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**SOUTHERN DISTRICT OF WEST VIRGINIA**

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February 24, 2020

Dana F. Eddy, Esq.  
Executive Director, Public Defender Services  
One Players Club Drive, Suite 301  
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Re: **United States Attorney's Office for the Southern District  
Of West Virginia Petite Policy and Application**

Dear Mr. Eddy:

I write to bring to your attention a recent case which ought to serve as a cautionary tale for state public defenders and appointed counsel advising clients facing state charges arising out of conduct that might also constitute a federal crime. I would ask that you share this information with your contacts who accept criminal defense appointments in the counties comprising the Southern District of West Virginia, whether through a Public Defender's Office or an appointment list.

My client, R.N., was indicted in March 2019 in the Circuit Court of Boone County on one count of Malicious Assault and one count of Prohibited Person in Possession of a Firearm, both based on conduct occurring on April 30, 2018. He pleaded guilty pursuant to a written plea agreement to being a Felon in Possession of a Firearm in exchange for the State dismissing the Malicious Assault charge and recommending that his sentence be suspended and that he be placed on probation. On March 20, 2019, R.N. was sentenced to a determinate period of five (5) years' incarceration, which sentence was suspended and he was placed on supervised probation for a term of 36 months.

Thereafter, R.N. was indicted in the United States District Court for the Southern District of West Virginia on one count of being a Felon in Possession of a Firearm based on the same conduct occurring on April 30, 2018. Meanwhile, R.N.'s supervision was transferred to Mason County where he was living in full compliance with the terms of his probation, including maintaining employment, refraining from

the use of controlled substances without a valid prescription, and maintaining contact with his supervising officer. He was arrested on the federal warrant on February 6, 2020, and the Government sought to have him detained. Although he was released on bond following his arraignment and detention hearing on February 11, 2020, by then he had lost his full-time job and was unable to take his prescribed medication.

At the initial appearance, I learned the above-referenced facts regarding R.N.'s Boone County charges and his success on probation. I also learned that the Assistant United States Attorney ("AUSA") and the arresting officer assigned to the case were *not* aware of the Boone County guilty plea or sentence, or R.N.'s success on probation, until his arrest. I obtained documentation to confirm the plea and sentence, spoke with R.N.'s Mason County probation officer, provided all of that information to the AUSA, and requested that the federal charges be dismissed. In response, I was told that the Government intended to proceed with its case.

As you are likely aware, situations like this fall under the United States Department of Justice ("DOJ") "Dual and Successive Prosecution Policy ('Petite Policy')." The policy, named after *Petite v. United States*, 361 U.S. 529 (1960), may be found in Section 9-2.031 of the Justice Manual, available online at <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031>. The policy provides, in pertinent part:

This policy 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 the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General.

In sum, in situations such as this where a federal defendant previously pleaded guilty and was sentenced in a prior state or federal prosecution arising out of the same acts, the Government is required to obtain DOJ approval before proceeding, and the approval should be conditioned on those three prerequisites being met. Unfortunately, however, there is no legal bar to such dual prosecutions, *see Gamble v. United States*, 587 U.S. \_\_\_ (2019), and the Petite policy confers no rights on defendants.

I requested and was granted a meeting with the Chief of the Criminal Division of the United States Attorney's Office regarding R.N.'s case. Despite acknowledging that no Petite waiver was sought or obtained prior to the federal indictment, that neither the AUSA nor the arresting officer was aware of the Boone County plea and sentence, and that R.N. had been doing well on probation, the Criminal Chief advised me that the Government intended to proceed with R.N.'s case and that a Petite waiver had been sought (and provisionally granted via telephone) *nunc pro tunc*. As R.N. has previously pleaded guilty to essentially the exact same charge based on the exact same conduct, it appears that we will likely be at the mercy of the federal sentencing judge to ensure that justice is done in this case.

In light of all this, I write to alert you to the application of the Petite policy under the current administrations in the United States Attorney's Office and the United States Department of Justice. Going forward, I would urge public defenders and appointed counsel when advising a client who could potentially face federal charges arising from their conduct to carefully consider the possibility that they may be charged federally regardless of any guilty plea or sentence in state court. This is especially true for cases involving firearms, which the Criminal Chief advised is a top priority.

I hope you find this information to be of use. If you have any questions or would like to discuss this matter further, please do not hesitate to contact me. I wish you the best navigating this difficult issue.

Very respectfully,



Wesley P. Page  
Federal Public Defender

WPP/wpp

cc: CJA Panel Counsel for the Southern District of West Virginia (*via Email*)