No. 14-3113

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Kyle Lunnin, Defendant-Appellant.	))))))))))	Appeal from the United States District Court for the District of Kansas No. 13-40039-JAR The Honorable Julie A. Robinson

REPLY BRIEF OF KYLE LUNNIN

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INTRODUCTION

The Opening and Response Briefs are like ships passing in the night. The disengaged Response avoids the numerous cases casting doubt on Kyle Lunnin's conviction. This disconnect is most glaring on the insufficiency of conspiracy evidence. Emphasized in the Opening and evaded in the Response:

- *United States v. Anderson*, 189 F.3d 1201 (10th Cir. 1999);
- *United States v. Arras*, 373 F.3d 1071 (10th Cir. 2004);
- *United States v. Austin,* 786 F.2d 986 (10th Cir. 1986);
- *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974);
- *United States v. Caldwell*, 589 F.3d 1323 (10th Cir. 2009);
- *United States v. Dunmire*, 403 F.3d 722 (10th Cir. 2005);
- *United States v. Evans*, 970 F.2d 663 (10th Cir. 1992);
- *United States v. McIntyre*, 836 F.2d 467 (10th Cir. 1988);
- *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000);
- *United States v. Thomas,* 114 F.3d 403 (3d Cir. 1997).

These cases establish the conspiracy evidence against Kyle is insufficient as a matter of law. Ignoring this precedent, the prosecution cedes entire swathes of the Opening. This neglect

might be excused if the prosecution supplied supporting authority. But aside from obligatory black letter law, the Response lacks any.

The absence of support stems from the unique facts. Kyle's conviction is the inverse of the typical conspiracy case. Using the largest players to pile on the smallest is counterintuitive. And abusing the conspiracy doctrine to tally one more casualty in the war on drugs defies precedent and policy. Reviewed *de novo*, the Court should reverse.

ARGUMENT

I. The Response Confirms The Conspiracy Evidence is Insufficient.

A. Kyle agreed to nothing.

The prosecution treats the first conspiracy element, agreement, swiftly. It asserts an agreement exists because the "four cooperating witnesses each described how the organization operated." (Response at 18). Such testimony "left no doubt" about an agreement. (*Id*.).

This argument is remarkably thin. While the four cooperating witnesses were in agreement, the prosecution never connects them to Kyle. An agreement may be inferred from

frequent contacts, or joint appearances at transactions. *Evans,* 970 F.2d at 669. But the Response cites no frequent contacts or joint appearances between Kyle and the others. Nor does it cite any testimony reflecting an agreement regarding drugs between Kyle and the conspirators.

To reiterate, Blaine Smith had no personal knowledge of drug activity by Kyle. (Doc. 250 at 101, 116). Garay did not know of any role Kyle had. (Doc. 250 at 149). Clovis divulged nothing incriminating about Kyle. (Doc. 250 at 179). Espinoza's iPad only revealed Kyle's loan to Shawn Smith. (Doc. 251 at 341-42). Finally, Brent Rupert, agent for the entire investigation, said Kyle did not sell drugs and viewed him as an afterthought. (Doc. 251 at 343-45). But not fitting the prosecution's narrative, these realities are disregarded. The single loan—whose timing, terms, purpose, and use are never identified—cannot confer agreement.

In sum, the Response's one-page summary on agreement does not quell the Opening's concerns. *See* Opening at 26-29. And because associating with known lawbreakers is not

enough, *Evans,* 970 F.2d at 669, the agreement element was not met.

B. The Response cites no clear and unequivocal evidence Kyle knew the conspiracy's objective.

The prosecution asserts the second element, knowledge of the conspiracy's objective, is met largely due to Shawn's jailhouse calls. (Response at 19). The irony that Shawn was already in jail and his operation in its death throes goes unnoticed. And despite the electronic data, wired conversations, and recorded phone calls, there was no evidence definitively establishing what Kyle's loan was for, or if and how it was used. Against this barren backdrop, the prosecution cobbles together stray remarks and Hinderliter's false testimony. Each is addressed in turn.

First, an opaque statement by Shawn that "the product is already out there, its already made its money." (Response at 19). This is too slender a reed to support a meeting of the minds about the drug ring. Shawn is telling Kyle about his ability to repay Kyle. Assuming *arguendo*, that Shawn used Kyle's money for drugs, and not something else, there was no evidence Kyle knew this when he loaned the money or that Shawn said how he would

use the funds. Thus, inference stacking is necessary for the prosecution's interpretation of Shawn's comment.

Second, Kyle remarks that his "shit is about done. I need to get out there anyways." (Response at 19). The prosecution translates this as evidence Kyle "was selling drugs and was running out of his supply." (*Id.*). Like the comment above, the prosecution speculates. Moreover, Agent Rupert said Kyle did not sell drugs. (Doc. 251 at 343-44). Blaine testified similarly. (Doc. 250 at 101, 116). Further, if Kyle was selling drugs for Shawn, why did no other conspirator know about it? The four cooperating witnesses were aware of everyone else, but said nothing about Kyle picking up, holding, or selling drugs. (Doc. 250 at 102-03; 148-49). Kyle was also not listed in Espinoza's iPad regarding drug sales. The record belies the prosecution's conjecture.

Third, the jailhouse calls in which Shawn references Kyle. Shawn asked Espinoza "to get ahold of Kyle to get things going" and told Dustin to meet Kyle and Nichole Lehman. (Response at 20). Relying on these conversations reveals a prosecution at odds with itself; Rupert admitted the jailhouse calls referencing Kyle

were only Shawn's aspirations. (Doc. 251 at 338-39). Rupert further said Shawn's requests were never carried out. (Doc. 251 at 338). Thus, there was no evidence Dustin and Lehman talked to Kyle about going to Colorado or that Kyle went. (Doc. 251 at 339). The record again undercuts the prosecution. Further, if knowledge of a conspiracy can be met by one's name being bandied about on prison calls, *mens rea* is dead.

Fourth, Blaine's testimony that Kyle "invested $5,000 toward the purchase of drugs." (Response at 20). This was hearsay as Blaine never met Kyle and admitted he did not know if Kyle gave Shawn money. (Doc. 250 at 149-50). Blaine also said Kyle never got drugs from Shawn. (*Id.*). However, Kyle did get stereo equipment from Shawn. (Doc. 250 at 101, 117). And Garay admitted the Colorado trips entailed getting stereo equipment along with drugs. (Doc. 250 at 139-40). Finally, Rupert conceded there was no evidence that Kyle was repaid his money. (Doc. 251 at 340). As argued in the Opening and ignored in the Response, a one-time loan whose purpose is never proven, whose actual use is never established, and whose lender is never repaid does not

establish the lender knew and agreed to the object of the conspiracy.

Additionally, it was never proven beyond a reasonable doubt how the $2500 would be earned. Shawn could have gotten the proceeds from stereo equipment, another, smaller drug exchange, or an exchange of different drugs. *See* Doc. 250 at 101, 117, 139-40. The Court reversed in *Austin* because there was no evidence the defendant "knew the focus of the conspiracy was the distribution of marijuana, rather than the distribution of other contraband, or the aiding of illegal aliens, or other equally speculative illegal conduct." 786 F.2d at 989. Ignoring *Austin*, the prosecution never acknowledges that the mere likelihood the money might be for nefarious purposes is not enough to establish a conspiracy.

Finally, Hinderliter's testimony that Kyle once picked up money from him and that Kyle counted a large sum of money once. (Response at 20-21). To understand why this evidence cannot establish a conspiracy, it must be put in perspective. First, Hinderliter said Kyle picked up money for Shawn once, but had no

idea how much it was. (Doc. 250 at 200-01). In fact, the prosecution asked if it was a large amount and Hinderliter admitted he did not know. (*Id*.). Second, while the evidence is viewed in a light favorable to the prosecution, Agent Rupert's testimony cannot be ignored. Rupert said Hinderliter was lying when he claimed he "distinctly remembered" telling Rupert about the two incidents involving Kyle. (Doc. 250 at 237). Third, in a conspiracy as wide ranging as this one, two isolated incidents cannot envelop Kyle. The involvement by Hinderliter and the others, compared with Kyle, is stark. Most Defendants had daily, if not weekly, contact with buyers, sellers, or distributors. Kyle had none. Per *Anderson*, 189 F.3d 1201, and *Rahseparian*, 231 F.3d 1257, this falls far short.

C. An unspecified loan is not knowing involvement.

In arguing the third element, knowing and voluntary involvement, the Response cites *United States v. Johnston*, 146 F.3d 785 (10th Cir. 1998), and *United States v. Gilmore*, 438 Fed. Appx. 654 (10th Cir. 2011). But in *Johnston*, there was "ample evidence" from which a reasonable jury could find that the

defendant-lawyer "really intended to help [a co-conspirator] continue his drug business," and the defendant's lies enabled the co-conspirator to continue the operation. 146 F.3d at 788-90. *Gilmore* is also inapplicable because that defendant tested drugs, collected money, contacted clients, and attended sales. 438 Fed. Appx. at 660.

The circumstantial evidence does not imply Kyle knew he was becoming involved in something illegal when he loaned Shawn money. But even if it did, this is not enough under *United States v. Lovern*, 590 F.3d 1095 (10th Cir. 2009). The *Lovern* defendant was convicted of conspiracy to distribute drugs. He printed labels for illegal prescriptions, to be filled by a co-conspirator. *Id*. at 1098. The defendant asked a co-conspirator to "hook a brother up on scripts" and said he "need[ed] some fake customers." *Id*. at 1107. The Court reversed for insufficient evidence. "One could surely infer that [the defendant] knew that something was fishy at [the pharmacy]. But, again, the difficulty is that this type of generalized knowledge isn't enough." *Id*.

The prosecution floats the argument that two other references to Kyle demonstrate knowledge. First, Espinoza's iPad contained a notation stating "Red $6 pay Kyle $4 n me $2 (sic)." (Response at 22). The prosecution asserts this means "$6,000 that the defendant's brother, known as 'Red,' owed." (*Id.*). This is of no import, other than tarnishing Kyle with the sins of the brother. Without Espinoza testifying what the notation meant, the prosecution is guessing. Speculation also plagues its reliance on Shawn's handwritten jail note reading "Rich San Fran Kyle Red 4 pounds." (Response at 22). Although Shawn was cooperating, he never explained what this notation meant. Further, Kyle had no way to challenge or confront this evidence as Shawn died.

It is true that an accused need not know all the conspiracy's details or every conspirator. *See United States v. Yehling,* 456 F.3d 1236, 1240 (10th Cir. 2006). Still, the prosecution must show he knowingly agreed to be in a conspiracy of the magnitude alleged. *United States v. Carnagie,* 533 F.3d 1231, 1239 (10th Cir. 2008). The prosecution did not show Kyle agreed to help distribute over 500 grams of methamphetamine and 68 kilograms of

marijuana. Because there can be no crime without intent, the third conspiracy element is not met.

D. The interdependence evidence was thin.

The evidence was insufficient to show Kyle knowingly facilitated the co-Defendants' operation. As explained above, most co-Defendants, along with Agent Rupert, knew nothing about the uninvolved Kyle. The conspiracy charge was too overreaching and the evidence implicating Kyle too narrow for interdependence, especially when the terms and use of the loan were never established.

As set forth in the Opening and ignored in the Response, the loan was between Kyle and Shawn. It never impacted the other conspirators because there was no evidence how the money was used. This was an isolated transaction not demonstrably linked to the conspiracy per *Caldwell*, 589 F.3d 1323, and *McIntyre*, 836 F.2d 467. Kyle could not facilitate the conspiracy if his loan was never proven to be used for the conspiracy.

The prosecution relies on *United States v. Dickey* for the proposition that "each major buyer may be presumed to know that

he is a part of a wide-ranging venture." (Response at 23, quoting 736 F.2d 571 (10th Cir. 1984)). *Dickey* is distinguishable on its face because it involved a large-scale, transnational drug ring in which conspirators purchased airplanes, made a 600-pound delivery of marijuana, and sold kilograms of cocaine for $56,000. *See* 736 F.2d at 579-81. Meanwhile, Kyle's $5000 loan could have bought eight ounces of methamphetamine, 1% of the 50 pounds of methamphetamine moved. (Doc. 250 at 166; Doc. 251 at 329, 343).

A simple inquiry demonstrates the insufficiency of evidence: If Kyle had testified against the others, what would he say? Kyle would have shed no light on Garay, Clovis, Blaine, or Espinoza. As for Hinderliter, Kyle could speak about the tattoo for methamphetamine trade, a petty incident involving drugs for personal use and thus insignificant for conspiracy purposes. *See United States v. Powell*, 982 F.2d 1422, 1430 (10th Cir. 1992). Kyle could address the loan to Shawn (but only speculate as to its use, which remains a mystery), along with Shawn's ignored jailhouse pleas to revive his moribund operation. However, Shawn committed suicide after the indictment, and in any event, was

cooperating before his passing. That leaves Kyle's brother, Dustin. The record is silent about whether Kyle was privy to his brother's illegalities, but even if he was, that alone is not interdependence. *See Evans,* 970 F.2d at 670. Thus, because Kyle knew virtually nothing and could only speculate how his loan may have facilitated the venture (as there was no evidence what Shawn did with the money and Kyle was never repaid), his ability to talk about the conspiracy was limited.

Despite all of the cooperating witnesses and evidence seized, interdependence rests on the prosecution's interpretations of jailhouse calls, made when Shawn's business was finished. Such speculation thus required the raft of direct evidence against the co-Defendants, in turn causing the jury to "fail to differentiate among particular defendants." *See Evans,* 970 F.2d at 674.

E. The failings of the Response.

The lack of authority in the Response is punctuated by the litany of precedent in the Opening. *See* Opening at 26-38. The prosecution employs the simplest way to deal with these cases—ignore them. The silence as to the 13 pages of cases and

contentions is deafening. Since nothing in the Response warrants the Court breaking precedent, the evidence was insufficient as a matter of law and the Court should reverse for entry of judgment of acquittal.

II. All of The Co-Conspirators' Hearsay Should Have Been Barred.

The symbiotic nature of the insufficient conspiracy evidence and co-conspirator hearsay is lost on the prosecution as it examines the hearsay issue in a vacuum. But the insufficient evidence contentions equally apply to the hearsay. The Opening made this point: "as set forth above, there was insufficient evidence demonstrating Kyle was a member of the conspiracy . . . [and] [w]ithout this predicate finding, the co-conspirator statements are barred." (Opening at 40).

While the prosecution bypasses the problems with the district court's predicate finding, these flaws bar the co-conspirator statements. Thus, the prosecution's claims that Kyle "argues-without pointing to any specific statement," "conveniently does not specify in his Brief," and "makes a general and vague complaint," fall flat. (Response at 26, 29, 30). The Opening clearly

challenged the co-conspirator statements as a whole. But even setting that reality aside, the Opening delineated what Kyle was challenging and provided specific record cites at page 41 of the Opening. The prosecution is thus wrong.

Additionally, the Response again conflates the Lunnin brothers. For example, footnote 12 of the Response discusses Dustin. (Response at 29, n. 12). The prosecution also relies on the mistakes of the district court, which discussed Dustin and Kyle in tandem during its *James* hearing ruling. (Response at 29). In admitting the hearsay, the court emphasized Shawn's jailhouse conversations "with the Lunnin brothers." (Doc. 248 at 186-87). However, there was no direct evidence tying Dustin and Kyle together, other than Hinderliter's shifting testimony regarding the one money counting incident. The only other association between Kyle and Dustin is their last name. That the district court and prosecution meld them together on this basis for conspiracy purposes is disturbing. Dustin was involved in the conspiracy and pled guilty. Extrapolating his involvement to Kyle because, they are brothers, turns the Constitution on its head.

Finally, the prosecution argues the jailhouse calls were not hearsay because they furthered the conspiracy. (Response at 30). The flaws of the jailhouse calls were explained above. Put simply, Agent Rupert, who knew "more about [the case] than anybody else" admitted there was no evidence Shawn's plans were carried out. (Doc. 251 at 259, 338-39). The operation was finished after Shawn and Blaine were arrested, (Doc. 250 at 104, 244), and Shawn's efforts to get Kyle (and others) to continue the operation under the specter of a looming prosecution were futile.

III. The Prosecution Embraced Hinderliter's False Testimony.

A. The Response's case law is distinguishable.

The Response cites *United States v. Langston*, 970 F.2d 692 (10th Cir. 1992), and *United States v. Caballero*, 277 F.3d 1235 (10th Cir. 2002). Neither can save it. The *Langston* defendants argued prosecutors should have corrected a witness' false testimony. 970 F.2d at 700. However, the testimony was not material and did not contribute to the verdict. *Id*. at 700-01. Thus, *Langston* did not involve a case agent eviscerating an informant's testimony. *Langston* is also inapt because the testimony was

peripheral while Hinderliter's testimony was integral. *Caballero* is unhelpful because the Court found no evidence the testimony was false. 277 F.3d at 1244. The remarks "are not inconsistent with, let alone contradict" prior testimony. *Id*. In contrast, Rupert conceded Hinderliter lied twice. (Doc. 251 at 349).

Besides invoking inapposite case law, the prosecution misconstrues *Napue v. Illinois*, 360 U.S. 264 (1959). *Napue* held the prosecution may not use false testimony, regardless of whether the witness is impeached on the topic. *Id*. at 269-70. Yet the prosecution argues successful cross-examination of Hinderliter and Rupert "rendered immaterial" Hinderliter's false testimony. (Response at 37). In other words, the cross-examination absolved the prosecution because the falsehood was revealed at trial. *Napue* is to the contrary, thwarting the prosecution's extensive argument on this point. *See* Response at 37-40.

B. Kyle's conviction was premised on Hinderliter's lies.

In the Response's Statement of Facts, Agent Rupert is sidelined and his testimony exposing Hinderliter is quarantined in a footnote. (Response at 8, n. 8). When Rupert's testimony is

acknowledged in the due process section, it is downplayed as a mere discrepancy with Hinderliter. The prosecution contends Kyle "does not point to contradictory testimony provided by Hinderliter . . . [but] only points to a discrepancy between two witnesses." (Response at 36). But Hinderliter told Rupert only Dustin and Shawn were present when the money was counted. He then changed his testimony at trial to include Kyle. (Doc. 251 at 348-50). That is a direct contradiction.

As an informant, Hinderliter's role was to divulge information and provide names to law enforcement. The cash counting encounter did not involve throngs of people. It was a specific scene, in a small room, with very few people. The difference between two and three people was thus substantial. More so that it was fresher in Hinderliter's mind when he said there were only two people, and that he confirmed this fact to Rupert on two separate occasions. (Doc. 251 at 348-50). Finally, it behooved Rupert to include every name and detail of what Hinderliter told him during the debriefing sessions. To doubt Rupert in favor of Hinderliter, whose memory is fogged by a three-

decade methamphetamine habit, is dubious. (Doc. 250 at 213-16). In fact, Hinderliter volunteered, "I kind of have a hard time remembering what the days and stuff was." (Doc. 250 at 223).

The prosecution's attempt to minimize Hinderliter's false testimony fails. First, the district court cited Hinderliter's testimony as a central basis to deny the Rule 29 Motion. (Doc. 251 at 375). Second, Hinderliter's false testimony was *sui generis*. He was the only person to suggest Kyle interacted with the operation, contradicting Blaine, Clovis, Garay, and Rupert. Third, without Hinderliter's false testimony, the prosecution only had the mystery loan to Shawn.

The prosecution argues the jury could have disregarded Hinderliter's false testimony and still convicted "based on the testimony of Blaine Smith, Garay, Clovis and Inspector Rupert." (Response at 39). The record says otherwise:

- Blaine had no personal knowledge of any drug activity by Kyle. (Doc. 250 at 101, 116).
- Garay did not know of any role Kyle had in the operation. (Doc. 250 at 149).
- Clovis saw Kyle once, and no money or drugs were exchanged during the encounter. (Doc. 250 at 168-69).

- Rupert said Kyle did not sell drugs, nor that he was repaid the loan. (Doc. 251 at 340-44).

Even accepting that Hinderliter told the truth, it would not advance the prosecution's position because it would mean Rupert was untruthful. Debating which of the two main prosecution witnesses lied is not academic when the prosecution admits "the evidence in this case is not as strong against Kyle Lunnin as it is against other people." (Doc. 251 at 369). Further, even if Hinderliter's testimony is merely inconsistent, this inconsistency is too great when the conviction rests on the omission.

C. Summation.

The state cannot violate the law to convict. The conspiracy conviction rests on a frail foundation, the testimony of an embittered Hinderliter. And despite Rupert exposing Hinderliter's lies, the prosecution never disavowed him. This violates *Napue*.

IV. Cumulative Error Warrants A New Trial.

A. Kyle's substantive rights were violated.

A new trial based on cumulative error is proper when "multiple non-reversible errors" infected the trial. *United*

States v. Battles, 745 F.3d 436, 462 (10th Cir. 2014). In a cumulative error analysis, the Court aggregates all errors found to be harmless and analyzes their cumulative effect. *Id.* The Court also considers whether the defendant's substantial rights were impacted by the cumulative effect. *Id.*

B. The evidentiary spillover warrants a new trial.

The Response's cursory treatment of the cumulative error issue masks the serious constitutional concerns at stake. Defendants have the right "not to be tried *en masse*" for separate offenses committed by others. *Kotteakos v. United States*, 328 U.S. 750, 775-76 (1946). As such, courts must "scrupulously safeguard" each individual defendant from the loss of identity in conspiracy prosecutions. *Id.*

Kyle's fate was sealed by the damaging evidence against individuals with whom he had no (or superficial) interaction. Such prejudicial evidentiary spillover warrants reversal as in *United States v. Dellosantos,* where the defendant was charged with conspiracy to distribute marijuana and cocaine, but the evidence only concerned cocaine. 649 F.3d 109, 116 (1st Cir.

2011). "Under the guise of its single conspiracy theory, the government subjected the Defendant to voluminous testimony relating to unconnected crimes in which he took no part." *Id.* at 125. This evidentiary spillover prejudiced the defendant by imputing the others' evidence to him. *Id.*

Closer to home is *United States v. Rufai*, which held there was insufficient evidence the defendant knowingly participated in a fraud ring. 732 F.3d 1175 (10th Cir. 2013). The Court was concerned about the substantial evidence against a conspirator juxtaposed with the weak evidence against the defendant. *Id.* at 1189. This "pos[ed] a risk of imputing knowledge to him from the strong evidence of wrongdoing by [the conspirator]." *Id.*

Like *Rufai* and *Dellosantos*, the jury was deluged with evidence having nothing to do with Kyle. Worse, the evidence against Kyle was scant, and made sense only by inference. With such a high volume of total evidence, and a low percentage implicating Kyle, the jury could not sift out the unconnected crimes. This spillover foreclosed a fair trial. The Response's refusal to address the underlying unfairness of the

trial underscores its frailty.

C. Summation.

There are several errors which, even if harmless alone, combine to undermine Kyle's substanial rights. Moreover, his Sixth Amendment right to a fair trial was violated. The errors in the aggregate require a new trial.

V. The Response Downplays The Lack of Witness Tampering Evidence.

A. The Response emphasizes questionable evidence on the true threat element.

As Kyle admitted, his language could be considered threatening. But his tone, volume, and demeanor were not. To reconcile these factors with a true threat, the prosecution argues that Kyle tried to avoid attention. However, Kyle did nothing to prevent Bobbi Moore from hearing him.

More importantly, the prosecution cannot explain Hinderliter's nonplussed reaction. The prosecution agrees the reaction of the recipient is key. Yet no witness, including Hinderliter, evinced fear. The responding officer said Hinderliter

was "agitated" and "unsettled," but the cursory police response suggests these words were used in their milder senses.

The prosecution provides no reason to ignore Hinderliter's reaction and the police response. The prosecution also argues, contrary to the record, that Kyle avoided making a scene, and stresses the conceded point that Kyle's language was facially threatening. There was insufficient evidence of a true threat.

B. There was no intent to interfere with testimony in an official proceeding.

Even if Kyle made a true threat, there is no evidence of intent to interfere with testimony. The prosecution ignores *United States v. Murphy*, 406 F.3d 857 (7th Cir. 2005), and distinguishes *United States v. Causey,* 185 F.3d 407 (5th Cir. 1999), on spurious grounds. In *Causey*, there was no evidence the defendant suspected federal scrutiny. 185 F.3d at 422-23. Similarly, there was no evidence Kyle suspected Hinderliter would testify.

The prosecution is correct that Kyle did not need to know Hinderliter would testify. But it does not address the Opening's point that Kyle could not intend to interfere unless he at least suspected as much. There was no such suspicion. The evidence

only shows awareness of Hinderliter's prior cooperation. An intent to interfere with testimony was thus not established.

VI. Resentencing is Warranted.

If the Court reaches sentencing, it should vacate and remand due to the erroneous enhancements and disparity in sentences.

A. The final co-Defendant is sentenced.

During the pendency of this briefing, co-Defendant Garay was sentenced. Garay, who moved 20 pounds of marijuana and had three people selling for him, (Doc. 250 at 155), was sentenced to 67 months. *United States v. Garay*, No. 5:13-40039-JAR 2, Doc. 262 (D. Kan. Dec. 15, 2014).

B. The obstruction of justice enhancement is improper.

The prosecution's response to the obstruction of justice enhancement is unavailing. It summarily states its burden was satisfied "through the evidence of witness tampering presented at trial." (Response at 58). It cites only *United States v. Mozee*, 405 F.3d 1082 (10th Cir. 2005), which does not address an obstruction of justice enhancement, and an unpublished decision, *United*

States v. Webster, 373 Fed. Appx. 867 (10th Cir. 2010) (unpublished), which is not binding. *See* 10th Cir. R. 32.1(A).

Nevertheless, *Webster* is inapplicable because the defendant pled guilty to assault and battery with a deadly weapon. *Webster*, 373 Fed. Appx. at 869. He argued self-defense at sentencing, and the prosecution countered that the defendant obstructed justice with his false self-defense claim. *Id.* at 870. The district court applied the obstruction of justice enhancement for perjury and the Court affirmed because the defendant willfully made false statements. *Id.* at 871. A felony charge of assault and battery was inconsistent with self-defense and accidental discharge of a weapon and therefore likely false. *Id.* at 871. Unlike *Webster*, there is no clear evidence of a willful attempt to tamper with a witness here.

The prosecution fails to address the most important element of an obstruction enhancement, intent. The enhancement applies only if the defendant acted "willfully." U.S.S.G. § 3C1.1. This section has been interpreted as contemplating that a defendant acted with a specific *mens rea. United States v. Gardiner,* 931 F.2d

33 (10th Cir. 1991). In other words, a defendant must have consciously intended to obstruct justice. *Id.* at 35. There is no evidence Kyle acted with specific intent to tamper with a witness. As far as Kyle knew, Hinderliter was not a witness because he was not on the witness list. (Doc. 251 at 390-93). Further, the police did not follow up or investigate the threat, reflecting the lack of seriousness and intent to affect Hinderliter's testimony. (Doc. 249 at 49-50).

C. Kyle's role in the conspiracy was minimal.

The prosecution argues that Kyle was not a minor participant because he helped Shawn count cash, loaned him $5000, collected money from Hinderliter, and Shawn asked his associates to contact Kyle. (Response at 59-60). Each of these bases was discredited in the Opening, and above.

Again, there was no evidence of what the loan was for or, if and how Shawn used the money. Even if the loan was proven to be used by Shawn to buy the drugs specified in the indictment, it would amount to 1% of the methamphetamine. (Doc. 250 at 166; Doc. 251 at 329-30, 343). And 1% of the total amount of drugs,

compared to the other co-Defendants, demonstrates Kyle played, at most, a minimal role in the conspiracy and therefore a reduction is warranted.

The case law in the Response is not dispositive. In *United States v. Martinez*, a non-conspiracy case, the defendant requested a minor participant reduction, arguing he was less culpable than his co-defendant and that they were both "mere mules." 512 F.3d 1268, 1275 (10th Cir. 2008). The Court held that a reduction was not warranted where both defendants were entrusted with a large amount of drugs, were in the car with the drugs when stopped by police, and fled from the police. *Id.* at 1276. Unlike *Martinez*, Kyle was not arrested with drugs nor while transporting them. He did not flee from authorities. He is not even a "mere mule."

Also unhelpful is *United States v. Rodriguez-Padilla*, 439 Fed. Appx. 754 (10th Cir. 2011) (unpublished). *Padilla* was a non-conspiracy case in which the defendant was arrested when an informant arranged to purchase three pounds of drugs from him and his co-defendants. *Id.* at *2. The defendant also had drugs on him when arrested. *Id.* The Court rejected a minimal participant

reduction, finding that an "average participant" requires the defendant's role be compared to other participants in the particular crime and the conduct of an average participant in that type of crime. *Id.* at *7. The defendant was an not a minimal participant because he arranged the meeting with the informant, brought a sample of drugs, and returned with the rest to complete the sale. *Id.* at *9. Further, he was not less culpable than his co-defendants or a "typical" drug dealer who gets caught selling three pounds of methamphetamine. *Id.*

Unlike *Padilla*, Kyle was not arrested during a sting with drugs in his pocket, nor were there any witnesses that testified he sold drugs. Kyle was not an average member of this conspiracy.

Finally, in *United States v. Virgen-Chavarin*, the defendant pled guilty to conspiracy to possess with intent to distribute. 350 F.3d 1122, 1126 (10th Cir. 2003). The Court found the defendant was not a minimal participant where he obtained over a pound of methamphetamine, exchanged money from the sale of drugs, and haggled with an undercover agent over prices. *Id.* at 1131. The record here has nothing similar.

The prosecution asserts Kyle was not entitled to a reduction because the district court sentenced him based on the drugs attributable to him. But the case cited by the prosecution, *Martinez*, 512 F.3d at 1276, does not find a *per se* rule that a defendant sentenced for drugs he transported is foreclosed from a minimal role reduction. In fact, *Martinez* stated, "[c]harged only with the amount of drugs he personally transported, [the defendant] of course was not categorically precluded from receiving a minor participant adjustment." 512 F.3d at 1276, n.3.

In sum, a minimal participant is one who is "among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2 comment (n.4). The prosecution admitted Kyle was the least culpable. (Doc. 251 at 343-44). Thus, the district court should have applied the reduction.

D. The Response skirts the sentence's unreasonableness.

Kyle's argument that his sentence was unreasonable remains standing. The Response contends the co-Defendants pled guilty, agreed to cooperate with the prosecution, and did not

threaten prosecution witnesses. (Response at 63). Kyle's parsimony provision argument goes unaddressed.

The only substantive authority cited by the prosecution is *United States v. Alapizco-Valenzuela*, 546 F.3d 1208 (10th Cir. 2008). There, the defendant pled guilty to transporting illegal aliens and was sentenced to 72 months. *Id.* at 1212. The defendant argued his sentence was unreasonable due to the disparity between his sentence and his co-defendant's (there was no record of the co-defendant's actual sentence). *Id.* at 1223, n.6. The Court found the defendant was more culpable. *Id.* In contrast, the district court did not find Kyle more culpable than his co-Defendants and the evidence is far less than in *Valenzuela*. Punishing the least involved the most is unreasonable.

CONCLUSION

"We cautiously review conspiracy convictions obtained against broad groups of defendants because guilt is always dependent on personal and individual conduct, not on mere association." *Powell*, 982 F.2d at 1429. As such, the Court should reverse with instructions to the district court to enter a judgment

of acquittal. In the alternative, the Court should reverse for a new trial sanitized of false testimony. In the further alternative, the Court should remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for Appellant Kyle Lunnin, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7): I hereby certify that this reply brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally-spaced font. The length of this reply brief is 6,399 words according to the Microsoft word count function.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellant's Reply Brief, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses and is free of viruses. Additionally, there are no required privacy redactions in this brief.

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CERTIFICATE OF SERVICE

This is to certify that I served a copy of the Appellant Kyle Lunnin's Reply Brief upon the following listed herein, via the Tenth Circuit ECF filing system on March 9, 2015:

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