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APPENDIX C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
NORTHEASTERN DIVISION

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No. C2-01-58

UNITED STATES OF AMERICA

*v.*

BILLY JO LARA A/K/A BILLY JOE LARA

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Nov. 29, 2001

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MEMORANDUM OPINION

SENECHAL, Magistrate J.

This case presents the issue of whether the double jeopardy clause bars federal prosecution subsequent to a tribal prosecution of a nonmember Indian for an offense arising from the same conduct. It is an issue on which there is no binding precedent.

FACTS

Defendant Billy Jo Lara, a/k/a Billy Joe Lara, was charged in an indictment with a misdemeanor assault of a federal officer under 18 U.S.C. § 111(a)(1). Defendant Lara consented to proceed before a magistrate judge pursuant to 18 U.S.C. § 3401(b).

Defendant Lara filed two motions to dismiss the indictment. One motion asked that the indictment be

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dismissed as violative of the double jeopardy clause. The other motion asked that the indictment be dismissed for selective prosecution, or that in the alternative discovery be allowed. Both motions were denied in an Order dated November 1, 2001, which also stated that this memorandum opinion would follow.

After the motions were denied, and with the consent of the government and approval of this Court, Defendant Lara entered a conditional plea of guilty pursuant to Fed. R. Crim. Pro. 11(a)(2). An Order for Release Pending Sentencing, which incorporated an Amended Order Setting Conditions of Release, was filed following the conditional guilty plea.

The charge to which Mr. Lara entered a conditional guilty plea is simple assault against a federal officer. The incident occurred while Mr. Lara was in the custody of Bureau of Indian Affairs officers on the Spirit Lake Nation Reservation. The incident occurred after Mr. Lara was arrested for public intoxication on June 13, 2001, and was transported to the police department. BIA officers told Mr. Lara of an order excluding him, a nonmember of the Spirit Lake Nation, from the Spirit Lake Nation Reservation. After he was told of the exclusion order, Mr. Lara hit BIA Police Officer Byron Swan.

Mr. Lara was charged with violations of the Spirit Lake Tribal Code: violence to a policeman [sic], resisting lawful arrest, trespassing, disobedience to a lawful order of the tribal court, and public intoxication. Two days later, on June 15, 2001, Mr. Lara pled guilty to three of the tribal charges: violence to a police officer, resisting lawful arrest, and public intoxication. On the three charges, he was sentenced to a term of 155 days in jail.

On August 29, 2001, a federal grand jury returned an indictment charging Mr. Lara with assault on a federal officer. He alleges that the indictment violates the double jeopardy clause, because the charge is based on the same conduct as that for which the tribal sentences were imposed.

*Double Jeopardy*

The double jeopardy clause provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause must be applied in light of the dual sovereignty doctrine, which provides that successive prosecutions initiated by separate sovereigns do not violate the double jeopardy clause. *See, e.g., United States v. Wheeler*, 435 U.S. 313 (1978); *Koon v. United States*, 518 U.S. 81 (1996).

The dual sovereignty doctrine is based on the principle that a crime is an offense against the sovereignty of a government, and that when a single act violates the sovereignty of two governments, the offender has committed two distinct offenses. *E.g., Heath v. Alabama*, 474 U.S. 82 (1985). If an action violates the laws of two sovereigns, the dual sovereignty doctrine holds that prosecution by both sovereigns does not result in the offender being punished twice for the same offense, but rather that the single action constitutes two offenses, and the offender can be punished for both offenses. *Id.* The dual sovereignty doctrine does not apply if the prosecuting entities are only nominally different; the dual sovereignty doctrine applies only when the prosecuting entities derive their prosecutorial powers from independent sources. *Id.*, 474 U.S. at 90. It must be determined, therefore, whether the Spirit Lake Nation's authority to prosecute Mr. Lara is

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derived from the same source as is the federal government's authority to prosecute him.

The premise of defendant's position is that, since he is a nonmember of the Spirit Lake Nation, the tribe had no inherent authority to prosecute him, and that the tribe's only authority to prosecute him arose from a federal statute. If that were true, the tribal prosecution would have arisen from the same source of authority as the federal prosecution, the dual sovereignty doctrine would not apply, and the double jeopardy clause would bar the federal government's prosecution of Mr. Lara. The Court must therefore consider whether the tribe's authority to prosecute Mr. Lara arises from an inherent power or a power delegated by federal statute.

In *Duro v. Reina*, 495 U.S. 676 (1990), the Supreme Court determined that Indian tribes did not have criminal jurisdiction over nonmember Indians. Shortly after the *Duro* decision, Congress amended the Indian Civil Rights Act's definition of tribal "powers of self-government." Before the 1990 amendment, the term was defined to include:

all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses.

The 1990 amendments changed the definition to include:

all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which

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they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians (emphasis added).

25 U.S.C. § 1301(2) (2000). Those courts which have found the double jeopardy clause bars a federal prosecution in these circumstances have concluded that the ICRA amendments constitute a delegation of power rather than "simply a non-substantive 'recognition' of inherent rights that Indian tribes have always held." *United States v. Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), *rehearing granted and opinion vacated*, 165 F.3d 1209 (8th Cir.) (*en banc*), *cert. denied*, 528 U.S. 829 (1999).

Mr. Weaselhead, a member of the Blackfoot Tribe, was prosecuted for sexually assaulting a minor on the Winnebago Indian Reservation. Mr. Weaselhead was later indicted by a federal grand jury for the same conduct. The district court denied a motion to dismiss the federal charges, holding that the Winnebago Tribe exercised its inherent sovereignty in prosecuting Mr. Weaselhead, a nonmember Indian, and that the tribe and federal government are two separate sovereigns for purposes of analysis under the double jeopardy clause. *United States v. Weaselhead*, 36 F.Supp. 908 (D. Neb. 1997). A divided panel of the Eighth Circuit reversed the district court's denial of the motion to dismiss. A petition for rehearing was granted, and the Court sitting *en banc* was equally divided, resulting in vacation of the panel opinion and affirmance of the district court opinion. The *en banc* decision has no precedential effect.

The United States District Court for the District of South Dakota recently addressed the same issue presented in *Weaselhead*, and in this case. That Court reached the same conclusion as had the *Weaselhead* trial court, and denied the motion to dismiss on double jeopardy grounds. *United States v. Archambault*, 2001 WL 1297767 (D.S.D. Oct. 18, 2001).

Two district courts in the Eighth Circuit, the *Weaselhead* trial court and the *Archambault* trial court, have determined that Congress had the authority to recognize inherent rights of Indian tribes, because the *Duro* decision is based on federal common law rather than on the Constitution. The Ninth Circuit, *en banc*, reached the same conclusion in *United States v. Enas*, 255 F.2d 662 (9th Cir. 2001).

This Court adopts the reasoning of the *Weaselhead* and *Archambault* trial courts, and of the Ninth Circuit's *Enas* decision. Concluding that the ICRA amendment was a valid recognition of inherent rights of Indian tribes, this Court concludes that authority for the tribal prosecution and the federal prosecution of Mr. Lara are derived from independent sources. The dual sovereignty doctrine therefore applies, and the federal prosecution does not violate the double jeopardy clause.

*Selective Prosecution under Petite Policy*

Mr. Lara asserts that the government's *Petite* policy results in impermissible selective prosecution based on the race of the defendant. He moved to dismiss the indictment on those grounds, or in the alternative for discovery. The *Petite* policy, based on *Petite v. United States*, 361 U.S. 529 (1960):

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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 admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact.

*United States Attorneys' Manual* § 9-2.031(A). Approval from the appropriate assistant attorney general is also required. *Id.*

Mr. Lara asserts that, since the *Petite* policy does not apply to prior tribal court prosecutions, and since only Indians can be prosecuted in tribal courts, the *Petite* policy never applies to preclude a second prosecution against an Indian, and therefore discriminates based on race. Mr. Lara cited no case law in support of his position.

The government's response is that the *Petite* policy does not confer substantive rights, but that, if the *Petite* policy were applied, Mr. Lara's prosecution would proceed. At argument, the government referenced other recent prosecutions in this district of non-Indian persons charged with assault against a federal officer.

To succeed on a claim of selective prosecution, one must meet a demanding standard. One claiming selective prosecution must show that the prosecutory policy

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had a discriminatory effect and that it 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 claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* The standard for allowing discovery to establish a selective prosecution is also rigorous. A defendant must make a threshold credible showing that persons of other races could have been, but were not, prosecuted for the offense with which the defendant is charged. *Id.*, 517 U.S. at 470.

Mr. Lara made no threshold showing that persons of other races could have been, but were not, charged with assault on a federal officer subsequent to a prosecution by another jurisdiction for the same conduct. He did not satisfy the requirements of *Armstrong* to allow discovery of information to assist in establishing his claim of selective prosecution.

It is well established that the *Petite* policy does not confer substantive rights on a criminal defendant. A challenge to application of the policy cannot establish a claim that a subsequent prosecution constituted selective prosecution barred by the equal protection clause. *United States v. Simpkins*, 953 F.2d 443 (8th Cir.), *cert. denied*, 504 U.S. 928 (1992).

#### CONCLUSION

An Indian tribe's authority to prosecute a non-member Indian is derived from the tribe's inherent powers. The federal government's authority for prosecution for the same conduct is derived from federal statute. Since the prosecutorial authority of the tribe and of the federal government are derived from independent sources, the dual sovereignty doctrine



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applies. Federal prosecution subsequent to a tribal prosecution of a nonmember Indian for an offense arising from the same conduct is not barred by the double jeopardy clause.

Under the rigorous standards of *United States v. Armstrong*, Mr. Lara failed to establish that his prosecution by the federal government was an impermissible selective prosecution in violation of the equal protection clause, or that he was entitled to discovery to pursue that claim.