UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	C.R. No. 99-008L
HENRY PETERSON	)	
	)	

DECISION AND ORDER

Ronald R. Lagueux, Chief Judge.

Henry Peterson was indicted on January 27, 1999 by a federal grand jury. He was charged with five counts that carry the possibility of a 15-year mandatory minimum sentence. Peterson moved on May 26, 1999 to dismiss the indictment based on two arguments – that he has already been prosecuted for these crimes and that this indictment resulted from grand jury irregularities.

This Court heard oral arguments on June 17, 1999, and it has considered both arguments. A careful examination of United States Supreme Court cases establishes that neither contention warrants a quashing of the indictment. Peterson has been indicted legally under the Constitution and laws of the United States. This Court recognizes that this is an unusual prosecution, therefore, it will explain the law at length to confirm why the United States has acted in a constitutional and appropriate manner.

Consequently, the motion to dismiss the indictment is denied.

I. Facts

Henry Peterson has been indicted on five counts: two counts of being a felon in possession of firearms (Counts I and II); conspiracy to distribute marijuana (Count III); possession with intent to distribute marijuana (Count IV); and possession with intent to distribute cocaine (Count V).

Last year, Peterson was prosecuted by the State of Rhode Island based on the same acts that led to the federal indictment. On February 27, 1998, he pleaded nolo contendere to the state charges, including charges of possession with intent to distribute controlled substances, possession of a firearm after conviction of a crime of violence, and possession of stolen goods.[1] See Rhode Island v. Peterson, Cr.No. P2.98-906; Rhode Island v. Peterson, Cr.No. P2.98-907. A Rhode Island Superior Court justice prescribed concurrent sentences for each charge, with the longest being ten (10) years in prison, three (3) to serve and seven (7) suspended.

After that sentence, Assistant United States Attorney Gerald B. Sullivan pursued an indictment on federal charges. By mistake, he presented evidence to two different grand juries -- the April 1997 Term Federal Grand Jury (the “1997 Jury”) and the April 1998 Term Federal Grand Jury (the “1998 Jury”). On August

[1] In their briefs, the parties disagree about the exact state charges. However, the difference is not material, and the parties agree on the sentence that Peterson received.

26, 1998, the government presented one day of testimony to the 1998 Jury. On January 27, 1999, the government presented evidence to the 1997 Jury and an indictment resulted.

In his brief and oral argument, Sullivan assured this Court that the mistake was inadvertent and probably caused by the juries both being designated with “April” and a year. There is no evidence or even an accusation that Sullivan was forum shopping to avoid the 1998 Jury. In fact, Sullivan began his presentation to the 1997 Jury by asking if the jurors remembered the Peterson case, and one grand juror said “Yup.”

Sullivan acted to rectify the problem as soon as he discovered it. He had presented the 1997 Jury with the transcript of the first day’s testimony, believing that the members had actually heard that evidence. He alerted defense counsel to the issue and volunteered transcripts of the grand jury proceedings.

II. Double Jeopardy

Generally, a person who commits a crime is prosecuted by only one sovereign. In this state, the person would be prosecuted either by the Rhode Island Attorney General or the United States Attorney, and if convicted, that person would be subject to a sentence by a single court. The Department of Justice (DOJ) even has a policy not to indict people who have been prosecuted by a state. To deviate from this so-called

Petite policy, a United States Attorney must receive permission from the Criminal Division of the DOJ.

However, there is no constitutional rule that prohibits a state and the federal government from both prosecuting a person based on the same actions. See United States v. Wheeler, 435 U.S. 313, 328-30 (1978); United States v. Bonilla Romero, 836 F.2d 39, 42 n.2 (1st Cir. 1987); United States v. Benmuhar, 658 F.2d 14, 18 (1st Cir. 1981). A state and the federal government are different sovereigns, just as if they were different countries. Double jeopardy under the Fifth Amendment applies to the "same offence," and when two sovereigns bring charges, they are not for the same offense. See Wheeler, 435 U.S. at 329-30. This rule is well-settled and irrefutable.

Although this may offer thin solace to Peterson, the cases cited show that this prosecution is absolutely constitutional. In Wheeler, the defendant had been convicted of contributing to the delinquency of a minor by the Navajo Tribe and then indicted by the United States for statutory rape. See Wheeler, 435 U.S. at 314-16. In Bonilla Romero, the defendant had evidence suppressed on a drug charge based on Puerto Rican law and then was convicted in federal court based on the same evidence. See Bonilla Romero, 836 F.2d at 40-42. In Benmuhar, the defendant had successfully had Puerto Rican arson charges dismissed and then faced indictment on conspiracy by the United States. See

Benmuhar, 658 F.2d at 18. All these cases mirror Peterson's situation.

This rule exists because various states and the federal government each have laws that forbid the same conduct in many instances. When a person commits certain crimes (such as possession of drugs or an illegal gun), he or she offends both sovereigns. Either could prosecute the person. In this case, Sullivan indicated that the United States does not think that three years in prison was an adequate sentence. The United States will apparently seek a sentence for a longer term in this case. Certainly, the United States Attorney has the discretion to swallow the short sentence and allow Peterson to serve only his state term. But that is a decision for the prosecutors to make, not the Court. Sullivan need not convince this Court that Peterson warrants such unusual attention, although the state sentence may be relevant if this Court were to eventually sentence Peterson.

Similarly, Peterson cannot rely on the Petite policy because it does not grant substantive rights to criminal defendants. See United States v. Gary, 74 F.3d 304, 313 (1st Cir. 1996). In this case, Sullivan received permission from the Criminal Division to prosecute Peterson. This Court would not intervene even if he had not.

Finally, the arguments that Peterson cobbled together at the

conclusion of his brief were too perfunctory to amount to legitimate objections. See United States v. Cardoza, 129 F.3d 6, 19 (1st Cir. 1997). Peterson mentions due process, equal protection, res judicata, collateral estoppel and the Cruel and Unusual Punishment Clause of the Eighth Amendment without any developed argumentation. See id. Although this Court does not address each issue in full, it assures Peterson that no winning argument lurks among the bunch. Double Jeopardy was the constitutional right closest to this situation, and it clearly does not apply.

III. Grand Jury Irregularities

Sullivan complicated this case by presenting evidence against Peterson to two grand juries. However, this Court may dismiss an indictment for grand jury irregularities only where the errors prejudiced the defendant. See Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988). Where there is a non-constitutional error, the Supreme Court approves of dismissal only where the error may have a substantial influence on the grand jury's decision. See id. at 256.

Nothing that Sullivan did prejudiced Peterson or had a substantial influence on the grand jury's decision. The issue is whether the 1997 Jury had sufficient evidence to find probable cause and return an indictment. Peterson does not allege that said grand jury lacked probable cause, and this Court can find no

evidence that would support such a claim. The 1997 Jury could rely on both the evidence that it heard and the transcript of evidence presented to the 1998 Jury. The First Circuit has made it clear that this Court should not inquire into the sufficiency of the evidence because the grand jury is acting at a preliminary stage in the case. See United States v. Flores-Rivera, 56 F.3d 319, 328 (1st Cir. 1995); United States v. Valecia-Lucena, 925 F.2d 506, 511-12 (1st Cir. 1991). A petit jury will decide whether Peterson is guilty beyond a reasonable doubt.

CONCLUSION

Peterson is correct that the United States is prosecuting him for the same acts previously prosecuted by the Rhode Island Attorney General's Office. Defense counsel has argued that there is no "substantial federal interest unvindicated" by the state conviction despite the claim made in the letter that Sullivan received from the DOJ. However, the weighing of the federal interest is squarely in the hands of the DOJ and the United States Attorney. In short, this is a legal prosecution, and it is headed for trial (unless Peterson pleads guilty) because the speedy trial clock is ticking again. The case will be called on the July 27, 1999 jury trial calendar and empanelled the next day.

For the preceding reasons, Peterson's motion to dismiss the indictment is denied.

It is so Ordered.

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Ronald R. Lagueux
Chief Judge
July , 1999