NO 21-3722

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff/Appellee

v.

WICAHPE MILK

Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

THE HONORABLE KAREN SCHREIER

APPELLANT'S REPLY BRIEF

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Wicahpe Milk, appellant, through his court appointed attorney, Terry L. Pechota, files this reply brief to the government's response to his opening brief. He will address government's arguments, where necessary, in the order set forth in the government's response. Where no response is made, appellant Milk relies upon the arguments as to any such assignment set forth in his opening brief in this case.

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Appellant disagrees with the government's conclusions as to the validity of the conviction. Appellant does not waive oral argument.

JURISDICTIONAL STATEMENT

No objection is made to the Jurisdictional Statement of the government.

STATEMENT OF THE CASE

A. Facts Before Arrest

Appellant at 39 to 46 of his opening brief sets out his analysis of the testimony of every one of the 15 non-law enforcement witnesses called by the government at the trial of this case. A comparison of the government's description of the testimony of the witnesses it relies upon with the undisputed background; criminal and addiction history; unsubstantiated testimony; lack of certainty; bargains and deals offered to witnesses by the government; admission by

witnesses that their testimony was to avoid serious penalties; failure to produce any physical evidence of drugs on the person or possession of defendant other than 156 grams found in a vehicle in which defendant was a passenger; lack of objective evidence that defendant possessed or sold any methamphetamine such as phone records; controlled buys; trash pulls; lack of recall; and speculation and conjecture as to any drug quantities established by the defense at trial with regard to virtually every one of the government's witnesses, proves the insufficiency of the evidence to sustain any conviction of defendant. Nothing found by law enforcement established any possession or sale of any drugs by defendant. None of the deficiencies in the testimony of the government's witnesses were overcome by any evidence that the government produced from any of them.

B. Facts After Arrest

The government discussed the obstruction charge at 10-11 of its brief. None of the facts overcome the weakness and fruitlessness of the charge as set forth by the defendant in his opening brief at 49-51 and will not be repeated again here.

C. Procedural History

The history set out by the United States is accurate as to the time and date of events occurring in this action. Contrary to the assertion of the government,

essentially all of the witnesses had agreements with the government of some sort or fashion.

SUMMARY OF ARGUMENT

Defendant disputes the conclusion of the government that there was sufficient evidence to to prove any of the three counts of the indictment for which he was convicted. It is a miscarriage of justice to sentence a defendant to an essentially life sentence on the basis of testimony that showed at its best that the most drugs defendant could have, but did not, possess was 156 grams of methamphetamine found in a vehicle that he occupied with three other persons.

ARGUMENT

I. PROBABLE CAUSE TO STOP AND SEARCH VEHICLE

B. Standing

The government effectively concedes that defendant had standing to raise the claim of an illegal search and seizure from the vehicle that, as the facts would have had shown if pursued by a phone call prior to the first suppression hearing, defendant had borrowed from Kyle Craven and allowed Michael Croyle to drive it while defendant was a passenger on August 17, 2016, at the time of the stop and seizure of the vehicle's contents.

C. and D. Probable Cause to Stop and Search Vehicle

That there was no probable cause to stop this vehicle is made clear by a review of the dash camera at 4 of the suppression transcript, exhibit 1. The proof is in the pudding. A stop for 30 seconds at a stop sign or other required stop is not a violation of the law. There was no evidence of abnormal, erratic, or other driving that would constitute a violation of any traffic law. When confronted with this argument, the government claims the absence of any proof of violation was due to the camera not being in the correct position and therefore the court should take the unsubstantiated testimony of the police officer as adequate. Of course, the other more reasonable explanation is that the officer was fibbing. The court's analysis needs to go no further than to find the lack of probable cause.

Once the vehicle was stopped, all the occupants were removed from the stopped vehicle and put in other police units. After removal, none of the occupants including defendant any no access to the interior of the vehicle. There was clearly time to secure an arrest warrant. Arrest warrants in this day and age can be secured telephonically and electronically. *New York v. Belton*, 453 U.S. 454, 460 (1981); *Arizona v. Gant*, 556 U.S. 332, 338 (2009). There was no justification in searching the vehicle at the scene without a warrant.

The search warrant issued the next day by the state court judge was tainted

by the illegal stop without probable cause and by the search of the vehicle at the scene without a warrant. If all reference to the illegally obtained and tainted evidence at the scene is removed from the state court search warrant, the affidavit in support lacked any information to support probable cause for issuance of the warrant. *See United States v. Madrid*, 152 F3d 1034, 1041 (8th Cir. 1998).

II. PROMPT APPEARANCE BEFORE MAGISTRATE

At the suppression hearing held in this case, the officers at the time that defendant was arrested on August 17, 2016, identified him as being a fugitive and wanted on a federal arrest warrant for violation of his supervised release. Officer Josh Kunde at 49, suppression transcript, stated that dispatch informed Kunde that Milk had a homicide warrant and Kunde then informed Milk and "told him that he had a warrant and was going to be taken into custody for it." There is no question that he was in federal custody at all times after August 17, 2016, even if he was also in custody for any state charges which according to the government were dismissed on October 3, 2016. His federal arrest was never abandoned or withdrawn. He was not taken before a magistrate until September 26, 2016, a month after he was arrested, in violation of Crim. R. 5 (b), and the federal charges should have been dismissed. *See United States v. Melendez*, 55 F.Supp. 2d 104, 109 (D.P.R.1999).

III. JURISDICTION OVER OFFENSES OCCURRING ON THE PINE RIDGE INDIAN RESERVATION

The government does not appear to dispute that under the first count of the indictment alleging a conspiracy to distribute methamphetamine significant, alleged illegal acts involving distribution occurred and were consummated on the Pine Ridge Indian Reservation. 21 U.S.C. § 841 is not listed as an offense over which the United States has jurisdiction under 18 U.S.C. § 1153, the Major Crimes Act. The government's response is that 21 U.S.C. § 841 is a general law of the United States, therefore without more it is applicable on the Pine Ridge Indian Reservation. The government's position is incorrect. In order for a general law of the United States to apply on an Indian reservation under the sovereignty of a federally recognized Indian tribe, such as the Oglala Sioux Tribe, there must be clear evidence that Congress when passing the general law intended for it to apply to Indian Country as defined in 18 U.S.C. § 1151, which includes the Pine Ridge Indian Reservation, in derogation of the treaty right to self governance. This showing is required under *United States v. Dion*, 476 U.S. 734, 739-740 (1986). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978). There is no showing made by the government of any clear evidence in 21 U.S.C. § 841 either on its face or in its legislative history that it was intended to be applied or enforced

in Indian Country. This case should be remanded for a determination of which acts in violation of 21 U.S.C. § 841 occurred on the Pine Ridge Indian Reservation and those acts and quantities associated therewith vacated, dismissed and barred from any consideration in defendant's required re-sentencing in this case.

The United States cites *United States v. Drapeau*, 414 F3d 869 (8th Cir. 2005), as support for its position. The section of the case relied upon by the government was an assignment of error made pro se by the defendant in that case. The argument there was that 18 U.S.C. § 1152 does not comply with the bad man provision of the 1868 Ft. Laramie Treaty requiring a Tribe to hand over any Indian, upon proof and notice to their agent, who commits any wrong or depredation against anyone, to the United States. *Drapeau*, 414 F3d 877. This Court confined its analysis to 18 U.S.C. § 1152 and the Treaty noting that the Court's jurisdiction was not premised on § 1152 and that the Treaty did not contain the notice requirement that *Drapeau* maintained was required. *Drapeau's* argument is not the argument made here by Milk.

The Court in *Drapeau* cited *United States v. Blue*, 722 F2d 383 (8th Cir. 1983); *Stone v. United States*, 506 F2d 561 (8th Cir. 1974); *United States v. White*, 508 F2d 453 (1974); *United States v. Consolidated Wounded Knee Cases*, 398 F. Supp. 235 (D. Neb. 1974); *United States v. Kane*, 537 F2d 310 (8th Cir. 1976), and

United States v. Dodge, 538 F2d 770 (8th Cir. 1976). Each of these cases were decided prior to the decision of *United States v. Dion*, 476 U.S. 734 (1986), requiring clear evidence on the face or in the legislative history that a general criminal law was intended to be enforceable in Indian County, which has not been shown in 21 U.S.C § 841.

The government additionally argues that some of the alleged criminal acts occurred both within and out of Indian Country and therefore only federal courts have jurisdiction. That too is an inaccurate statement of the law. The Oglala Sioux Tribe has a comprehensive drug code under which Milk could have been prosecuted and sentenced to a period longer than one year under 25 U.S.C. § 1302 (b) (2).

Finally, the Court in *Drapeau* stated that 18 U.S.C. § 1152 does not restrict application of general criminal statutes with little or no authority given other than its own conclusions. 18 U.S.C. § 1152 says in the first sentence that "(e)xcept as otherwise provided by law, the general laws of the United States as the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States...shall extend to Indian Country." A Supreme Court case, namely *Dion* and its progeny, are laws of the United States. Moreover, 1152 has specific provisions where it is not applicable to Indian County, namely

an offense against the person or property of another Indian, an Indian who has been punished by the law of the Tribe, or when exclusive jurisdiction is given to the Indians. Defendant Milk disagrees generally with the Court's statement in the first sentence of this paragraph.

IV. BILL OF PARTICULARS

Defendant timely filed a motion for bill of particulars on January 3, 2019, pursuant to the scheduling order setting out the dates for motions to be filed. A bill of particulars is a motion and therefore, contrary to the government's assertion, the bill was timely filed under the scheduling order requiring all motions to be filed on or before March 22, 2019. Historically in the Western Division bills of particulars have been filed pursuant to the prevailing scheduling order. Crim. R. 7 (f) says specifically that bills of particulars can be filed at a time later than 14 days after arraignment if the court permits, such as in a pretrial order.

After erroneously determining that the bill of particulars was not timely filed, the lower court denied the motion on its merits because the indictment included all required elements and discovery was provided. A review of the motion for a bill of particulars shows that the request was simple and straightforward. A review of the indictment shows no essential facts whatsoever are set forth only parts of the statute under which defendant was charged.

Incomplete and only partial discovery had been provided, showing no theory of conspiracy. Final discovery was not provided until shortly before trial. In the meantime until trial on June 28, 2021, two and a half years after the motion for a bill of particulars was filed, counsel was left to his own efforts to ascertain the facts, circumstances, physical evidence, and witnesses in the case. The final discovery provided by the government shortly before trial resulted in a surprise on many fronts. Courts should consider a motion for bill of particulars with a liberal attitude not as a disfavored tool as it is in the Eighth Circuit. *Compare Walsh v. United States*, 371 F2d 436 (1st Cir. 1967). Defendant was deprived of his right under the Sixth Amendment to a fair trial because of the denial of his imminently reasonable motion for bill of particulars.

V. SEVERANCE OF CONSPIRACY FROM FIREARM POSSESSION COUNT

Defendant had a need to testify on the first count of the indictment alleging conspiracy to distribute methamphetamine. This count carried the heaviest penalties as compared to the count two gun charge. Had severance been ordered, he could have testified, refuted, and denied significant amounts of the evidence presented on count one with the possibility that he could have been acquitted entirely or found to have distributed much less than he was found by the jury or

the judge at his sentencing. Without a severance, however, testimony would have been introduced as to the possession of firearm under count two along with the probability of introduction of his prior conviction offsetting any advantage of testifying to face the prejudice of the gun charge. The government argues that even with a severance, the prior conviction would have been admissible to impeach his testimony when he testified. Only the fact of having been convicted of a felony would have been admissible but nothing about the possession of the gun charge because such testimony would have been irrelevant not being on trial for that offense and there was nothing in the indictment alleging that the alleged possession of the gun was related to any drug activity as required by *United States v. Chavis*, 296 F3d 450, 458 (6th Cir. 2002). Counts one and two should have been severed and defendant was denied of a fair trial by the denial.

VI. SEVERANCE OF THE COUNT THREE OBSTRUCTION CHARGE

The obstruction charge in count three was the last count of the indictment that was added by amendment on July 26, 2019, to count one charging conspiracy to distribute and count two charging possession of firearm by a felon. Obstruction is not of the same or similar character as conspiracy or possession nor is it based on the same act or transaction as either. Neither does the obstruction constitute

parts of a common scheme or plan. The two letters on which the obstruction is based have no relationship to the conspiracy or possession of a firearm and other evidence of conspiracy or possession of a firearm is entirely separate from the obstruction charge. The prejudice to defendant was obvious if no severance was ordered. Why would he write the letters if he did not conspire or possess as charged. He could not present separate defenses to each count. His decision was to testify to all or none of the counts. Moreover, since the court denied severance on the government's argument that obstruction constituted common parts of a common scheme or plan, the count of obstruction is duplicitous being subsumed within counts one and two and should be vacated. *See United States v. Manton*, 107 F2d 834 (2nd Cir. 1938).

VII. CONSTITUTIONALITY OF 18 U.S.C. § 1503

First, the phrase "threatening letter" and "due administration of justice" are vague, overbroad, and subject to about anything any person construes them to be. No guidance to the public, description of the nature of the offense, or guidance to the courts is given. The statute is unconstitutional under the case law cited in defendant's opening brief. Second, inmates enjoy the right to free speech and association in compliance with the guidelines of the institution where being held, especially where the people participating in free speech activities are

acquaintances, relatives, and other friends such as in the present case. Third, count three of the indictment in this case alleges Milk wrote and caused to be delivered letters to a witness to discourage and alter his testimony. This count is facially invalid and neglects to state an crime because 18 U.S.C. § 1503 requires allegations of threat or force or any threatening letter or communication. No such allegation is made in count three. An allegation of letters to discourage and alter is not a threatening letter. Lastly, the government argues that defendant does not show how the district court erred. Obviously failing to dismiss a count based on an unconstitutional statute that does not properly state an offense is prejudicial to the defendant.

VIII. SEIZURE OF ATTORNEY CLIENT MATERIALS AND THE USE OF SUCH MATERIALS CONTRARY TO COURT ORDER SHOULD HAVE RESULTED IN THE DISMISSAL OF THE ACTION OR REMAND FOR A NEW TRIAL.

Defendant Milk was arrested on August 17, 2016, and went to trial on June 28, 2021, all the time being held in custody and all the while working on his case, writing back and forth to his attorney, determining witnesses in the case, analyzing the government's case, drafting direct and cross examination questions, and all other things that are done to defend a criminal case. On August 30, 2019, FBI agents went to his cell at the Pennington County Jail and seized hundreds of pages

of written documents, everything in his cell for the purpose of securing evidence of tampering. This seizure was unnecessary because the government had direct evidence from the witnesses who allegedly had been tampered with. The government at 35 of its brief admits as much ("The obstruction count had no relation to the items seized from the jail cell."). At the time of the seizure, defendant had an attorney, was working with his attorney on the defense of his case, and agents had to know that seized papers consisted of attorney-client or work product materials. Seizure of materials are not permitted if they are attorney-client or work product imbued. *Maine v. Moulton*, 474 U.S. 159 (1985); *Lanza v. New York*, 370 U.S. 139 (1962). Prejudice has been shown under the four factor test set out in appellant's brief at 32. The intrusion was intentional, the attorney client, work product materials were obtained directly from the intrusion, details of the defendant's pretrial preparation and defense strategy was obtained, and have been used to the detriment of the defendant. In fact, the lower court granted the motion to suppress the materials that defendant filed holding that certain items seized were attorney client protected. A review of those items suppressed, Bates 002895-002905, R. Doc. 251-252, Add 011-021, shows the attorney client and work product nature of the suppressed materials. Instead of giving the government the opportunity to show prior to the use of those materials that the

government had independent knowledge of the materials suppressed, the lower court should have dismissed the entire case against defendant because the materials seized dealt with evidence as to all three counts of the indictment, not just the obstruction charge.

As part of the lower court's suppression of certain materials that the court found to be attorney client imbued, the government was required to make a showing that it had independent knowledge outside the materials seized before any reference or evidence could be utilized at trial. This was an obligation that it had, but it completely ignored throughout the trial. Not once did the government make a single showing of their independent knowledge of any the materials suppressed by the lower court. Appellant's brief at 36-37. This was the government's obligation and burden, not any obligation of either the court or the defense.

IX. INSUFFICIENCY OF EVIDENCE TO SUSTAIN A CONVICTION FOR ANY COUNT OF THE INDICTMENT

Appellant Milk has throughly analyzed at 38 to 50 of his opening brief the witnesses, their testimony, and physical evidence presented at trial upon which the government maintains the convictions of all three counts of the indictment and will not be repeated. Milk here in reply will address the position of the government as set forth in their responsive brief at 36-40.

Count one of the indictment charged a conspiracy to distribute methamphetamine. The conviction on this charge must be reversed based on the reasons delineated with respect to each witness. Milk was never found to be in possession of any methamphetamine, never was shown to have used methamphetamine, none of his bodily fluids were every found to contain methamphetamine, there was no objective evidence such as a controlled buy, wire, video, or other electronic recording showing him selling methamphetamine or acting in any conspiratorial role, no surveillance, phone admissions, or wire taps showed him buying, selling, or conspiring to deal methamphetamine, nor was he ever found to have large sums of money, high priced cars, expensive jewelry, fancy clothes, or the like, characteristics of persons involved in big time drug sales. When the background of those who were called to testify by the government, including having felony backgrounds, drug convictions, suffering from addiction, being admitted drug dealers, having insufficient recall, were serving prison sentences, or had been given deals by the government to testify is considered, there is no testimony that can sustain any conviction of defendant Milk for conspiring to distribute methamphetamine.

There was insufficient evidence to support a conviction of possession of a firearm by Milk. *United States v. Flenoid*, 718 F2d 867, 868 (8th Cir. 1983);

United States v. Evans, 950 F2d 187, 192 (5th Cir. 1991). When the vehicle was stopped on August 17, 2016, Milk was one of four people in the vehicle. The vehicle was borrowed. Milk was in the rear passenger seat of the vehicle. The firearm at issue was found in a red bag along with a number of other female items, in the front passenger seat of the car occupied by a female. The gun was not found in possession or within reaching distance of Milk. No one in the vehicle was called to testify and there was no evidence from any occupant that the gun belonged to Milk. Milk's fingerprints were not found on the gun nor any other evidence showed the gun had been handled or possessed by Milk. The bag carried by Milk in the Walmart video was never shown by testimony or other evidence to have been the same bag as found in the vehicle. There was no evidence that Milk had knowledge or control over the firearm. The testimony that Milk was seen with firearms on other occasions, of doubtful truth, is insufficient to establish that he had possession of a gun on August 17, 2016, weeks or months before or after. *United States v. Grubbs*, 506 F3d 434 (6th Cir. 2007). Mere presence on the scene plus association with illegal possessors is not enough to establish constructive possession. *United States v. Birmley*, 529 F2d 103, 107 (6th Cir. 1976). This conviction must be reversed.

X. FINDINGS BY THE SENTENCING COURT WERE WITHOUT SUPPORT IN THE EVIDENCE AND THE CASE SHOULD BE REMANDED FOR SENTENCING

The government essentially argues that the testimony of each of its fact witnesses who testified as to any quantities should be believed and determined to be credible. Defendant has established that each of the witnesses upon which the government relies to establish quantities lack any credibility or reliability. The government realizes that the quantity actually recovered from defendant was 156 grams, but then argues that it is allowed to approximate to 23 kilograms, an incredulous and unsubstantiated position given the sparse amount of methamphetamine physically recovered, the lack of any substantiated weights other than guesswork, and the lack of credibility and reliability of the witnesses who speculated as to quantities. In defendant's opening brief at 55, it is shown and argued that 6,072.12 grams is the amount that witnesses testified were either purchased directly from defendant or of which he was observed to be in physical possession, a far cry from 23 kilograms. An approximation of quantities has to be based on actual amounts not guesses.

Evidence regarding quantities in a drug case must be reliable and corroborated. *United States v. Kearby*, 943 F3d 969 (5th Cir. 2019); *United States v. Pacheco*, 884 F3d 1031 (10th Cir. 2018) (credibility required). Sufficient indicia

of reliability must be established. *United States v. Sosa*, 2009 WL 1028040 (N.J., 2009). Any estimates of drug quantities need not be greater than necessary to meet the goals of sentencing. *United States v. Atteberry*, 775 F3d 1085 (8th Cir. 2015), and should be based on a sensible view of the record. *United States v. Ackies*, 918 F3d 1090 (1st Cir. 2019). The sentencing court must, if relying on the presentence court as to quantities, find that its quantities are reliable or make a finding on what evidence it did find reliable. *United States v. Garrett*, 757 F3d 560 (7th Cir. 2014). Vague, non-specific, and speculative evidence on times and quantities cannot be utilized in sentencing a defendant. *United States v. Navarrette-Aguilar*, 813 F3d 785 (9th Cir. 2015). Determination of quantity by the court lacked sufficient indicia of reliability where no weights, volumes, or purity results were available to draw any conclusions. *United States v. Chase*, 499 F3d 1061 (9th Cir. 2007). Evidence was insufficient to show quantities because defendant did not have the ability to raise the amount of money for drugs of the quantity alleged. *United States v. Maisonet*, 493 F.Supp.2d 255 (D.P.R. 2007). *United States v. Caldwell*, 589 F3d 1323 (10th Cir. 2009), found the finding of drug quantity to be clearly erroneous. And this court has rejected determinations of quantities put forth by witnesses whose credibility was seriously undermined at trial. *United States v. Simmons*, 964 F3d 763 (8th Cir. 1992).

Defendant's case should be remanded for resentencing on the basis of evidence other than guesswork and approximations based on those guesses.

CONCLUSION

For the above reasons the judgment of conviction should be reversed or at the very least the case be remanded for resentencing.

Dated September 6, 2022.

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CERTIFICATE OF SERVICE

I hereby certify on September 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that a copy of the same was served upon AUSA Kathryn Rich by electronic transmission via CM/ECF.

/S/ Terry L. Pechota
Terry L. Pechota

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the page limitations of F.R.A.P. 32(a)(7)(b)(ii) and the brief contains 4,417 words of text and is printed in proportional typeface of 14 points.

Dated September 6, 2022.

/S/ Terry L. Pechota
Terry L. Pechota