NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

WICAHPE GEORGE MILK

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether acts occurring on the Pine Ridge Indian Reservation deprived the Court of jurisdiction over all parts of the indictment.

II. Whether 18 U.S.C. § 1503 is unconstitutional and could not have formed the basis for any conviction.

III. Whether the seizure of attorney client material from defendant's jail cell should have been suppressed and resulted in the dismissal of all counts against him.

PARTIES TO THE PROCEEDING

Petitioner is Wicahpe Milk, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Wicahpe Milk, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit, which was published at 66 F4th 1121, was issued on May 3, 2023, and is reprinted in Appendix A to this Petition ("App.A") at 1a-19a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (a). The decision of the United States Court of Appeals for the Eighth Circuit for which petitioner seeks review was issued on May 3, 2023. This petition is filed within 90 days of the date that the Eight Circuit Court of Appeals issued its decision and judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 5, provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law... .

United States Constitution, Amendment 6, provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...

STATEMENT OF THE CASE

This is a case that started with a traffic stop in August, 2016, and arrest of

the defendant, an enrolled member of the Oglala Sioux Tribe. Thereafter an indictment was returned and later superceded charging conspiracy to distribute methamphetamine, felon in possession of a firearm, and obstruction of justice. Pretrial motions were filed including those raising the three issues forming the basis of the present petition. The reasons for granting this petition sets out facts relevant to each of the issues.

REASONS FOR GRANTING THE PETITION

I. ACTS OCCURRING ON THE PINE RIDGE INDIAN RESERVATION DEPRIVED THE COURT OF JURISDICTION OVER ALL OR PARTS OF THE INDICTMENT.

From the facts adduced at trial, a significant number of purported methamphetamine distributions allegedly committed by defendant occurred on the Pine Ridge Indian Reservation, Rosebud Indian Reservation, and Cheyenne River Indian Reservation, all Indian County under 18 U.S.C. § 1151. All of the alleged sales were to other Indians. These facts give rise to a number of jurisdictional impediments to the present action.

First, under the Major Crimes Act, 18 U.S.C. § 1153, the crime of conspiracy to distribute a controlled substance, prohibited person in possession of a firearm, and obstruction are not set forth as prohibited offenses. Thus, under *Ex parte Crow Dog, 109 U.S. 556* (1883), the prosecution of these offenses are barred in federal court.

Second, if the government is relying upon 18 U.S.C. § 1152, jurisdiction is still lacking because there is an exception for offenses by one Indian over the person or property of another Indian and also where by treaty jurisdiction rests with a tribe. As to the former, the alleged sale of an illegal substance would qualify as an offense against another Indian. Additionally, the Oglala Sioux Tribe has its own drug laws that apply to tribal members. See Oglala Sioux Tribe Ordinance 16-22, passed on August 23, 2016. As to the latter, under the Treaty of 1868, April 29, 1868, 15 Stat. 635, ratified February 16, 1869, Proclamation February 24, 1869, when an offense is committed in Indian Country, the tribe must deliver the individual to the United States and the United States cannot take it upon itself to institute an original action, such as here, that was not proceeded by the tribe turning over the Indian offender.

Third, the Oglala Sioux Tribe retains inherent authority over its land and its people within the exterior boundaries of the Pine Ridge Indian Reservation. This includes the power and authority to exercise criminal jurisdiction over its members, such as Wicahpe Milk. The United States will in all likelihood argue that 21 U.S.C. § 841 (a) (1) and 18 U.S.C. § 922 are general laws of the United States. However, to make that argument, they are required to show either on the face of the general law or from its legislative history, Congress intended the above laws to apply to Indian Country. *United States v. Quiver*, 241 U.S. 602 (1916); *United States v. Dion*, 476 U.S. 764 (1986); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *United*

States v. Markiewicz, 978 F2d 786, 799 (2nd Cir. 1992). No such showing as required by *Dion* can be or was made in this case and the federal courts had no jurisdiction to convict or sentence for any distribution or possession of illegal drugs or firearms occurring on any of the three Indian reservations.

II. 18 U.S.C. § 1503 IS UNCONSTITUTIONAL AND COULD NOT HAVE FORMED THE BASIS FOR ANY CONVICTION.

Defendant Milk maintained that 18 U.S.C. § 1503 and its application to his case violated his constitutional rights. First, the statute contains the amorphous, non-definite, and totally vague phrase "due administration of justice." Criminal statutes that lack sufficient definiteness or specificity are void and run afoul of the due process clause because they fail to give guidance to the public, to advise defendants of the nature of the offense for which they are charged, or give guidance to the courts. *Cantwell v. Connecticut*, 310 U.S. 296, 298 (1940). Penal statutes must define an offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983.) The phrase "due administration of justice" means about anything that a prosecutor or judge says it is and for this reason is unconstitutional. Many similar criminal statues have been invalidated because of vagueness the same as § 1503 is vague. Compare *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Edelman v. California*, 344 U.S. 357 (1953); *Papachristou v. City of Jacksonville*, 405 U.S. 156

(1972); *Smith v. Goguen*, 414 U.S. 566 (1974).

Secondly, the basis of the § 1503 count is that defendant allegedly wrote certain letters to other individuals in the jail population discussing his case. Clearly an indictment based on action and conduct of defendant that is protected by the First Amendment right to free speech and association within the confines of the jail facility cannot be the proper basis of a criminal charge. The rights under the First Amendment can be invoked and were invoked in this criminal case. *Watts v. United States*, 394 U.S. 705 (1969); *see Branzburg v. Hayes*, 408 U.S. 665, 707-708 (1972); *In Re Grand Jury 87-3 Subpoena Duces tecum*, 955 F2d 229 (4th Cir. 1992). Defendant's right to communicate and associate with other inmates could not be the basis of a criminal prosecution that burdens that right, such as the § 1503 does in this case. The District Court erred in not upholding the validity of 1503 on its face and as applied. R. Doc. 219.

III. THE SEIZURE OF ATTORNEY CLIENT MATERIAL FROM DEFENDANT'S JAIL CELL SHOULD HAVE BEEN SUPPRESSED AND RESULTED IN THE DISMISSAL OF ALL COUNTS AGAINST HIM.

Wicahpe Milk pursuant to Crim. R. 12 (b) (3) (c), moved to suppress all evidence seized from his jail cell at the Pennington County Jail on or about August 30, 2019, and to dismiss the entire action against him for the reasons set in the motion. R. Doc. 232. His motion was denied. Add. 63; Add. 80 (District Court).

An evidentiary hearing, R. Doc. 257, was held before the Magistrate and a

Report and Recommendation was filed by her. R. Doc. 283. The District Court adopted the Report and Recommendations made by the Magistrate, R. Doc. 294, which granted in part and denied in part the motion to suppress and to dismiss all claims against him. R. Doc 294 at 1. The District Court suppressed "pages 7 - 15 and 17 of Exhibit 2, Bates 2895-2903 and 2905." R. Doc. 294 at 16. Add 11. The government "was cautioned that it must first approach the court out of the presence of the jury and secure a ruling from the court before attempting to use either the documents or the defendant's mental impressions as evidence at trial." R. Doc. 294 at 7. "The government, as in Pelletier, will be required to show the evidence it seeks to use against the defendant was derived "as legitimate sources wholly independent of the suppressed documents." R. Doc. 294 at 12.

On August 26, 2019, a jury trial commenced for Brandon Janis, a defendant at the Pennington County Jail. During that trial, a government witness said he had received threats from Janis and Milk regarding his cooperation and testimony. On August 30, 2019, FBI agents and FBI Task Force officers went to the jail cell of Wicahpe Milk at the Pennington County Jail and seized virtually everything that he had in his cell. At that time, Milk was represented by his current attorney and no search warrant authorized the seizure of his property. The same agents also seized all contents of the cell occupied by Brandon Janis. According to the FBI, the materials seized reflected "potential evidence of obstruction of justice and witness tampering." According to the United States, an Assistant United States Attorney

reviewed all the documents seized and did not see any evidence of seized material protected by the attorney-client privilege. On or about October 22, 2019, a superceding indictment was returned against Milk charging him with obstruction of justice. Appendix B to this Petition ("App.B") at 20b-22b.

The amount of materials seized from Milk was voluminous, numbering in the hundred of pages. The materials that were kept by the FBI for use, and provided as discovery in the case to Milk's attorney, are set forth in Bates 2885 to 2912, which were filed with the Court under seal as part of the motion. R. Doc. 251-252. However, the agents also reviewed hundreds of other pages of documents seized from Milk's cell that were returned to defendant's attorney in a storage box still in possession of Milk's attorney in the same condition as when they were left at his office.

A defendant's Sixth Amendment right to counsel attaches "at or after the initiation of adversarial judicial criminal proceedings." *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972). A "heavy burden is placed on the government to show a knowing and intelligent waiver of Sixth Amendment rights." *Brewer v. Williams*, 430 U.S. 387, 403 (1977); *Faretta v. California*, 422 U.S. 806 (1975). This includes the situation where police investigate other crimes which defendant has not been charged with and which the police should know will reveal incriminating evidence involving the indicted charges. *Maine v. Moulton*, 474 U.S. 159 (1985). Seizures are not permitted if they involve "a special relationship" which the law has

traditionally endowed with confidentiality, such as the attorney-client relationship. *Lanza v. New York*, 370 U.S. 139 (1962).

Once a defendant's right to counsel has attached, government intrusion into the attorney-client relationship violates the Sixth Amendment if the defendant can show a realistic possibility that he or she was prejudiced by the intrusion. *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977). Courts use four factors to determine whether a defendant suffered prejudice from government intrusion. First, whether government intrusion into the attorney-client relationship was intentional. *United States v. Morrison*, 449 U.S. 361, 365 (1981) ("demonstrable prejudice, or substantial threat thereof" warrants dismissal of indictment); *United States v. Schwimmer*, 924 F2d 443, 446-47 (2nd Cir. 1991) (intrusion warrants careful scrutiny); *Nordstrom v. Ryan*, 856 F3d 1265, 1271 (9th Cir. 2017) (intentional intrusion into attorney client relationship because government policy undermined relationship by allowing officials to read defendant's mail.) Second, whether evidence offered at trial was obtained directly or indirectly from the intrusion. *Weatherford*, 429 U.S. 556. Third, whether the prosecution obtained any details of the defendant's pretrial preparation or defense strategy. *Weatherford*, 429 U.S. 556; *Shillinger v. Haworth*, 70 F3d 1132, 1142 (10th Cir. 1995) (violation when deputy sheriff present during defense's trial preparation because prosecution obtained and used information regarding defense strategy). *United States v. Danielson*, 325 F3d 1054, 2073-74 (9th Cir. 2003) (intrusion proved when prosecution was sent

information about defense strategy meetings, informant elicited privileged information, prosecution listened and transcribed privileged information and kept information in office). Four, whether information obtained has been used to detriment of the defendant. *Weatherford*, 429 U.S. 554.

In the government's case, they introduced testimony that had been suppressed by the District Court at "pages 7-15 and 17 of Exhibit 2, Bates 2895-2903 and 2905" that the government "was cautioned that it must first approach the court out of the presence of the jury and secure a ruling from the court before attempting to use either the documents or the defendant's mental impressions as evidence at trial." This was the proof that the government had to satisfy before using any of the suppressed materials. "The government, as in Pelletier, (was) required to show the evidence it (sought) to use against the defendant was derived as legitimate sources wholly independent of the suppressed documents." Not once throughout the trial did the government even attempt to make such a showing. Each time the government alluded to any of the suppressed materials, defendant timely objected citing the suppression ruling of the District Court. The objections were each time overruled and the objected to evidence was considered by the jury in finding defendant guilty of the charges resulting thereby depriving him of his constitutional right to a fair trial.

CONCLUSION

For any one or all of the above reasons set forth in assignment of error I, II, or III, the petition for certiorari should be granted and defendant's conviction reversed in whole or part and the action dismissed against him or remanded for a new trial as appropriate.

Dated July 25, 2023.

Respectfully submitted,
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