
**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

USCA No. 10-2849

UNITED STATES OF AMERICA,

Appellee,

v.

MARC SEAN WISECARVER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION
THE HONORABLE RICHARD BATTEY
SENIOR UNITED STATES DISTRICT JUDGE

APPELLANT'S REPLY BRIEF

Neil Fulton, Federal Public Defender
Gary G. Colbath, Jr., Assistant Federal Public Defender
Mark S. Falk, on the brief
703 Main Street, Second Floor
Rapid City, SD 57701
Telephone: (605) 343-5110
Facsimile: (605) 343-1498

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii
Preliminary Statement.....	1
Reply to Statement of Case and Facts.....	1
Arguments.....	13
I. This Court remanded this case “to the district court with directions to vacate its judgment of conviction on the depredation count and its sentence.” The district court, <i>sua sponte</i>, ordered a retrial. The retrial order is outside the scope of this Court’s remand directions.	13
II. <i>Liteky v. United States</i>, 510 U.S. 540, 554 (1994), held that judicial predispositions developed during the course of a trial will sometimes suffice for recusal. Mr. Wisecarver moved for recusal based upon district court opinions formed during the first trial. The district court erred by concluding that “ ‘opinions held by judges as a result of what they learned in earlier proceedings,’ are not grounds for recusal.”	17
III. Mr. Wisecarver defended on the ground that he reasonably believed a BIA employee trespassed on his land and threatened to injure or harm Mr. Wisecarver with the government vehicle. The district court, however, instructed the jury “A BIA employee who goes upon private property in the performance of his duty is not a trespasser.” Such an instruction improperly undermined the defense.	21
IV. A finding of perjury for an obstruction enhancement must be based upon a false statement about a material fact rather than an opinion. The district court erred by basing a perjury	

finding upon the court’s disagreement with Mr. Wisecarver’s opinions that the BIA employee: (1) trespassed; and (2) walked in a threatening manner after the alleged offense conduct. 25

V. For a sentence to be substantively reasonable, the district court is required to adequately consider relevant factors that should receive significant weight. An individual’s ability to thrive in Indian Country, service to the country and community, lack of criminal history, and commitment to family are relevant factors requiring significant weight. The district court erred by imposing an upward variance with no mention of these factors. 28

VI. Each special condition of supervised release must be reasonably related to specific section 3553(a) factors and be based on the specific facts of the defendant's criminal history and his particular offenses. Mr. Wisecarver’s offense did not involve alcohol and he had no history of alcohol abuse. Three conditions of supervised release premised on alcohol abuse are not reasonably related to Mr. Wisecarver’s circumstances. 31

Conclusion. 33

Certificate of Service. 34

Certificate of Compliance. 35

TABLE OF AUTHORITIES

<u>United States Supreme Court</u>	<u>Page(s)</u>
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	29
<i>Liteky v. United States</i> , 510 U.S. 540 (1994).	17, 18, 20
<i>United States v. Booker</i> , 543 U.S. 220 (2005).	29
<u>United States Court of Appeals</u>	<u>Page(s)</u>
<i>American Prairie Construction Co. v. Hoich</i> , 560 F.3d 780 (8th Cir. 2009).....	18
<i>Fletcher v. Conoco Pipe Line Co.</i> , 323 F.3d 661 (8th Cir. 2003).	18
<i>Sentis Group, Inc. v. Shell Oil Co.</i> , 559 F.3d 888 (8th Cir. 2009).....	20
<i>United States v. Bass</i> , 121 F.3d 1218 (8th Cir. 1997)..	32
<i>United States v. Big Crow</i> , 898 F.2d 1326 (8th Cir. 1990)..	30
<i>United States v. Burns</i> , 577 F.3d 887 (8th Cir. 2009)..	29
<i>United States v. Byrne</i> , 83 F.3d 984 (8th Cir. 1996)..	15
<i>United States v. Campbell</i> , 95-5856, 1995 WL 758468 at *1, 1995 U.S. App. LEXIS 38835 at *4 (6th Cir. 1995).....	16
<i>United States v. Campbell</i> , 168 F.3d 263 (6th Cir. 1999).	16
<i>United States v. Cornelius</i> , 931 F.2d 490 (8th Cir. 1991).	14, 15
<i>United States v. Cornelius</i> , 968 F.2d 703 (8th Cir. 1992).	15
<i>United States v. Curry</i> , 627 F.3d 312 (8th Cir. 2010)	32

<i>United States v. Feemster</i> , 572 F.3d 455 (8th Cir. 2009).....	29
<i>United States v. Has No Horse</i> , 11 F.3d 104 (8th Cir. 1993).....	13
<i>United States v. Kenyon</i> , 397 F.3d 1071 (8th Cir. 2005).	16
<i>United States v. Montgomery</i> , 100 F.3d 1404 (8th Cir. 1996).	16
<i>United States v. One Star</i> , 9 F.3d 60 (8th Cir. 1993).	30
<i>United States v. Prendergast</i> , 979 F.2d 1289 (8th Cir. 1992).	32
<i>United States v. Schrader</i> , 10 F.3d 1345 (8th Cir. 1993).	13
<i>United States v. Wiley</i> , 509 F.3d 474 (8th Cir. 2007).	32
<i>United States v. Wisecarver</i> , 598 F.3d 982 (8th Cir. 2010).	2, 14, 16
<i>Wilkinson v. United States</i> , 564 F.3d 927 (8th Cir. 2009).	23
<u>State Cases</u>	<u>Page(s)</u>
<i>State v. Frey</i> , 440 N.W.2d 721 (S.D. 1989).	23
<u>Statutes</u>	<u>Page(s)</u>
18 U.S.C. § 3553(a).	29, 31, 32
<u>Rules</u>	<u>Page(s)</u>
FED. R. APP. P. 28(c).	1

PRELIMINARY STATEMENT

Mr. Wisecarver submits his Reply brief pursuant to FED. R. APP. P. 28(c), to clarify the record and respond to the prosecution's arguments.¹

REPLY TO STATEMENT OF CASE AND FACTS

The prosecution's statement of facts, (PB 2-13), has not addressed nor disputed the key facts identified by Mr. Wisecarver, (AB 8-15), nor cited testimony from the record to contradict Mr. Wisecarver's statement of facts. Thus, the prosecution either agrees with Mr. Wisecarver's factual statement or waives any dispute.

Instead of acknowledging or contesting the facts as identified by Mr. Wisecarver, the prosecution has added several new factual statements. While many of these statements are not necessarily incorrect, the prosecution has misunderstood the record on several key points and may have overlooked the context.

For example, the prosecution states "On March 22, 2010, this Court vacated the judgement based on an erroneous jury instruction and remanded it to the district court for further proceedings. CR 94." (PB 1-2, 10-11). While partially

¹Mr. Wisecarver will use the same designations as used in his opening Appellant's brief, and will refer to his opening brief as "AB" and to the prosecution's Appellee brief as "PB" followed by a page reference.

correct, the statement overlooks the actual directions of this Court and the context of these directions.

In context, this Court's March 22, 2010, Judgment ordered a remand "for proceedings consistent with the opinion of this court," (CR 94), which, in turn, specifically instructed the district court what action to take in these further proceedings. "The case is remanded to the district court with directions to vacate its judgment of conviction on the depredation count and its sentence." *United States v. Wisecarver*, 598 F.3d 982, 990 (8th Cir. 2010).

In describing the events leading to the depredation count, the parties agree that without notifying or requesting permission from Mr. Wisecarver, Duke Bourne, who was later discovered to be an employee of the Bureau of Indian Affairs (BIA), drove an unmarked Chevrolet pickup truck on to the land where Mr. Wisecarver and his daughter made their home. (AB 12-13; PB 4-5). The prosecution, however, incorrectly suggests that Mr. Bourne obtained permission to enter the land from Randall Hughes, another owner: "Bourne had permission from Hughes, the majority landowner, to survey the land for its best use in response to the land lease application." (PB 30)

Although Mr. Hughes stated that he had submitted a lease application to the BIA, (TT 32), he said nothing about any contact or communication with

Mr. Bourne to give him permission or consent to go on the land on the day of the incident. (TT 29-39). In fact, Mr. Bourne testified that he did not talk with Mr. Hughes before entering the land.

Q. Before you went there, you didn't talk to Mr. Hughes either, did you?

A. No.

(TT 69).

Clarifying the prosecution's incorrect statement is necessary because Mr. Bourne's entry upon the land without first contacting either Mr. Hughes or Mr. Wisecarver is an important factor on two issues. *First*, it should be weighed in evaluating the district court's decision to instruct the jury, in effect, that they were not permitted to consider whether Mr. Bourne was a trespasser. *Second*, the fact that he entered without contacting an owner is directly relevant to the district court's perjury finding based on Mr. Wisecarver's opinion that he thought Mr. Bourne was trespassing. The failure to contact Mr. Hughes eliminates any factual inference that Mr. Hughes might have informed Mr. Wisecarver about Mr. Bourne's plans to visit.

The prosecution is mistaken about another important factor on the trespass issue. The prosecution incorrectly asserts Mr. Wisecarver claimed at trial "that

Bourne drove through the front gate to the property past a no trespassing sign” (PB 4, citing TT 61, 89-90). The cited pages do not contain Mr. Wisecarver’s testimony and do not represent his position at trial. He did not claim the truck entered through the front gate; rather, Mr. Wisecarver testified that he first saw Mr. Bourne’s vehicle sitting inside the posted front gate. (TT 141:21-25, 142:1-8, 12-15). Thus, the prosecution has incorrectly recalled Mr. Wisecarver’s testimony.

The prosecution also overlooks uncontested evidence about Mr. Bourne’s interaction with Mr. Wisecarver’s horses grazing on his land. While Mr. Bourne testified that “he drove slowly and deliberately when trying to determine their brand, so as not to spook the horses,” (PB 5), he did not deny that Mr. Wisecarver observed him “chasing” those horses “in a clockwise circle” with his truck, nearly clipping the back foot of one animal. (TT 145:22-25, 146:1-13). Since Mr. Bourne did not dispute this description or provide contrary testimony, it is a mistake to implicitly deny that Mr. Bourne frightened the horses.

Similarly, the prosecution’s statements that Mr. Bourne “identified himself several times as a government employee,” (PB 6, n. 6), and “identified himself as a BIA employee inspecting the land pursuant to a lease application,” (PB 6), could be misleading if taken out of context. In context, the undisputed evidence

established that when Mr. Wisecarver asked Mr. Bourne what he was doing on the property, Mr. Bourne presented nothing objective to confirm his claim of government employment. He wore no government uniform or badge and his clothing and hat had no government markings. He showed no identification or business card. The truck had no observable government markings on the body or interior. (TT 87:16-25; 88:1-2, 6-9; 93:19-25). In sum, the absence of objective factual evidence that a reasonable observer might expect a genuine government employee to possess is undisputed. Coupled with Mr. Bourne's conduct (entering posted property without providing notice or requesting permission, driving on the property without coming to Mr. Wisecarver's visible residence, and frightening Mr. Wisecarver's livestock), the lack of objective indica of government employment provides an accurate explanation for the context in which Mr. Wisecarver questioned Mr. Bourne's claims about his employment and purpose.

Although the prosecution acknowledges that while on Mr. Wisecarver's property near his home, Mr. Bourne accused Mr. Wisecarver of lying about being the "sole landowner," (PB 6), the prosecution overlooks that the phrase "sole landowner" originated with Mr. Bourne, not Mr. Wisecarver.

A. . . . I asked him if he was a landowner and he said, "Yes." I said, "Are you the sole landowner?" He said, "Yes." I said, "I don't think so." . . .

. . .

Q. Okay. And once you -- did you say you disagreed with him being the landowner?

A. I disagreed with him being the sole landowner

(TT 63:7-11, 21-23). In response to Mr. Bourne's statement, "Well, you don't own all this land," Mr. Wisecarver said "Well, I am the resident landowner. I live here." (TT 150:11-13). The evidence is undisputed that only Mr. Wisecarver's family lived on the property.

Although the prosecution's brief also identifies no dispute in the factual record concerning the events leading up to the shooting of the grill, the prosecution makes several statements that could be misleading if considered out of context. For example, the prosecution states that Mr. Bourne's comment "What?" when Mr. Wisecarver told Mr. Bourne to get out of the truck and walk off property, "prompted Wisecarver to chamber a round into his rifle, step back from the driver's side window several yards at a side angle, and fire a round through the grill and into the radiator." (PB 7, citing TT 64, 66).

Mr. Bourne's testimony at the cited pages, however, does not purport to explain what prompted Mr. Wisecarver's actions. Instead, Mr. Wisecarver's uncontradicted testimony provides the explanation.

Q. Okay. What happened when you told him, "No, get out and walk" or "leave the truck here?"

A. I think I told him that once or twice, and he's just glaring at me. And then he leans forward and glares at me, revs the motor, and --

Q. Let me stop you there. What do you mean revs the motor?

A. Revving the motor gives it gas. He leans forward, gives the truck gas, glaring at me; then the truck is like (indicating a noise) revving up.

Q. What did you do when you heard that noise? Or first of all, how did that make you feel when you heard that noise?

A. I couldn't believe it. I thought, "He's going to run me over."

Q. So what did you do when you heard the noise?

A. When I heard the noise, at that second I heard that, then I couldn't believe it. I stepped back and lowered the barrel. And then he snapped his hand on the gear shifter; and then I fired the weapon.

(TT 151:18-25; 152:1-12). The prosecution has not identified any testimony in the record disputing this explanation of what prompted Mr. Wisecarver to step back and fire into the grill of the truck.

Similarly, the prosecution makes another factually incorrect statement about Mr. Bourne's purported "testimony that Wisecarver shot out of anger regarding the land lease application initiated by his cousin and majority owner of the allotment, Randy Hughes." (PB 36). The prosecution does not and cannot cite a source in the transcript for this incorrect statement because there is no such testimony in the record. Mr. Bourne did not offer an explanation of why Mr. Wisecarver fired the gun nor did Mr. Bourne dispute Mr. Wisecarver's testimony describing Mr. Bourne's conduct at the time.

The prosecution has also misread or overlooked information in the presentence report (PSR). For example, the prosecution incorrectly states paragraph 39 of the PSR alleged violent conduct and physical abuse toward Mr. Wisecarver's daughter, and states that paragraph 39 describes "how law enforcement investigated and corroborated daughter's disclosure that Wisecarver had threatened and physically abused her." (PB 41, 44-45). This is an incorrect description of the contents of paragraph 39.

The PSR expressly reported that the daughter stated that her allegations were not true, but were fabrications due to the child's jealousy of her father's female friend and her teenage desire to be free from parental control.

[RW's] paternal grandmother reported [RW] told her she was angry at her father because he had a girlfriend. She also stated [RW] was extremely jealous of the girlfriend, and the black eye occurred when she was riding a horse. During the pretrial stage of the instant offense, [RW] reported some of the allegations school officials reported were inaccurate. She admitted she was mad at the defendant because of the rules and restrictions he placed on her, and she rebelled to get out of his custody. Once things calmed down, she returned to his care and nothing more was said until the presentence investigation in the instant offense; therefore, she wanted to set the record straight. . . .

(PSR ¶ 39). The prosecution did not object to or challenge the daughter's statements, which provide the "rest of the story" concerning the actual content of the paragraph 39, as repeatedly referenced by the prosecution.

The prosecution's frequent but incorrect assertion of anger, threats, and abuse in dealing with the child also overlooked the following un-objected to factual statement.

[RW] indicated she has a good relationship with her father, and she stated he provided for all her needs. Additionally, he has always been there for her and for anyone else that needed help. She stated he is always willing to help others. . . . She described occasional fights between her and her father; however, she indicated the fights are normal and not all his fault. She indicated she does not always agree

with his strict parenting, but he has done a good job of teaching her to be responsible, reliable, confident, and independent.

(PSR ¶ 38).²

The prosecution also has misunderstood what the PSR reported concerning Mr. Wisecarver's use of alcohol, controlled substances, and his mental health. Thus, the prosecution incorrectly suggests that Mr. Wisecarver requires "rehabilitative efforts to address Wisecarver's mental health issues" and that he should not be permitted to consume alcohol. (PB 44-45). The prosecution has overlooked undisputed information to the contrary.

The PSR reports, "The defendant first consumed alcohol at age 16. Following this exposure, he drank socially until approximately 15 years ago, at which time he quit drinking all together. He reportedly has never experimented with or consumed any illegal drugs, nor has he abused prescription medication."

² The prosecution also erroneously cites to allegations from the first sentencing hearing that were not repeated in the current proceeding. The prosecution asserts that Mr. Wisecarver "brandished a weapon to [his daughter] and threatened to throw her down a prairie dog hole." (PB 44-45, citing hearsay statements from the first sentencing transcript). During the first sentencing proceeding, Mr. Wisecarver objected to the hearsay allegations as unreliable and untrue. The second PSR did not repeat these allegations, (PSR § 39), and the prosecution did not repeat the allegations or offer the hearsay at the second sentencing hearing. Thus, they are not part of the current sentencing record.

(PSR ¶ 46). This is the only reference to Mr. Wisecarver's history with alcohol or controlled substances in the trial transcript, PSR, or sentencing transcript.

The prosecution's statements about Mr. Wisecarver's mental health apparently overlook the fact that he has had no mental health problems or any need for treatment for over 20 years. The PSR reports that in 1987 he sustained a "minor head injury" and acted "strange" for a week afterward. He also experienced one "amnesic episode while he was in high school." (PSR ¶ 43). Then in January 1990, while in the U.S. Marine Corps, he experienced a similar amnesic episode, (PSR ¶ 42), and in March 1990, he was honorably discharged from the service due to his "episodic trance-like states," with a diagnosis of "dissociative disorder, not otherwise specified." (PSR ¶ 44). None of these episodes are reported to involve alcohol or controlled substances and there have been no further reports of similar episodes or treatment since 1990.³

The district court made no findings or statements about Mr. Wisecarver's mental health, need for treatment, temper, alcohol use, emotional stress, or substance abuse. The prosecution apparently overlooked this fact when it implies

³ In an effort to improve his ability to parent his teenage daughter and deal with the stress caused by the current allegations against him, Mr. Wisecarver chose to attend a few individual therapy sessions in Kyle, South Dakota. (PSR ¶ 45).

the district court made findings pertaining to “a history of a violent temper, a history of use of a dangerous weapon in conjunction with that violent temper, or a history of mental health issues which are worsened by emotional stress,” and then erroneously states “the district court had all of these concerns before it when imposing the alcohol ban.” (PB 47-48). The district court made no such statements or findings, and did not give any reason for imposing the special conditions prohibiting alcohol. Rather, the record is simply silent.

Mr. Wisecarver will respond in the argument section below to other misleading or incorrect assertions of fact contained in the prosecution’s brief.

ARGUMENTS

- I. **This Court remanded this case “to the district court with directions to vacate its judgment of conviction on the depredation count and its sentence.” The district court, *sua sponte*, ordered a retrial. The retrial order is outside the scope of this Court’s remand directions.**

Standard of Review.

The prosecution does not contest the *de novo* standard of review identified by Mr. Wisecarver. (AB 21; PB 15).

Merits.

The prosecution has misunderstood Mr. Wisecarver’s position regarding this Court’s explicit remand instructions. Contrary to the prosecution’s suggestion, Mr. Wisecarver has not argued that “this Court . . . intended the [sic] to effectively acquit” him on the depredation charge. (PB 13). Rather, this Court provided explicit instructions to the district court, and in contrast with the cases cited by Mr. Wisecarver that direct a retrial or new trial,⁴ (AB 22-24), this Court’s explicit instruction did not direct retrial or a new trial. Instead, this Court

⁴ Case law cited by the prosecution, (PB 20), is very helpful and confirms this Court’s practice of explicitly directing retrials if intended. See, *United States v. Has No Horse*, 11 F.3d 104, 106 (8th Cir. 1993) (explaining “if the evidence was not sufficient to establish guilt beyond a reasonable doubt, we would reverse the conviction and would not remand the case for a new trial”); *United States v. Schrader*, 10 F.3d 1345, 1352 (8th Cir. 1993)(holding, “[a]s there was trial error but not insufficiency of the evidence, defendants may be retried”).” (PB 20).

“remanded to the district court with directions to vacate its judgment of conviction on the deprecation count and its sentence.” *United States v. Wisecarver*, 598 F.3d 982, 990 (8th Cir. 2010).

While this Court’s sufficiency analysis established that a second deprecation prosecution would not be barred by double jeopardy, this Court gave no indication to the district court that it should commence a second prosecution or continue this prosecution with a retrial. Thus, granting Mr. Wisecarver’s motion and dismissing the superceding indictment without prejudice would have constituted “proceedings consistent with the opinion of this Court.” (CR 94).

The prosecution’s law of the case analysis conflates the distinction between issues decided by this Court on appeal and this Court’s instructions to hold a retrial, resentencing, or other proceedings on remand. The prosecution is correct that once an issue is decided by this Court, that becomes the law of the case for any future proceedings ordered or permitted by this Court. For example, *United States v. Cornelius*, 931 F.2d 490 (8th Cir. 1991) (*Cornelius I*), affirmed a district court’s career offender finding, but reversed the court’s classification of a second felony (breaking and entering) for the purposes of an armed career offender enhancement. On his second appeal Mr. Cornelius argued that the district court should have considered new evidence on both the career offender and the armed

career offender enhancement. This Court reversed, holding that additional evidence and arguments should have been allowed on the *armed* career offender issue because this Court had only decided that the second felony constituted a proper predicate, but had not made the ultimate finding on whether the enhancement applied. This Court, however, affirmed the district court's refusal to consider new evidence or arguments on the career offender enhancement because this Court's first decision constituted the law of the case and could not be reconsidered on remand. *United States v. Cornelius*, 968 F.2d 703, 706 (8th Cir. 1992) (*Cornelius II*).

In contrast, both *Cornelius* decisions illustrate the difference between deciding an issue (the law of the case) and directing the district court to hold a further proceeding on remand. *Cornelius I* explicitly "remand[ed] for resentencing" 931 F.2d at 494. *Cornelius II* also explicitly "remand[ed] the case to the district court for resentencing" 968 F.2d at 707.

Although such instructions do not equate to the law of the case, the district court still must abide by this Court's directive. Similar instructions were given in the initial reversals later appealed in other cases cited by the prosecution. *See e.g.*, *United States v. Byrne*, 83 F.3d 984, 994 (8th Cir. 1996) ("We affirm Santonelli's conviction on all counts, vacate his sentence and remand his case to the district

court for resentencing.”); and *United States v. Campbell*, 95-5856, 1995 WL 758468 at *1, 1995 U.S. App. LEXIS 38835 at *4 (6th Cir. 1995) (unpublished)⁵ (“remanded to the district court for an evidentiary hearing . . .”).

In contrast, this Court did not remand with instructions to hold further hearings or a new trial. Instead, this Court “remanded to the district court with directions to vacate its judgment of conviction on the depredation count and its sentence.” *Wisecarver*, 598 F.3d at 990. Thus, the district court’s *sua sponte* decision to schedule and hold a retrial exceeded the scope of the remand instructions. Since the prosecution has made no attempt to meet its burden of establishing harmless error,⁶ the conviction should be reversed and the matter remanded with further instructions to the district court to dismiss the superceding indictment.

⁵ The citation to this unpublished case is to establish the history behind *United States v. Campbell*, 168 F.3d 263 (6th Cir. 1999), as cited by the prosecution. (PB 16). Since the case is available in a “publically accessible electronic database,” (Westlaw and Lexis) no copy is attached. Eighth Circuit Rule 32.1A .

⁶ See *United States v. Kenyon*, 397 F.3d 1071, 1081 (8th Cir. 2005), and *United States v. Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996).

II. *Liteky v. United States*, 510 U.S. 540, 554 (1994), held that judicial predispositions developed during the course of a trial will sometimes suffice for recusal. Mr. Wisecarver moved for recusal based upon district court opinions formed during the first trial. The district court erred by concluding that “ ‘opinions held by judges as a result of what they learned in earlier proceedings,’ are not grounds for recusal.”

Standard of Review.

The prosecution does not contest the abuse of discretion standard identified by Mr. Wisecarver for reviewing the denial of a recusal motion. (AB 26; PB 20). In addition, Mr. Wisecarver pointed out, “A district court abuses its discretion when it applies an incorrect legal standard,” citing several decisions of this Court. (AB 26).

Merits.

Here, the district court explicitly applied an incorrect legal standard in resolving the recusal motion, namely, “ ‘opinions held by judges as a result of what they learned in earlier proceedings’ are not grounds for recusal.” (CR 115, at p. 3; Add. 2, at p. 3). This constitutes an abuse of discretion under the decisions identified by Mr. Wisecarver. (AB 27-29). The prosecution, however, has not addressed this error and has not attempted to meet its burden of proving harmless error.

The prosecution, however, has identified some helpful case law. For example, *American Prairie Construction Co. v. Hoich*, (PB 20-21), requires a district court to apply “an objective standard of reasonableness in determining whether recusal is required.” 560 F.3d 780, 789 (8th Cir. 2009). Under this objective standard, “disqualification is required if a reasonable person who knew the circumstances would question the judge’s impartiality, even though no actual bias or prejudice has been shown.” *Id.* Here, due to the district court’s misreading of *Liteky*, the court’s written ruling does not acknowledge nor apply this required objective standard. (Add. 2).

The prosecution cites another helpful case, *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003), that correctly applied the objective standard in evaluating whether recusal should have been ordered due to a district court’s predisposed opinion of a witness’ credibility. (PB 21). *Fletcher* affirmed the denial of a recusal motion premised on a social relationship between the trial judge and a fact witness, holding the mere existence of such a relationship did “not ordinarily warrant an inference that the judge would be predisposed to credit that witness’ testimony.” *Id.* at 665.

Fletcher’s reasoning confirms that recusal is required if the record establishes that a judge is “predisposed” to credit or discredit a witness’ testimony.

In this case, the district court's explicit findings in the first sentencing proceedings established as a matter of record that the court was predisposed to discredit Mr. Wisecarver's testimony in any second trial and sentencing proceeding. In addition, a reasonable person who knew these circumstances would question the district court's impartiality in a second trial, knowing that although the jury acquitted at the first trial, the court itself disagreed with the jury and made findings at sentencing rejecting Mr. Wisecarver's testimony.

The prosecution candidly acknowledges the district court's opinion regarding Mr. Wisecarver's credibility during the first sentencing proceeding, arguing that this was necessary to determine whether to increase the punishment for the acquitted conduct. (PB 21-22). What the prosecution overlooks is the fact that since this Court reversed the prior conviction and sentence, Mr. Wisecarver is entitled to start with a clean slate. This necessarily means that in any new trial on the depredation charge after the reversal, Mr. Wisecarver was entitled to appear before a district court judge who had not developed a deep seated antagonism against him creating the predisposition to discredit his testimony.

The district court's credibility comments at the first sentencing proceeding constitute evidence of a deep seated antagonism toward Mr. Wisecarver and counsel. Even if the district court did not, in fact, hold such views, under the

required objective test a reasonable person could conclude that it would be impossible for the same district court to conduct a fair and neutral evaluation of Mr. Wisecarver's identical testimony in a second trial. Contrary to the legal standard applied by the district court, the fact that the district court expressed these attitudes in the first trial and sentencing does not prevent recusal. *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009) (Reassignment of a judge "may be necessary based solely on events transpiring in current court proceedings or on a court's statements or rulings where 'they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.' ").

Ultimately, given the district court's use of the incorrect standard, contrary to *Liteky* and *Sentis Group, Inc.*, coupled with the prosecution's decision to waive harmless error analysis by declining to meet its harmless error burden, reversal is required. This Court should remand for further proceedings before a new judge.

III. Mr. Wisecarver defended on the ground that he reasonably believed a BIA employee trespassed on his land and threatened to injure or harm Mr. Wisecarver with the government vehicle. The district court, however, instructed the jury “A BIA employee who goes upon private property in the performance of his duty is not a trespasser.” Such an instruction improperly undermined the defense.

Standard of Review.

The prosecution does not contest the abuse of discretion standard identified by Mr. Wisecarver for reviewing jury instructions. (AB 30; PB 24-25).

Merits.

The prosecution’s jury instruction argument generally is premised upon an incorrect reading of the record in at least three areas. Since the record does not support the prosecution’s theme, its arguments necessarily fail.

First, contrary to the prosecution’s repeated statements, (PB 26, 29, 30, 31), the record does not support the district court’s factual conclusion concerning Mr. Bourne’s authority to drive a vehicle upon private property posted no trespassing without obtaining prior permission from a landowner. While Mr. Bourne may have believed he had this authority, the record offers no support for such a belief. There is no evidence of BIA regulations or handbooks giving a BIA employee the right to go upon another’s property without permission.

Mr. Bourne identified no BIA policy granting him that right, and the prosecution offered no testimony from any BIA official to support Mr. Bourne's opinion.

Second, as demonstrated in the reply to the prosecution's statement of facts, Mr. Hughes did not give Mr. Bourne permission to enter the land. Thus, the prosecution's statements that he entered "with the consent of the majority owner," (PB 28), and that "he had proper permission from the majority landowner," (PB 30), are incorrect. Mr. Bourne testified that he did not speak with Mr. Hughes prior to driving the truck on the posted land.

Third, since this was a jury trial, the district court did not have the authority to decide the factual question of whether Mr. Wisecarver reasonably believed Mr. Bourne was a trespasser. Thus, the prosecution errs by arguing "the court was well within its discretion to instruct the jury that Bourne had a legal right to be on the land in performance of his duty." (PB 27). Instead, Instruction 8 took the factual question out of the hands of the jury by telling them, in effect, Mr. Wisecarver could not have reasonably believed Mr. Bourne to be a trespasser since the district court instructed that he was not a trespasser.

The jury should have been told that whether Mr. Bourne was trespassing either was irrelevant or was a factual question for the jury to decide. Just because he was a BIA employee acting pursuant to his duties does not resolve the question

of whether he had the right to enter posted property without obtaining consent or permission from a landowner or resident of the property. Otherwise, as a BIA employee, Mr. Bourne also could have claimed the right to enter the Wisecarver home without permission to establish a rental value for the home simply because it was located on the land. In either case, whether it would be reasonable for the homeowner to consider Mr. Bourne a trespasser in fact is for the jury to decide. The district court erred by removing this factual question from the jury.

Contrary to the prosecution's arguments, BIA employees are not immune from being considered trespassers merely because they enter an individual's property to conduct BIA business. That is precisely the point of the citation to *Wilkinson v. United States*, 564 F.3d 927 (8th Cir. 2009), in which the prosecution acknowledges, "This Court held that the BIA's actions extended beyond its vested authority." (PB 28, n. 10). While Mr. Bourne may have acted within his legal authority to conduct a lease survey, that does not equate to the authority to enter another person's posted private property without notice to the owner and/or legal resident, and without first obtaining permission or consent from the owner and/or legal resident.

The prosecution's argument that Mr. Bourne was an "officer of the law" within the meaning of *State v. Frey*, 440 N.W.2d 721 (S.D. 1989), (PB 28-29), is

likewise contrary to the record. Mr. Bourne did not characterize himself as an officer of law nor claim any law enforcement duties. Rather he testified, “I am a soil conservationist. . . ,” (TT 40), with degrees “in plant science,” or “agronomy.” (TT 41). Rather than engage in law enforcement, Mr. Bourne testified, “my job basically is to determine what the land is to be used for and I have to determine and make my recommendation to whoever wants to lease the land.” (TT 42). He identified no law enforcement function.

Finally, the prosecution’s argument that a jury is presumed to follow the district court’s instructions, (PB 32), supports reversal. The prosecution identified no instruction to negate or contradict Instruction 8. Once the district court instructed the jury that “A BIA employee who goes upon private property in the performance of his duty is not a trespasser,” and “conduct otherwise a trespass is often justifiable by reason of authority vested in the person who does the act, as, for example, an officer of the law acting in the performance of a duty,” (CR 127, Instruction 8), the jury would be presumed to follow this instruction.

It necessarily follows that Instruction 8 told the jury that Mr. Bourne’s action did not constitute the requisite “criminal interference” with Mr. Wisecarver’s property as required by Instruction 6. (CR 127, Instruction 6). The presumption that the jury followed Instruction 8, which focused them on

whether Mr. Bourne was in fact a trespasser, but then prevented them from finding him to be a trespasser, or finding that criminal interference with the property, establishes that reversal is required. Instruction 8 undermined Instruction 6, as well as the jury's consideration of Mr. Wisecarver's contrary belief and, in effect, directed a verdict against him.

In a manner quite similar to the error in the first trial, the district court erred in giving Instruction 8 in the second trial. The prosecution has not tried to establish harmless error, waiving any such claim. Reversal is required.

IV. A finding of perjury for an obstruction enhancement must be based upon a false statement about a material fact rather than an opinion. The district court erred by basing a perjury finding upon the court's disagreement with Mr. Wisecarver's opinions that the BIA employee: (1) trespassed; and (2) walked in a threatening manner after the alleged offense conduct.

Standard of Review.

The prosecution does not contest the standards identified by Mr. Wisecarver for reviewing a perjury obstruction enhancement, namely, *de novo* review of the district court's application of the guidelines, and reviewing factual findings for clear error. (AB 40-41; PB 32-33).

Merits.

The prosecution's perjury argument is premised on a misreading of the record and a misunderstanding of the findings necessary to support a perjury enhancement. For example, the prosecution incorrectly states the enhancement was based on the district court's resolution of a credibility contest between Mr. Bourne and Mr. Wisecarver. (PB 34). The record, however, shows no conflict in the testimony over either of the statements the district court relied upon for the obstruction enhancement.

First, the district court found perjury because, "The defendant consistently was stating that the victim was trespassing." (CR 144, p. 5). While Mr. Bourne did not believe he was trespassing, he testified that Mr. Wisecarver accused Mr. Bourne of lying about his entry onto the land. (TT 61:14-23; 90). The prosecution has identified no testimony from Mr. Bourne that challenges Mr. Wisecarver's belief that Mr. Bourne was trespassing, and the cited testimony confirms that Mr. Bourne understood that Mr. Wisecarver had formed the opinion that Mr. Bourne was lying.

Second, the district court found perjury because of Mr. Wisecarver's opinion that "Bourne, threatened him by walking in a menacing manner towards him." (CR 144, p. 6). As above, Mr. Bourne's testimony did not contradict

Mr. Wisecarver's opinion; rather, it provided an evidentiary basis supporting Mr. Wisecarver's perceptions.

Q. And how did you walk? Did you walk slowly or quickly?

A. Well, I walked slowly because I figure, like, I try very much as possible to diffuse the situation. I figure if I walk fast, I'm facing him, I walk backwards, walk fast and facing him, you know, he may think I was scared, which I was. So I just backed him; just kept walking slowly as far as possible.

(TT 67:12-18). In addition, he testified that Mr. Wisecarver was standing facing the front of the truck at an angle of approximately 45 degrees from the driver's side headlight at Mr. Bourne's left. Thus, when Mr. Bourne got out of the driver's side door he walked directly toward Mr. Wisecarver before turning to walk across the front of the truck. (TT 66, Ex. 17; 65:20-21). Thus, the prosecution's credibility argument is not supported by the record.⁷

In addition to the erroneous credibility argument, the prosecution has either overlooked or declined to address certain aspects of the district court ruling. These include: (1) the court's failure to make a specific finding that Mr. Wisecarver's opinions constituted a "willful intent to provide false testimony" rather than being formed "as a result of confusion [or] mistake," (AB 43-44); (2)

⁷ The prosecution's argument also presents several additional incorrect or misleading factual assertions that are unrelated to the two statements relied upon by the district court for the perjury/obstruction enhancement. (PB 35-36).

the court's failure to allocate the burden of proof on the issue to the prosecution, (AB 41); and (3) the court's error in relying upon the jury verdict, (AB 44-45).

Finally, the prosecution does not claim this to be harmless error. Thus, the prosecution has waived any challenge to each of these points.

- V. For a sentence to be substantively reasonable, the district court is required to adequately consider relevant factors that should receive significant weight. An individual's ability to thrive in Indian Country, service to the country and community, lack of criminal history, and commitment to family are relevant factors requiring significant weight. The district court erred by imposing an upward variance with no mention of these factors.**

Standard of Review.

The prosecution does not contest the standards identified by Mr. Wisecarver for reviewing the reasonableness of a sentence, nor the standards for determining an abuse of discretion. (AB 45-46; PB 38).

Merits.

The prosecution's argument relies on at least two mistakes in reading the record. *First*, as pointed out in the reply to the factual statement, the prosecution has completely misread paragraph 39 of the PSR. (PB 41). *Second*, the prosecution has inaccurately described the process used by the district court to formulate the sentence. (PB 39). Rather than listening to the parties' arguments before proposing a sentence, the district court drafted a memorandum that stated

the sentence before the sentencing hearing and then essentially read the memorandum into the record before receiving any comments from the parties. (AB 41; Add. 3; ST 2-14). Thus, the record is contrary to the prosecution's statements.

The prosecution's argument that "In the end, the determination at issue is not whether another, shorter, sentence would also have been reasonable," (PB 40), overlooks the parsimony requirement directing that the sentence be "not greater than necessary." 18 U.S.C. § 3553(a); *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) ("The statute, as modified by *Booker*⁸, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' . . ."). Indeed, the prosecution's citation to two very helpful *en banc* decisions of this Court, (PB 38-39), each reject government appeals arguing for lengthier sentences. *United States v. Burns*, 577 F.3d 887 (8th Cir. 2009)(*en banc*); and *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009)(*en banc*). Thus, the statute does require this Court to decide whether another, shorter, sentence would have been reasonable.

Finally, the prosecution's argument that the mitigating evidence is "in the sentencing record and there is no indication that the district court overlooked

⁸*United States v. Booker*, 543 U.S. 220 (2005).

them,” (PB 41), is both factually incorrect and misunderstands the abuse of discretion standard relied upon by Mr. Wisecarver. *First*, the district court’s sentencing memorandum and comments at sentencing mention none of the mitigating evidence, which is a clear indication that the district court did not consider this evidence. *Second*, under this Court’s standard of review, a district court abuses its discretion “when a relevant factor that should have been given significant weight is not considered,” and the court commits a clear error in judgment in weighing the proper factors. (AB 46).

Here the record establishes the district court failed to consider mitigating factors that decisions such as *United States v. Big Crow*, 898 F.2d 1326, 1331 (8th Cir. 1990), and *United States v. One Star*, 9 F.3d 60, 61 (8th Cir. 1993), have determined deserve significant weight. (AB 47-48). If the district court did consider these factors, it gave them no weight whatsoever, which is a clear error in judgment under this Court’s precedent. In either case the district court abused its discretion.

VI. Each special condition of supervised release must be reasonably related to specific section 3553(a) factors and be based on the specific facts of the defendant's criminal history and his particular offenses. Mr. Wisecarver's offense did not involve alcohol and he had no history of alcohol abuse. Three conditions of supervised release premised on alcohol abuse are not reasonably related to Mr. Wisecarver's circumstances.

Standard of Review.

The prosecution's "plain error review" argument overlooks the manner in which the district court imposed sentence. The court drafted a sentencing memorandum that stated the intended sentence, read it into the record, (ST 2-14), and then stated, "Having announced the tentative sentence in this case and the findings upon which it is based, the Court will hear from counsel for the defendant, Mr. Colbath." (ST 14:15-17). The sentence described by the district court, however, did not include any of the three special conditions relating to alcohol, thus there was no basis or reason to object to or argue against such conditions.

After hearing all arguments from both parties, the district court imposed sentence and added the three special conditions unrelated to the offense or Mr. Wisecarver's history, (ST 24), and advised Mr. Wisecarver of his right to appeal. (ST 26). Thus, the district court did not give Mr. Wisecarver any opportunity to object or contest the conditions *before* imposing sentence.

United States v. Wiley, 509 F.3d 474 (8th Cir. 2007), recognizes the futility of requiring an objection after a sentence is imposed. “The government apparently urges that the defendant must then raise an objection to the sentence just pronounced, and essentially ask for reconsideration, in order to preserve for appeal a contention that the length of the sentence is unreasonable with regard to § 3553(a).” *Id.* at 476-77. This Court joined four sister circuits and rejected the government’s argument that a defendant must file a motion to reconsider the sentence or object after the sentence has been imposed. *Id.*

Even if plain error review applies, reversal is in order under this Court’s precedent. *See, e.g., United States v. Curry*, 627 F.3d 312, 315 (8th Cir. 2010) (“we conclude that the district court’s imposition of special condition 4 without explanation was plain error that warrants relief.”). Given this Court’s prior decisions in *United States v. Bass*, 121 F.3d 1218 (8th Cir. 1997), and *United States v. Prendergast*, 979 F.2d 1289 (8th Cir. 1992), reversal is required under either standard of review.

Merits.

The prosecution’s argument is again premised on incorrect factual statements, (PB 44-45, 48), that Mr. Wisecarver has previously corrected in the reply to the factual statement. Since the record shows no history of alcohol

problems, no alcohol connection to the offense, no need or recommendation for any treatment, counseling or other rehabilitative needs, and no explanation for imposing the conditions, the three special alcohol related conditions must be reversed under this Court's precedent.

CONCLUSION

Mr. Wisecarver respectfully requests that this Court reverse his conviction and sentence.

Dated this 28th day of February, 2011.

Respectfully submitted,
NEIL FULTON
Federal Public Defender
By:

/s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Marc Sean Wisecarver
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
703 Main Street, Second Floor
Rapid City, SD 57701
(605)343-5110; Fax: (605)343-1498
[filnguser SDND@fd.org](mailto:filnguser_SDND@fd.org)

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Gary G. Colbath, Jr.
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Marc Sean Wisecarver

I further certify that the electronic version of the foregoing has been scanned for viruses using Symantec Anti Virus Corporate Edition, and that the scan showed the foregoing is virus free.

By: /s/ Gary G. Colbath, Jr.
Gary G. Colbath, Jr.
Assistant Federal Public Defender
Attorney for Appellant Marc Sean Wisecarver

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Word Perfect Version X3 was used in the preparation of the foregoing Appellant's Reply Brief and that the word count done pursuant to that word processing system shows that there are 6,883 words in the foregoing Appellant's Reply Brief.

Dated this 28th day of February, 2011.

By: /s/ Gary G. Colbath, Jr.

Gary G. Colbath, Jr.

Assistant Federal Public Defender

Attorney for Appellant Marc Sean Wisecarver