as to constitute a bar of federal prosecution under the Double Jeopardy clause." RE 171, June 24 Order, p. 7. Moreover, the court noted, the state prosecutor "always remained free to prosecute the matter as he saw fit." RE 171, June 24 Order, p. 7.

The district court also rejected the defendant's argument that his state court plea agreement precluded the United States from prosecuting him. RE 171, June 24 Order, pp. 7-8. The district court found, based upon the testimony of both defense attorney Wagerman and Assistant U.S. Attorney Webber, that "it is clear that the AUSA Webber's involvement in the plea negotiations was limited to the distinct issue of the federal gun case. She did not discuss disposing of all possible federal charges that might be brought against Defendant in the future." RE 171, June 24 Order, p. 7. The United States, the district court, found, "upheld its end of the agreement by not prosecuting for the federal firearms offense." RE 171, June 24 Order, p. 8. Thus, the plea agreement did not bar the present prosecution against the defendant. RE 171, June 24 Order, p. 8.

Finally, the district court rejected defendant's contention that the federal indictment violates the Department of Justice's *Petite* policy. RE 171, June 24 Order, pp. 8-10. The *Petite* policy guides federal prosecutors' decisions whether to prosecute a defendant "based on substantially the same act(s) or transactions involved in a prior state or federal proceeding." RE 171, June 24 Order, pp. 8 (quoting *United States Attorneys' Manual*, § 9-2.031 (1997)). Defendant claimed that the United States violated the *Petite* policy when it suspended its investigation during the pendency of the state prosecution and then allegedly re-opened it when Wright's family objected to the state plea. RE 171, June 24 Order, p. 8. The district court ruled, however, that the *Petite* policy does not require the United States "to perform its investigation contemporaneously with the state investigation." RE 171, June 24 Order, p. 9. Indeed, the court noted, the *Petite* policy "applies to prosecutions, not investigations." RE 171, June 24 Order, p. 9. The court explained that the *Petite* policy has three substantive requirements: (1) a substantial federal interest; (2) that has not been vindicated by the prior State prosecution; and (3) a belief that a federal offense has been committed and can be proven by admissible evidence. RE 171, June 24 Order, p. 9. As the court noted, the *Petite* policy permits "successive or dual prosecutions such as in the instant matter when federal interests have not been vindicated." RE 171, June 24 Order,

p. 9. In this case, the court concluded, the government did not violate the *Petite* policy. RE 171, June 24 Order, p. 10. In any event, the policy "is not constitutionally mandated and confers no rights upon the accused." RE 171, June 24 Order, p. 10.

SUMMARY OF ARGUMENT

The Dual Sovereignty doctrine permits successive prosecutions of the same defendant by two sovereigns for the same conduct. This doctrine is rooted in the words of the Double Jeopardy Clause, which provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Dual Sovereignty doctrine is a recognition that, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985) (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)). Because the States and the federal government are separate sovereigns, the United States may prosecute a defendant for the same conduct that has been the subject of a state prosecution. See *Abbate* v. *United States*, 359 U.S. 187 (1959); *Lanza*, 260 U.S. at 381.

The courts have suggested that the dual sovereignty doctrine might be inapplicable if the prosecution by one sovereign is merely a "sham and a cover"

for prosecution by the other sovereign. *Bartkus* v. *Illinois*, 359 U.S. 121, 124 (1959). Any such exception is a narrow one, limited to those cases "in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States* v. *Guzman*, 85 F.3d 823, 827 (1st Cir.), cert. denied, 519 U.S. 1020 (1996).

There was no "sham prosecution" in this case. While the federal and state authorities cooperated in the investigation of Mickey Wright's disappearance, the record establishes that the state and federal prosecutions proceeded independently and that neither prosecutor manipulated the other. The U.S. Attorney's Office's only involvement in the state prosecution came at the invitation of defense counsel, resulting in the resolution of a federal machine gun charge and the addition of one and a half years to defendant's state sentence. The Assistant U.S. Attorney involved in the discussions did not make any misrepresentations to defense counsel about potential federal charges or about whether the United States might reopen its own investigation into Wright's disappearance. Indeed, defense counsel did not even ask about a non-prosecution agreement for any other potential federal charges.

Nor does the *Petite* policy require dismissal of the indictment. The *Petite* policy is an internal Justice Department policy that "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." *United States Attorneys' Manual,* § 9-2.031A (2009). As defendant acknowledges (Def. Br. 40), the *Petite* policy "does not confer any rights upon a defendant. Nor can it be used by a defendant to bar prosecution." See *United States* v. *Renfro*, 620 F.2d 569, 574 (6th Cir.), cert. denied, 449 U.S. 902 (1980). It provides no basis for a court to review the United States's prosecutorial decisions.

STANDARD OF REVIEW

This Court reviews a denial of a motion to dismiss on double jeopardy grounds *de novo*. *United States* v. *DeCarlo*, 434 F.3d 447, 452 (6th Cir. 2006). To the extent the district court made factual findings following the evidentiary hearing, those findings may be overturned only if they are clearly erroneous. *Ibid.*

ARGUMENT

THE FEDERAL PROSECUTION DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

A. The Dual Sovereignty Doctrine Permits Successive Prosecutions Of The Same Defendant By Two Different Sovereigns For The Same Conduct

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or

limb." U.S. Const. Amend. V. As its plain language makes clear, the Clause is violated "only if the two offenses for which the defendant is prosecuted are the 'same' for double jeopardy purposes." *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985). The Dual Sovereignty doctrine is a recognition that, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Id.* at 88 (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)). Thus, because the States and the federal government are separate sovereigns, a State may prosecute a defendant for the same conduct that has been the subject of a federal prosecution and the federal government may prosecute a defendant following a state prosecution for the same conduct. See *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Lanza*, 260 U.S. at 380-382. Similarly, one State may prosecute a defendant for the same conduct that has been the subject of prosecution by another State. See *Heath*, 474 U.S. at 87-91. "In applying the dual sovereignty doctrine * * * the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Id.* at 88.

1. The Dual Sovereignty Doctrine Is Well-Established And There Is No Basis For This Court To Reconsider Its Validity

The Dual Sovereignty doctrine is "founded on the common-law conception of crime as an offense against the sovereignty of the government." *Heath*, 474 U.S. at 88. As the Supreme Court has explained, the doctrine has its roots in judicial decisions stretching back to the early Nineteenth Century. See *Abbate*, 359 U.S. at 190-194 (citing *Houston* v. *Moore*, 5 Wheat. 1 (1820); *Fox* v. *State of Ohio*, 5 How. 410 (1847); *United States* v. *Marigold*, 9 How. 560 (1850); *Moore* v. *People of State of Illinois*, 14 How. 13 (1852)). It has been applied by the Supreme Court as recently as 2004, see *United States* v. *Lara*, 541 U.S. 193 (2004), and by this Court in 2008, see *United States* v. *Ross*, 300 F. App'x. 386, 389, available at 2008 WL 4888993 (6th Cir. 2008), cert. denied, 2009 WL 2134394 (Oct. 5, 2009).

The Dual Sovereignty doctrine is not an exception to the Double Jeopardy Clause. Rather, it is based upon the language of the Double Jeopardy Clause itself and on the very nature of our federal system. As the Court explained in *Heath*, 474 U.S. at 92-93:

> The Court's express rationale for the dual sovereignty doctrine is not simply a fiction that can be disregarded in difficult cases. It finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the

> Double Jeopardy Clause itself, "nor shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5 (emphasis added). * * * It is axiomatic that "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." McCulloch v. Maryland, 4 Wheat. 316, 410 (1819).

There is simply no basis, therefore, for the defendant's invitation to this Court "to re-examine the legitimacy of the doctrine's rigid application in light of the modern criminal justice system" (Def. Br. 14).

2. The Dual Sovereignty Doctrine Is Fully Applicable To This Case

The defendant contends that the Dual Sovereignty doctrine is inapplicable to this case "because the actions of the federal and state authorities * * * are so intertwined that they are indistinguishable as separate sovereigns." Def. Br. 12. In fact, as the record demonstrates (see pp. 4-15, *supra*), while federal and local authorities cooperated in conducting the investigation of this case, state and federal prosecutors made independent decisions about the conduct of their respective prosecutions.

In *Bartkus*, the Supreme Court suggested that the Dual Sovereignty doctrine might be inapplicable if the prosecution by one sovereign is merely a "sham and a cover" for prosecution by the other sovereign. 359 U.S. at 124. The defendant in

Bartkus was first tried and acquitted by a federal court, then indicted by a state grand jury for the same conduct less than a month after his acquittal. *Id.* at 121-122. The FBI agent who had investigated the case submitted all of the evidence he had collected to state prosecutors, including additional evidence that he obtained after the defendant's acquittal in federal court. *Id.* at 122. In addition, the federal court delayed the sentencing of two accomplices until they had testified in the state court trial. *Id.* at 122-123. This cooperation between federal and state authorities, the Supreme Court concluded, was "conventional practice between the two sets of prosecutors throughout the country," and did "not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities." *Id.* at 123. "The state and federal prosecutions," the Court found, "were separately conducted," and "[t]he record establishe[d] that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction." *Ibid*.

Any "sham prosecution" exception to the Dual Sovereignty doctrine is a narrow one, "limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *United States* v. *Guzman*, 85 F.3d 823, 827

(1st Cir.), cert. denied, 519 U.S. 1020 (1996); see *United States* v. *Angleton*, 314 F.3d 767, 774 (5th Cir. 2002) ("The key * * * is whether the separate sovereigns have made independent decisions to prosecute, or whether, instead, 'one sovereign has essentially manipulated another sovereign into prosecuting'") (footnote and citation omitted), cert. denied, 538 U.S. 946 (2003).

In *Guzman*, the defendant was first prosecuted by the Dutch government after he was apprehended while attempting to smuggle illegal drugs into the Netherlands Antilles. 85 F.3d at 825. A United States Drug Enforcement Agency (DEA) agent had followed the defendant at sea, kept his ship under surveillance, alerted local officials of the defendant's presence in St. Maartens, and testified against the defendant at his trial. *Id.* at 825, 828. The defendant alleged, but the United States denied, that the DEA agent also participated in the search of his ship. *Id.* at 825. The First Circuit concluded that the Double Jeopardy Clause did not bar the defendant's subsequent prosecution by the United States for the same conduct, and rejected his contention that the DEA agent's participation in the case was sufficient to invoke the "sham prosecution" exception. Such "[c]ooperative law enforcement efforts between independent sovereigns are commendable," the court wrote, "and, without more, such efforts will not furnish a legally adequate basis for invoking the *Bartkus* exception to the dual sovereign rule." *Id.* at 828.

In *Angleton*, after the defendant was acquitted of murder charges in state court, the district attorney's office asked the U.S. Attorney's Office to investigate. 314 F.3d at 770. A joint task force of local police officers and FBI agents investigated the crime; the task force received all of the evidence gathered during the local investigation; the two assistant district attorneys who had prosecuted the offense in state court assisted with the investigation; and FBI agents interviewed members of the state court jury that had acquitted the defendant. *Ibid.* The Fifth Circuit ruled that this cooperation did not defeat the Dual Sovereignty doctrine: "The facts of *Bartkus* demonstrate that the degree of cooperation between federal and state authorities cannot, by itself, constitute a sham prosecution." *Id.* at 774.

As the record establishes (see pp. 4-15, *supra*), and as discussed below, the interactions between federal and state authorities in this case were insufficient to invoke the "sham prosecution" exception or to deprive either the State or the federal government of its sovereignty. Neither the state prosecutor nor the U.S. Attorney's Office acted as a "tool" of the other. *Bartkus*, 359 U.S. at 123. Nor did either "so thoroughly dominate[] or manipulate[] the prosecutorial machinery of

another that the latter retain[ed] little or no volition in its own proceedings." *Guzman*, 85 F.3d at 827.[2]

a. The investigation of Mickey Wright's disappearance was conducted by the Safe Streets Task Force, an entity created by the Memphis Police Department, the Shelby County Sheriff's Office, and the FBI. Local law enforcement officers assigned to the Task Force are deputized as federal officers, and their Task Force activities are supervised on a day-to-day basis by a supervisory FBI agent. But officers are assigned to the Task Force by their respective agency supervisors, and "the policy and direction" of the Task Force itself is "the joint responsibility of the Director of Police Services of the" Memphis Police Department, the Shelby County Sheriff, and the Special Agent in Charge of the FBI. App. 30, U.S. Exh. 4, MOU, p. 2.

As the district court wrote, "[c]ooperation between local, state and federal law enforcement bodies to investigate crimes is to be encouraged." RE 171, June

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[2] Defendant suggests that this Court recognize a "joint sovereign exception" to the Dual Sovereignty doctrine (Def. Br. 31-35). Citing *United States* v. *Claiborne*, 92 F. Supp. 2d 503, 508 (E.D. Va. 2000), defendant contends that this exception would be based upon a "tandem investigation and prosecution between the two sovereigns" (Def. Br. 32). But, as the district court in *Claiborne* recognized, such an exception is foreclosed by existing law, which holds that cooperation between state and federal authorities does not defeat the Dual Sovereignty doctrine. 92 F. Supp. 2d at 508 (citing *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1997)). Moreover, there was no "tandem" prosecution in this case.

24 Order, p. 7. Nothing in the record supports a conclusion that the investigative cooperation among law enforcement authorities in this case rendered the state and federal governments "indistinguishable as separate sovereigns." Def. Br. 12. Moreover, while federal and state authorities cooperated in the investigation of Mickey Wright's disappearance, the prosecutions were conducted separately. Indeed, state prosecutor Henderson vehemently denied that the U.S. Attorney's Office had manipulated his prosecution of the defendant in any way (see p. 14, *supra*). There is no evidence to the contrary.

b. Defendant also contends that the involvement of the U.S. Attorney's Office in the plea negotiations between the State and the defendant deprived the State of its separate sovereignty. Def. Br. 20-27. As the record indicates, however, and the district court concluded, the U.S. Attorney's Office's involvement in the plea negotiations "was not so substantial as to constitute a bar of federal prosecution under the Double Jeopardy clause. ADA Henderson always remained free to prosecute the matter as he saw fit." RE 171, June 24 Order, p. 7.

Defendant's first assertion in this regard – that "[t]he federal government deliberately interfered with the State prosecution's plea negotiations and agreement" (Def. Br. 20) – is misleading. Before any federal involvement in the negotiations, state prosecutor Henderson and defense attorney Wagerman had

reached agreement whereby defendant would plead *nolo contendere* to second degree murder, he would be sentenced to 13 and a half years imprisonment, and his attorney would provide a hand written statement concerning the location of Wright's body. After the two had reached this agreement, Wagerman – on his own initiative – called Assistant U.S. Attorney Webber to ask about resolving federal charges against his client through the state plea agreement. Thus, it was Wagerman, not Webber, who brought the U.S. Attorney's Office into the process.

Defendant's contention (Def. Br. 22) that "the federal government now has a plea to second degree murder and a statement regarding disposition of the body" as a result of Webber's alleged "interference" is similarly misleading, since both the *nolo contendere* plea and the statement were elements of the agreement before Wagerman ever called Webber. The only change to the plea that resulted from Webber's involvement was the addition of one and a half years to defendant's term of imprisonment to account for the federal machine gun charge. Moreover, Wagerman, not defendant, wrote the note regarding the disposition of Wright's body. As the district court found, "[t]he note does not mention Defendant nor how Mr. Wagerman obtained the information." RE 171, June 2 Order, p. 3.

Defendant also asserts that Webber "intentionally misrepresented the existence of federal charges that could subsequently be brought against the

Defendant." Def. Br. 22. This claim is false. As the district court found, after Wagerman and Henderson reached agreement on a resolution of the state charges, Wagerman contacted Webber "to determine if there were outstanding federal charges that could be disposed of as well." RE 171, June 2 Order, p. 6. Significantly, in his testimony about this conversation, Wagerman did not testify that he asked Webber whether there were any "federal charges that could subsequently be brought against" his client. Nor did he ask about a universal plea agreement to resolve all potential federal charges. He testified that he asked Webber whether there was "anything over there * * * that's going to come up and bite me if we resolve this." RE 176, May 27 Tr. (morn.), p. 63. Wagerman explained in his testimony that, in the past, he had resolved cases through a plea in state court only to learn that there was a sealed indictment against his client in federal court. Webber testified that Wagerman asked her if there were any *pending* charges and told her that he had previously called the court clerk's office to ask about such charges, confirming her understanding that he was seeking information about sealed or unsealed indictments. Indeed, Wagerman admitted in his testimony that Webber did not promise that the federal government would not conduct a new investigation from a different angle if new information arose. Wagerman testified that he and Webber "didn't go into that at all," and that he

"wasn't concerned" about a new investigation. RE 176, May 27 Tr. (morn.), p. 76.

In direct contradiction of defendant's current assertion that Webber misrepresented the potential for federal civil rights charges, Wagerman testified that he believed that Webber told him only about the machine gun charge because that was all she anticipated at the time (see p. 11, *supra*). In fact, the record indicates that Webber had no reason to anticipate any federal civil rights charges in this case at the time of her conversation with Wagerman. Everson testified that the only charge recommended in the case report he submitted at the time of defendant's arrest was a state charge of first degree murder. Webber testified, based upon her knowledge of the federal grand jury transcripts, that there was no evidence presented to the grand jury regarding racial motivation. And she said that the only federal charges under consideration at the time of her conversation with Wagerman were arson and interstate transportation of a motor vehicle, charges that the federal government did not pursue.

Thus, the district court found:

> Despite AUSA Webber leading the federal grand jury in 2001, from the testimony of both Mr. Wagerman and Ms. Webber, it is clear that the AUSA Webber's involvement in the plea negotiations was limited to the distinct issue of the federal gun case. She did not discuss disposing of all possible federal charges that might be brought against Defendant in the future.

RE 171, June 24 Order, p. 7.

The district court correctly concluded that Webber's involvement in the state plea negotiations does not bar the federal prosecution. The U.S. Attorney's Office's resolution of the machine gun charge in the context of the state plea agreement did not "so thoroughly dominate[] or manipulate[] the prosecutorial machinery of [the State prosecutor] that the latter retain[ed] little or no volition in its own proceedings." *Guzman*, 85 F.3d at 827; see *United States* v. *Johnson*, 516 F.2d 209, 212 n.2 (8th Cir.) (federal participation in state plea negotiations does not constitute participation in State trial), cert. denied, 423 U.S. 859 (1975). As the district court concluded, "Henderson always remained free to prosecute the matter as he saw fit." RE 171, June 24 Order, p. 7.

B. Public Policy Does Not Require Dismissal Of The Indictment

Defendant contends (Br. 35-42) that public policy requires dismissal of the Indictment, but he cites no authority for such a dismissal.

Defendant argues first that permitting the federal prosecution to proceed "will undermine both the integrity of the federal government and public confidence in the federal criminal judicial system." Def. Br. 35. He contends that he had a "right to have his trial completed by a particular tribunal" and to have his case resolved through the entry of a plea without suffering the stress of an

additional trial. Def. Br. 36-37 (citing *United States* v. *Stevens*, 177 F.3d 579, 583 (6th Cir. 1999)). That is simply another way of arguing that there should be no Dual Sovereignty doctrine.

Defendant also contends (Def. Br. 37) that he would not have pled guilty to the State charges had he known that he would be subject to federal charges. But, as demonstrated above, the U.S. Attorney's Office made no representation about whether it would reopen its investigation into Mickey Wright's disappearance, and defense counsel did not request any such representation. As the district court found, the United States complied with its agreement not to pursue a federal firearms charge, and "there was obviously no meeting of the minds between Mr. Wagerman and AUSA Webber on the settlement of all possible federal charges – only the federal weapons charge." RE 171, June 24 Order, p. 8. Defendant also contends (Def. Br. 37) that his case has been "highly publicized," that the Wright family seeks vengeance, and that the United States "should seek justice, not vengeance." This argument appears to be nothing more than a plea to this Court to evaluate the United States's decision to prosecute the defendant. There is no basis for such an intervention. "The decision of whether or not to prosecute * * * is a decision firmly committed by the constitution to the executive branch of the

government." *United States* v. *Renfro*, 620 F.2d 569, 574 (6th Cir.), cert. denied, 449 U.S. 902 (1980).

Defendant next contends (Def. Br. 38) that the United States should not be permitted to use the *Petite* policy as "both a sword and shield." The *Petite* policy, set forth in Section 9-2.031 of the *United States Attorneys' Manual* (USAM), "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." USAM § 9-2.031A.

As defendant acknowledges (Def. Br. 40), the *Petite* policy "does not confer any rights upon a defendant. Nor can it be used by a defendant to bar prosecution." See *Renfro*, 620 F.2d at 574 (citing *United States* v. *Frederick*, 583 F.2d 273 (6th Cir. 1978), cert. denied, 444 U.S. 860 (1979)). Defendant argues (Def. Br. 47) that "the federal government seeks to hide behind the Petite policy without having to explain whether it indeed followed its own internal policy." The *Petite* policy, however, does not require the government to "explain whether it indeed followed its own policy" and provides no basis for this Court to inquire into the United States's prosecutorial decision-making. Moreover, in *Heath*, the Supreme Court rejected just the kind of balancing of interests analysis that

defendant advocates. In ruling that a *State* was not required to justify a successive prosecution, the Court wrote: "Just as the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government, a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interest." *Heath*, 474 U.S. at 93. The United States was entitled to conclude that the state plea agreement in this case did not vindicate the federal interest in the murder of Mickey Wright.

Finally, defendant contends (Br. 41) that the indictment should be dismissed because permitting this prosecution to continue will discourage defendants from accepting plea agreements. This policy argument is foreclosed by ample authority holding that a prosecution by one sovereign may follow a defendant's guilty plea to charges brought by another sovereign. See *e.g. Heath*, 474 U.S. at 84-86.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains 8,198 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

In addition, I hereby certify that I have signed the original of the foregoing document and will retain the original signed document for a period not less than the maximum allowable time to complete the appellate process.

/s/ Linda F. Thome
LINDA F. THOME
Attorney

Date: October 23, 2009

ADDENDUM

DESIGNATION OF RELEVANT RECORD COURT DOCUMENTS

DOCKET NUMBER	DOCUMENT DESCRIPTION
4	Indictment
84	Motion and Memorandum of Law in Support of Motion to Dismiss
87	United States Response to Defendant's Motion to Dismiss
163	Exhibit List from May 27, 2009, Hearing
165	June 3 Order, Denying Def's Motion to Dismiss
168	Notice of Appeal
171	June 24 Order, Denying Def's Motion to Dismiss
176	May 27, 2009, Transcript (morning)
177	May 27, 2009, Transcript (afternoon)
178	May 28, 2009, Transcript

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2009, the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

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