IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO. _____

ELI ERICKSON,

PETITIONER,

-vs.-

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

APPENDIX

Appendix A – Superseding Indictment

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELI ERICKSON, a/k/a Black, Defendant.	CR 18-30148 REDACTED SUPERSEDING INDICTMENT CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE, POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME, POSSESSION OF AN UNREGISTERED FIREARM, POSSESSION OF A FIREARM WITH AN OBLITERATED SERIAL NUMBER, and POSSESSION OF A FIREARM BY A PROHIBITED PERSON 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A), 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(i), 921(a)(6), 922(g)(3), 922(d), 924(d), 26 U.S.C. §§ 5861(d), 5861(h), 5845(a)(2), 5871, 21 U.S.C. § 853, and 28 U.S.C. § 2461(c)

The Grand Jury charges:

COUNT I

Beginning at a time unknown to the Grand Jury but no later than on or about the 1st day of January, 2016, and continuing to on or about the 6th day of September, 2018, in the District of South Dakota and elsewhere, Eli Erickson, a/k/a Black, knowingly and intentionally, combined, conspired, confederated, and agreed with persons known and unknown to the Grand Jury, to knowingly and intentionally distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of

methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A).

COUNT II

On or about the 22nd day of October, 2016, in the District of South Dakota, Eli Erickson, a/k/a Black, knowingly possessed firearms, to wit:

a. a Stevens, model 320 Security Ghost Ring Pistol Grip, 12 gauge shotgun, with an obliterated serial number;

b. an O.F. Mossberg & Sons Incorporated, model 835 Ulti-Mag Wild Turkey Federation Limited Edition, 12 gauge shotgun, with serial number UM277335;

c. an Amadeo Rossi Sociedade Anomina (S.A.), model R92, .357 Magnum caliber rifle, with serial number 51T205030;

d. a Remington Arms Company Incorporated, model 1100, 12 gauge shotgun, with serial number L026014V;

e. an Izehevsky Mechanichesky Zavod, Baikal brand name, model MP18, 20 gauge shotgun, with serial number 11038096B, which has a barrel length less than eighteen inches; and

f. an O.F. Mossberg & Sons Incorporated, model 500 ATP, 12 gauge shotgun, with serial number H988253,

during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, Conspiracy to Distribute a Controlled Substance, and he possessed the firearms in furtherance of the offense in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(i), 924(c)(1)(B)(i), 921(a)(6), and 924(d).

COUNT III

On or about the 22nd day of October, 2016, in the District of South Dakota, Eli Erickson, a/k/a Black, knowingly possessed a firearm, to wit: an Izehevsky Mechanichesky Zavod, Baikal brand name, model MP18, 20 gauge shotgun, with serial number 11038096B, which has a barrel length less than eighteen inches, not registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. §§ 5861(d), 5845(a)(2), 5841, 921(a)(6), and 5871.

COUNT IV

On or about the 22nd day of October, 2016, in the District of South Dakota, Eli Erickson, a/k/a Black, knowingly possessed a firearm, to wit: a Stevens, model 320 Security Ghost Ring Pistol Grip, 12 gauge shotgun, which had the serial number and other identification required by chapter 53 of Title 26 obliterated, in violation of 26 U.S.C. §§ 5842, 5861(h), 5845, and 5871.

COUNT V

On or about the 22nd day of October, 2016, in the District of South Dakota, Eli Erickson, a/k/a Black, then knowingly being an unlawful user of and addicted to a controlled substance as defined in 21 U.S.C. § 802, knowingly possessed firearms, to wit:

a. a Stevens, model 320 Security Ghost Ring Pistol Grip, 12 gauge shotgun, with an obliterated serial number;

b. an O.F. Mossberg & Sons Incorporated, model 835 Ulti-Mag Wild Turkey Federation Limited Edition, 12 gauge shotgun, with serial number UM277335;

c. an Amadeo Rossi Sociedade Anomina (S.A.), model R92, .357 Magnum caliber rifle, with serial number 51T205030;

d. a Remington Arms Company Incorporated, model 1100, 12 gauge shotgun, with serial number L026014V;

e. an Izehevsky Mechanichesky Zavod, Baikal brand name, model MP18, 20 gauge shotgun, with serial number 11038096B; and

f. an O.F. Mossberg & Sons Incorporated, model 500 ATP, 12 gauge shotgun, with serial number H988253,

which had been shipped and transported in interstate commerce and foreign commerce, in violation of 18 U.S.C. §§ 922(g)(3), 924(a)(2), and 924(d).

COUNT VI

On or about the 3rd day of June, 2018, in the District of South Dakota, Eli Erickson, a/k/a Black, then knowingly being an unlawful user of and addicted to a controlled substance as defined in 21 U.S.C. § 802, knowingly possessed a firearm, to wit: an Armi Jager, model AP-74, .22 caliber rifle, with serial number 118328, which had been shipped and transported in interstate commerce and foreign commerce, in violation of 18 U.S.C. §§ 922(g)(3), 924(a)(2), and 924(d).

COUNT VII

On or about the 6th day of September, 2018, in the District of South Dakota, Eli Erickson, a/k/a Black, then knowingly being an unlawful user of and addicted to a controlled substance as defined in 21 U.S.C. § 802, knowingly possessed a firearm, to wit: a Beemiller Incorporated, Hi-Point brand name,

model C9, 9x19mm Luger caliber pistol, with serial number P127339, which had been shipped and transported in interstate commerce and foreign commerce, in violation of 18 U.S.C. §§ 922(g)(3), 924(a)(2), and 924(d).

ASSET FORFEITURE ALLEGATION I

1. The allegations contained in Counts I, II, V, VI, and VII of this Superseding Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).

2. Upon conviction of the offenses in violation of 18 U.S.C. §§ 924(c)(1)(A), 922(g)(3), and 924(a)(2) set forth in this Indictment, Eli Erickson, a/k/a Black, shall forfeit to the United States, pursuant to 18 U.S.C. § 924(d), and 28 U.S.C. § 2461(c), any firearm or ammunition involved in the commission of the offense, including, but not limited to:

a. a Stevens, model 320 Security Ghost Ring Pistol Grip, 12 gauge shotgun, with an obliterated serial number;

b. an O.F. Mossberg & Sons Incorporated, model 835 Ulti-Mag Wild Turkey Federation Limited Edition, 12 gauge shotgun, with serial number UM277335;

c. an Amadeo Rossi Sociedade Anomina (S.A.), model R92, .357 Magnum caliber rifle, with serial number 51T205030;

d. a Remington Arms Company Incorporated, model 1100, 12 gauge shotgun, with serial number L026014V;

e. an Izehevsky Mechanichesky Zavod, Baikal brand name, model MP18, 20 gauge shotgun, with serial number 11038096B;

f. an O.F. Mossberg & Sons Incorporated, model 500 ATP, 12 gauge shotgun, with serial number H988253;

g. an Armi Jager, model AP-74, .22 caliber rifle, with serial number 118328;

h. a Beemiller Incorporated, Hi-Point brand name, model C9, 9x19mm Luger caliber pistol, with serial number P127339.

3. If any of the property described above, as a result of any act or omission of the Defendant:

a. cannot be located upon the exercise of due diligence;
b. has been transferred or sold to, or deposited with a third party;
c. has been placed beyond the jurisdiction of the court;
d. has been substantially diminished in value; or
e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, § 853(p).

ASSET FORFEITURE ALLEGATION II

1. The allegations contained in Count I of this Superseding Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to 21 U.S.C. § 853.

2. Pursuant to 21 U.S.C. § 853, upon conviction of an offense in violation of 21 U.S.C. § 841, Eli Erickson, a/k/a Black, shall forfeit to the United States of America any property constituting, or derived from, any proceeds obtained, directly or indirectly, as the result of such offense and any property used, or intended to be used, in any manner or part, to commit, or to facilitate

the commission of, the offense. The property to be forfeited includes, but is not limited to the following:

a. $327 in United States currency seized from Eli Erickson on or about September 6, 2018.

3. If any of the property described above, as a result of any act or omission of the Defendant:

a. cannot be located upon the exercise of due diligence;
b. has been transferred or sold to, or deposited with a third party;
c. has been placed beyond the jurisdiction of the court;
d. has been substantially diminished in value; or
e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p).

A TRUE BILL:

NAME REDACTED

Foreperson

RONALD A. PARSONS, JR.
United States Attorney

By: _____

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELI ERICKSON, a/k/a Black, Defendant.	3:18-CR-30148-RAL OPINION AND ORDER DENYING MOTION FOR ACQUITTAL OR NEW TRIAL

Eli Erickson was indicted for conspiracy to distribute methamphetamine and on six additional counts involving firearms offenses. Docs. 1, 57. This Court conducted a jury trial between November 5 and November 7, 2019. The jury returned a verdict finding Erickson guilty of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine. Doc. 108. The jury found Erickson guilty of some firearms offenses and not guilty on other firearms offenses. Id.

Erickson then filed a motion for acquittal or in the alternative for new trial. Doc. 118. The government opposes the motion. Doc. 122. Erickson makes five arguments to claim entitlement to acquittal or new trial: 1) a violation of his speedy trial rights; 2) an absence of a jury of his peers, asserting underrepresentation of Native American jurors; 3) alleged newly discovered evidence; 4) error in allowing a witness allegedly under the influence of drugs to testify; and 5) a verdict contrary to the great weight of evidence, particularly focused on the credibility of Witness C and

the alleged absence of sufficient proof of an agreement or common purpose to establish a conspiracy.

Because of the nature of Erickson's challenge to the method of jury selection in the District of South Dakota, this Court ordered the Clerk of Court to file in this case the District of South Dakota's approved jury plan and information concerning the racial makeup of the panel of jurors reporting for Erickson's jury trial. Doc. 123. The Clerk of Court did so through the filing of an affidavit and attachments. Doc. 124. Erickson has filed nothing further to argue any inadequacy in the jury plan. Because one of Erickson's arguments raised a potential Brady issue in asserting newly discovered evidence, this Court ordered that the government submit for in camera review certain audio recordings and written reports of those interviews. Doc. 125. This Court now has conducted its in camera review of that material. For the reasons explained below, this Court denies Erickson's motion for acquittal or in the alternative new trial.

I. Summary of Facts Relevant to Issues Raised by Erickson's Post-trial Motion

On November 14, 2018, Erickson was indicted as the lone defendant in a seven-count indictment. Doc. 1. Count 1 of the indictment alleged conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine. Count 2 of the indictment alleged that Erickson had possessed six different firearms in relation to a drug trafficking crime. Count 3 alleged that Erickson had illegally possessed a short-barreled shotgun. Count 4 alleged that Erickson had possessed a shotgun with an obliterated serial number. Count 5 alleged that Erickson had possessed six different firearms at a time when he was an unlawful user of and addicted to a controlled substance. Counts 6 and 7 alleged possession on particular dates of a rifle and a pistol respectively at a time when Erickson was an unlawful user of and addicted to a controlled substance.

Criminal Justice Act (CJA) panel attorney Terra Fisher was Erickson's original court-appointed attorney. Doc. 10. Consistent with the Speedy Trial Act, this Court entered an early Scheduling and Case Management Order setting a jury trial for January 22, 2019. Doc. 16. In late December of 2018, Erickson sought to have different counsel appointed for him, and Magistrate Judge Mark A. Moreno met with Erickson and attorney Fisher in chambers on January 4, 2019. Magistrate Judge Moreno thereafter denied Erickson's request for substitute counsel. Doc. 26. Fisher, on behalf of Erickson, made a motion to continue the jury trial. Doc. 30. Erickson signed a consent to a continuance indicating that he had been advised of his speedy trial right and consented to postponement of the trial. Doc. 29. This Court granted the motion to continue, resetting the jury trial for April of 2019. Doc. 30. Meanwhile, Erickson's disagreements with Fisher continued, resulting in another motion to withdraw, which Magistrate Judge Moreno granted on January 11, 2019. Docs. 31, 33.

Erickson's next appointed counsel was CJA panel attorney Jeffrey Banks. Understandably, Banks filed a motion for continuance on behalf of Erickson after he had to postpone two meetings with Erickson due to the weather[1] and had not reviewed the discovery with Erickson. Doc. 39. Erickson signed a consent again indicating that he had been advised of his Speedy Trial Act rights. Doc. 38. This Court granted a continuance and set the jury trial for July 23, 2019. Doc. 45.

On June 25, 2019, Banks on behalf of Erickson filed another motion for continuance, indicating that he was still receiving discovery from the government and was requesting funds for a private investigator to assist in locating and interviewing witnesses. Doc. 46. Erickson signed another consent acknowledging that he had been advised of his speedy trial rights and waived the

[1] Attorney Banks offices in Huron, South Dakota, and Erickson was detained pending trial more than an hour's drive from Huron. There were several snow storms in central South Dakota during the first few months of 2019.

period of time of the continuance under the Speedy Trial Act. Doc. 47. By July, Erickson was dissatisfied with Banks, and Magistrate Judge Moreno held a hearing on July 1, 2019, to hear from Erickson and Banks, thereafter denying Erickson's request for new counsel. Docs. 49, 50. This Court granted the continuance requested by Banks and Erickson and set the jury trial for September 24, 2019. Doc. 51.

On September 10, 2019, the government filed a superseding indictment, making somewhat modest changes to the original indictment. Doc. 57. Erickson's disgruntlement with Banks continued, so Magistrate Judge Moreno held another hearing to consider Erickson's ex parte motion for new counsel and denied the motion. Docs. 60, 61. On the heels of the denial of new counsel, Banks filed another motion for continuance indicating that he was still preparing for trial and that the work of the private investigator was ongoing. Doc. 62. Erickson signed a consent to that motion for continuance, similar in content to what had been filed previously as his consents. Doc. 63. This Court granted the motion for continuance setting the trial to begin on November 5, 2019. Doc. 64.

In October, Banks sought to withdraw because his attorney-client relationship with Erickson was "irrevocably broken." Doc. 67. Magistrate Judge Moreno granted the motion to withdraw, Doc. 68, and appointed CJA panel attorney John Rusch, Doc. 71. Rusch was the trial counsel for Erickson during the trial that took place from November 5 through 7, 2019.

This Court summoned jurors consistent with the approved Plan for Random Selection of Grand and Petit Jurors in effect in the District of South Dakota pursuant to the Jury Selection and Service Act of 1968. See Doc. 24 at 5–18. Both the government and Rusch were allowed access to the jury qualification questionnaires for the jurors. See Doc. 78; Doc. 124 at 3–4 (blank Juror Qualification Questionnaire used in the District of South Dakota). Fifty-one qualified jurors

reported for service for Erickson's trial on November 5, 2019. Of that number, nine identified their race as "American Indian/Alaskan Native" on the Juror Qualification Questionnaire. Doc. 124. That is, 17.6% of the pool of qualified jurors for Erickson's trial were of Native American ancestry. Erickson and most of the government's witnesses were of Native American ancestry.

Forty-nine of the summonsed fifty-one prospective jurors were questioned as this Court sought to have 31 jurors passed for cause in order to empanel a jury of thirteen individuals (twelve who deliberate, with one alternate). Of those forty-nine prospective jurors questioned by the Court and counsel, eight of them had identified their race as "American Indian/Alaskan Native." Doc. 124. Thus, 16.3% of those questioned during voir dire were of Native American ancestry. By happenstance of the random draw, of the two people reporting for jury service but not questioned, one was Native American. After both the government and Erickson passed a group of 31 potential jurors for cause, this Court excused those two remaining people who had reported for jury duty.

As this Court recollects, six of the otherwise qualified Native American jurors were excused for cause during voir dire with neither the government nor Erickson objecting. Some of the prospective Native American jurors knew Erickson or potential witnesses, and indeed one of the prospective Native American jurors indicated that she knew what Erickson had done. As Erickson's counsel noted on the record during the trial, this Court was reluctant to excuse Native American jurors for cause and noted the importance of having Native American jurors on the panel. There were only two Native American jurors remaining among the thirty-one that counsel passed for cause prior to peremptory challenges being exercised. The government exercised one peremptory challenge on a Native American and Erickson exercised one peremptory challenge on a Native American.

After this Court read the names of the thirteen jurors selected to hear the evidence and excused all remaining jurors, Erickson's counsel asked to approach. At sidebar, Erickson's counsel made an argument about the absence of Native American jurors and referenced Batson v. Kentucky, 476 U.S. 79 (1986). After noting that a Batson challenge should have been raised prior to excusing all remaining jurors, this Court nonetheless heard from the government on what it proffered as a legitimate nondiscriminatory reason for exercising a peremptory challenge on one Native American juror. After the reason was given, Erickson's counsel chose not to argue pretense, and this Court denied the Batson challenge concluding that the government had a legitimate nondiscriminatory reason to exercise a peremptory challenge on that particular juror. Erickson's counsel, however, made an argument at sidebar akin to what is made in the post-trial motion about a systematic problem of underrepresentation of Native Americans on juries in the District of South Dakota. This Court proceeded with the jury trial.

Eight different witnesses testified about Erickson's involvement with methamphetamine on the Rosebud Indian Reservation. The first such witness whom the Government called was Witness C,[2] who is serving a 25-year sentence for conspiracy to distribute methamphetamine. Witness C said that Erickson was like a brother to her and was solemn and emotional during her testimony. Witness C testified that she obtained large quantities of methamphetamine in Lexington and Kearney, Nebraska, and elsewhere. Witness C was living in Nebraska and dating a man with connections through which he purchased many pounds of methamphetamine, which Witness C helped distribute. Witness C, who was from Rosebud, delivered methamphetamine to Erickson on the Rosebud Indian Reservation beginning in 2015 and continuing until she was

[2] This Court filed a sealed opinion and order using the witnesses actual names, but in this unsealed opinion and order seeks to protect witnesses who cooperated with the government by using pseudonyms.

imprisoned in late 2015. On the first such occasion, Witness C brought methamphetamine to Erickson's home in South Antelope and sold three ounces (approximately 85 grams) of methamphetamine from Erickson's home. Witness C testified that she took approximately 20 trips from Nebraska to sell methamphetamine on the Rosebud Indian Reservation. After her first trip, she typically brought 1 to 3 pounds of methamphetamine to South Dakota on each trip, and the largest quantity she brought at any one time was between 8 to 12 pounds of methamphetamine. She typically split half of what she brought to South Dakota with Erickson, selling the rest herself sometimes from Sunrise Apartments in Mission and sometimes in Rapid City. Using Witness C's most conservative estimate of 1 pound per trip on 20 trips, split evenly with Erickson, the drug quantity attributable to Erickson based on Witness C's testimony is at least 4535.9 grams (10 pounds x 453.59 grams/pound). Witness C typically fronted methamphetamine to Erickson, and Erickson gave her what he earned from the sales, sometimes about $3,000 per pound. Witness C saw Erickson distribute methamphetamine to at least three other individuals. Witness C brought Erickson guns and personally gave him one gun. Witness C testified that Erickson always carried a gun for protection. Witness C saw Erickson smoke methamphetamine, but knew Erickson to use marijuana more frequently than methamphetamine.

Witness R testified that he was a friend of Erickson's entire family and bought from and sold methamphetamine to Erickson a couple of times in the 2014 to 2015 time period. Witness R recalled buying two to three ounces (56.7 to 85 grams) of methamphetamine from Erickson over the years and described Erickson as a "small time guy." The largest quantity of methamphetamine Witness R saw in Erickson's possession at any one time was two ounces. Witness R saw Erickson distribute methamphetamine to others at times and used methamphetamine with Erickson occasionally. Witness R saw firearms in and around Erickson's home, but did not know whether

they belonged to Erickson or to Erickson's brother or father. Witness R saw Erickson with a shotgun once. Witness R is serving a 120-month sentence for conspiracy to distribute methamphetamine and received his methamphetamine primarily from Denver.

Witness MB, who is serving a 120-month sentence for conspiracy to distribute methamphetamine, testified that Erickson bought methamphetamine from him in November and December of 2017. Erickson came multiple times in a week, buying half an ounce to one ounce on each occasion. Witness MB estimated that Erickson bought a total of approximately 10 ounces (283 grams) of methamphetamine, paying $1,000 to $1,100 per ounce. On one occasion at Erickson's home, Witness MB saw two ounces of methamphetamine in a bag on a counter and smoked methamphetamine with Erickson in his home. Witness MB saw Erickson with a shotgun in November of 2017, when Erickson tried to trade the shotgun for methamphetamine.

Witness TE, who is serving a 30-month sentence, dealt methamphetamine for Witness MB. Witness TE knows Erickson's "baby momma" Jaylen LaPointe. Witness TE sold 2 grams of methamphetamine for $175 to LaPointe when Erickson was present, but that was Witness TE's first time meeting Erickson.

Witness AB testified that she bought methamphetamine from Erickson in 2017. Witness AB twice purchased .5 grams (a 50-bag), for a total of one gram from Erickson. Witness AB bought those "50-bags" from a window on the side of Erickson's home. Witness AB saw Erickson in the bedroom smoking what appeared to be methamphetamine out of a lightbulb.

Witness W, who is serving a 120-month sentence for conspiracy to distribute methamphetamine, met Erickson at the end of 2014 and bought methamphetamine from Erickson in 2014 or 2015. Witness W purchased a couple of "eight-balls" (3.5 grams of methamphetamine each), paying between $300 and $450 for each eight-ball. To purchase methamphetamine, Witness

W would drive to Erickson's home, and Erickson would come out and deliver the methamphetamine to Witness W's female companion. Witness W used methamphetamine with Erickson at Witness R's home on one occasion. Witness W saw Erickson with a pistol in South Antelope.

Witness G, who had served a federal drug sentence as well, knew Erickson from middle school, but never dealt directly with Erickson on buying or selling methamphetamine. Witness G conspired to distribute methamphetamine with her then-boyfriend RGJ. Witness G made trips with RGJ, including to Erickson's home in South Antelope, to deliver methamphetamine in 2015 and 2016. Witness G would wait in the car while RGJ would deliver methamphetamine into Erickson's home. RGJ would return with over $100 and sometimes more than $1,000, and at other times with weapons, including firearms, after having gone into Erickson's home.

On October 22, 2016, Rosebud Sioux Tribe (RST) law enforcement responded to a call concerning gun fire at Erickson's home in South Antelope. Law enforcement originally suspected that Erickson was the shooter, although he was not. RST law enforcement, together with an FBI special agent, ultimately obtained a search warrant and searched Erickson's home on October 22, 2016. The search yielded pipes used for smoking methamphetamine, torches, ammunition, and two guns found in a bedroom where the first names of Erickson and his girlfriend were written on the wall. The jury convicted Erickson of offenses involving possession of those two firearms. Law enforcement found four additional firearms in an old Ford Mustang car located in the yard just a few feet behind Erickson's residence. Testimony during the trial suggested that those guns may have belonged to Erickson's brother, who had passed away earlier during the month of October of 2016. The jury did not convict Erickson on any offenses involving the firearms in the Mustang.

RST law enforcement on June 3, 2018, executed a tribal search warrant on Erickson's home after a shooting where the shooter told law enforcement about obtaining the gun from Erickson. Law enforcement located a disassembled gun in a bucket in Erickson's home. Erickson was convicted by the jury on counts concerning this disassembled gun, which testimony established to qualify as a firearm under federal law. Law enforcement on June 3, 2018, also seized needles and baggies from Erickson's home that tested positive for methamphetamine residue.

On September 6, 2018, RST law enforcement officer Joshua Marti attempted to contact three individuals walking near Sunrise Apartments in Mission after Officer Marti observed the three behaving suspiciously. Erickson was one of two males who took off running to evade Officer Marti. Erickson jumped a fence and crouched near a pickup truck. As Officer Marti approached, Erickson fled from hiding near the pickup truck and dropped approximately $300 of cash out of his pocket before being apprehended. RST Special Agent Frank Iron Heart later found a handgun in the grill of the pickup truck where Erickson had been hiding.

Erickson testified during his jury trial, stating that he was unaware of any drugs in his home or of any guns in the Mustang located behind his home in October of 2016. Erickson denied that Witness C delivered methamphetamine to him and denied that he had any agreement with Witness C whom he characterized as a very heavy drug user. Erickson stated that he does not own a gun because he gets pulled over by cops a lot. Erickson denied knowing many of the individuals who testified and denied selling methamphetamine or setting up deals to sell methamphetamine. During a surprisingly terse and tepid cross-examination, Erickson testified that he never told Deputy Sheriff Dustin Baxter that he sold methamphetamine or set up deals to sell methamphetamine. Erickson on cross-examination also denied trying to get Witness JS to sell methamphetamine for him.

In the government's rebuttal case, Witness JS testified that Erickson tried to get Witness JS to sell methamphetamine for him in South Antelope in 2015. Witness JS also testified that he bought a couple "20s" ($20 bags of methamphetamine) from Erickson on four or five occasions at Erickson's home between June and August 2015. Witness JS saw seven or eight ounces (198.45 to 226 grams) of methamphetamine on the table in Erickson's home when he was there. At trial, Erickson's counsel insisted that Witness JS appeared to be under the influence as he testified and that the jury should have been instructed to disregard his testimony. This Court did not see anything in Witness JS's demeanor to suggest that he was under the influence. Witness JS had been picked up on a material witness warrant the previous evening and had spent the night before testifying in United States Marshal Service custody. Nevertheless, this Court allowed defense counsel to ask Witness JS in the presence of the jury whether he was willing to undergo a urine test, and Witness JS answered that he was not. This Court declined to instruct the jury to disregard Witness JS's testimony altogether, but in no way impeded defense counsel from arguing that the jury should somehow discount or disregard Witness JS's testimony based on his demeanor or other instructions this Court gave about evaluating witness credibility.

As a part of the government's rebuttal case, to refute Erickson's testimony that he never told Deputy Sheriff Baxter that he sold or set up deals for methamphetamine, Deputy Sheriff Baxter testified that he interviewed Erickson in September of 2005 in Nebraska. Erickson said during the interview that he set up methamphetamine deals and sold methamphetamine to another person. This Court instructed the jury to consider the testimony about Erickson's statements in 2005 (which was well outside the time frames alleged in the superseding indictment) only to assess Erickson's credibility.

The jury found Erickson guilty on Count 1 for conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine. The jury found Erickson guilty on Count 2 with respect to the two firearms located in his bedroom on October 22, 2016—an Amadeo Rossi Sociedade Anomina, model R92, .357 magnum caliber rifle; and a Remington Arms Company Incorporated, model 1100, 12-gauge shotgun—finding them to be used in furtherance of drug trafficking. The jury found Erickson not guilty on Count 2 with respect to four other firearms that had been seized from the Mustang parked behind his home in October of 2016. The jury found Erickson not guilty of Counts 3 and 4, which were counts related to two of the firearms found in the Mustang behind his home. The jury found Erickson guilty on Count 5 for the crime of being a drug user in possession of firearms based on possession of the same two firearms found in his bedroom, though he was found not guilty on Count 5 regarding the four firearms found in the vehicle behind his home in October of 2016. The jury found Erickson guilty on Counts 6 and 7 for drug user in possession of a firearm for a Armi Jager, .22 caliber rifle taken from his home on June 3, 2018, and for a Beemiller Incorporated, Hi-Point brand name Model C9, 9x19mm Luger caliber pistol found in the grill of a pickup where Erickson had hidden from police on September 6, 2018.

Erickson's conviction for conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine indicates that the jury probably believed the testimony of Witness C. If the jury had not believed the testimony of Witness C, the drug quantity of conviction still could have been above 500 grams of methamphetamine based on the remaining witness testimony.

II. Discussion of Grounds Raised in Erickson's Motion

A. Standard for Granting Judgment of Acquittal or New Trial

"A motion for judgment of acquittal should be granted only if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." United States v. Dupont, 672 F.3d 580, 582 (8th Cir. 2012) (quoting United States v. Boesen, 491 F.3d 852, 855 (8th Cir. 2007)). In ruling on a motion for judgment of acquittal, the court must view the evidence "in the light most favorable to the guilty verdict, granting all reasonable inferences that are supported by that evidence." Id. at 582 (quoting United States v. Milk, 447 F.3d 593, 598 (8th Cir. 2006)). Of course, "a jury's credibility determinations are well-nigh unreviewable because the jury is in the best position to assess the credibility of witnesses and resolve inconsistent testimony." United States v. Hodge, 594 F.3d 614, 618 (8th Cir. 2010).

Erickson's post-trial motion does not mention his conviction on the firearms offenses. Rather, he makes some arguments about one witness in particular, Witness C, not being credible and there being no evidence of an agreement or common purpose for there to be a conspiracy. In short, Erickson's arguments for acquittal relate to his conviction on Count 1 involving conspiracy to distribute methamphetamine. "To establish that a defendant conspired to distribute drugs under 21 U.S.C. § 846, the government must prove: (1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the defendant knew of the conspiracy; ... (3) that the defendant intentionally joined in the conspiracy;" and for a conviction here (4) that the conspiracy involved 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine. United States v. Sanchez, 789 F.3d 827, 834 (8th Cir. 2015) (quoting United States v. Slagg, 651 F.3d 832, 840 (8th Cir. 2011)). "An agreement to join a conspiracy need not be explicit but may be inferred from the facts and circumstances of the case." United States v. Green, 835 F.3d 844, 850 (8th Cir. 2016) (quoting Sanchez, 789 F.3d at 834).

The standard for a new trial under Rule 33 of the Federal Rules of Criminal Procedure is different. Rule 33 allows the court to vacate any judgment and grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). When evaluating a motion for a new trial on the basis of insufficient evidence, "the district court is not required to view the evidence in the light most favorable to the verdict; instead, [it] may weigh the evidence and judge witness credibility for itself." United States v. Clayton, 787 F.3d 929, 935 (8th Cir. 2015). However, a "jury's verdict must be allowed to stand unless 'the evidence weighs heavily enough against the verdict [such] that a miscarriage of justice may have occurred.'" Id. (alterations in original) (quoting United States v. Johnson, 474 F.3d 1044, 1051 (8th Cir. 2007)); see United States v. Stacks, 821 F.3d 1038, 1044 (8th Cir. 2016) ("Motions for new trials based on the weight of the evidence are generally disfavored."). The power of the court to grant a new trial should be invoked only in an exceptional case where the evidence preponderates heavily against the verdict. United States v. Starr, 533 F.3d 985, 999 (8th Cir. 2008). "As a general rule, the decision whether to grant or deny a motion for a new trial lies within the discretion of the district court." United States v. McMahan, 744 F.2d 647, 652 (8th Cir. 1984). Such authority, however, "should be exercised sparingly and with caution." United States v. Cole, 537 F.3d 923, 926 (8th Cir. 2008) (citation omitted).

B. Erickson's Arguments in Post-Trial Motion

1. Alleged Speedy Trial Right Violation

Rule 12(b)(3)(A)(iii) of the Federal Rules of Criminal Procedure provides that "a violation of the constitutional right to a speedy trial" must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits. A defendant forfeits a right when he fails "to make the timely assertion of [the] right." United States v. Olano, 507 U.S. 725, 733 (1993).

Erickson's argument is that he believes he never truly consented to any continuances besides the initial continuance. However, as set forth in the facts section, there are consent forms signed by Erickson that accompanied each of the motions for continuance. Erickson's current counsel asserts that he was advised by Erickson that Erickson did not sign certain of the consent forms and avers that the last three signatures of Erickson appear to him to be different than the first two. To this Court's eye, all of the signatures on the consent forms appear to be substantially similar. Erickson has not even bothered to file an affidavit or any evidence that it was not he who signed the consent forms.

Even if somehow Erickson did not sign some of the consent forms, this argument of a violation of the Speedy Trial Act was known to Erickson before the trial. Erickson failed to file any motion invoking the Speedy Trial Act until after he was convicted, and his argument now is untimely under Federal Rule of Criminal Procedure 12(b)(3)(A)(iii). Erickson does not have grounds for acquittal or new trial based on his speedy trial right argument.

2. Alleged "inherent flaw" in Jury Selection Process

Erickson's argument about the alleged "inherent flaw in the jury selection process in South Dakota" is encapsulated in the following paragraph:

> There appears to have developed a system of jury selection in South Dakota which has the effect of excluding Native Americans from the jury pool despite the Court's best efforts at inclusion. First, the undersigned would commend the Court for the efforts and lengths to which the Court attempted to insure that Native American jurors were on the initial jury pool and were not struck for cause. The problem however may be inadvertently built into the South Dakota jury selection system in such a way that larger drug cases will always exclude Native American jurors.

Doc. 118 at 6 (defense argument regarding "inherent flaw in jury selection process").

"[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 527 (1975). That is, a jury must

"be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. However, neither statute nor the Sixth Amendment requires precise proportional representation of minority groups on jury panels. Swain v. Alabama, 380 U.S. 202, 208–09 (1965), overruled on other grounds by Batson, 476 U.S. at 95–96.

To show a prima facie case of a violation of the Sixth Amendment right to a fair jury due to underrepresentation of Native Americans, Erickson must satisfy the three-part test set forth by the Supreme Court of the United States in Duren v. Missouri:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. 357, 364 (1979). Without question and for reasons apparent from the attached Timeline of Native American History and Indian Law,[3] Native Americans are a "distinctive" group in the community under the first element of the Duren test. United States v. Yazzie, 660 F.2d 422, 426 (10th Cir. 1981).

[3] The Undersigned wrote the Timeline of Native American History and Indian Law when working on the Tribal Issues Advisory Group to the United States Sentencing Commission. The Timeline was submitted with the final report of the Tribal Issues Advisory Group with the goal of providing the Sentencing Commission with historical context for the report. Since that time, a couple of federal government agencies and Indian law professors have asked (and been granted permission) to use the report for teaching purposes. The Timeline has not otherwise been published previously; the undersigned has no interest in copyright protection and simply hopes that the Timeline—though necessarily oversimplifying Native American History and Indian Law—is of some use in understanding the context for this decision and perhaps otherwise as a pedagogical tool.

The second element of the Duren test requires that the "representation of [the] group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." The Supreme Court of the United States in Swain v. Alabama, determined that an underrepresentation of as much as ten percent as calculated by the "absolute disparity concept" does not constitute prima facie evidence of underrepresentation. 380 U.S. at 208–09. The United States Court of Appeals for the Eighth Circuit has used the "absolute disparity calculation" in evaluating whether there is prima facie evidence of underrepresentation of Native Americans on District of South Dakota petit juries. United States v. Clifford, 640 F.2d 150, 154–56 (8th Cir. 1981). "Under the absolute disparity calculation, the percentage of Indians on the list of persons eligible for petit jury service is subtracted from the percentage of Indians in the general population, resulting in a figure constituting the absolute difference." Id. at 155. At the time of the Clifford decision, Native Americans living within the Central Division constituted 15.6% of the total population and 8.4% of the jurors sitting on petit juries, so the absolute disparity calculation was 7.2% (15.6% minus 8.4% equals 7.2%). Id. at 154–55. The Eighth Circuit in Clifford rejected the appellant's argument for "comparative disparity" statistical calculation and applied the "absolute disparity" calculation instead. Id. at 155. The Eighth Circuit in Clifford held the 7.2% absolute disparity not to establish prima facie evidence of underrepresentation of Native Americans on petit juries in the Central Division of the District of South Dakota. Id.

As set forth in the Affidavit of Matthew Thelen Clerk of Court, Doc. 124, the percentage of Native Americans according to 2015 Census Bureau population data is 25% in the Central Division of the District of South Dakota, and 7.1%. in the state of South Dakota as a whole. Of the fifty-one jurors reporting for jury service for Erickson's trial on November 5, 2019, nine of those individuals (17.6%) identified themselves as "American Indian/Alaska Native" on their jury

questionnaires. Doc. 124. Thus, the absolute disparity calculation using the jurors reporting for jury service for Erickson's trial is 7.4% (calculated as 25% minus 17.6%). This is nearly an identical absolute disparity percentage (7.4% versus 7.2%) that the Eighth Circuit in Clifford found "does not represent substantial underrepresentation."[4] Clifford, 640 F.2d at 155.

The final element for a prima facie case under the Duren test requires a showing that any underrepresentation is due to systematic exclusion of the distinctive group in the jury selection process. Duren, 439 U.S. at 364. The District of South Dakota, as it did back in 1981 at the time Clifford was decided, uses voter registration lists from which to randomly draw jurors. The Eighth Circuit in Clifford noted that "[t]he use of voter registration lists in almost every instance provides each qualified citizen an equal opportunity to be selected in random drawing to serve on a petit jury." Clifford, 640 F.2d at 156. The Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–69, requires jurors to be randomly selected from voter registration lists or the lists of actual voters of the political subdivisions within the district and is intended to eliminate discriminatory and arbitrary selection practices to ensure a representative cross section of the community. 28 U.S.C. § 1863(b)(2). The District of South Dakota has ensured a random selection of jurors through its formal Jury Plan. The Jury Plan filed by the District of South Dakota has been approved at the

[4] Erickson's brief cites to a research report by Professor Richard Braunstein, who relied on a Rapid City attorney named Stephen Demik to conclude that Native Americans comprised 24% of the Western Division's adult population but only 6% of the Western Division's pool in 2013. This information apparently was included in a Rapid City Journal article on July 7, 2019, to which Erickson cites. There are two major problems with Erickson's argument. First, Erickson's trial was in the Central Division of the District of South Dakota and not in the Western Division. Second, the information Professor Braunstein reportedly drew from Attorney Demik is flat wrong; the Western Division, as set forth in the Affidavit of Matthew Thelen Clerk of Court, has 11% (and not 24%) of its population being of Native American ancestry. If Attorney Demik was correct that 6% of the Western Division's jury pool in 2013 was Native American, the underrepresentation of Native Americans in the Western Division jury pool was 5% under the "absolute disparity" measure.

Circuit level. Even if Erickson had made a prima facie showing of underrepresentation of Native Americans in his jury pool or any other, Erickson has not shown that any alleged underrepresentation is due to systematic exclusion of Native Americans in the jury selection process in the District of South Dakota.

This Court is not oblivious to the unique challenges to achieving adequate representation of Native Americans on jury panels in the Central Division of the District of South Dakota. First, there is the combined issues of poverty and distance from many reservation communities to the Central Division courthouse in Pierre. When the undersigned wrote the attached Timeline of Native American History to give the Sentencing Commission the context for the Tribal Issues Advisory Group's report, five of the poorest eleven counties in the United States were Indian country counties in South Dakota. Four of those counties—Buffalo, Dewey, Ziebach, and Todd counties[5]—are in the Central Division of South Dakota and comprise portions of the Crow Creek Indian Reservation, Cheyenne River Indian Reservation, and Rosebud Indian Reservation. Three of the four reservations located in the Central Division of the District of South Dakota are the remnants of the Great Sioux Indian reservation lands deemed unsuitable to be carved up for homesteads under the Dawes Act; the land tends to be of limited agricultural use and remote from population centers. Impoverished people regardless of their race often struggle with reliable transportation, and many reservation communities are distant from Pierre. For instance, the most populous towns on the Cheyenne River Indian Reservation—Eagle Butte, Dupree, and Timber Lake—are 104, 107, and 134 miles northwest of Pierre respectively. The five most populous towns on the Rosebud Indian Reservation—White River, Mission, Rosebud, Parmelee, and Saint

[5] The fifth such county is Oglala Lakota (formerly Shannon) County, which comprises the bulk of the Pine Ridge Indian Reservation in the Western Division of the District of South Dakota.

Francis—are 80, 101, 108, 118, and 116 miles southwest of Pierre respectively. There exists no public transportation in rural South Dakota and weather and road conditions during certain months complicate travel. This Court frequently reads responses to jury questionnaires from those who live on reservations about having no transportation or no ability to pay for gas if they have a car. To combat this, this Court, long before Erickson's trial, began advancing the daily jury fee and mileage to those (both Native American and non-Indian) who cannot otherwise make it to Pierre for jury service. Furthermore, before Erickson's trial, the Clerk of Court contracted with River City Transit, a Pierre business, to pick up and transport people from reservation towns to Pierre for jury service when they otherwise lack transit.

This Court also is very aware from reading jury questionnaire responses through the years of what appears to be increasing hostility to the federal government and in turn jury service in central South Dakota, primarily from non-Indian jurors. Some Native Americans in South Dakota likewise express on their responses to jury questionnaires dissatisfaction about the federal government for understandable reasons, some of which are explained in the attached Timeline. In the District of South Dakota, the vast majority of criminal cases involve Native American defendants and witnesses with the indicted behavior having occurred on reservations and often involving Native American victims. The tribes in South Dakota are not subject to Public Law 280, there is no state jurisdiction over "Indians" in "Indian country" in South Dakota, the tribes lack the power to punish anyone for greater than one year (unless certified under the Tribal Law and Order Act which none of the four tribes in the Central Division presently are), and thus felony cases involving Native American defendants or victims in South Dakota's "Indian country" land in federal court. As a consequence, many Native American jurors from Central Division reservations know of people, sometimes family members, who have been defendants or victims in

cases charged in federal court. The outcomes and perceptions about whether justice resulted from those cases can affect responses from prospective Native American jurors on the jury questionnaire and during voir dire. Moreover, because the vast majority of criminal cases in the Central Division involves reservation crime, prospective Native American jurors are more likely to know the defendant, witnesses and victims than non-Indian jurors. This seems to be what Erickson has in mind when arguing about some "inherent flaw" in the jury selection system in the Central Division of the District of South Dakota.

Erickson's argument overlooks that there are four separate reservations in the Central Division. In Erickson's case, jurors from the Rosebud Indian Reservation knew Erickson or witnesses. But that leaves jurors from the Cheyenne River Indian Reservation, Crow Creek Indian Reservation, and Lower Brule Indian Reservation. In fact, despite the vast majority of federal criminal cases in the Central Division arising from reservations, Erickson's all-white jury (after eight Native American jurors were excused for cause or by peremptory challenges) is an anomaly; Central Division petit juries almost always have at least one, not uncommonly two, and occasionally three Native Americans among the twelve who deliberate.

Nevertheless, with most defendants, fact witnesses and victims in Central Division criminal cases being Native American, and with the ideal ratio of Native Americans on petit juries being three of twelve, this Court has contemplated whether there might be a way of revising this Court's jury plan to supplement the jury wheel beyond using the voter registration information. After all, with the weakening of the two-party system in South Dakota over the last two decades and the dominance of a single political party, South Dakota has moved toward purging of voter registration lists of infrequent voters and away from the era when the minority party in South Dakota had organized voter registration drives on reservations. This Court has considered the possibility of

augmenting the list of registered voters with those who have driver's licenses within the state of South Dakota, but has determined that doing so would likely dilute the numbers of Native Americans reporting for jury service. After all, a Native American in South Dakota is not necessarily required to have a South Dakota driver's license to drive on a reservation. State law generally does not apply to Native Americans on reservations in South Dakota because no South Dakota tribe is subject to Public Law 280. Accordingly, augmenting the jury wheel with driver's license lists almost certainly would result in a higher percentage of non-Indians and in turn a lower percentage of Native Americans on District of South Dakota juries. This Court of course cannot violate the randomness requirement of the Jury Selection and Service Act by somehow prioritizing Native Americans on lists or juries. See 28 U.S.C. § 1861. In short, there is no systematic exclusion under Duren, and this Court has done all it reasonably can to promote service by Native Americans on petit juries in the Central Division.

C. Newly Discovered Evidence

Erickson next argues that he should be granted a new trial because evidence concerning two debriefs of Witness C were not disclosed to the defense. Specifically, Erickson believes those debriefs contain information that would contradict Witness C's testimony at trial and would be exculpatory in nature. "Motions for a new trial based on newly discovered evidence are disfavored." United States v. Dogskin, 265 F.3d 682, 685 (8th Cir. 2001). Such motions will typically only be granted if (1) the evidence is in fact newly discovered; (2) there was no lack of diligence by the movant; (3) the new evidence is not merely cumulative or impeaching; (4) it is material to the issues involved; and (5) it would likely produce an acquittal if a new trial was granted. United States v. Castillo, 171 F.3d 1163, 1167 (8th Cir. 1999). "Due diligence requires that a defendant exert some effort to discover the evidence." Id. (citation omitted).

Erickson's motion asserted that while in custody after his trial he learned from a cellmate of additional debriefs of the government's witness Witness C which were not disclosed to defense counsel. The government responded that it provided defense counsel with all of the written reports of Witness C's interviews, but acknowledged that it failed to disclose to Erickson's counsel two of the audio recordings associated with those reports until after trial. This Court therefore ordered the government to file those two audio recordings and their corresponding written reports under seal for in camera review. After the government filed those materials, this Court conducted an in camera review. Based on that review, this Court has determined that Erickson is not entitled to a new trial based on newly discovered evidence.

First, it is unclear whether the audio recordings are truly "newly discovered." The written reports disclosed to defense counsel before trial state the following:

> The below is an interview summary. It is not intended to be a verbatim account and does not memorialize all statements made during the interview. Communications by the parties in the interview room were electronically recorded. The recording captures the actual words spoken.

Doc. 126-1. Based on this information, defense counsel should have known that a recording existed which might not be entirely consistent with the written report. Because defense counsel appeared not to make efforts to seek the audio recording before the trial began, the recordings are hard to consider "newly discovered." Castillo, 171 F.3d at 1167 (finding that due diligence requires a defendant to make some effort to discover the evidence).

Moreover, having conducted its in camera review, this Court finds the audio recordings to be substantially similar to the written summaries provided. The additional information that the audio recordings contain beyond the written summaries is not material to Erickson's defense. In fact, most of the additional references to Erickson in the recordings provide further evidence of his

illegal activities. Nothing Witness C relates in those recordings provides exculpatory information about Erickson's involvement in the conspiracy to distribute methamphetamine, and the written reports provided to Erickson before trial fairly summarize what Witness C said. Because the recordings not previously disclosed to Erickson do not contain exculpatory evidence, nothing in the recordings would likely lead to an acquittal if a new trial were granted. Therefore, Erickson is not entitled to a new trial based on newly discovered evidence. See Castillo, 171 F.3d at 1167.

D. Witness JS Testimony

Witness JS was subpoenaed for trial and did not initially appear. This Court issued a material witness warrant at the government's request, and the United States Marshal Service took Witness JS into custody. Witness JS spent the night in United States Marshal Service custody and then testified the following day. The defense attorney postulated that Witness JS was under the influence at the time of his testimony, but this Court thought otherwise. Typically, "[c]ompetency of the witness is a matter of discretion with the trial judge." United States v. Stout, 599 F.2d 866, 869 (8th Cir. 1979) (per curiam). This Court nevertheless allowed defense counsel to recall Witness JS and ask whether he would be willing to take a urinalysis test that day. Witness JS responded that he would not. The defense attorney did not ask further questions at that point.

It is for the jury of course to determine whether to credit testimony of a witness or not. See United States v. Dabney, 367 F.3d 1040, 1043 (8th Cir. 2004) (explaining the "jury's unique rule in judging the credibility of witnesses"). Witness JS's testimony that he bought small amounts of methamphetamine from Erickson and that Erickson had wanted him to sell methamphetamine contradicted Erickson's testimony, but was consistent with other witnesses' testimony concerning Erickson's methamphetamine-related activities. Furthermore, defense counsel's questioning of Witness JS provided the jury with information regarding the witness's possible recent drug use to

allow the jury to determine his credibility and to adequately weight his testimony. Erickson is not entitled to a new trial simply because Witness JS testified or simply because this Court declined to instruct the jury to disregard Witness JS's testimony.

E. Argument Concerning Verdict Being Against the Great Weight of Evidence

Erickson makes essentially two arguments to justify acquittal or new trial based on the verdict being against the weight of the evidence. Erickson argues that Witness C was not credible and could not be believed by any reasonable jury. Erickson also argues that there was no evidence of an agreement sufficient to establish a conspiracy.

As to the credibility of Witness C, it is for the jury to evaluate credibility, and the defense attorney subjected Witness C to active cross-examination. See United States v. Gaona-Lopez, 408 F.3d 500, 505 (8th Cir. 2005) ("The jury is free to believe the testimony of any witness in its entirety, or to reject that testimony as untrustworthy.") (citation omitted); see also Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of [her] testimony are tested."). The jury observed Witness C's demeanor on both direct and cross examination and had ample opportunity to assess her credibility. The jury's verdict finding the conspiracy to involve 500 grams or more of methamphetamine suggests it credited Witness C's testimony, although the drug weights from the other seven witnesses who testified about Erickson's involvement in methamphetamine distribution separately add up to slightly in excess of 500 grams.

As for the existence of a conspiracy, the testimony, if believed, established that Erickson was involved in methamphetamine distribution with at least eight other individuals. "In a drug conspiracy case ... the government is not required to present direct evidence of an explicit agreement; juries may rely upon circumstantial evidence to discern a tacit agreement or

understanding between the co-conspirators." United States v. Hodge, 594 F.3d 614, 618 (8th Cir. 2010). Once the government proves that a conspiracy existed, "only slight evidence is required to connect a defendant to the conspiracy." United States v. Hayes, 391 F.3d 958, 961 (8th Cir. 2004). While there was no testimony regarding some written agreement, the testimony was sufficient from which the jury could discern the existence of a conspiracy involving Erickson in which the jury could have reasonably foreseen 500 grams or more of methamphetamine to be distributed. Witness C testified that she repeatedly delivered multiple pounds of methamphetamine to the Rosebud Indian Reservation where she would split it with Erickson, he would sell his portion, and then he would pay Witness C for the methamphetamine from his sales. Witness R testified about Erickson buying and selling methamphetamine and saw him possess and distribute amounts of the drug. Witness MB testified that he would repeatedly sell distributable amounts of methamphetamine to Erickson. Others, including Witness TE, Witness AB, Witness W, Witness JS, and Witness G, testified about Erickson's involvement in other purchases and sales of methamphetamine. The testimony of these witnesses provides sufficient circumstantial evidence from which the jury could find a conspiracy to distribute methamphetamine. See United States. v. Conway, 754 F.3d 580, 588 (8th Cir. 2014) ("Evidence of multiple sales of resale quantities of drugs is sufficient in and of itself to make a submissible case of a conspiracy to distribute.") (cleaned up and citation omitted). Erickson makes no argument in his post-trial motion that this Court improperly instructed the jury on what constitutes a conspiracy. The jury reasonably could have believed those who testified about Erickson's involvement in the distribution of methamphetamine. Erickson has not met the standard either for acquittal or for a new trial, and there exists evidence to support the jury's verdict on Count 1.

III. Conclusion

For the reasons contained herein, it is hereby

ORDERED that Erickson's Motion for Acquittal or in the Alternative New Trial, Doc. 118, is denied.

DATED this 28th day of January, 2020.

BY THE COURT:

ROBERTO A. LANGE
CHIEF JUDGE

TIMELINE OF NATIVE AMERICAN HISTORY AND INDIAN LAW

This timeline of Native American history and Indian law is designed as a summary to aid in understanding how the federal government's relationship with American Indians developed. This timeline is a general history, not meant to represent the history of any one of the 567 separate federally recognized Indian tribes. The word "Indian" is used in this outline at times because federal statutes and case law use that word to define a Native American who is a member of a federally recognized tribe. A reading of this history should help in understanding why American Indians can be wary of the federal government and sensitive about changes in federal law and policy being made without tribal consultation.

Roberto A. Lange
Chief Judge
District of South Dakota

I. Native American Prehistory

30,000 BCE – 12,000 BCE
Most tribal origin stories have tribal peoples populating the Americas since the beginning of their existence. The well-known Bering Land Bridge Theory posits that Native American ancestors came from Asia in several waves of migration when an icy land bridge linked modern-day Russia to modern-day Alaska, populating North America and South America before humans anywhere discovered written language. Other theories assert that migration occurred from other parts of the world, possibly earlier than is believed in the Bering Strait Theory.

10,000 BCE – 9,000 BCE
The end of the final Ice Age results in relative isolation of North and South America and its native people from the land mass of Europe, Asia, and Africa. The Americas are rich in native game, but have very few mammals—the Andean llama and alpaca—capable of being domesticated as livestock, while in Europe and Asia sheep, goats, pigs, horses, donkeys, and cows become domesticated. Some Native Americans grow corn, squash, and beans while others subsist on natural vegetation and wild game. The Americas lack the wide variety of small grains in Europe and Asia such as wheat, barley, rice, soybeans, flax, oats, and the like. The Americas are arranged along longitudinal lines with different climates and growing seasons; mountains and deserts within the Americas complicate travel, although some trade and travel occur. By contrast, much of Europe and Asia are oriented on the same latitude allowing for development of intercontinental trade along the Silk Road and otherwise, prompting the spread of innovations in agriculture, writing, culture, and technology, as well as the spread of disease and immunity to disease.

4,000 BCE
Copper culture begins among Native Americans along the Great Lakes earlier than in many cultures in Europe, Asia, Africa, and Australia, and within two centuries after copper is first used in Eurasia.

1000 – 1492 AD

Native Americans have many diverse communities, with separate cultures, language, and societies. Some Native Americans dwell in villages, such as the settlement of Cahokia near present day St. Louis, which will remain the largest population concentration in North America until 1770 when New York City surpasses Cahokia's peak population. Other groups of Native Americans remain in hunter-gatherer settings. Archeology proves that trade occurred among and between Native American groups, that warfare appears to have been very limited, and that life expectancy among Native Americans may have surpassed that of Europeans during the pre-colonial centuries. Tribes govern their members in various way with the Iroquois nations forming a confederacy.

II. Colonial America

1492

Christopher Columbus lands three ships on an island in modern-day Bahamas. Believing that he has reached the East Indies, Columbus calls the Native people "Indios." The "Indians" in reality are perhaps as many as 400 independent nations in North America alone with distinctive cultures, languages, and practices. What Columbus "discovers" in reality is an island off of continents with an estimated 70 to 75 million residents. The population of the Americas in 1492 approximates that of Europe. Other Europeans—most prominently Leif Erikson—previously had journeyed to North America, and there is linguistic and other evidence that a group of Africans sailed to South America previously. Unlike previous journeys, however, Columbus returns, and he and subsequent European explorers claim the lands for their countries and kings, applying Papal Bulls of 1455, 1456, and 1479 to assert rights to the lands and to Christianize Native Americans.

1500 – 1700

In the "Columbian Exchange" between the Americas and Europe, Europe prospers with its population going from approximately 80 million to 200 million in the span of two centuries, in part due to the import and then growing of maize (corn) and potatoes to sustain a growing population. Forty years before 1492, the Ottoman Empire had conquered Constantinople, the last remnants of the East Roman Empire, and controlled much of modern Eastern Europe in the Fifteenth Century; China, likewise, at that time rivaled Europe in technology and culture. The Columbian Exchange allows European nations to surge past China and the Ottoman Empire in power and prosperity as products from the Americas like fur, sugar cane, chocolate, tomatoes, chile, spices, coffee, tobacco, gold and silver fuel European trade and wealth. The Columbian Exchange has the opposite effect on Native Americans. Because of the historical isolation of the Americas, Native Americans are subject to a "virgin soil epidemic" of smallpox, influenza, measles, yellow fever, typhoid, bubonic plague, and pneumonic plague. When combined with European conquests using horses, swords, and firearms unknown previously in the Americas, an estimated 80 to 90 percent of the indigenous population of the Americas, perhaps as many as 60 million, perish.

1600

The French settle along the St. Lawrence Seaway and ally with Algonquin speaking Native Americans to supply furs to satisfy the growing demand for fur products in Europe. The Iroquois Confederacy, which dates as early as the Fourteenth Century, attempts to maintain its independence and supplies furs primarily to the Dutch headquartered at New Amsterdam on

Manhattan Island. Disputes over hunting and trapping territories begin and become increasingly violent with the introduction of European guns and increased demand for furs.

1607
English settlers at Jamestown form the colony of Virginia. The initial settlers, intent on finding gold like the Spanish had brought from its holdings in the New World, randomly dig holes. Unprepared for the first winter, the Jamestown settlers are kept alive by local Native Americans. By 1620, Virginia settlers are at war with local Native Americans.

1614
A group containing Puritans, whom popular culture calls Pilgrims, land near Plymouth in modern Massachusetts, at the suggestion of Squanto, a Native American from the Patuxet Tribe, who had been seized from the area about a decade earlier. Squanto finds his entire village dead from disease. The Puritans settle near the village, tilling the lands already cleared by Squanto's people and assisted by Squanto's guidance on what to grow. A nearby tribe of Indians who previously had traded with Squanto's people begin trading with the Puritans and join them for a multi-day gathering, the precursor to our modern Thanksgiving. By 1636, the Puritans are at war with local Native American tribes.

1640 – 1677
English speaking settlers continually immigrate to the Eastern seaboard, and occasional wars break out with Native Americans over territory. Because of the advantage of firearms and gunpowder, the settlers repeatedly win the periodic wars, expanding the English footprint in what becomes the colonies. By 1670, about fifty years after the initial English settlement in New England, English in the area outnumber Native Americans three-to-one as a result of continuing immigration, wars, and ravages of disease among the Native Americans. By 1690, English outnumber Native Americans in New England by a factor of approximately nine-to-one. Unlike the French and Dutch whose focus in North America is on furs and trade with Native America groups, the English settlements seek to transform the land for agricultural purposes and for permanent settlement of English speaking people. The English import slaves for agricultural labor and expand settlements to the Chesapeake, the Carolinas, and Georgia.

1750
France, through alliances with Algonquin speaking tribes, controls commercial relationships in the Great Lakes area and Ohio River Valley, despite only having approximately 75,000 French settlers in North America. The thirteen colonies meanwhile have grown to approximately 1.5 million English speaking residents. The Iroquois Confederacy in the north and the "Five Civilized Tribes"—Cherokee, Chickasaw, Choctaw, Creek, and Seminole—in the south maintain neutrality between the French and the English, trading with each.

1756 – 1763
A ragtag band of colonial militia unsuccessfully attacks Fort Duquesne, which the French had built at the convergence of three key rivers of the Ohio River Valley to prevent English fur traders from the colonies further invading the French fur empire. George Washington, one of the members of the defeated colonial militia, is captured and later released. England uses the defeat of the militia at Fort Duquesne as a provocation for a larger, somewhat global, war against French holdings,

which is known in American history as the French and Indian War and in world history as the Seven Years War. Most Indian tribes ally with France against expansion of the English colonies, and Indian attacks on westernmost English colonies result. England responds with an "America first" approach to throw resources into conquering French and Indian lands. At the height of the war in North America, the English regular troops outnumber French troops in North America 50,000 to 7,000. Fort Duquesne ultimately is taken by the British and renamed Pittsburgh after its prime minister. The British take Quebec and other French territory, and the French Empire in North America largely collapses.

1763 – 1775

The Treaty of Paris in 1763 ends the Seven Years War. England emerges with France's holdings in what now is Canada, but leaves France the right to the Ohio River Valley in the Midwest and Spain the right to Louisiana, Florida, and certain southern holdings. A war-weary England issues the Proclamation of 1763 prohibiting further settlement of English citizens past the Appalachians in an effort to avoid another war in North America. England, to make up the cost of the Seven Years War, begins imposing unpopular taxes on its American colonists and stops providing military protection for American colonists west of the Appalachians. Many colonists are displeased not only by the new taxes, but also by the restriction on expanding colonial settlements west of the Appalachians into the then-existing Indian country. On December 16, 1774, some Massachusetts colonists dress up as Mohawk Indians to dump tea into the Boston Harbor in a protest against British rule over the colonies.

1776

In the Declaration of Independence, one of the wrongs cited against King George is that he "has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction . . . ." This charge arose primarily out of the colonists' opposition to the Proclamation of 1763 by which the British crown deemed all the lands beyond the Appalachians off limits to settlement by English colonists. In the Revolutionary War, most of those tribes involved in the fighting support the British.

III. Establishment of Federal-Tribal Relationship

1776 – 1781

Benjamin Franklin's prior Albany Plan of Union, likely inspired by the Iroquois Confederacy, becomes the basis of the Articles of Confederation adopted by the thirteen colonies seceding from English rule.

1789

The United States Constitution is adopted. Indians are mentioned twice in the Constitution. Article I, Section 2, in determining representation in the House of Representatives excludes counting "Indians not taxed." Article I, Section 8 grants Congress the authority to regulate commerce "with foreign nations, and among the several states, and with the Indian Tribes." The latter clause becomes known as "the Indian Commerce Clause," a potential source of federal power in Indian affairs.

1789 – 1797

In dealing with what becomes known as the "Indian problem," President George Washington declares a "boundary line" based on his belief that the country is large enough to contain settlers and Indians alike living separately. The Northwest Ordinance of 1789 declares: "The utmost good faith shall always be observed toward Indians; their land and property shall never be taken from them without their consent." The Trade and Intercourse Acts of 1790 and 1793 require non-Indians to obtain a federal license to do business with Indians and prohibit non-Indian settlement in Indian country. These laws go largely unenforced and unobserved, and settlers continue to flood into Indian country.

1794
The United States and Great Britain, in what is called Jay's Treaty, establish a boundary commission to set the international boundary between the United States and the British territory of Canada. The international boundary in many cases divides Tribal nations and Tribal lands between the United States and Canada.

1803
Through the Louisiana Purchase, the United States acquires France's claim, which France itself had acquired from Spain, of 828,000 square miles for the modern equivalent of 42 cents per acre, thereby more than doubling the territorial claims of the fledgling United States. Almost all of the hundreds of thousands of occupants of the land at issue are Native Americans, who have no idea that Spain, then France, and now the United States claims authority over the territory. The purchase includes portions of what now are the states of Louisiana, Arkansas, Oklahoma, Kansas, Missouri, Iowa, Nebraska, Minnesota, South Dakota, North Dakota, Montana, Wyoming, Colorado, northern New Mexico, and northern Texas.

1804 – 1805
Curious about the land claim the United States had acquired from France, President Thomas Jefferson commissions Meriwether Lewis and William Clark to lead the Corps of Discovery expedition up the Mississippi River and then up the Missouri River. Lewis and Clark are met consistently with assistance from Native American people and winter with the Mandan Indians near Bismarck, North Dakota. Heading west to attempt to discover a passage to the Pacific Ocean, the Corps of Discovery finds itself lost, low on provisions, and horseless. Fortuitously, their Indian guide, Sacagawea, encounters her long-lost relatives in a band of Shoshone Indians. The Corps of Discovery trade for the Shoshone's horses, which the Shoshones themselves had acquired from southern tribes who traded with the Spanish. Due in part to the assistance of various Native American people encountered, the Corps of Discovery loses just one member of the expedition, because of disease and not because of any Indian hostility. At the Corps' northernmost campsite (called Camp Disappointment because it is where the Expedition learned that the Missouri River watershed ended), Lewis and five men have a confrontation with Blackfeet men who want the Corps' guns and kill two Blackfeet Indians, the only Native Americans killed in the Expedition.

1812
Declared by the United States against the British, the War of 1812 saw the burning of the U.S. Capitol, the Executive Mansion, and the Treasury in Washington by British troops. Various Indian tribes ally with the British in trying to contain the United States. The results of the War of 1812

and subsequent regional wars are not good for Indian tribes in the eastern United States. Virulent anti-Indian sentiments arise, particularly in the southern United States.

1823
The Supreme Court of the United States issues the first decision of the so-called "Marshall Trilogy" written by Chief Justice John Marshall, which becomes the foundation of Indian law. In Johnson v. McIntosh, a case involving two competing landowners claiming to rightfully own the same land previously belonging to a tribe, Chief Justice Marshall writes that Indian communities do not have full ownership of land, but have an "occupancy right," that only the federal government can extinguish. According to Johnson v McIntosh, the United States government through the European "Doctrine of Discovery," and based on the Indian Commerce Clause of the Constitution, owns Indian land on which the tribes have occupancy rights. Thus, a private company could not buy and sell rights to Indian lands, absent federal approval.

IV. Indian Removal and Relocation

1824
President Monroe modifies President Washington's approach to the so-called "Indian problem" by suggesting that the vast territory of the Louisiana Purchase be used to "invite or induce" Indians to resettle.

1830
President Andrew Jackson pushes the Indian Removal Act through Congress authorizing him to "negotiate" with eastern tribes for their relocation west of the Mississippi River. President Jackson takes the view that Indians are subject to state law if they are within the territory of a state and choose not to be removed. The state of Georgia effectively legislates Indian communities out of existence and seeks to seize Cherokee land once gold is discovered there. The Cherokee Nation sues the state of Georgia, resulting in the second decision of the Marshall Trilogy, Cherokee Nation v. Georgia. Chief Justice Marshall writes for the Court that the Cherokee Nation is a "state" capable of managing its own affairs and governing itself, but is not "a foreign state." Rather, Indian tribes are "domestic dependent nations" in a relationship akin to a guardian and ward with the United States government under which the federal government has a "trust responsibility." However, because the Cherokee are not a "foreign state," the Supreme Court does not have jurisdictional authority to decide the case.

1832
In the final of the Marshall Trilogy cases, Worchester v. Georgia, Chief Justice Marshall writes that Georgia law—which sought to extinguish all Indian right to land and to redistribute the land to white settlers—has no force in Indian country. Further, Georgia citizens have no right to enter Indian country absent the consent of the tribe, and the assent of the Cherokee Indian tribe is required for Georgia to impose state law in Indian country. Purportedly, President Jackson declares "Marshall has made his ruling; let him now enforce it," and refuses to intervene to prevent the state of Georgia from forcibly seizing Indian lands. In the "Trail of Tears," Cherokee Indians and other Indians from the southeast are forced out of Georgia to settle in Oklahoma; approximately twenty-five percent of those on the "Trail of Tears" die on route.

1836 – 1845
Mexico, after having gained independence from Spain, invites white settlers into its province of Texas in part to offset the power of the Comanches and Apaches and other tribes. The white settlers in Texas quickly outnumber both the Mexicans and Native Americans and rebel against Mexico, gaining independence in 1836 and later obtaining annexation to the United States in 1845.

1846 – 1848
Through the Treaty of Guadalupe Hidalgo, following the Mexican-American War, the United States obtains the former Spanish claim on vast Indian territories in the states now known as California, New Mexico, Arizona, Colorado, Nevada, and Utah.

1848 – 1849
The discovery of gold in California draws white settlers to the area. Some 50,000 Native Americans living in California are dead within a year from disease and homicide. A wave of migration of white settlers through and across Indian country occurs. Despite what is depicted in Western movies, of the approximately 250,000 migrants during these years, only 362 are believed to have died in conflicts with Indians during the white migration to California.

1849
The Bureau of Indian Affairs (BIA), which was originally established in 1824, is moved out of the Department of War to the Department of the Interior.

1860s
"Indian wars" erupt in the west beginning just before the Civil War and continue during and after the Civil War. The Dakota Sioux Indian War in Minnesota is exemplative. In an 1851 treaty, the Dakota Sioux ceded parts of Minnesota to settlers, in exchange for assurances to annual provisions and no further incursion into lands set aside for their tribe. In part because of troop demand to fight the Civil War, the United States government pulls troops out of Minnesota, and settlers flood into the land set aside by the treaty for the Dakota Sioux. The United States then fails to provide the provisions called for under the 1851 treaty. One official responsible (or irresponsible) for the provisions diverts them and publicly declares "so far as I am concerned if they are hungry, let them eat grass." Violence erupts and nearly 1,000 settlers are killed. Union troops arrive to Minnesota to put down the "Indian uprising." In a brief mass trial, nearly 200 Dakota Sioux are convicted and sentenced to death. President Abraham Lincoln commutes most of the sentences, but 38 Dakota men are hung at Mankato, Minnesota, in the largest mass execution in United States history. The remaining Dakota Sioux are dispersed, and their lands are settled by non-Indians. During this period, large numbers of Native Americans die of starvation and disease, and tribes suffering from hunger and disease agree to cede large amounts of land in exchange for provisions.

1864
Navajo and Apache raid the livestock of white settlers in their ancestral lands. Led by Kit Carson, the United States Calvary engages in a scorched earth approach to destroy crops and herds of the Navajo and Apache nations to force their resettlement to an agency under military control. Having their crops and livestock destroyed, most of the Navajo are forced on a 300-mile-plus march, since called "The Long Walk," to an agency at Bosque Redondo, New Mexico, far removed from their

ancestral lands. Several hundred Navajos die on this walk, and almost 2,000 die during the four years the Navajos remain in the Bosque Redondo area.

1868
The Lakota people (known to non-Indians as the "Sioux") entered into the 1851 Fort Laramie Treaty to assure to themselves Western South Dakota and much of North Dakota, Wyoming, Montana, and Nebraska for their bison hunting and lifestyle. The Lakota object to the increasing building of forts by the United States Army in their lands and fight what is called Red Cloud's War, resolved by a second treaty known as the Fort Laramie Treaty of 1868, which reaffirms rights to a smaller "Great Sioux Reservation." The Fourteenth Amendment to the Constitution is ratified, but excludes "Indians not taxed" from being counted when allocating House seats.

1871
The federal government ends the practice of making Indian treaties. Congress deals with tribes and Native Americans by passing statutes, which, unlike treaties, do not require tribal consent.

1874 - 1876
Gold is found within the Great Sioux Reservation in the Black Hills of Western South Dakota creating a gold rush. The United States Army initially attempts to keep settlers out of the Black Hills, but then relents and issues an ultimatum to the Lakota to surrender arms and to come to BIA agencies. When the Lakota refuse, rations are cut for the Lakota, and Lakota chiefs are taken hostage. Meanwhile, Buffalo Bill Cody and others have hunted the bison nearly to extinction. Much of the Great Sioux Reservation eventually is ceded for white settlers.

V. Major Crimes Act and Allotment and Assimilation Policy

1883
Crow Dog kills Chief Spotted Tail on the Rosebud Indian Reservation. Crow Dog, is prosecuted and convicted in federal court, and then appeals the issue of federal jurisdiction over crimes Indians commit in Indian country against fellow Indians. In Ex Parte Crow Dog, the Supreme Court of the United States reverses the conviction for lack of federal criminal jurisdiction in Indian country. Meanwhile, the federal government establishes Courts of Indian Offenses to prosecute Indians who violate the Indian Religious Crimes Code, adopted by the U.S. Government Office of Indian Affairs to prohibit Indians from practicing their traditional ceremonies and practices. The Courts later evolved into today's Tribal Courts, which now enforce laws passed by the Tribes themselves.

1885
Congress responds to Ex Parte Crow Dog by enacting the Major Crimes Act making eight major felonies (subsequently expanded to thirteen) committed by Indians in Indian country subject to federal court criminal jurisdiction. In the Kagama decision in 1886, the Supreme Court upholds the Major Crimes Act. The separate Assimilative Crimes Act incorporates state criminal law into federal law as a gap-filler and provides the statutory basis for federal jurisdiction in Indian country for Indians who commit larceny, embezzlement, child abuse, and other felonies not covered by the Major Crimes Act.

1887

Congress passes the General Allotment Act known as the Dawes Act, which is designed to force assimilation of Native Americans. Through treaties, Native Americans had secured about 150 million acres of land, approximately eight percent of the United States, as Indian lands. Under the General Allotment Act, 90 million acres of land become "allotted;" that is, subdivided for private ownership by Native Americans for them to farm their own land. Much of Indian land is declared "surplus" and is opened up to white settlement. Significant portions of the land allotted for individual Indians end up being sold to white settlers as Indians accustomed to communal land ownership struggle to create consistent cash flows from individual parcels to pay state property taxes on the allotted land. Business interests buy Indian land with natural resources, such as timber stands. The result eventually is a reduction of those Indian lands allotted by two-thirds, down from 90 million to about 30 million acres. Much of the remaining Indian land is either desert or unwanted land, or in many places a "checkerboard" where some land is held in trust, some land is held privately by Native Americans, and some land is owned by non-Indians. The Supreme Court in Lone Wolf in 1903 upholds the Dawes Act as being within Congress's plenary power over Indian affairs.

1887 – 1930

The United States pursues a policy of assimilation to "civilize" Native Americans by remaking them in the image of whites. Off-reservation schools are founded and financed, with the founder of the famous Carlisle school in Pennsylvania, Richard Pratt, a former American Cavalry colonel in the Indian Wars, professing the school's goal to "kill the Indian and save the man;" despite such an offensive view, Pratt at the time is seen as an advocate for Indians who devoted his life to the success of the Carlisle school. The underlying social theory of the time is that Native Americans are hindered by their culture. Accordingly, young Native Americans at these off-reservation schools like Carlisle are taken from their homes and reservation and are forced to adopt different names, clothing, haircuts, faith, language, and cultural practices in an effort to "assimilate" the next generation of Indians into white, English-speaking, Christian culture. Many Native American children at boarding schools are subject to physical abuse, and some experience sexual abuse as well. Pratt's legacy is mixed as the Carlisle school educates and produces Native American leaders who demonstrate American Indians to be the equal of whites, even to the point of Carlisle becoming a dominant and innovative team in early college football originating the overhand spiral pass and fake handoff. The greatest athlete of the time is Carlisle graduate Jim Thorpe, a member of the Sac and Fox Tribe; Thorpe wins Olympic track and field medals, and plays professional football, baseball, and basketball. Some graduates of the Carlisle school lead in the effort to end assimilation, but many graduates of schools like Carlisle struggle to find work outside of menial and industrial labor.

1890

United States troops assigned to protect the Lakota force disarmament of a band of Lakota Indians at Wounded Knee. As the Lakota are surrendering their guns, a shot is fired and the American soldiers react by massacring approximately 300 Native Americans, two-thirds of whom are women and children. Other such massacres occur with other Indian nations, resulting in many tribes sacrificing their arms and acceding to live on reservations near agencies.

1911

Native American leaders found the Society of American Indians to advocate for an end of assimilation polices and for respect for Indian peoples.

1924
Congress passes the Indian Citizenship Act, also known as the Snyder Act, to grant full citizenship to Native Americans, but this tardy naturalization did not extend to Native Americans the constitutional civil rights guaranteed to other American citizens. For example, under the Snyder Act, Native Americans are not authorized to vote in city, county, state, or federal elections; testify in courts; serve on juries; attend public schools; or even purchase a beer, for it was illegal to sell alcohol to Indians.

1926
In a report entitled "Problem with Indian Administration," also known as the Merriam Report, Congress is presented with a national survey of Indian affairs. The report indicts the assimilation policy, concludes that the process has resulted in the overwhelming majority of Indians becoming extremely poor, and calls for change in Indian policy.

VI. Indian Reorganization

1934
Congress enacts the Indian Reorganization Act (IRA) as a part of a greater "Indian New Deal," in an effort to revive tribal self-governance. Tribes are allowed to reorganize, adopt a constitution of their own subject to the approval of the Department of Interior, elect a tribal council, and govern themselves. The IRA reflects a fundamental reversal of Indian affairs and brought a legal end to the practice of subdividing reservations. However, by this time, many tribal members had been forcibly relocated away from reservations, and some tribes struggle with adoption and implementation of this new and, to many tribes, quite foreign form of governance.

1941
The United States recognizes for the first time the Native Americans' right of Aboriginal title and forms the Indian Claims Commission. Funding is redirected to tribes to create tribal schools on reservations, permitting education on reservations as a means of preserving cultural practices. Many tribes challenge the legality of past seizures of their lands in this forum, but are awarded only money damages. For the taking of the sacred Black Hills, an area of nearly 7.3 million acres, the Lakota have refused to accept an award well above $100 million and have maintained entitlement to return of the land.

1941 – 1945
During World War II (and indeed even today), Native Americans participate in military service at a higher percentage than other major ethnicities. The United States during World War II successfully uses Navajo "code talkers" to communicate encrypted messages. Native American Ira Hayes is among those famously pictured raising the American flag atop a mountain on Iwo Jima. The National Congress of American Indians convenes in 1944 to seek to unite tribes in dealings with the federal government.

VII. Termination Policy

1953
Over strong opposition of Indian people, Congress passes House Concurrent Resolution 108 and Public Law 280. House Concurrent Resolution 108 ushers in the "termination policy," which has two fundamental purposes: (1) end the federal relationship with Indian peoples; (2) attempt to urbanize Indians for employment in industry as a part of a Cold-War era notion of "uplift" of the Indian people to suburban American status. For those tribes subject to termination, their tribal governments are disbanded, and their land is privatized. The termination policy initially is focused on terminating small bands of Indian tribes, and ultimately more than 100 tribes lose federal recognition and support during the termination era. More than 1.3 million acres of Indian land, approximately three percent of the remaining Indian land, is released from trust status. Relocation of well over 100,000 Native Americans occurs to cities, where many find neither housing nor employment opportunity and end up homeless. Separately, in Public Law 280, Congress extends state authority over certain Indian lands, including state criminal jurisdiction in Indian country, as part of the federal government's effort to get out of the business of handling Indian affairs.

VIII. Tribal Self-Determination

1968
Congress passes the Indian Civil Rights Act which imposes "bill of rights" style civil liberty limitations on tribal governments. It also requires tribal consent for any further imposition of state jurisdiction under Public Law 280 (PL 280) arrangements. Tribes are limited in their jurisdictional authority to prosecute only tribal offenses, which can include crimes such as homicide, but with limited sentencing authority similar to that of misdemeanor crimes—punishable up to one year in prison and a $5,000 fine for each offense. Federal courts continue with felony jurisdiction in Indian country (for tribes not subject to PL 280) as before, including over cases that a tribal court may have prosecuted. In the Wheeler case, the Supreme Court holds that an Indian convicted of rape in tribal court may be prosecuted in federal court as well because the double jeopardy bar of the Fifth Amendment does not apply. Under the prior precedent of Talton v. Mayes decided in 1896, tribes and tribal courts are not bound by the Bill of Rights because tribes are inherently sovereign and not mere extensions of the federal government. In Wheeler, the Supreme Court determines that it is not the same offense when two distinct sovereign governments prosecute the same person.

1969
Standing Rock Sioux Tribe member Vine Deloria Jr. publishes the seminal work Custer Died For Your Sins. Deloria in this manifesto answers the question "What do Indians want?" by calling for a "cultural leave us alone agreement in spirit and in fact." Deloria helps to revive the National Congress of American Indians as an intertribal organization. Meanwhile, the American Indian Movement (AIM), founded in Minneapolis in 1968, seizes Alcatraz Island in an effort to draw attention to the plight of American Indians.

1972 – 1973
AIM holds a march on Washington in 1972 called the "Trail of Broken Treaties," culminating in the occupation of the BIA building in Washington, D.C. In 1973, AIM activists militarily seize

the town of Wounded Knee on the Pine Ridge Indian Reservation and hold federal officials at bay for 71 days.

1974
Congress passes the American Indian Religious Freedom Act, finally recognizing the right of Native Americans to worship according to tribal religious traditions.

1975
Congress passes the Indian Self-Determination and Education Assistance Act authorizing tribes to enter contracts with the federal government for the tribes to assume responsibility for the administration of certain federal programs on reservations. Congress also passes acts of "restoration" for some of the tribes that had been terminated in the 1950s.

1978
The Supreme Court decides in Oliphant that tribal courts lack criminal jurisdiction over non-Indians for crimes committed in Indian country. As a result, a jurisdictional maze exists in Indian country where tribes, states, or the federal government may have or may lack criminal jurisdiction depending on whether the victim or defendant is Indian and whether the alleged offense took place in Indian country. Congress also passes the Indian Child Welfare Act (ICWA) to curb the practice of removal of Indian children from reservations by state welfare agencies. Prior to ICWA, roughly one-third of Indian children were removed for placement commonly in foster care of non-Indians or boarding schools. Since ICWA, state agencies still often handle abuse and neglect cases involving Native American children, but must seek to place the children with Indian relatives, for instance, as a priority over other placements.

1979
After a decade of litigation over what came to be known as the "fish wars," the Supreme Court in United States v. Washington, affirms a district court ruling—known as the Boldt decision—assuring off-reservation fishing rights to the Puyallup Indian tribe consistent with the language of an 1855 treaty. The Boldt decision and case leads to other federal cases where tribes and tribal members turn to treaties and treaty language to assert rights to various resources against states and the federal government.

1981
In the Montana case, the Supreme Court decides that tribal courts lack civil jurisdiction over non-members in Indian country unless: 1) the non-member enters into a consensual relationship with the tribe or its members through commercial dealings, contracts, leases or other arrangements; or 2) the lack of tribal regulatory power would directly affect tribal political integrity, tribal economic security, or tribal health and welfare. Civil jurisdiction in Indian country continues to be the subject of litigation and controversy.

1987
In the Cabazon case, the Supreme Court of the United States upholds the right of an Indian tribe to conduct gaming activities in Indian country independent of state regulation, based on the sovereignty of the tribe and the tribe's relationship with the federal government.

1988
Congress passes the Indian Gaming and Regulatory Act (IGRA) to authorize and regulate gaming activities on reservations, as tribes increasingly turn to operating casinos as a means of employing tribal members and bringing economic activity to reservations. Under IGRA, states enter into compacts with tribes that determine how much the state will receive from Indian gaming activities. Under some compacts, states receive up to twenty-five percent of revenues from Indian gaming. Certain tribes close to metropolitan areas experience great economic growth, while other tribal casinos in more rural areas prove to be marginally self-sufficient. At the time of IGRA's passing, Indian casinos generated between $100 and $500 million of revenue per annum. By 2002, more than $15 billion per year was spent at Indian gaming facilities, and by 2014, this figure had grown to more than $28 billion. Most tribal gaming facilities seek to break even and only 20% reportedly turn significant profits, in part because of the geographic isolation of much of Indian country from cities.

1990
The Supreme Court holds in Duro that tribes lacked jurisdiction to prosecute non-member Indians. Congress later amends the Indian Civil Rights Act, with what is called the "Duro fix" to recognize inherent tribal criminal jurisdiction over all Indians for misdemeanor crimes in Indian country.

2000
Approximately four million people identify themselves in the census as being Native American.

2004
The National Museum of the Native American opens as a Smithsonian museum on the national mall in Washington D.C. The museum is partially funded through tribal contributions. This reflects an ironic reversal of Native American perception of Washington, which in the Iroquois language is actually called "The Place of the Town Destroyer" and whose professional football team is named the Redskins, which the National Congress of American Indians and many others consider to be a racial slur.

2009
The President invites tribal leaders from all tribes to Washington, D.C. for the first Tribal Nations Conference to seek to improve federal-tribal relations. The Tribal Nations Conference becomes an annual meeting for eight years.

2010
Congress enacts the Tribal Law and Order Act (TLOA), which among various things, recognizes the authority of tribal courts in criminal cases to sentence those under its jurisdiction to up to three years in custody and a $15,000 fine for each offense committed in Indian country, as long as the tribal court assures certain due process rights. TLOA also allows PL 280 tribes to restore federal jurisdiction, concurrent with the state, over Indian country offenses.

2013
In the Violence Against Women Reauthorization Act (VAWA Reauthorization), Congress, among other things, restores limited tribal court criminal jurisdiction over non-Indians who commit

domestic assaults against their Indian dating partners or spouses, as long as the tribal court assures certain due process rights.

2014

In 2014, eight of the eleven poorest counties in the United States—five in South Dakota, and one each in North Dakota, Alaska, and Arizona—are Indian country counties. Such poverty in parts of Indian country have been chronic and longstanding. The Native American male has the shortest lifespan of any demographic group in the United States. Unemployment, poverty, suicide, and substance abuse rates are substantially higher in Indian country than elsewhere. In response to the high rate of juvenile suicide and victimization in Indian country, President Obama creates Generation Indigenous and holds the first Native American Youth Leadership Forum in Washington, D.C.

2020

Criminal jurisdiction in Indian country remains complex. In every state, the federal government has jurisdiction over generally applicable federal offenses, such as drug offenses and assault on federal officers, no matter the locus of the offense or the identity of the persons involved. In PL 280 states, which cover the vast majority of tribes, it is state courts, not federal courts, that possess felony jurisdiction over offenses committed by or against anyone in Indian country, whether the defendant is Indian or non-Indian. In PL 280 states, tribes possess concurrent jurisdiction over all Indians and may exercise jurisdiction over non-Indians in rare circumstances under the VAWA Reauthorization, but tribal sentences are limited by federal law. In so-called Indian country jurisdictions, which comprise a minority of the total number of tribes but which encompass some of the largest reservations, criminal jurisdiction over crimes involving Indians (as either perpetrators or victims) are shared between the federal government and tribal governments, while crimes involving only non-Indians on reservations are handled by the states. In Indian country, federal jurisdiction of felony offenses involving Indians has the effect of minimizing sentencing disparity across federal cases, which originally was a significant goal of federal sentencing reform and was one of the main reasons for creating the U.S. Sentencing Guidelines. Federal jurisdiction also ensures that it is federal policy, not varying state policies, that govern in Indian country, preserving reservations as sanctuaries for Indians from state laws and state policy choices, which Indians might characterize as discriminatory.

This Timeline of Native American History and Indian Law is based in part on years of reading and study and in part on Professor Ned Blackhawk's excellent 14-lecture audio course. Ned Blackhawk, History of Native America (Prince Frederick, MD: Recorded Books) 14-lecture CD audio course with 114-page study guide (2010). I owe particular gratitude to Dean Kevin Washburn, a member of the Chickasaw Tribe, Wendy Bremner, a member of the Blackfoot Tribe, and Leah Jurss, a descendant of the White Earth Nation, for their fine work in editing and making suggestions for changes in this timeline.

Roberto A. Lange
Chief Judge
District of South Dakota

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELI ERICKSON, a/k/a Black Defendant.	3:18-cr-30148 Affidavit of Matthew Thelen Clerk of Court

Comes now Matthew Thelen and after being duly sworn states as follows:

1. I am the Clerk of Court for the United States District Court for the District of South Dakota.

2. On December 9, 2019, I was ordered to provide jury plan and panel information in the case of *United States of America v. Eli Erickson*, 3:18-cr-30148 [123].

3. Fifty-one (51) qualified jurors reported for service in this case.

4. Of that number, nine (9) identified their race as "American Indian/Alaska Native" on the Juror Qualification Questionnaire. A blank copy of the Juror Qualification Questionnaire is attached as Exhibit 1. None of the fifty-one (51) jurors identified as "Other" on the questionnaire.

5. Forty-nine (49) jurors were questioned during voir dire.

6. Eight (8) of the forty-nine (49) jurors questioned identified their race as "American Indian/Alaska Native" on the Juror Qualification Questionnaire.

7. The Administrative Office of the United States Courts (AO) makes Census Bureau population data available to United States District Courts. The data is organized by district court and by divisions within district courts. The data provided is for citizen population of those eighteen (18) years and older. The most recent Census Bureau Population Tables prepared by the AO used 2015 Census Bureau data.

8. The 2015 Census Bureau Population Table for the District of South Dakota provides the following percentage distribution for "American Indian and Alaska Native":

State of South Dakota: 7.1%

Northern Division: 6.6%
Southern Division: 2.5%
Central Division: 25%
Western Division: 11%

9. A copy of the most recent version of the "Plan for the Random Selection of Grand and Petit Jurors" for the United States District Court for the District of South Dakota is attached as Exhibit 2.

Dated this 10th day of December 2019.

Matthew Thelen,
Clerk of Court

Exhibit 1

United States District Court

Save time and money by completing this form on the court's website.

FOR OFFICIAL USE
Jurors Please Do Not Write In This Space
Q ○ X ○ E ○ D ○

County/Parish/Borough/District/Ward
You Now Live In

- If your name and/or address has changed please indicate correction here or online.
- If the juror is deceased, please indicate correction here or online and do not complete the remainder of this questionnaire.

Contact Phone ___-___-____ **Email** _____

JUROR QUALIFICATION QUESTIONNAIRE

Please read the Prospective Juror letter before completing the Questionnaire

Dear Prospective Juror:

Your name has been drawn by random selection, and you are being considered for jury service in the United States District Court. Trial by jury is a keystone of our system of justice. Jury service is, therefore, both an opportunity and an obligation of every American. Jurors will receive mileage and, unless they are federal government employees, an attendance fee for each day of service.

In order for us to obtain some information about you from which we can objectively determine whether you are qualified to serve pursuant to federal law, please complete this questionnaire, either online at the court's website noted above or by completing both sides of this paper form. **Answer all questions, sign, date and return this form in the enclosed envelope or complete the form online within ten days.**

If you do not return this questionnaire form fully completed or complete the online form within ten days, you can be legally required to report at your expense for completion of the questionnaire at this office.

If you are unable to fill out this form, someone else may do it for you provided that person indicates in the "Remarks" section why it was necessary for him or her to do so instead of you.

Do not attach anything to this form. Please write your comments in the "Remarks" section. **Do not ask to be excused by telephone.**

If your address changes after you have returned this questionnaire, you should notify us promptly through e-Juror or through US Mail, addressing it to **"Attention: Jury Administrator"**.

If completing a paper copy:
- Use a blue or black ink pen that does not soak through the paper.
- Do not write in margins nor in "official use only" areas.
- Fill the ovals completely. **Right** ● **Wrong** ✗

1. Are you a citizen of the United States? **Yes** ○ **No** ○

2. Are you 18 years of age or older? **Yes** ○ **No** ○

Give your age _____

Date of Birth: Month _____ Day _____ Year _____

3. a. Has your primary residence for the past year been in _____ **Yes** ○ **No** ○

b. Has your primary residence for the past year been in _____ of _____ **Yes** ○ **No** ○

If "No" to either question, see the notes to the right.

4. a. Do you speak the English language? **Yes** ○ **No** ○

b. Do you read, write, and understand the English language well enough to complete this questionnaire without help? **Yes** ○ **No** ○

c. If it is necessary to explain your answers to either Question 4a or 4b, please do so in the notes to the right of Question 4.

Continued on the Back

REMARKS

Question 3 - RESIDENCE. If you answered **"No,"** that your primary residence was not in the same state or county for the past year, name the other states and counties of primary residence, and give dates.

Question 4 - LANGUAGE. If you need to explain your answers to either part of Question 4, provide explanation below.

5. Are any charges now pending against you for a violation of state or federal law punishable by imprisonment for more than one year (a felony)? Yes ○ No ○

6. Have you ever been convicted of or sentenced for a state or federal crime for which punishment could have been more than one year in prison or jail (a felony)? Yes ○ No ○

7. Answer if your response to **Question 6** is **"Yes,"** Was your right to serve on a jury restored? (If "Yes," explain in the notes to the right) Yes ○ No ○

8. Do you have any physical or mental disability that would interfere with or prevent you from serving as a juror? (If "Yes," see instructions to the right for question 8). Yes ○ No ○

9. Are you Hispanic or Latino? Yes ○ No ○

10. Please fill in completely one or more ovals that describe your race. (See notes to the right for Question 10).

○ Black/African American ○ Asian
○ American Indian/Alaska Native ○ White
○ Native Hawaiian/Pacific Islander ○ Other, Specify: _____

11. SEX: Male ○ Female ○

12. OCCUPATION (See instructions to the right)

a. Are you now employed? Yes ○ No ○

b. Are you a salaried employee of the U.S. government (this does not include U.S. Postal Service employees)? Yes ○ No ○

13. Are you employed on a paid full time basis as a:

a. Public official of the United States, state, or local government who is elected to public office or directly appointed by one elected to office. Yes ○ No ○

b. Member of any non-federal government police or fire department. Yes ○ No ○

c. Member in active service of the U.S. armed forces. Yes ○ No ○

14. EXCUSE CATEGORIES

If one of the numbered excuses listed to the right applies to you AND you wish to be excused on this basis, fill in the corresponding oval for that excuse number and provide additional information in the "Remarks" section if requested. See Notes to Question 14 as more information supporting your request may be required. Or if you wish to serve, do not show anything here.

1 ○ 2 ○
3 ○ 4 ○
5 ○ 6 ○
7 ○ 8 ○
9 ○ 10 ○

15. YOUR SIGNATURE

Be sure you have signed the form. If another person had to fill out this questionnaire for you, that person must indicate his or her name, address and reason why in the "Remarks" section on the front of this form.

I declare under penalty of perjury that all answers are true to the best of my knowledge and belief. (Sign below and date)

SIGN HERE ▶ _____

Date _____

Question 5, 6 and 7 - CRIMINAL RECORD. If your answer to either question 5 or 6 is "Yes," please show below: (a) date of the offense, (b) date of the conviction (or date of pending charge), (c) nature of the offense, (d) the sentence imposed (if a conviction), and (e) the name of the court. One is disqualified from jury service only for criminal offenses punishable by imprisonment for more than one year, but it is the maximum penalty, and not the actual sentence, which controls. **NOTE - Answer Question 7 only if your answer to Question 6 is "Yes."**

Question 8 -YOUR HEALTH. If you claim a mental or physical disability, please explain and/or enclose proof of it in a separate document. Do not attach anything to the form. NOTE - Do not ask the court to call your doctor. Any doctor's statement you obtain regarding your physical condition must be sent to the court by you rather than by the doctor. Qualified individuals with disabilities have the same opportunity and obligation to serve as jurors as individuals without disabilities. If you have a disability that would affect, but not prevent, your serving as a juror, please advise and explain below or by enclosing a separate unattached letter.

Question 10 - RACE. Federal law requires you as a prospective juror to indicate your race. This answer is required solely to avoid discrimination in juror selection and has absolutely no bearing on qualifications for jury service. By answering this question you help the federal court check and observe the juror selection process so that discrimination cannot occur. In this way, the federal court can fulfill the policy of the United States, which is to provide jurors who are randomly selected from a fair cross section of the community.

Question 12 - OCCUPATION. Federal law requires that you answer the questions about your occupation so that the Federal Courts may determine promptly whether you fall within an excuse or exemption category (See Questions 13 and 14).

Your Usual Occupation, Trade, or Business

Your Employer's Name

Question 14 - GROUNDS FOR EXCUSE. If one of the categories listed below applies to you and you wish to be excused for that reason, fill in completely the oval for your category at Question 14. Please make sure you also give in the "Remarks" on the front of this form such information as may be requested within the excuse category. You may still be qualified to serve if the court determines upon review that you appear to be eligible for service. Other persons may be excused only by showing jury service would cause them undue hardship or extreme inconvenience.

FOR OFFICIAL USE

Exhibit 2

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

PLAN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Pursuant to the Jury Selection and Service Act of 1968, as amended, the judges of the United States District Court for the District of South Dakota adopt the following plan for the random selection and service of grand and petit jurors in all divisions of the United States District Court for the District of South Dakota. The master and qualified wheels existing at the time of the adoption of this plan were created under the provisions of the Jury Plan adopted by the District of South Dakota in 2008. With the exception of those jurors qualified and/or summoned under the provisions of that plan who have not yet completed their service, all jurors summoned for service following the adoption of this plan will be qualified and summoned under the provisions of this plan.

I.

EFFECTIVE DATE AND DURATION

This plan for jury selection shall be placed in operation after approval by the reviewing panel as provided in 28 U.S.C. § 1863(a), and shall remain in force and effect until modified by the court with the approval of the reviewing panel.

II.

POLICY OF THE PLAN

It is the purpose of this plan to implement the policies of the United States declared in 28 U.S.C. § 1861:

1. that all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division where the Court convenes;
2. that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States; and
3. that all citizens shall have an obligation to serve as jurors when summoned for that purpose.

A. It is further the purpose of this plan to prohibit discrimination as set forth in 28 U.S.C. § 1862, which provides that no citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

III.

APPLICABILITY OF THE PLAN

Pursuant to 28 U.S.C. § 1869(e), the District of South Dakota is divided for jury selection purposes into four divisions, which are identical with the statutory composition of the district, as follows:

NORTHERN DIVISION—consisting of the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Spink, and Walworth.

SOUTHERN DIVISION—consisting of the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton.

CENTRAL DIVISION—consisting of the counties of Buffalo, Dewey, Faulk, Gregory, Haakon, Hand, Hughes, Hyde, Jerauld, Jones, Lyman, Mellette, Potter, Stanley, Sully, Todd, Tripp, and Ziebach.

WESTERN DIVISION—consisting of the counties of Bennett, Butte, Custer, Fall River, Harding, Jackson, Lawrence, Meade, Pennington, Perkins, and Oglala Lakota.

IV.

MANAGEMENT OF THE JURY SELECTION PROCESS

The Clerk of this Court under the supervision of the judges of this Court shall manage the jury selection process and maintain a separate master and qualified jury wheel for each of the respective divisions.

V.

CREATION OF THE MASTER AND QUALIFIED JURY WHEEL

A. Source of Names of Prospective Jurors

Because voter registration lists represent a fair cross section of the community, all jurors shall be selected at random from the list of registered voters provided by the office of the South Dakota Secretary of State.

B. The Master Jury Wheel

The master jury wheel shall be refilled at least every four years and must be refilled between January 1 and July 1 of the year following a federal general presidential election. To ensure that the master wheel for each division contains names from each county in each division in the same proportion that existed in the list of registered voters, the master jury wheel shall include the names of all registered voters.

C. Taking Names from the Master and Qualified Wheels

The selection of names from the master jury wheel for the purpose of determining qualification for jury service, and from the qualified wheel for summoning persons to serve as grand or petit jurors, shall be accomplished by a purely randomized process through a properly programmed electronic data processing system. In each instance, the selection of names shall ensure that the mathematical odds of any single name being picked are substantially equal.

The Court authorized use of the Jury Management System ("JMS"), an electronic data processing system developed by the Administrative Office of the United States Courts, to select names from the master jury wheel to fill the qualified wheel; to select names from the qualified wheel for persons to be summoned to serve as grand or petit jurors; and for the recording of names and other information on any papers and records needed by the Court to administer the selection and payment of jurors.

VI

QUALIFICATION FOR SERVICE AND EXEMPTIONS

The judges shall use the information provided in the juror qualification forms and other reliable evidence to determine whether a person is unqualified or exempt for jury service within their respective divisions. The judge may delegate this responsibility to the Clerk.

A. Qualification for Jury Service

Pursuant to the provisions of 28 U.S.C. § 1865(b), any person is qualified to serve on grand or petit juries in the District Court unless he or she:

1. is not a citizen of the United States at least eighteen years old who has resided for a period of one year within the judicial district;
2. is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification forms;
3. is unable to speak the English language;
4. is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
5. has a charge pending against him or her for the commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year, and his or her civil rights have not been restored.

B. Exemptions from Jury Service

Pursuant to the provisions of 28 U.S.C. § 1863(b)(6), the District Court finds that exemption of the following groups of persons, who are employed on a full-time basis, or occupational classes is in the public interest and would not be inconsistent with the Act:

1. members in active service in the Armed Forces of the United States;
2. full-time, employed members of the fire or law enforcement departments of any state, district, territory, or possession or subdivision; and
3. public officers in the executive, legislative, or judicial branches of the government of the United States, or any state, district, territory, or possession or subdivision, who are actively engaged in the performance of official duties. Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

VII.

EXCUSES FROM JURY SERVICE

Upon individual request, the presiding judge of each division may grant an excuse from jury service if the judge finds that jury service will entail undue hardship or extreme inconvenience and the excuse will not be inconsistent with the Act. The Court may establish internal operating procedures that allow the Clerk or the Clerk's designee to grant permanent excuses to persons whose service

would cause them undue hardship or extreme inconvenience. These procedures will identify specific categories of persons where excuse from jury service would be consistent with the Act.

Pursuant to 28 U.S.C. § 1863(b)(5)(B), the court will grant an excuse, upon individual request, to volunteer safety personnel who serve without compensation as firefighters or members of a rescue squad or ambulance crew for a public agency of the United States, or any state, district, territory, or possession or subdivision.

Upon individual request, persons summoned for jury service may be temporarily excused by a judge, or by the Clerk or the Clerk's designee under supervision of the Court, upon a showing of undue hardship or extreme inconvenience. At the conclusion of a juror's temporary excuse period, the person either shall be summoned again for jury service or the name of the person shall be reinserted into the qualified jury wheel for possible resummoning.

VIII.

JURORS EXCLUDED BY THE COURT

Pursuant to the provisions of 28 U.S.C. § 1866(c), any juror who has been summoned for jury service may be excluded by the Court upon the following grounds:

A. That the person may be unable to render impartial jury service or that his service as a juror would likely disrupt the proceedings;

B. That the person is peremptorily challenged as provided by law;

C. That the person should be excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown;

D. Upon a determination by the Court that the person as a juror would likely threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations; provided that no person shall be excluded under this subparagraph D unless the judge, in open court, determines that exclusion is warranted, and that exclusion will not be inconsistent with 28 U.S.C. §§ 1861 and 1862. The number of persons excluded under this subparagraph D shall not exceed one percent of the number of persons who return executed jury qualification forms during the period, specified in this plan, between two consecutive fillings of the master wheel. The names of persons excluded under this subparagraph (D), together with detailed explanations for the exclusions, shall be forwarded immediately to the Eighth Circuit Judicial Council for disposition under the provisions of 28 U.S.C. § 1866(c); and

E. That any person excluded from a particular jury under the provisions of subparagraphs A, B, or C of section VIII shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on that jury.

XI.

DRAWING OF NAMES FROM QUALIFIED WHEELS, THE ISSUANCE OF SUMMONS, AND DISCLOSURE OF NAMES

A. Petit Jury Panels

1. Division Basis

Each petit jury panel will be summoned on a division-wide basis and will sit at the statutory place or places of holding court in the division.

2. Drawing from Qualified Jury Wheels

When jurors are needed, the Clerk shall select at random from the qualified jury wheel the number of jurors required. Each of those jurors will be mailed a summons.

3. Petit Jury Panels

All petit jurors who report for service pursuant to a summons will be considered the petit jury panel. Prior to the opening of court, a randomized list will be generated of all those jurors who have reported for service. The jurors will be seated in this randomized order. In the alternative, a judge may choose to have the names of all jurors who have reported for service placed in a courtroom jury wheel from which names shall be drawn at random.

B. Grand Jury Panels

1. Composition of Grand Jury Panels

Grand jury panels will consist of jurors from one or more divisions of the District as approved by the Chief Judge. The Chief Judge shall determine where each grand jury panel will report for service.

2. Drawing from the Qualified Jury Wheels

When a judge of this Court orders, the Clerk or deputy clerks shall draw sufficient names from the qualified wheel to establish a grand jury panel. If the grand jury includes jurors from more than one division, the selection of grand jurors shall be made so that each division is proportionately represented on the grand jury. Grand jurors shall be summoned in the same manner as specified for petit jurors.

3. Grand Jury Panels

In the interest of achieving administrative economy, the Court may direct that one grand jury comprised of jurors drawn from the qualified wheel shall serve the entire judicial district.

XII.

UNANTICIPATED SHORTAGE OF PETIT JURORS

When there is an unanticipated shortage of available petit jurors on a panel drawn from a master or qualified wheel, the Court may enter an order directing the Clerk to summon a sufficient number of petit jurors to meet the requirement of the Court. The additional petit jurors shall be selected at random by the Clerk from voter registration lists of one or more counties in the division as the Court may direct in its order.

XIII.

RELEASE OF JUROR INFORMATION

Names and personal information concerning petit and grand jurors shall not be disclosed to attorneys, parties, the public, or the media, except:

A. Names and personal information concerning persons who have been entered in the jury wheel shall not be disclosed, except upon order of the Court;

B. Names and personal information concerning prospective and sitting petit jurors shall not be disclosed to the public or media outside open court, except upon order of the Court. A request for disclosure of petit juror names and personal information to the media or public must be made to the presiding judge;

C. The Clerk will only provide names and personal information concerning prospective petit jurors to the attorneys, or a party if proceeding pro se, in a case set for trial upon motion of the party and as ordered by the court. If ordered by the court, the names and information will be provided in written form. The attorneys or pro se party may not share the jury information except as necessary for purposes of jury selection. Following jury selection, the information provided to the attorneys or pro se party and any copies made of that information must be returned to the Clerk;

D. The presiding judge may order juror names and personal information kept confidential when the interests of justice require;

E. The names of grand jurors may be provided by the Clerk to the U.S. Attorney's Office prior to the convening of the Grand Jury; and

F. A copy of the qualified petit jury list and juror answers to questionnaires may be provided to the U.S. Attorney's Office and to the

office of the Federal Public Defender. All copies must be returned to the Clerk when a new qualified petit jury list is drawn.

This plan supersedes all existing plans and shall constitute the rule of this Court.

Dated October 15, 2018.

BY THE COURT:

JEFFREY L. VIKEN
CHIEF JUDGE

United States Courts
Judicial Council of the Eighth Circuit
Thomas F. Eagleton United States Courthouse
111 South 10th Street - Suite 26.325
St. Louis, Missouri 63102-1116

Millie B. Adams
Circuit Executive

Voice (314) 244-2600
Fax (314) 244-2605
www.ca8.uscourts.gov

EIGHTH CIRCUIT JUDICIAL COUNCIL

ORDER

I hereby certify that the Eighth Circuit Judicial Council has approved the amended Plan for the Random Selection of Grand and Petit Jurors for the District of South Dakota, as adopted by the court on October 15, 2018.

Millie B. Adams
Circuit Executive

St. Louis, Missouri
October 31, 2018

cc: Judicial Council Members
Chief Judge Jeffrey L. Viken
Matt W. Thelen, Clerk of Court
Administrative Office

Approval was given by the Jury System Committee.

JCO 3017

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1861

United States of America

Plaintiff - Appellee

v.

Eli Erickson, also known as Black

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Central
(3:18-cr-30148-RAL-1)

JUDGMENT

Before LOKEN, BENTON and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 02, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1861

United States of America

Plaintiff - Appellee

v.

Eli Erickson, also known as Black

Defendant - Appellant

Appeal from U.S. District Court for the District of South Dakota - Central
(3:18-cr-30148-RAL-1)

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June 02, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 20-1861

United States of America

Plaintiff - Appellee

v.

Eli Erickson, also known as Black

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Central

Submitted: February 18, 2021
Filed: June 2, 2021

Before LOKEN, BENTON, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

On November 7, 2019 a jury in the District of South Dakota convicted Eli Erickson of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine, 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), 846, and

several firearm offenses. He filed two post-trial motions. The district court[1] denied both and sentenced Erickson to 188 months' imprisonment and a five-year term of supervised release. He now appeals his conviction. We affirm.

I.

Erickson, who is Native American, has lived on the Rosebud Indian Reservation for most of his life. The Central Division of the District of South Dakota, where Erickson's trial took place, encompasses parts of the Rosebud Indian Reservation, Crow Creek Indian Reservation, and Cheyenne River Indian Reservation. Although the 2015 United States Census Bureau Population Table for the District of South Dakota states that 25% of the Central Division's population is "American Indian or Alaska Native," no Native Americans were seated on Erickson's jury.[2]

A.

Erickson filed a motion for new trial, asserting that the absence of Native Americans on his jury deprived him of "his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." Taylor v.

[1]The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota.

[2]Because the U.S. Census Bureau uses the term "American Indian or Alaska Native" to describe our country's indigenous people, but the parties generally use "Native American," we use both terms more or less interchangeably. Our understanding is that "[e]ither term is generally acceptable and [that they] can be used interchangeably, although individuals may have a preference." *Reporting and Indigenous Terminology*, NATIVE AMERICAN JOURNALISTS ASSOCIATION, https://najanewsroom.com/wp-content/uploads/2018/11/NAJA_Reporting_and_Indigenous_Terminology_Guide.pdf; see FTC v. Payday Fin., LLC, 935 F. Supp. 2d 926, 929 n.1 (D.S.D. 2013) (explaining that it is "appropriate . . . to refer to this nation's indigenous people as Native Americans or American Indians").

Louisiana, 419 U.S. 522, 536 (1975). The district court denied the motion. We review this issue de novo. United States v. Reed, 972 F.3d 946, 953 (8th Cir. 2020); see United States v. Rodriguez, 581 F.3d 775, 789 (8th Cir. 2009) ("Allegations of racial discrimination in jury pools involve mixed questions of law and fact, and receive de novo review."). To establish a prima facie violation of the Sixth Amendment's fair cross section requirement, Erickson must show that the representation of Native Americans in the Central Division's jury pool "is not fair and reasonable in relation to the number of such persons in the community," and "that this underrepresentation is due to systematic exclusion of the group in the jury-selection process," among other elements. Duren v. Missouri, 439 U.S. 357, 364 (1979).

The Central Division selects potential jurors in accordance with the District of South Dakota's 2018 Plan for the Random Selection of Grand and Petit Jurors. Under the Plan, "all jurors [are] selected at random from the list of registered voters provided by the office of the South Dakota Secretary of State." Nine of the 51 qualified jurors who reported for service on the day of jury selection for Erickson's trial, or 17.6%, identified their race as American Indian or Alaska Native. The district court excused six of these potential jurors for cause, and the government exercised peremptory challenges to remove two others.[3] On appeal, Erickson does not challenge the for-cause or peremptory strikes.

Although we know the number of Native Americans who showed up for jury selection in Erickson's case, the record contains no evidence about the percentage of potential jurors on the Central Division's master jury wheel who identified as American Indian or Alaska Native at the time of Erickson's trial. It is the number of Native Americans in the jury pool, not the number who showed up for jury selection in a particular case, that is relevant to assessing the merits of a fair cross section

[3]Only eight of the nine potential jurors who identified as American Indian or Alaska Native were questioned during voir dire.

challenge. See United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981) (using "the percentage of [American] Indians on the list of persons eligible for petit jury service" to assess a fair cross section claim); Euell v. Wyrick, 714 F.2d 821, 823 (8th Cir. 1983) (explaining that to resolve a fair cross section challenge we examine "the percentage of [the underrepresented group] who served on venires during the time period in which the defendant was tried"); see also Berghuis v. Smith, 559 U.S. 314, 323 (2010) (relying on "the percentage of [the underrepresented group] in the jury pool . . . in the six months leading up to [the defendant's] trial" to evaluate a fair cross section challenge). Because Erickson has not presented evidence about the number of Native Americans in the Central Division's jury pool, he necessarily has failed to show that their representation in that pool was "not fair and reasonable in relation to the number of [Native Americans] in the community." Duren, 439 U.S. at 364.

But even assuming Native Americans are underrepresented in the Central Division's jury pool, as the district court suggests they may be, Erickson has not shown the underrepresentation "is due to systematic exclusion of the group in the jury-selection process." Id. He makes two arguments in support of his assertion that Native American are systematically excluded from the jury pool. The first is that the Central Division's use of voter registration polls to populate the master jury wheel excludes Native Americans because they register to vote in a lower proportion than the general population.

This first argument is foreclosed by our precedent. The practice of using voter registration rolls to compile the master jury wheel is expressly permitted under the Jury Selection and Service Act of 1968, which governs the manner for selecting federal jurors. See 28 U.S.C. § 1863(b)(2). And we have consistently held "that a jury selection plan based on registered voter lists withstands constitutional scrutiny unless there is [otherwise] a showing of systematic exclusion of [the underrepresented group] in the jury selection process." Smith v. Copeland, 87 F.3d 265, 269 (8th Cir. 1996); see Clifford, 640 F.2d at 156 ("The mere fact that one identifiable group of

individuals votes in a lower proportion than the rest of the population[, standing alone,] does not make a jury selection system illegal or unconstitutional."). To demonstrate systematic exclusion, Erickson must provide additional evidence in support of his claim, such as "a defect in the [jury selection] process itself that serves to exclude [the underrepresented group]," "that the voter registration . . . requirements impose . . . discriminatory qualifications on applicants," or "that the administration of the juror selection plan is discriminatory." United States v. Warren, 16 F.3d 247, 252 (8th Cir. 1994); see United States v. Sanchez, 156 F.3d 875, 879 (8th Cir. 1998) (suggesting that systematic exclusion may be established by presenting evidence that an underrepresented group "face[s] obstacles in the voter registration process"). On this record Erickson has not provided any explanation for how the Central Division's reliance on voter registration rolls otherwise operates to systematically exclude Native Americans from criminal jury pools. As a result, he is missing another required element of his prima facie case.

Erickson's second argument concerning systematic exclusion is that "the remote, small and cohesive [nature of] Indian Reservations located in Central South Dakota" makes it impossible to empanel "a jury drawn from a fair cross section of [his] community." Taylor, 419 U.S. at 527. But this is a challenge to the final composition of the jury, rather than to the composition of the jury pool. The Sixth Amendment's fair cross section requirement applies only to the latter. In Taylor v. Louisiana, the Supreme Court was careful to "emphasize[] that in holding that petit juries must be drawn from a source fairly representative of the community [it] impose[d] no requirement that petit juries actually chosen must mirror the community." 419 U.S. at 538. Indeed, the Supreme Court has never used the fair cross section principle "to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." Lockhart v. McCree, 476 U.S. 162, 173 (1986). Rather, Taylor requires only that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not . . . fail to be reasonably

representative" of the community. 419 U.S. at 538. Because this claim is not cognizable under the Sixth Amendment's fair cross section principle, it was not grounds for a new trial.

B.

Erickson also argues he was entitled to a new trial in a different venue based on the fact that a disproportionate number of potential Native American jurors were stricken for cause because they either knew Erickson or a government witness, or were familiar with the alleged facts underlying the case. But Erickson agreed to each of the for-cause strikes of Native Americans, at least one of which was based on unrelated medical issues, and he did not contest the non-discriminatory reasons the government offered for its peremptory strikes of the remaining Native Americans on the jury panel. Moreover, Erickson did not seek a change of venue on these grounds at jury selection or at any other time during trial. See United States v. Cordova, 157 F.3d 587, 597 n.3 (8th Cir. 1998).

The district court denied the motion for new trial in a thorough order that addressed "the unique challenges to achieving adequate representation of Native Americans on jury panels in the Central Division." Despite those challenges, the district court described the complete absence of Native Americans on Erickson's jury as an "anomaly," stating that "despite the vast majority of federal criminal cases in the Central Division arising from reservations . . . Central Division petit juries almost always have at least one, not uncommonly two, and occasionally three Native Americans among the twelve who deliberate." And it noted that while potential jurors from the Rosebud Indian Reservation may have had familiarity with Erickson or his case, there were three other reservations from which jurors might have been called for service on Erickson's jury. The district court was aware of and attentive to Erickson's concerns, but ultimately concluded that a new trial in a different venue was not warranted on these grounds. We discern no abuse of discretion in this

carefully explained decision. See United States v. Dowty, 964 F.3d 703, 708 (8th Cir. 2020) (explaining that we review the district court's ruling on a motion for a new trial for "a clear and manifest abuse of discretion") (quoting United States v. Amaya, 731 F.3d 761, 764 (8th Cir. 2013)).

II.

Next, Erickson asserts there was insufficient evidence for the jury to convict him on the conspiracy count. See 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), 846. We review this challenge de novo, examining the evidence "in the light most favorable to the guilty verdict, [and] granting all reasonable inferences that are supported by that evidence." United States v. Sullivan, 714 F.3d 1104, 1107 (8th Cir. 2013) (quoting United States v. Van Nguyen, 602 F.3d 886, 897 (8th Cir. 2010)). The court "will reverse a conviction only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." Id. (quoting United States v. Wells, 706 F.3d 908, 914 (8th Cir. 2013)).

To convict Erickson on this count, the jury had to find beyond a reasonable doubt: (1) that there was a conspiracy to distribute 500 grams or more of methamphetamine, (2) that Erickson knew about it, and (3) that he intentionally joined it. See United States v. Holmes, 751 F.3d 846, 852 (8th Cir. 2014). Proving a conspiracy does not require evidence of "an express agreement." United States v. Adams, 401 F.3d 886, 893–94 (8th Cir. 2005). "Rather, the government need only establish a tacit understanding between the parties, and this may be shown wholly through the circumstantial evidence of the defendant's actions." Id. at 894 (cleaned up) (quoting United States v. Cabrera, 116 F.3d 1243, 1245 (8th Cir. 1997)).

The government's main witness at trial was Witness C. Witness C told the jury that she provided Erickson with several pounds of methamphetamine to sell on numerous occasions in 2015, and that he also obtained significant quantities directly

from one of her contacts in Nebraska. Witness C acknowledged "there was no actual I'm going to give you this much and I want this much in return" kind of agreement. But she testified that she "would just show up with the meth" and Erickson "would help [her] sell it." And, rather than requiring immediate payment from Erickson, Witness C said she would often "front" the methamphetamine to him, allowing him to repay her from the proceeds of his own drug sales. This is sufficient to establish a tacit understanding between Erickson and Witness C that they would work together to sell methamphetamine.

It was also Witness C who linked Erickson to more than 500 grams of methamphetamine—the amount required to convict him on this count. See 21 U.S.C. § 841(b)(1)(A)(viii). She told the jury that she took approximately 20 trips from Nebraska to the Rosebud Indian Reservation in 2015 for the purpose of distributing methamphetamine. She generally transported between one and three pounds of methamphetamine at a time and usually gave half of that amount to Erickson to sell. The government's other witnesses painted Erickson as a "small time guy" and described purchasing personal use amounts of methamphetamine from him on several occasions. But Witness C's testimony about the significant drug quantities Erickson received and distributed supported a finding that he conspired to distribute 500 grams or more of methamphetamine.

Erickson takes issue with the government's heavy reliance on Witness C to prove both his participation in the conspiracy and the quantity of methamphetamine he was held responsible for. Although his conviction on this count indeed turned largely on Witness C's testimony, the jury's verdict shows it found her credible. We cannot reweigh the evidence or reexamine the credibility of witnesses to determine whether this was justified—"that is the province of the jury." United States v. White, 794 F.3d 913, 918 (8th Cir. 2015). We find there was sufficient evidence for the jury to find the government proved the elements of the conspiracy count beyond a reasonable doubt.

III.

Erickson also challenges an evidentiary matter that arose during his trial. At trial, the government called Witness S. Witness S testified that Erickson tried to recruit him to sell methamphetamine and that he purchased small amounts from Erickson on several occasions during the summer of 2015. After Witness S finished testifying, defense counsel told the court that he believed Witness S was under the influence of methamphetamine. Counsel cited to Witness S's slurred speech as well as to information he received from family members, and he asked the court to order Witness S to submit a urine sample for drug testing. The district court responded that it "didn't have the same impression during [Witness S's] testimony," noting that Witness S had spent the previous night in custody, but asked counsel "who, if anyone, would testify" that Witness S had recently used drugs. Counsel was unable to identify anyone.

The district court then granted counsel's request for a short break. When court resumed, defense counsel said he intended to call Witness S back to the stand, and he proposed that he ask Witness S one question: whether he was "willing to take a urinalysis today to prove to this jury that [he wasn't] under the influence while . . . here testifying today." The court granted the request, and Witness S was brought back into the courtroom. When asked this question in front of the jury, Witness S said no.

We see no abuse of discretion in how the district court handled this evidentiary matter. See United States v. White, 557 F.3d 855, 857 (8th Cir. 2009) (stating that evidentiary rulings are reviewed for an abuse of discretion). Erickson challenges the district court's failure to order Witness S to submit a urine sample for testing, but the court did not rule on this request, presumably because counsel proposed an alternative way to present the sought-after information to the jury. The court permitted defense counsel to re-call Witness S and ask him whether he would submit to drug testing.

That question and Witness S's answer to it gave the jury relevant information—the possibility that he might be under the influence of drugs—to consider when assessing the reliability of his testimony.

And while Erickson now argues it was also error to prohibit him from "fully cross-examining [Witness S] regarding his possible intoxication and methamphetamine use on the [day prior to trial]," defense counsel requested permission to ask only a single question when he re-called Witness S to the stand. In his proposal to the court, counsel said, "whatever the answer [from Witness S] is, the answer is and that would be my only question." Counsel did not seek permission to question Witness S further and the district court did not abuse its discretion by excusing Witness S after he answered the single question posed to him.

IV.

Finally, Erickson contends the district court erred by denying his motion for a new trial on the basis of newly discovered evidence. We review the district court's ruling "for clear abuse of discretion." United States v. Shumaker, 866 F.3d 956, 961 (8th Cir. 2017). To warrant a new trial based on previously unavailable evidence, Erickson must demonstrate the following: "(1) the evidence is in fact newly discovered since trial; (2) diligence on his part [in identifying the evidence]; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issues involved; and (5) it is probable that the new evidence would produce an acquittal at the new trial." Id. (quoting United States v. Bell, 761 F.3d 900, 911 (8th Cir. 2014)).

Three months after trial, the government turned over to defense counsel audio recordings of law enforcement's May and June 2019 interviews with Witness C. Erickson had received written reports summarizing the interviews prior to trial, but not the recordings. The reports describing the two June 2019 interviews included the

following disclaimer: "The below is an interview summary. It is not intended to be a verbatim account and does not memorialize all statements made during the interview. Communications by the parties in the interview room were electronically recorded. The recording captures the actual words spoken." The report summarizing the May 2019 interview did not contain a similar disclosure.

Putting aside whether Erickson could, with more diligence on his part, have discovered the audio recordings before trial, previously unavailable evidence must be material to warrant a new trial. Id. at 961. And evidence that merely impeaches is not material. See United States v. Lewis, 976 F.3d 787, 795 (8th Cir. 2020); United States v. Meeks, 742 F.3d 838, 841 (8th Cir. 2014) ("In order to meet the materiality requirement, newly discovered evidence must be more than merely impeaching." (cleaned up) (quoting United States v. Baker, 479 F.3d 574, 577 (8th Cir. 2007))).

The district court reviewed the audio recordings and the written reports in camera and found that any information contained in the recordings that was not included in the reports was neither material to Erickson's defense nor exculpatory. Instead, the court found the recordings and their corresponding written reports were "substantially similar." Although Erickson argues to the contrary, he merely points out inconsistencies between Witness C's trial testimony and her statements to law enforcement as captured on those recordings and asserts that the government's late disclosure of the recordings "prevented [him] from devastating [Witness C's] credibility by a thorough impeachment of it." This is impeachment evidence, and Erickson fails to explain how it is nevertheless material. The district court did not abuse its discretion by denying Erickson's motion for a new trial on the basis of newly discovered evidence.

V.

We affirm the judgment of the district court.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District Of South Dakota, Central Division

UNITED STATES OF AMERICA
v.
Eli Erickson
a/k/a Black

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:18CR30148-1
USM Number: 17805-273
John S. Rusch
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the Court.

■ was found guilty on count(s) 1s, 2s, 5s, 6s, and 7s of the Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)	Conspiracy to Distribute a Controlled Substance	09/06/2018	1s
18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(i), and 924(d)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	10/22/2016	2s
18 U.S.C. §§ 922(g)(3), 924(a)(2), and 924(d)	Possession of a Firearm by a Prohibited Person	10/22/2016	5s
18 U.S.C. §§ 922(g)(3), 924(a)(2), and 924(d)	Possession of a Firearm by a Prohibited Person	06/03/2018	6s
18 U.S.C. §§ 922(g)(3), 924(a)(2), and 924(d)	Possession of a Firearm by a Prohibited Person	09/06/2018	7s

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) 3s and 4s of the Superseding Indictment

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States attorney of material changes in economic circumstances.

04/20/2020
Date of Imposition of Judgment

Roberto A. Lange
Signature of Judge

Roberto A. Lange, Chief Judge
Name and Title of Judge

April 22, 2020
Date

Appendix E

DEFENDANT: Eli Erickson a/k/a Black
CASE NUMBER: 3:18CR30148-1

IMPRISONMENT

■ The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 128 months on Count 1s, 120 months on Count 5s, 120 months on Count 6s, and 120 months on Count 7s to run concurrently; and 60 months on Count 2s, to run consecutively to Counts 1s, 5s, 6s, and 7s.

■ The Court makes the following recommendations to the Bureau of Prisons:
Your history of substance abuse indicates you would be an excellent candidate for a Bureau of Prisons' substance abuse treatment program. It is recommended that you be allowed to participate in a program.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Eli Erickson a/k/a Black
CASE NUMBER: 3:18CR30148-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 5 years on Count 1s, and 3 years on Counts 5s, 6s, and 7s, all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state, local, or tribal crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.
   - ☐ The above drug testing condition is suspended, based on the Court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ■ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
6. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*
7. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other state authorizing a sentence of restitution. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this Court as well as with any other conditions on the attached page.

DEFENDANT: Eli Erickson a/k/a Black
CASE NUMBER: 3:18CR30148-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the Court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at reasonable times, at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: Eli Erickson a/k/a Black
CASE NUMBER: 3:18CR30148-1

SPECIAL CONDITIONS OF SUPERVISION

1. You must reside and participate in a residential reentry center as directed by the probation office. You will be classified as a prerelease case.

2. You must submit your person, residence, place of business, vehicle, possessions, computer, smart phone, tablet, or any other internet capable device to a search conducted by a United States Probation Officer without a warrant when the officer has reasonable suspicion of a violation of a condition of supervision. You must notify any other residents that the premises and its contents may be subject to searches pursuant to this condition.

3. You must participate in the District of South Dakota's community coach/mentoring program as directed by the probation office.

4. You must participate in and complete a cognitive behavioral training program as directed by the probation office.

5. You must undergo inpatient/outpatient psychiatric or psychological treatment, as directed by the probation office. You must take any prescription medication as deemed necessary by the treatment provider.

6. You must participate in a program approved by and at the direction of the probation office for treatment of substance abuse.

7. You must not consume any alcoholic beverages or intoxicants. Furthermore, you must not frequent establishments whose primary business is the sale of alcoholic beverages.

8. You must submit a sample of your blood, breath, or bodily fluids at the discretion or upon the request of the probation office.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the Court and has provided me with a written copy of this Judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Eli Erickson a/k/a Black
CASE NUMBER: 3:18CR30148-1

CRIMINAL MONETARY PENALTIES

You must pay the total criminal monetary penalties under the Schedule of Payments set below.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$500	Not applicable	$1,000	Not applicable	Not applicable

☐ The determination of restitution is deferred until
An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ You must make restitution (including community restitution) to the following payees in the amount listed below.

If you make a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to Plea Agreement $_____

☐ You must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the Judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

■ The Court determined that you do not have the ability to pay interest and it is ordered that:

■ the interest requirement is waived for the ■ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Amy, Vicky, & Andy Child Pornography Assistance Act of 2018, Pub. L. 115-299.
**Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
***Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Eli Erickson a/k/a Black
CASE NUMBER: 3:18CR30148-1

SCHEDULE OF PAYMENTS

Having assessed your ability to pay, payment of the total criminal monetary penalties is due as follows:

A ■ Lump sum payment of $500 due immediately, balance due

☐ not later than _____, or

■ in accordance with ☐ C, ☐ D, ■ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____, to commence _____ *(e.g., 30 or 60 days)* after the date of this Judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ■ Payment of the total restitution and other criminal monetary penalties shall be due in regular quarterly installments of 50% of the deposits in your inmate trust account while the you are in custody, or 10% of your inmate trust account while serving custody at a Residential Reentry Center. Any portion of the monetary obligation(s) not paid in full prior to your release from custody shall be due in monthly installments of $50, such payments to begin 60 days following your release.

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise, if this Judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

You shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*,	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ You shall pay the cost of prosecution.

☐ You shall pay the following Court cost(s):

■ You shall forfeit your right, title, and interest in the following property to the United States:
1. an Amadeo Rossi Sociedade Anomina (S.A.), model R92, .357 Magnum caliber rifle, with serial number 51T205030;
2. a Remington Arms Company Incorporated, model 1100, 12-gauge shotgun, with serial number L026014V;
3. an Armi Jager, model AP-74, .22 caliber rifle, with serial number 118328;
4. a Beemiller Incorporated, Hi-Point brand name, model C9, 9x19mm Luger caliber pistol, with serial number P127339; and
5. $327 in U.S. currency seized on or about 09/06/2018.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1861

United States of America

Appellee

v.

Eli Erickson, also known as Black

Appellant

Appeal from U.S. District Court for the District of South Dakota - Central
(3:18-cr-30148-RAL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix F