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9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN FRANCISCO DIVISION

| | | |
|------------------------------|---|-------------------------------|
| 13 UNITED STATES OF AMERICA, |) | No. CR 05-00383 PJH |
| 14 Plaintiff, |) | |
| 15 v. |) | UNITED STATES' OPPOSITION TO |
| 16 |) | DEFENDANT'S MOTION TO DISMISS |
| 17 LONNIE WILLIAMS, |) | FOR VINDICTIVE PROSECUTION |
| 18 Defendant. |) | |
| |) | Date: October 12, 2005 |
| |) | Time: 3:30 p.m. |

19
20 **I. INTRODUCTION**

21 Defendant Lonnie Williams does not dispute that the United States had probable cause to
 22 indict him for possessing a firearm with an obliterated serial number, which gun had been used in
 23 a homicide a few days earlier. This probable cause ends the "vindictive prosecution" inquiry,
 24 even if Williams was charged with the motive of pressuring him to provide information in the
 25 homicide case. United States v. Paguio, 114 F.3d 928 (9th Cir. 1997). This is true regardless of
 26 whether the government complied with its internal Petite policy. See United States v. Snell, 592
 27 F.2d 1083 (9th Cir. 1979). Consequently, the Court should deny Williams' Motion to Dismiss for

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1 Vindictive Prosecution.

2 II. FACTUAL BACKGROUND

3 On October 17, 2004, at approximately 12:44 p.m., San Francisco Police Department
4 officers were patrolling in the area of the Sunnydale Housing Development. The officers saw
5 Williams walking between buildings, wearing all dark clothes, including a dark gray hooded
6 sweatshirt with the hood up. The officers noted that Williams had pulled his arms into the
7 sleeves of sweatshirt, thereby concealing his hands. Significantly, Williams' left arm swung
8 freely, while his right arm did not swing; Williams held it tightly against his right side. The
9 officers believed, based on their training and experience, that Williams was concealing a firearm.

10 As the officers approached Williams, they asked him to show his hands. When he started
11 to push his hands out of his sleeves, the officers noticed that he was wearing gloves on both
12 hands. Williams simultaneously rotated his body, keeping his right side away, as he stepped
13 behind a parked car. When asked why he was wearing gloves, Williams responded, "Man,
14 Knoble, you know I always wear gloves." Williams began to look around nervously and take off
15 his gloves, putting them in his pants pocket. Officer Kumli advised Williams that they needed to
16 check him for weapons. Immediately, Williams began to run away.

17 The officers chased Williams, ordering him to stop. Williams, however, continued
18 fleeing, holding his right arm to his body. Upon rounding a corner during the chase, Officer
19 Kumli saw Williams throw a black metallic object, consistent with a firearm, over a fence into a
20 residential yard. In so doing, Williams dropped a glove. While one officer retrieved the gun and
21 glove, the other chased Williams and arrested him without further incident.

22 Analysis of the gun revealed it to be a Glock, nine millimeter, semi-automatic pistol with
23 a high-capacity seventeen-round magazine, which was manufactured in Austria. The serial
24 number on the Glock had been obliterated. After receiving his Miranda warnings, Williams
25 admitted having been given the gun shortly before he was arrested, by someone whom he refused
26 to identify, and further admitted noticing that the serial numbers were scratched off and knowing
27 the gun was probably stolen.

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1 Williams was charged in San Francisco Superior Court with carrying a concealed stolen
2 firearm, in violation of Penal Code § 12025(b)(2) (a felony); carrying a loaded, stolen weapon in
3 a public place, in violation of Penal Code § 12031(a)(1) and (a)(2)(B) (a felony); tampering with
4 identification marks on a firearm, in violation of Penal Code § 12090 (a felony); receiving stolen
5 property, in violation of Penal Code § 496(a) (a felony); and obstructing a public officer, in
6 violation of Penal Code § 148(a)(1) (a misdemeanor). On November 18, 2004, Williams pled
7 guilty to carrying a loaded weapon in a public place, while not being the registered owner, in
8 violation of Penal Code § 12031(a)(1) and (a)(2)(F) (a misdemeanor). The District Attorney's
9 Office dismissed all other charges, and Williams received a sentence of three years probation and
10 ten days in jail.

11 After the disposition in the state case, in the course of investigating homicides believed to
12 be committed by members of a Sunnydale-based gang, United States law enforcement learned
13 that the gun that Williams was carrying had been used in a murder committed just a few days
14 earlier. See attached Declaration of Hartley M. K. West, ¶ 3. The United States also learned that
15 Williams was known to associate with certain members of the gang. See West Decl., ¶ 4. These
16 facts – together with disparate elements involved in possessing a firearm with an obliterated
17 serial number versus carrying a loaded weapon that was not registered to him, as well as the state
18 disposition's failure to vindicate the important federal interest in enforcement against guns with
19 obliterated serial numbers – prompted the United States to seek a waiver from the Department of
20 Justice under its Petite policy (the Petite waiver) to pursue federal prosecution. See West Decl.,
21 ¶ 5.

22 After the Petite waiver was granted, on June 2, 2005, U.S. Magistrate Judge Maria-Elena
23 James authorized a federal Complaint against Williams for possessing a firearm with an
24 obliterated serial number, in violation of 18 U.S.C. § 922(k), and issued an arrest warrant
25 pursuant to the Complaint. FBI agents arrested Williams the following day. After the arrest, the
26 agents asked Williams whether he was interested in talking with them. Williams declined and
27 invoked his right to counsel. West Decl. ¶ 6. On June 22, 2005, a federal Grand Jury in the

1 Northern District of California returned an indictment against Williams for the same offense.
2 Shortly before or after Williams' arraignment on the indictment, Assistant U.S. Attorney Hartley
3 West advised Williams' attorney that the government would be interested in having Williams
4 cooperate. West Decl. ¶ 7.

5 III. ARGUMENT

6 The Ninth Circuit has already rejected the argument that indicting a defendant to induce
7 cooperation constitutes vindictive prosecution. See United States v. Paguio, 114 F.3d 928 (9th
8 Cir. 1997). In Paguio, the government indicted two defendants – Paguio, Jr. and his fiancée – for
9 submitting a false loan application, with the motive of obtaining cooperation in an unrelated case.
10 Id. at 930. Prior to indictment, the government had interviewed Paguio in connection with a
11 computer theft investigation. Paguio had provided no useful information. The government
12 thereafter investigated Paguio's finances, determined that he and his fiancée had submitted a
13 false loan application, and then indicted them "in order to pressure Paguio, Jr. to tell what the
14 government suspected he knew about the computer theft." Id.

15 The court recognized that "[v]indictive prosecution occurs when the government
16 'penalize[s] a person merely because he has exercised a protected statutory or constitutional
17 right.'" Id. (quoting People of Territory of Guam v. Fegurur, 800 F.2d 1470, 1472 (9th Cir.
18 1986)). However, the court held that there is no vindictive prosecution where a defendant is
19 indicted to pressure cooperation, noting "[t]here is no constitutional right not to snitch." Id. The
20 court similarly found no violation when the prosecution is "used to pressure a spouse, so long as
21 the prosecutor has probable cause to believe a defendant committed a crime." Id. (quoting
22 United States v. Duran, 41 F.3d 540, 544 (9th Cir. 1994). "The government may indict, even if its
23 motive is to get cooperation in another case, where the government has probable cause." Id.
24 (citing United States v. Gardner, 611 F.2d 770, 773 (9th Cir. 1980)). Such indictment is "not
25 vindictive, even though the prosecution had an ulterior motive." Id.

26 Because it is undisputed that the United States had probable cause to believe that
27 Williams possessed a firearm with an obliterated serial number, indicting him for that crime does
28

1 not constitute vindictive prosecution.

2 That Williams was previously prosecuted for a related charge in state court does not alter
3 this analysis. “[S]uccessive prosecutions based on the same conduct are permissible if brought
4 by separate sovereigns.” United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987). “[T]he
5 federal government always ‘has the right to decide that a state prosecution has not vindicated a
6 violation’ of federal law. . . . Such a decision is necessarily made only after the state prosecution
7 has ended.” Id. at 183 (quoting Heath v. Alabama, 474 U.S. 82, 88 (1985)). This is true even
8 though such prosecutions “are duplicative and expensive and should be avoided as a matter of
9 policy.” Id. (citing Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam). Recognizing
10 the powers of separate sovereigns, “federal courts repeatedly have rejected the idea that federal
11 prosecution, after state proceedings, constitutes vindictive prosecution.” United States v.
12 Raymer, 941 F.2d 1031, 1041 (10th Cir. 1991) (finding federal indictment after state proceedings
13 neither sham nor vindictive prosecution); see also United States v. Ballester, 763 F.2d 368, 369-
14 70 (9th Cir. 1985) (rejecting vindictive prosecution claim where expanded federal charges
15 followed state attorney’s assertion “that he would refer the matter to federal authorities if
16 appellants persisted in efforts to gain dismissal of the state indictment”).

17 Latching onto the Department of Justice’s general policy against successive prosecutions,
18 which arose out of the Petite case, Williams contends that “the government has violated its own
19 ‘Petite’ policy,” supporting dismissal for vindictive prosecution. (Def. Mtn., at 7.) However, it
20 is not the court’s role to “examine the application of the Petite policy for evidence of vindictive
21 prosecution.” United States v. Leathers, 354 F.3d 955, 962 (8th Cir. 2004).

22 The Petite policy is an internal Department of Justice policy, which provides that the
23 United States not prosecute someone federally “if the alleged criminality was an ingredient of a
24 previous state prosecution against that person” unless the federal prosecution “is specifically
25 authorized in advance by the [DOJ] itself, upon a finding that the prosecution will serve
26 ‘compelling interests of federal law enforcement.’” Thompson v. United States, 444 U.S. 248,
27 248 (1980) (per curiam). This policy is “not constitutionally mandated,” Rinaldi v. United

1 States, 434 U.S. 22, 29 (1977), and “confers no substantive rights on the accused.” United States
2 v. Basile, 109 F.3d 1304, 1308 (8th Cir. 1997). A violation of these “internal housekeeping rules
3 of the Department of Justice does not entitle [a defendant] to dismissal of the indictment.”
4 United States v. Snell, 592 F.2d 1083, 1087 (9th Cir. 1979). Moreover, “according the internal
5 policy such binding effect would discourage the Department from adopting other such laudable
6 policies.” Id. at 1087-88. In sum, “Petite is an internal policy of self-restraint that should not be
7 enforced against the government.” Id. at 1088 (quoting United States v. Nelligan, 573 F.2d 251,
8 255 (5th Cir. 1978)).

9 Thus, it is not the role of this Court to examine the Department’s basis for granting a
10 Petite waiver in Williams’ case. Regardless, as probable cause exists, there is no vindictive
11 prosecution arising out of Williams’ indictment.

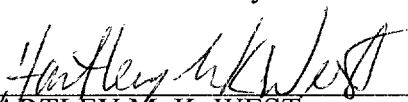
12 **IV. CONCLUSION**

13 Williams’ indictment does not constitute vindictive prosecution. The Court should
14 therefore deny his motion to dismiss on this ground.

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16 DATED: September 28, 2005

Respectfully submitted,

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United States Attorney

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19 _____
20 HARTLEY M. K. WEST
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