UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40234
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID KEITH WILLS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:17-CR-390-1

(Filed Nov. 21, 2018)

Before: KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

PER CURIAM.*

David Keith Wills is presently awaiting trial in federal district court on one count of aiding and abetting the trafficking of a person under the age of 14 and one count of conspiring to traffic a person under the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

age of 14 for commercial sex acts. Wills moved to dismiss the charges on the grounds that he was being subjected to punishment in federal court for the same actions for which he was punished in state court, in violation of the Double Jeopardy Clause. Although he had not been tried in state court, Wills argued that he was punished by onerous state bond conditions that treated him as a convicted sex offender. The district court denied the motion based on the dual sovereignty doctrine. Wills now seeks interlocutory review and reurges the arguments presented to the district court.

Under the collateral order doctrine, this court has jurisdiction to consider an interlocutory appeal from the denial of a motion to dismiss on double jeopardy grounds. *United States v. Rabhan*, 628 F.3d 200, 203 (5th Cir. 2010). This court reviews the denial of such a motion de novo and accepts as true the district court's underlying factual findings unless clearly erroneous. *United States v. Hoeffner*, 626 F.3d 857, 863 (5th Cir. 2010).

The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction or acquittal and, as relevant here, against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Under the dual sovereignty doctrine, two different sovereigns may prosecute and punish a person for a single act that violates their respective laws without violating the Clause. *United States v. Moore*, 958 F.2d 646, 650 (5th Cir. 1992). Even if the state bond conditions constitute punishment, an issue we do not reach, the dual sovereignty doctrine

nevertheless bars Wills' double jeopardy claim. *See United States v. Angleton*, 314 F.3d 767, 771 (5th Cir. 2002).

As Wills notes, the Supreme Court granted certiorari in *United States v. Gamble*, 694 F. App'x 750 (11th Cir. 2017), *petition for cert. granted* (June 28, 2018) (No. 17-646), to consider whether the dual sovereignty doctrine should be overruled. However, this court is obligated to apply its precedent even though certiorari has been granted. *See United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008). We therefore decline Wills' invitation to stay this appeal pending a decision in *Gamble*. *See Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

Accordingly, we AFFIRM the district court's denial of Wills' motion to dismiss the indictment on double jeopardy grounds.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL ACTION
VS.	§	NO. 2:17-CR-390-1
	§	
DAVID KEITH WILLS	§	

ORDER DENYING MOTION TO DISMISS FOR VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

(Filed Mar. 9, 2018)

Before the Court is Defendant's Motion to Dismiss for Violation of the Double Jeopardy Clause (D.E. 96), seeking relief pursuant to the Fifth Amendment to the United States Constitution. Also before the Court is the Government's response (D.E. 108), Defendant's reply (D.E. 167), and Defendant's Corrected Post Hearing memorandum and Anticipatory Motion for Stay Pending Appeal (D.E. 186). After an evidentiary hearing on January 29, 2018, the Court DENIES the motion to dismiss (D.E. 96) and DENIES the motion for a stay pending appeal (D.E. 186) for the reasons set out below.

ISSUES

The Double Jeopardy clause reads, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend V. This clause has been interpreted to bar both a second

prosecution for the same offense (whether previously acquitted or convicted) and multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *United States v. Nichols*, 741 F.2d 767, 771 (5th Cir. 1984). As detailed below, six criminal cases in four jurisdictions governed by two sovereigns—three Texas counties and this federal district—have been initiated against Defendant for conduct related to Jane Doe.[1]

For jeopardy to attach, the criminal prosecution must reach the stage where a jury is empaneled or, in a non jury case, where evidence is heard. *See generally*, *Serfass v. United States*, 420 U.S. 377, 388 (1975). None of the six cases against Defendant reached that stage and the only case still pending is this federal case. Thus Defendant's double jeopardy complaint does not rest on being twice prosecuted, but on the argument that he has already been subjected to punishment for the alleged offenses. The alleged punishment is derived from pretrial conditions of release ordered by the courts and the manner in which those conditions were executed.

The Government disputes that the pretrial conditions of release constitute punishment. But it also

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[1] "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696 (1993). The parties do not seriously dispute that the charges brought in the various cases contain the same elements and trigger double jeopardy concerns.

argues that the Court need not reach that issue because of the exception to double jeopardy known as the dual sovereignty rule, explained more fully below. Defendant urges that the Government cannot rely on dual sovereignty because federal and state authorities worked together hand-in-glove, such that they have lost their independent capacity. The evidence offered on these double jeopardy issues—whether by Defendant or the Government—is not in dispute, although its effect is certainly contested. Defendant further urges that the dual sovereignty doctrine should be retired and he seeks a stay of these proceedings in order to present that issue to the Fifth Circuit and the Supreme Court of the United States.

FACTS

Defendant David Keith Wills is alleged to have sexually assaulted Jane Doe on a nearly weekly basis, starting in 2012 when she was nine years old. DX 27, p. 34. According to the allegations, the sexual assault continued over a period of years, during which time Defendant gained access to the victim with the knowledge, consent, transportation, and participation of the victim's mother, and in exchange for money. *Id.*; DX 15, 40. The mother entered a guilty plea in this Court and is currently awaiting sentencing. D.E. 179.

A. Charges Filed in Multiple Jurisdictions

Defendant was first arrested at his residence in Rockport, Texas on April 15, 2015. He was charged

under Texas law in three Texas counties and under federal law in this federal district in a total of six cases, summarized as follows:

Jurisdiction	Cause No.	Charge	Disposition
San Patricio County, Texas	October 13, 2015 S-15-3222-1CR DX 27, pp. 1-2.	**Continuous Sexual Abuse of Young Children** From March 22, 2014 to December 31, 2014 An aggravated first degree felony Tex. Penal Code § 21.02	May 1, 2017 Dismissed—Defendant re-indicted in Cause No. S-17-3136CR. DX 16, p. 1.
San Patricio County, Texas	October 13, 2015 S-15-3223-1CR DX 27, p. 3	**Trafficking of persons (a child)** From March 22, 2014 to December 31, 2014 A first degree felony Tex. Penal Code § 20A.03 "Continuous Trafficking of Persons"	July 17, 2017 Dismissed in deference to federal action. DX 16, p. 2.

Cameron County, Texas	Nov. 4, 2015 2015-DCR-02018 DX 27, pp. 31-32.	**Sex Abuse of Child Continuous: Victim Under 14** From July 1, 2012 to November 1, 2013 Tex. Penal Code § 21.02.	March 9, 2016 Dismissed in deference to Nueces and San Patricio County cases. DX 27, p. 27.
Nueces County, Texas	Nov. 19, 2015 15-CR-4083-F DX 27, pp. 10-14, 15-24	**Continuous Trafficking of a Child; Continuous Sexual Abuse of Young Child** From November 15, 2013 to March 2, 2014 Tex. Penal Code §§ 20A.03, 21.02, punishable by life or 25-99 years.	June 21, 2016 Dismissed in deference to the San Patricia County case. DX 17, 27 p. 25.

		Reindicted as **Trafficking of a Child; Aggravated Sexual Assault of a Child; Compelling Prostitution; Indecency with a Child** First and second degree felonies Tex. Penal Code §§ 20A.02, 22.021, 43.05, 21.11	
San Patricio County, Texas	February 21, 2017 S-17-3136CR DX 27, pp. 6-7.	**Sex abuse of Child Continuous: Victim Under 14** From March 2012 to March 31, 2015 A first degree felony Tex. Penal Code §§ 21.02, 22.11(a)(1) and 22.021.	January 12, 2018 Dismissed in deference to federal action. DX 27, p. 9.

United States-Southern District of Texas	June 28, 2017 17-cr-390-1 D.E. 1, 153	**Aiding and Abetting Trafficking of Person Under 14** 18 U.S.C. §§ 1591(a)(1), (b)(1), 1594(a), & (2) Superseding Indictment: **Aiding and Abetting Trafficking of Person Under 14; Trafficking of Person Under 14** 18 U.S.C. §§ 1591(a)(1), (b)(1), (c), & (2) and 18 U.S.C. §§ 1594(c), 1591(a)(1), & (c).	Pending

B. Pretrial Conditions of Release on Bond

Defendant highlighted for complaint several conditions of release imposed on him in connection with his release on bond. They can be categorized as: (1) restricted travel; (2) monitoring of and prohibitions on

electronic communications and internet usage; (3) monthly in-person reporting; (4) medical testing for sexually transmitted disease; and (5) treatment as being on the sex offender caseload. More specifically, Defendant has offered the Cameron County Municipal Court Order Revoking Bond and Setting New Bond (DX 12) as containing the only recorded bond conditions issued by that court. They are handwritten at the bottom of the order, after the judge's signature. Barely legible, they appear to state, "Conditions of Bond 1) Defendant to Surrender Passport to Court 2) Defendant to have no contact with victim or members of family." Only the first condition is challenged, and only in the context of travel restrictions made more onerous by Nueces and San Patricio Counties.

The 214th Judicial District Court of Nueces County released Defendant on Bond, conditioned on a number of restrictions against Defendant's conduct, including compliance with "all standard conditions of sex offender case loads." DX 4. This court required that Defendant submit to Acquired Immune Deficiency Syndrome testing, refrain from electronic communications and internet usage (permitting monitoring of devices, but allowing such use if permission is granted in writing), and identify all vehicles owned, possessed or used. DX 4, 5. The 36th Judicial District Court of San Patricio County bond conditions also included the prohibitions against computer usage and computer device monitoring requirements. DX 6. It further required monthly reporting, in person, to a county supervision officer. *Id.*

The conditions for release on bond in this federal action, as set by Magistrate Judge Ellington, included:

- Surrender of passport and prohibition on travel outside of the Southern District of Texas with the exception of traveling to San Antonio to meet with his attorney if pre-approved by pretrial officer;
- Home detention with GPS monitoring;
- Prohibition against attending his son's wedding in Canada; and
- Prohibition of the use of computers and recording devices.

DX 7.

Despite the travel prohibitions, Defendant was permitted to travel out of state to Maryland for business and within the state to Brownsville for court appearances and to San Antonio to meet with his attorneys. And he did so without incident during the time he was released on bond. DX 9, p. 27. However, Defendant complains that his travel permits from San Patricio and Nueces County effectively branded him as a convicted sex offender. The San Patricio County permits represented that Defendant was on "community supervision" for the offense of "Trafficking Of Persons: Continuous" or "Sexual Abuse of Child: Continuous Victim." DX 25. The permits from Nueces County represented that Defendant was on "probation" for the offense of "Trafficking Of Persons: Continuous." *Id.*

While not a matter specified in conditions of release, Defendant also complains of treatment as a registered sex offender.[2] On March 22, 2016, the Nueces County Community Supervision & Corrections Department (Adult Probation) left a bright pink door knob hang tag at Defendant's residence, plainly stating that the Sex Offender Stabilization Unit had been by to verify Defendant's address and that he was to contact the named Community Supervision Officer in response. DX 11. The same department issued letters addressed to the Nueces County Health Department informing it that Defendant, an "offender," had been ordered to submit for HIV/AIDS testing. DX 24.

Defendant also offered a printout from a PublicData.com search allegedly evidencing treatment as a convicted sex offender. DX 26. It shows that David Keith Wills, Sr. is subject to probation on charges of sex abuse of a child and trafficking of persons, with a sentence date of "0001-01-01." DX 26. The Court questioned Defendant regarding the source and authenticity of this exhibit and ruled that it was inadmissible.[3]

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[2] The Nueces County court's order that he be treated as on a sex offender caseload did not actually require registration as a sex offender and Defendant did not so register. However, Defendant claims that he was treated as if he had registered.

[3] Defendant supplied no sponsoring witness or indicia of authenticity of the content of the information provided in this exhibit. Judicial notice of the contents of a website must conform to the requirements of Federal Rule of Evidence 201. Ordinarily, authenticity and accuracy issues in web sites are satisfied by limiting judicial notice to official governmental sources. *See e.g.*, *Ball v. LeBlanc*, 792 F.3d 584, 591 (5th Cir. 2015) (National Weather

Defendant argues that the restrictions were punitive because they stigmatized him with language reserved for convicted sex offenders and that such stigma equates to punishment. He claims that the conditions of release were excessive under the circumstances because they were not calculated to address the level of danger he posed to society on a pretrial basis. Furthermore, they included a level of confined movement and compelled reporting reserved for those convicted. Testimony supporting these arguments was offered by three attorney witnesses, proffered as experts on corrections law and criminal punishment. James J. Prescott and Wayne Logan testified that social science research has revealed that the isolation and stigmatization of sex offenders is counterproductive with respect to deterring recidivism. However, none of the witnesses testified that they were familiar with the specific charges against Defendant. And they did not testify regarding the purposes of pretrial conditions of

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Service website historical data); *Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 84 (1st Cir. 2010) (CDC website regarding Lyme disease—cause, symptoms, and treatment). *PublicData.com* is not a government website. In fact, on its "Welcome to *PublicData.com*" page, under the subheading "About *PublicData.com*," the website recites that governmental units are loathe to provide governmental information pertaining to individuals to the public, raising questions that it does not answer regarding the accuracy, both in form and substance, of the information it posts. *See* https://login.publicdata.com/. On its policies and positions page, the website states, "PublicData is a public records disseminator and is not responsible for any inaccuracies in any database." https://login.publicdata.com/pandp.html. Consequently, Defendant has not demonstrated that he is entitled to judicial notice of the content of this website.

release on bond or the different interests served by such conditions at this stage of a prosecution as opposed to post-conviction interests.

C. Federal and State Concert of Action

While reluctant to call it "collusion," Defendant complained of the nature of the investigation and resulting prosecutions on two fronts: (1) the investigation was conducted by state and federal law enforcement as a single team such that the independence of separate sovereignty was lost; and (2) the jurisdictions acted in concert with a sequence of prosecutions designed to unduly burden Defendant.

In arguing that the State of Texas and the United States are not acting as separate sovereigns, Defendant complains that the investigation against him was conducted under the auspices of Project Safe Childhood. D.E. 15. That project is part of the National Strategy for Child Exploitation Prevention and Interdiction, described in reports to Congress. DX 13, 14. "The United States Attorney's offices lead Project Safe Childhood, a program designed to marshal federal, state and local investigative and prosecution resources to combat the technology-facilitated sexual exploitation of children." D.E. 13, p. 2. In 2011, the project "was expanded to include every type of federal crime involving sexual violence against children." DX 14, pp. 2, 4. The April 2016 Report (DX 14) notes that United States Attorneys guide the entire law enforcement

community and act as the go-to point persons for a cooperative team in these efforts.

Specifically with respect to Defendant, a United States Attorney press release announced the indictment, arrests, and initial appearances of Jane Doe's mother and Defendant Wills before the United States Magistrate Judge. DX 15. It states that Immigration and Customs Enforcement's Homeland Security Investigations (HSI), Texas Rangers, and police departments in Brownsville and Rockport conducted the investigation. *Id.*

The Brownsville Police Department Law Incident Supplement Narrative recites that Defendant was arrested by the U.S. Marshals Fugitive Task Force and that HSI Agent Joe Mirino conducted forensic examinations of the mother's and Defendant's phones, accompanied investigators in obtaining and executing a search warrant for Defendant's home and electronic communications devices, and canvassed several hotels and motels in the area. DX 40. It also mentions the incidental involvement of other federal agents. *Id.*; *see also*, DX 41, 43.

According to Agent Mirino, he is the only law enforcement officer in the southern region of Texas qualified to conduct forensic examinations of cell phones and other electronic devices for law enforcement purposes. His participation in the investigation of Defendant was pursuant to that expertise, routinely offered to state and federal law enforcement authorities for any type of case. He accompanied investigators on the

searches regarding Defendant so that any electronic devices found could be immediately examined, if necessary.

Agent Mirino testified that the U.S. Marshals Service routinely executes arrest warrants for state law enforcement authorities, without necessarily participating further in those criminal investigations. While he offered his expertise to the state, he did not pitch the Defendant's prosecution to federal authorities nor was it his understanding that federal agents were controlling the investigation. Agent Dustin Wiatrek similarly testified that the Wills investigation was not a federally controlled investigation and that his involvement was a routine matter associated with his office's area of responsibility and knowledge of local resources.

DISCUSSION

A. The Dual Sovereignty Doctrine Permits Prosecution

A recognized exception to the prohibition against double jeopardy is the dual sovereignty doctrine, which permits prosecutions by both federal and state authorities on the exact same charge because the sources of their prosecutorial powers are different. *Abbate v. United States*, 359 U.S. 187, 195–96 (1959). Defendant does not dispute the existence of the doctrine. D.E. 96, p. 2 (citing *United States v. Wheeler*, 435 U.S. 313, 317 (1978)). However, he argues that at least two of the justices of the United States Supreme Court invited review of the doctrine to determine its continued efficacy

with respect to prosecutions by states admitted to the union and the United States of America as a federal body. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring) (joined by Thomas, J.) (the case before them addressed the doctrine as it applied to the unusual commonwealth status of Puerto Rico).

This Court is governed by precedent. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (stating that lower courts are governed by controlling Supreme Court opinions even if a line of cases has rejected the underlying rationale; only the Supreme Court may reject its precedents); *Kelly v. Quarterman*, 296 F. App'x 381, 382 (5th Cir. 2008) (explaining the binding nature of Supreme Court opinions and Fifth Circuit panel and en banc opinions). Defendant has provided no basis for this Court to ignore the general applicability of the dual sovereignty doctrine in this case. The Court notes Defendant's preservation of the issue and declines to accept the invitation to depart from settled law.

Thus this prosecution may proceed unless Defendant demonstrates that a recognized exception to the dual sovereignty doctrine applies. He raises the collusion exception, derived from the opinion in *Bartkus v. Illinois*, 359 U.S. 121 (1959). While finding that a collusion exception did not apply in that case, the Court suggested that dual sovereignty would not insulate a second prosecution from the Double Jeopardy Clause if the first authority, after concluding its prosecution, essentially procures a new prosecution in collusion

with the second authority in order to achieve a better result. For purposes of the analysis in the Wills case here, this Court assumes without deciding that one or more of the state conditions of release constituted punishment of Defendant Wills.

Bartkus speaks forcefully about the propriety of dual sovereignty prosecutions as being unaffected by the Double Jeopardy Clause. And it observes that the routine exchange of products of investigations between state and federal prosecutors—described as being the conventional practice throughout the country—does not evidence manipulation or sham prosecutions as required by the collusion exception. 359 U.S. at 123-24. In *Bartkus*, there were two matters of cooperation beyond the exchange of evidence: (1) continued federal gathering of evidence after the federal acquittal; and (2) the delay of federal sentencing of the accomplices who testified against the defendant until after they testified in the state trial. The Supreme Court found that those matters did not evidence the type of collusion that nullifies the dual sovereignty doctrine.

The type of collusion necessary to invoke the Double Jeopardy Clause against a second prosecution by a second sovereign is illustrated in *United States v. Bernhardt*, 831 F.2d 181 (9th Cir. 1987). There, federal authorities had not initiated any sort of investigation on the matter. The state court prosecution was dismissed on limitations grounds and the state Deputy Attorney General contacted the United States Attorney for that region and requested a federal prosecution. The federal authorities agreed to prosecute on condition that the

state's attorney act as a federal prosecutor to handle the case, with his salary being paid by the state. The court found that the state authority conducted both prosecutions, making the federal prosecution a sham, manipulated by the state.

Similarly, in *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 496 (2d Cir. 1995), collusion supporting a double jeopardy claim could not be ruled out. The case involved a criminal conviction in state court, followed by the state authorities requesting that a state district attorney, properly deputized, bring a forfeiture action in the name of the United States, but for the sole benefit of the state. "The federal government would have no interest in the forfeiture proceeding, and would be serving simply as a 'tool' for the advancement of the state's interest." *Id.* at 495-96. The court held, "[W]e do not think we can resolve the applicability of the *Bartkus* exception without additional fact-finding concerning the expected proceeds of the forfeiture, the extent, cost, and value of the labor and services provided by state officials in the federal action, and the bargain between federal and state authorities as to the split of the proceeds." *Id.* at 496.

In sum, for the *Bartkus* exception to the dual sovereignty doctrine to apply, "The state government must have effectively manipulated the actions of the federal government, so that federal officials retained little or no independent volition." *United States v. Certain Real Prop. & Premises Known as 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29, 38 (2d Cir. 1992). Even if viewed from the opposite direction—whether the

federal officials manipulated the actions of the state government—no such manipulation has been demonstrated here. The evidence on which Defendant relies shows nothing more than the conventional cooperative investigation and exchange of evidence between state and federal authorities. *See* D.E. 34, pp. 44, 65, 166; D.E. 96-1, 96-2.

While the three Texas counties did appear to divide the time frame for which they indicted Defendant, nothing in the record suggests that federal authorities were responsible for, or orchestrated, the details of the state indictments. The Court rejects Defendant Wills' argument that this case falls within the exception to the dual sovereignty doctrine for collusion between sovereigns.

B. **Pretrial Punishment Precluding Federal Prosecution**

Defendant claims that the Government's pretrial conditions for release on bond were sufficiently severe to find that he has already been punished by this sovereign. To evaluate this claim, the Court must limit its consideration to the conditions imposed by this Court. Thus the Court disregards the county-imposed (1) restricted travel in excess of that ordered here and the travel permits of record; (2) monitoring of and prohibitions on electronic communications and internet usage in excess of that imposed here; (3) monthly in-person reporting; (4) medical testing for sexually transmitted disease along with the letter notice regarding same;

and (5) treatment as being on the sex offender caseload, with the use of the pink hang tag seeking to verify Defendant's address.

What remains in controversy are:

- Travel restricted to C.C. DIVISION with permission to travel to San Antonio for attorney conferences with Mr. Goldstein. Pre-Approval by USPO of intended travel to San Antonio. No international travel.
- Home Detention. You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities approved in advance by the pretrial services office or supervising officer.
- DEFENDANT SHALL SUBMIT TO ACTIVE GPS MONITORING.
- Deft. cannot attend son's wedding in Canada.
- No computers.
- Business will be conducted from the home.
- Landline telephone only to conduct business; to be installed.
- Permit the search of your computer by the supervising officer or designated pretrial

> services personnel to assist in ensuring compliance with these conditions.

DX 7 (omissions without ellipses).

These conditions are imposed pursuant to federal statute. Pretrial release on bond is permitted with conditions that are "reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." 18 U.S.C. § 3142(c).

> Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—an offense under chapter 77 [including sections 1591 and 1594] of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or an offense involving a minor victim under section . . . 1591 . . . of this title.

18 U.S.C. § 3142(e)(3)(D), (E). *See also* D.E. 34, p. 7 (arraignment, reciting range of punishment); 153 (Superseding Indictment specifying minor victim and charges pursuant to 18 U.S.C. §§ 1591, 1594); 154 (Criminal Docket Sheet specifying a maximum sentence of life imprisonment). "Nothing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j).

The transcript of the detention hearing is of record. D.E. 34. This Court has previously reviewed and affirmed the Magistrate Judge's order granting pretrial release on bond and the conditions on which that was ordered. D.E. 75. The additional evidence presented in the double jeopardy hearing fails to demonstrate that any of the conditions were punitive rather than directly related to assuring the appearance of Defendant and the safety of other persons and the community. Nothing in the federal conditions stigmatize Defendant as a convicted sex offender.

Defendant's argument, in his corrected post-hearing memorandum (D.E. 186), is that the federal prohibition on the use of computers was unwarranted and thus punitive, according to the seven *Mendoza-Martinez* factors, which are:

1. Whether the sanction involves an affirmative disability or restraint,
2. Whether it has historically been regarded as a punishment,
3. Whether it comes into play only on a finding of scienter,
4. Whether its operation will promote the traditional aims of punishment—retribution and deterrence,
5. Whether the behavior to which it applies is already a crime,

6. Whether an alternative purpose to which it may rationally be connected is assignable for it, and

7. Whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (footnotes omitted).

Defendant represents that there is no evidence of his use of a cell phone or computer in connection with his alleged criminal conduct. That representation is not accurate. The record shows that the alleged victim did not own a cell phone. However, she described a time when Defendant called her or her mother on her mother's cell phone and requested that she, the victim, send him provocatively staged pictures of herself. She claims to have refused the request and investigators did not find any such photographs on Defendant's equipment. However, they did discover that such pictures were taken, apparently on the mother's—an alleged co-conspirator's—equipment.

Moreover, computers and cell phones can be the means for fleeing the jurisdiction. The record demonstrates that Defendant has the financial means, travel experience, and worldwide contacts to escape this jurisdiction. And the charges against him carry such significant punishments as to provide a motive to flee. Considering the seven *Mendoza-Martinez* factors, the Court concludes that the federal conditions of release on bond are appropriate as consistent with (and not excessive for) an alternative purpose—the goals of bail:

to secure the defendant's attendance at trial and to protect the safety of persons and the community. Nothing in the federal conditions, and certainly not the prohibition against the use of computers and cell phones, constitutes a punishment in that context.

The Court FINDS that there is insufficient evidence of prior punishment by the federal sovereign to which jeopardy would attach on a single-sovereign basis.

C. **Discretion: The *Petite* Policy**

Defendant seeks dismissal on the basis of the *Petite* policy. Defendant argues that the policy requires compelling reasons and prior approval from the United States Assistant Attorney General for a successive federal prosecution. U.S. Dep't of Justice, U.S. Attorney's Manual § 9-2.031 (2009). This policy cites to *Petite v. United States*, 361 U.S. 529 (1960) (per curiam), in which the Supreme Court granted the government's motion to vacate and remand so that the district court could voluntarily dismiss the indictment. The government had determined that its interests would not be served by a second prosecution in that case. The *Petite* policy, as it appears in the manual, also cites statutes governing certain crimes not at issue here, which include provisions that a state conviction for the same offense is to be treated as a bar to federal prosecution, despite the dual sovereignty doctrine.

Defendant has no right to a dismissal of this action based on the *Petite* policy. First, there has been no prior

trial, conviction, or acquittal to which the Government can or should defer. Second, there is no evidence whether the Government prosecutors sought or obtained permission to proceed with this prosecution. Third, "Courts have consistently held that the *Petite* policy is an internal rule of the Justice Department; criminal defendants may not invoke it to bar prosecution by the federal government." *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990). The Court DENIES Defendant's request for dismissal on this basis.

D. **Due Process Violation: Vindictiveness**

The Due Process Clause prohibits a prosecutor from using criminal charges to penalize a defendant in retaliation for his valid exercise of constitutional rights. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (finding no such vindictiveness in a prosecutor carrying out a plea negotiation threat to re-indict with additional charges). This complaint may be demonstrated by evidence of actual or presumptive vindictiveness. However, for a presumption to apply, there must be evidence that there is a realistic likelihood of vindictiveness. *United States v. Goodwin*, 457 U.S. 368, 373 (1982). And that presumption must be appropriate for application to all cases of the same nature. *Id.* at 381 ("The conviction in this case may be reversed only if a *presumption* of vindictiveness—applicable in all cases—is warranted.").

Defendant has not presented any evidence of actual vindictiveness. The only issue before the Court is whether there is evidence sufficient to trigger a presumption of vindictiveness that is not peculiar to this case. Defendant Wills' claim is based on the scenario that he sought a double jeopardy writ in the San Patricio County case, that state court was about to deny his writ, and he was going to exercise his constitutional right to appeal. In retaliation for his intention to exercise his appellate rights as to an as-yet-to-be-entered order, he argues that federal authorities took over the prosecution to moot his contemplated appeal.

This scenario does not give rise to a presumption of vindictiveness. First, Defendant did not actually exercise any constitutional right. An intention to do so is not amenable to proof and Defendant does not submit any evidence or authority on the issue. Such an intention is simply too vague and idiosyncratic to serve as a basis for the imposition of a presumption across the board to other cases.

Second, Defendant has cited no authority to suggest that a dual sovereignty prosecution is vindictive, particularly one in which the first sovereign's prosecution ended in the pretrial stages. Third, to support a presumption of prosecutorial vindictiveness, the second charge must be harsher than the first. *Miracle v. Estelle*, 592 F.2d 1269, 1275 (5th Cir. 1979). Defendant complains that he will be punished again, based on his contention that the conditions of release on bond constitute a first punishment. He does not address the issue that the Court is to focus on: whether the federal

charges are more severe than the state charges. The Government demonstrated that the mandatory minimum sentence under the federal charge is actually less than the mandatory minimum sentence under the state charges and the maximum sentence is the same.[4]

Defendant has failed to demonstrate that the federal prosecutors were actually vindictive in taking on the prosecution of this case. He has also failed to demonstrate that the fact scenario alleged here supports a claim for a presumptive vindictiveness. Successive prosecutions between state and federal authorities are common and the federal charge at issue here presents a potentially lesser sentence. This record does not support the imposition of a new rule that federal prosecutions are presumptively vindictive simply because Defendant subjectively intends to appeal an adverse state decision—before any such state decision is entered.

E. **No Stay Should Issue Pending Appeal**

Defendant has the right to an immediate appeal of this ruling. *Abney v. United States*, 431 U.S. 651, 662 (1977). Ordinarily, the appeal and divestiture or stay of the trial court's jurisdiction are required to prevent the harm that the Double Jeopardy Clause was

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[4] The state charges carry penalties of 25 years to 99 years or life in prison. Tex. Penal Code §§ 20A.03(e); 21.02(h). The federal penalties begin at 15 years and extend to life in life. 18 U.S.C. 1591(b)(1). Thus the federal charge is not more severe than the state charges.

designed to prevent. *Id.* at 662. However, if this Court deems the double jeopardy claim to be frivolous, the prosecution need not be delayed pending that appeal. *United States v. Dunbar*, 611 F.2d 985, 988-89 (5th Cir. 1980).

The *Dunbar* opinion sets out some considerations that govern this Court's determination of whether to find a double jeopardy argument frivolous. Two principles are salient here. First, the Court is to keep in mind the interests of all concerned. On one hand is the weight or "colorability" of the double jeopardy claim. On the other hand is the risk of intentional dilatory tactics, the delay of justice for alleged victims, and the need for judicial efficiency. *Dunbar*, 611 F.2d at 987-88. Weighing the two sides, the Court finds that the merit of the double jeopardy claim fails to outweigh the need to proceed.

Second is the fact that, regardless of this Court's assessment, Defendant has time to seek and obtain a stay from the appellate courts,[5] which are prepared to consider such a request on an expedited basis, in the event that they deem the claim nonfrivolous. *Id.* at 989. This is particularly compelling here. If only the appellate courts can change the law, it should be up to the appellate courts to assess whether such a change is imminent and whether this case presents the scenario on which that change will be based. If so, the appellate

[5] There is no trial date currently set. The last trial date was removed upon the Defendant's arraignment on the Government's Superseding Indictment (D.E. 153), pending conclusion of the Court's review of pending motions. *See* D.E. 166.

courts can grant any necessary injunctive or other relief to preserve Defendant's constitutional rights.

The Court FINDS that, in this Court, Defendant's double jeopardy claim is frivolous. It thus DENIES Defendant's request for a stay of the prosecution pending appeal.

CONCLUSION

For the reasons set out above, the Court DENIES Defendant's Motion to Dismiss for Violation of the Double Jeopardy Clause (D.E. 96). The Court further DENIES Defendant's motion (D.E. 186) for a stay pending interlocutory appeal of this Order.

ORDERED this 9th day of March, 2018.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES
DISTRICT JUDGE