No. 04-3070

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

ADAN MENDOZA,

Defendant/Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

Hon. Andrew W. Bogue, Presiding

APPELLANT'S BRIEF

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I. SUMMARY AND REQUEST FOR ORAL ARGUMENT

On August 19, 2004, Appellant Mendoza was sentenced to 120 months in prison for his conviction of the count of Conspiracy to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(1)(ii)(II) and 120 months in prison for his conviction on the count of Possession with Intent to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(A)(ii)(II), to be served concurrently with the sentence imposed in count I. This conviction followed a three-day jury trial.

On behalf of Appellant Mendoza present counsel files this brief setting forth various perceived errors by the District Court at trial.

Appellant respectfully requests of this court an opportunity for oral argument. Appellant requests twenty minutes for his presentation to the Court. Oral argument is appropriate in this case because of the importance of the issues.

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IV. JURISDICTIONAL STATEMENT

Appellant Adan Mendoza-Larios [hereinafter Mendoza] was convicted of one count of Conspiracy to Distribute a Controlled Substance and one count of Possession with Intent to Distribute a Controlled Substance, in the United States District for the Western Division of South Dakota, the Honorable Andrew W. Bogue presiding. SR. 125.

Mendoza was charged with one count of Conspiracy to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(1)(ii)(II) and one count of Possession with Intent to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(A)(ii)(II). Jurisdiction in the trial court was based upon 18 U.S.C. § 3231 as Mendoza was charged with an offense against the laws of the United States. He was convicted on May 21, 2004, and sentence was imposed on August 19, 2004. Appellant Mendoza's Judgment of Conviction was entered of record by the District Court on August 19, 2004. SR. 125. Appellant Mendoza filed a timely Notice of Appeal on August 24, 2004. SR: 127. This court's jurisdiction is based upon 28 U.S.C. § 1291, which provides for a jurisdiction over a final judgment from a U.S. District Court. Fed.R.App.P.4(b).

Throughout the course of this brief, all appellants and witnesses shall be referred to by their surnames. References to pages in the transcript of the motion hearing will be cited as "MH: __." References to pages in the transcript of the jury trial will be cited as "JT: __." References to pages in the sentencing transcript will be cited as "ST:__. References to documents in the criminal docketing /settled record will be cited as "SR. __."

V. STATEMENT OF THE ISSUES

A. Whether there was sufficient evidence to sustain convictions for possession with the intent to distribute and conspiracy to distribute controlled substances.

United States v. Fitz, 317 F.3d 878 (8th Cir. 2003)

United States v. Huerta-Orozco, 272 F.3d 561 (8th Cir. 2001)

U.S. v. Hernandez, 301 F.3d 886 (8th Cir. 2002)

B. Whether the probable cause affidavit proffered pursuant to a request for a search warrant, when read with the omitted material, sets forth probable cause for the issuance of a search warrant.

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983)

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 56 L.Ed. 667(1978)

United States v. Jacobs, 986 F.2d 1231 (8th Cir. 1993)

United States v. Reivich, 793 F.2d 957 (8th Cir. 1986)

VI. STATEMENT OF THE CASE

The Defendant Adan Mendoza was charged by way of indictment with two counts: Conspiracy to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(1)(ii)(II) and 120 months in prison for his conviction on the count of Possession with Intent to Distribute a Controlled Substance in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(A)(ii)(II). Mendoza was tried over three days and convicted by the jury of both counts. Mendoza appeals denial of his suppression motion for material omissions in the search warrant application as well as denial of his motion for judgment of acquittal.

VII. STATEMENT OF FACTS

On October 25, 2003, Trooper Oxner of the South Dakota Highway Patrol and his canine were parked facing west on Interstate 90 at mile marker 66 observing the eastbound lanes of traffic leaving Rapid City, South Dakota. JT: 130. He observed a white 1998 Chevrolet Malibu pass his location traveling east bearing Washington plates and containing Appellant Adan Mendoza, as a passenger and co-defendant Jose Naranjo, as the driver. JT: 131. The trooper accelerated into the eastbound lane behind the white Malibu and followed it four miles to milepost 70 and initiated a traffic stop for following too closely and improper covering of a broken rear window. JT: 131, 135-136. The Malibu is pulled over a approximately 8:51 a.m. and the squad car dashboard video camera is engaged, recording the events thereafter.[1] JT: 132, 135 and SR: 81 at Exhibit 17.

The trooper approached the Malibu from the passenger's side. JT: 145. As he walked up he noticed trash on the back seat and floor through the windows. MH: 10. Mendoza, the passenger, rolled down the window

[1] Approximately fifteen minutes in the middle of this tape were taped over by the Trooper. He claimed he accidently taped over a portion in the middle when he was later viewing it at the squad office and put it in the camera of his vehicle believing it was a blank tape. The missing portion was during conversations he was having with Appellant herein. JT: 131-132.

and the trooper told Naranjo, the driver, why he stopped him and asked him to come back to the patrol car. JT: 145-147. The driver complied. JT: 146.

In the patrol car and in response to Trooper Oxner's many questions, the driver identified himself, provided identification and vehicle information, and explained he was coming from Seattle and heading to South Dakota. SR: 81 at Exhibit 17, JT: 222. Naranjo was speaking in broken English with a strong Hispanic accent. Id., MH: 9. Despite obvious language barriers Trooper Oxner persisted in his questioning and Narnajo identified his passenger as Adan, could not remember his last name, and said he had only known him for three days. Naranjo later provided the last name of Adan to be Mendoza. Naranjo also explained the purpose of the trip was to pick up a cousin, that the passenger knew where they were going, and stated the person who owned the vehicle was one Gildardo Santos, a friend of his. SR: 81 at Exhibit 17.

At this point Trooper Oxner exited his vehicle and again approached the Malibu and spoke to the passenger Mendoza. JT: 179. In response to the trooper's questions Adan Mendoza identifies himself, states their destination is a place somewhere in South Dakota, then corrects himself and says Minnesota, for which Naranjo has a cell phone number, and the purpose

of their trip was to pick up Naranjo's cousin and her two children. SR: 81 at Exhibit 17. Mendoza also speaks broken English with a thick Hispanic accent, and there are obvious language barriers between the two. Id., JT: 221-222, 224, 253. In answer to specific questions Mendoza stated he had known Naranjo for two years and believed Naranjo's cousin owned the car. Id. Both provided the name of Gildardo Santos as the owner of the vehicle, and this checked out through police dispatch. JT: 179, SR: 81 at Exhibit 17.

Trooper Oxner then radios in the identifying information for both and requests a license and warrants check. SR: 81 at Exhibit 17, JT: 222. As he is waiting for this information he deploys his drug dog around the white Malibu, whereupon the dog indicates to the presence of an odor of a drug by scratching on the passenger door. JT: 147-148.

Trooper Oxner begins a search of this car. JT: 148-153. In searching the interior of the vehicle the Trooper noticed the dashboard pasenger-side airbag was hard instead of spongy, there were wire clippings on the floor, and the glove box door was slightly uneven when closed. MH: 10. Various tools, sockets, and garbage were strewn about the back seat of the vehicle. JT: 207. From underneath the dash paint runs and tack welds could be observed, MH: 42, although the trooper was not sure if this was stock and

said he thought it looked normal. JT: 231. The trooper used a screwdriver to pry the lid of the airbag up from the dash. JT: 230. Under the lid he could see a black, tar-like substance around the edges, a blue speckled material around the airbag, a rusty metal plate with steel parts being pried up. MH: 43, JT: 175. Through an air vent he could see a box. Id. Trooper Oxner believed there was a secret compartment in the dash. MH: 43. At this point he radios his supervisor, Trooper Don Allen, to come to the scene. MH: 21, 25.

As he is waiting for his supervisor to arrive he continues searching, calls in a request to dispatch to see if either person has any history of drug offenses. JT: 226, 228. Because he is not absolutely sure the airbag has been modified and wants to know what other 1998 Malibu airbags look like, he calls another canine trooper and car dealerships to have that information tracked down. JT: 173.

Neither person has any drug history/convictions and there are no warrants or problems with their licenses. JT: 226, 228.

Unable to find any drugs or illegal contraband Trooper Oxner resorts to his canine training. MH: 39, 40. An interior search with a canine is used to pinpoint something that is in the vehicle. MH:20. His drug dog is trained

to search a location and ferret out drugs in such a location. MH: 30. At 9:30 a.m., in keeping with his training and experience, he puts his drug dog inside the Malibu in an effort to pinpoint the location of drugs inside the vehicle. MH: 40, 56. In an effort to determine if there are drugs in the dash he repeatedly directs the dog's attention to the dash and the airbag by tapping on the window, verbal coaxing, and slapping on the dash to see if the dog will alert to this area. MH: 50-51. If the dog indicates on the dash it could show drugs are in the dash. MH: 51-52. Conversely, a failure to indicate on the airbag/dash area could mean there are no drugs present. MH: 54. On this first interior dog sniff/search the drug dog does not show an interest in or indicate on the dash/airbag where the secret compartment is believed to be. MH: 51-52.

Supervising Trooper Don Allen arrives on the scene at 9:32 a.m. SR: 81 at Exhibit 17. Supervisor Allen points to the dash and asks Trooper Oxner if the dog had been put in the car yet and if the dog indicated on the dash. MH: 49. Trooper Oxner explained the dog did not indicate to an odor of drugs in the dash area. Id. Oxner tells his supervisor, "you'd think she [the dog] would indicate to it if it was in there." JT: 240. The "it" was referring to illegal drugs. MH: 60.

Both troopers again re-search the vehicle. SR: 81 at Exhibit 17. At 9:33:50 Trooper Oxner told his supervisor that he could not tell if it (the air bag compartment) was fake or not and he really did not know for sure. JT: 239. At 9:34 a.m. Trooper Oxner said "It's a bag, but I don't think it's an air bag, I might be wrong." JT: 240. The vehicle is very thoroughly combed through by the troopers for 30 minutes. SR: 81 at Exhibit 17. At 10:05 a.m., after continually searching the vehicle and not finding a way to open the so-called secret compartment, Trooper Oxner again placed his drug dog inside the vehicle in a second attempt to direct its attention to the dash area. MH: 57, JT: 178. Again, even after the coaxing, the drug dog did not alert to the dash. Id.

At approximately 10:30 a.m. supervising Trooper Allen who had been on the scene for over an hour and who had searched the vehicle and closely examined the compartment himself, told Trooper Oxner to release the individuals and let them get on their way. JT: 180. Thereafter Oxner went back to the squad car, again asked Mendoza and Naranjo if there were any drugs in the vehicle, and when he was told there were not, he warned them that if there were drugs in there they better get rid of them. MH: 62-63. The trooper thanked them for their cooperation and apologized for the

inconvenience. SR: 81 at Exhibit 17. After both denied knowing anything about any drugs and both claimed there were no drugs in the vehicle, they were allowed to leave. JT: 180.

Trooper Oxner then went to several junk yards in the area and looked at cars near the same year. JT: 183-184. He noticed differences in the air bag compartments, and prepared an application for a search warrant so the subject car could be searched further on down the interstate. JT: 185-186. In the search warrant which is located in the search warrant application, which is located at Appendix B., Trooper Oxner explained the perceived discrepancies between the stories of the individuals and his findings concerning the air bag compartment and the differences with other known air bags in salvage yards. He also explained that his dog had indicated to an odor of illegal drugs during a walk around the car. Appendix B. Trooper Oxner did not spell out in his application that the vehicle had been searched by two troopers for over an hour and half or that the drug dog had been directed toward the area of requested access several times and did not indicate. MH: 52-53. Oxner also did not include details of the language barrier between the individuals which could explain the minor discrepancies, their clean criminal history, cooperation, and lack of criminal admission.

As Trooper Oxner was applying for the search warrant he radioed 90 miles to the east on interstate 90 and requested that another trooper stop the vehicle and detain the subjects until a search warrant could be granted. JT: 186. The vehicle was stopped and held until the search warrant was issued. Id. A search warrant was issued and the vehicle was searched at a highway shop in Kadoka, South Dakota. JT: 187. Trooper Oxner dismantled the dash, pulled out the stereo and noticed a large wire behind the stereo leading toward the air bag compartment. Id. The wire was spliced and given a source of electricity with a battery charger and the air bag compartment popped open. JT: 187-188. There was no evidence that any wire clippings on the floor were from this wire, and the trooper had been told during the first stop that the window had previously been broken out when the stereo was stolen. JT: 178, 220-221. Inside the compartment the troopers located eight kilos of cocaine heavily wrapped in plastic and other materials. JT: 192. The substance was field tested and tested positive for cocaine, and the troopers carefully preserved the outer packaging of the cocaine bricks so the packaging could be tested for fingerprints. JT: 194, 242. Trooper Oxner in fact made an immediate request of the evidence technicians to process the packaging for prints, and Mendoza and Naranjo were both arrested for

possession with intent to distribute. SR: 1. They were both ultimately charged with possession with intent to distribute and conspiracy to distribute a controlled substance. SR: 1, 11. Despite Trooper Oxner's request for fingerprinting, the packaging was never tested for prints. JT: 242-245.

Motions were filed by Mendoza seeking suppression of the fruits of the search in pertinent part upon material omissions in the search warrant application, culminating in an unlawful seizure. SR: 26. After an evidentiary hearing the U.S. magistrate court and district court found that while there were material omissions in the search warrant, one would have been granted even if certain omitted information were included. SR: 37, 54.

The case proceeded to trial. The government called two troopers and a chemist. JT: 129, 137, 273. The only evidence presented in the case-in-chief at trial detailed the stop, searches, and chemical analysis of the drugs found in the dash. For the Mendoza defense, Mendoza testified that he did not know of the drugs and did not enter into any conspiracy. JT: 289-324. He explained the circumstances of the trip and the events leading up to it. Id. He explained how he was a father of three, had never been in trouble, and how he wanted to see the Midwest as he had never been there. JT: 296-300. Mario Martinez, a fruit seller from Washington, testified that he knew

Adan Mendoza well, that Mendoza had coached his children in soccer, and that Mendoza had a good reputation in his community for truthfulness. JT: 324-326. Margarita Mendoza, a Washington state social worker and Mendoza's niece, testified that Mendoza had a good reputation in his community for truthfulness. JT: 326.

Naranjo presented a similar defense. Naranjo confirmed Mendoza's testimony that they did not know of the drugs and were simply picking up his cousin. JT: 333, 341-342. He explained they were picking the cousin up for the owner of the vehicle, Gildardo Santos, and he thought they would be reimbursed for gas and hotel bills. JT: 336, 337, 355.

At the close of the evidence, Mendoza made a motion for judgment of acquittal on both counts for failure of the government to prove up a prima facie case. JT: 286-287. The court ultimately denied this motion.

The jury asked several questions. SR: 94, 96, 97, 99. One question asked was: "Because the prosecution did not present evidence that we feel would strengthen their case, do we infer it was not available or they just choose to not present it or discount it all together?". SR: 97. The court answered, "You are not to speculate as to what evidence was not presented to you. You must consider only that evidence which is before you. I

recommend you read the instructions again." SR: 98. The jury convicted both defendants of possession with intent to distribute and conspiracy. They were sentenced (SR: 125) to two concurrent 120 month sentences and this appeal followed. SR: 127.

VIII. SUMMARY OF THE ARGUMENT

A. Based upon the admitted lapses in the proof, lack of criminal history, a clean urine sample, no record of drug involvement, no criminal admissions, no statements indicative of criminal conduct, and no direct evidence of knowledge and/or possession, Mendoza's convictions should be overturned upon the insufficiency of the evidence introduced at trial.

B. Inclusion of material omitted from the search warrant application shows there existed no probable cause for the issuance of the search warrant. Therefore, the fruits of the search should have been suppressed.

IX. ARGUMENT

A. Whether there was sufficient evidence to sustain convictions for possession with the intent to distribute and conspiracy to distribute controlled substances.

At the close of the case the defendant moved for the court to enter a judgment of acquittal based upon the government's failure to prove up a prima facie case as to each count. JT: 286-287. The standard of review for sufficiency of evidence claims in connection with a motion for a judgment of acquittal is well known. "We review the sufficiency of the evidence de novo, viewing evidence in the light most favorable to the government, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." U.S. v. Sheikh, 367 F.3d. 756 (8th Cir. 2004) (citing United States v. Hamilton, 332 F.3d. 1144, 1148 (8th Cir. 2003)). In that regard, ". . . this standard of review is strict and permits . . . [the appellate court] . . . to reverse a verdict only if no reasonable jury interpreting the evidence could find the defendant guilty beyond a reasonable doubt." Id. at 763.

It is the contention of Mendoza herein that no reasonable jury could have convicted Mendoza of the aforementioned charges based upon the evidence presented at trial, even when the evidence is viewed in a light most

favorable to the government. In essence, the crux of Mendoza's defense was that he did not have knowledge of the fact that the cocaine was present in the car, and likewise did not know of any conspiracy, understanding, or agreement to violate the law reference the distribution of such. Simply put, there was no direct evidence of possession and/or knowledge of the existence of the cocaine in the car by Mendoza, except mere presence. "Evidence of association of acquaintance, though relevant, is not enough by itself to establish a conspiracy." U.S. v. Collins, 340 F.3d 672 (8th Cir. 2003) (citing United States v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990)).

The government's case rested primarily upon the fact that Mendoza's explanations as to why he was traveling across the country to Minnesota were such that they were unbelievable, and were therefore indicative of knowledge of the presence of a controlled substance. Much of the testimony centered around the discrepancies between the statements of the driver of the vehicle, Naranjo, and the statements of the passenger of the vehicle, Mendoza. The clear inference being that the only reason there would be such discrepancies would be that these two were knowingly and intentionally acting as mules in transporting a controlled substance across the country.

However, when the trial transcript is examined, there arise significant doubts which would have caused any reasonable person substantial doubt in forming the conclusion that the government had proven Mendoza knew of the existence of the controlled substance beyond a reasonable doubt. The trial transcript bears out that Mendoza made no admissions or said anything at all indicative of criminal behavior. JT: 232. Mendoza was not nervous, acted like an ordinary motorist, and was in all respects cooperative. JT: 214. The trooper specifically requested information as to whether or not either of the defendants had any history of "10-80" or drug history. JT: 224-226. Neither did, and this makes it less likely they were trafficking in drugs. JT: 228. Upon arrest, the urine of Mendoza was drawn and tested. JT: 235-236. This is normal protocol and can show one has knowledge of the drugs. JT: 235-236. Mendoza's urine sample was negative. JT: 236. The trooper agreed that the existence of the secret compartment would not be obvious to a person who just happened to be riding in a car or using the car (JT: 247); therefore, it could exist without that person's knowledge.

More importantly, the types of possibilities the trooper agreed existed during the course of the trial, are so significant and so powerful that no reasonable jury could have convicted an individual of drug possession based

upon the evidence in this record, once those possibilities were in fact exposed. Proof of the legitimate destination was intentionally ignored by Trooper Oxner. JT: 234. Both Naranjo and Mendoza verified the fact that they were on the way to pick up Narnajo's cousin. Both individuals told the trooper there was a phone number they were to call once they got to their destination to pick up the cousin. Trooper Oxner did not write the phone number down, did not attempt to call the phone number, did not attempt to verify the existence of the cousin, and took no steps to rule out the fact that they were going to pick up the cousin, rather than to transport drugs. JT: 233-234. In this regard, Trooper Oxner testified he would not want to investigate information that would confirm the story of the people he suspected of criminal activity:

> Q.: (By Mr. Rensch) Did you ever call anyone up there and say, you know, these guys have the number of the place they were going, we may want to get that?
> A.: (By Trooper Oxner) DCI agents Gobel and Ardis met us at the State Shop, and I don't recall if I ever informed them of that or not.
> Q.: That would be a pretty important piece of information, wouldn't it, sir?
> A.: I guess in my opinion, no.
> Q.: Because you already had the drugs?
> A.: That's correct.
> Q.: And because if those drugs were in there without their knowledge, you wouldn't want to dig

> up information that would confirm their story, would you, sir?
> A.: No.

JT: 233-234. In a circumstantial case, as this one was, the trooper himself is agreeing that he took no steps to check out the story of the people who maintained their innocence.

Trooper Oxner admitted that the cocaine could have been hidden in the dash for a long time:

> Q.: (By Mr. Rensch) Did you ever find anything on this cocaine that had names on it?
> A.: (By Trooper Oxner) No, other than initials.
> Q.: Other than the K and the N?
> A.: Yes.
> Q.: You don't know what that K and N stands for?
> A.: No.
> Q.: You don't know how old that cocaine was?
> A.: That's correct.
> Q.: You don't know where that cocaine was produced?
> A.: That's correct.
> Q.: You don't know when that cocaine was put in that vehicle?
> A.: That's correct.
> Q.: That cocaine could have been in that vehicle for a long time, couldn't it, sir?
> A.: That's a possibility.
> Q.: And you don't know the answer to that?
> A.: No.
> Q.: And there was nothing that you could ascertain in that vehicle that would tell us the answer to that' isn't that true, sir?

A.: That's right.

JT: 208-209. No evidence in the record shed any light on these important questions.

The trooper also admitted doubts existed concerning fingerprints. Trooper Oxner carefully preserved the outer packaging of this cocaine so it could be tested for fingerprints. JT: 241. He in fact made a request that the outer packaging be tested for fingerprints so he could determine if either of these defendants had touched the cocaine. Id. The trooper learned four or five days prior to trial that the packages had never been fingerprinted and was upset about it. The doubts which the trooper admits existed concerning these fingerprints are significant in such that no reasonable jury should have convicted Mendoza:

> Q.: (By Mr. Rensch) And these bricks of cocaine were wrapped in a plastic substance, isn't that correct, sir?
> A.: (By Trooper Oxner) That's correct.
> Q.: Did you take any steps to preserve them in the condition they were in as you removed them from the vehicle?
> A.: Yes.
> Q.: Why?
> A.: To possibly get fingerprints off of them.
> Q.: Why would you want to do that?
> A.: To see who last touched them.
> Q.: What would be the importance of knowing that?

A.: To see who handled them as far as possession?
Q.: Yes.
A.: Obviously if somebody touched them, they'd have to have possessed them.
Q.: And that's how you are trained?
A.: Yes.
Q.: Did you ever take steps to request that any fingerprint analysis be done on the outside packages of these?
A.: Yes, I did.

JT: 241-242. . . .

Q.: (By Mr. Rensch) So you, as a law enforcement officer, in keeping with the oath you take in the State of South Dakota, requested that this material be fingerprinted, is that right?
A.: (By Trooper Oxner) Yes.
Q.: Because you felt that that could have evidentiary information that would be significant to this case, right?
A.: Yes.
Q.: Were they fingerpringed?
A.: No.

JT: 243. . . .

Q.: (By Mr. Rensch) How did that make you feel when you learned that?
A.: (By Trooper Oxner) Not very happy.
Q.: Why?
A.: Because I thought there would be some sort, possibly some fingerprints on the packages.
Q.: Would it be important to you to know if Adan Mendoza's fingerprints were on those packages?
A.: Possibly.

> Q.: Why would that be?
> A.: It would show that he handled them.
> Q.: That would show that he knew they were there if he touched them, wouldn't it?
> A.: That's correct.
> Q.: And likewise, if his fingerprints aren't on those items, that could show that he did not touch them and did not know they were there, correct?
> A.: Yes.

JT: 244-245.

The circumstantial evidence the government relied upon consisting of primarily of the discrepancies between where Naranjo and Mendoza said they were going, how long they were going to stay, and how the trip was set up, do not in and of themselves circumstantially show beyond a reasonable doubt knowledge of the existence of drugs in the vehicle. The government's case-in-chief for possession and conspiracy was based upon the existence of the drugs in the vehicle alone, the large quantity, and the purported circumstantial knowledge of both of said drugs. In this case there was no evidence of any drug transactions, direct evidence of any agreement to violate the law or knowledge of the existence of drugs. The government's case rested primarily upon inferences drawn by the presence of Mendoza in the car which contained such a large quantity of drugs and the improbability that a trip across the country in the fashion that Naranjo and Mendoza

claimed.

In United States v. Fitz, 317 F.3d 878 (8th Cir. 2003), this Court reversed a drug conviction and held there was insufficient evidence to prove that a defendant was aware of a conspiracy and joined in an agreement to distribute controlled substances. A search of the vehicle in that case revealed four packages containing 10 pounds of methamphetamine hidden in the gas tank. Fitz, 317 F.3d at 880. The driver of the vehicle, after a pre-arranged drug buy, told a confidential informant he had the methamphetamine and he was looking for someplace to remove the drugs from the hiding place in the vehicle. Id. Under surveillance by law enforcement, the defendant in that case said nothing and was merely present during these conversations. Id. After noting the strong presumption in favor of a conviction, the Fitz court stated "'We will uphold a jury verdict if substantial evidence supports it' . . . (citing United State v. Cruz, 285 F.3d. 692, 697 (8th Cir. 2002). . . . Substantial evidence exists if a reasonable jury could have found the defendant guilty beyond a reasonable doubt. . . . we do not overturn jury verdicts lightly, and '[r]eversal is appropriate only where a reasonable jury could not have found all of the elements of the offense beyond a reasonable doubt.' United States v. Armstrong, 253 F.3d. 335, 336

(8th Cir. 2001)." United States v. Fitz, supra, at 881. Mendoza, like Fitz, said nothing incriminatory, and was faced with no evidence of guilt other than presence.

The Fitz court went on to note what is required in order to prove a conspiracy case, and dealt with the same elements present in this case appealed by Mendoza. As to the conspiracy, "once the government established the existence of a drug conspiracy, only slight evidence linking the defendant to the conspiracy is required to prove the defendant's involvement and support the conviction." Fitz, supra, (quoting United States v. Beckman, 222 F.3d 512, 522 (8th Cir. 2000)). Here there is not even slight evidence which shows beyond a reasonable doubt Mendoza knew of the drugs and/or joined in a conspiracy to distribute them.

The Fitz court looked to previous cases where there was substantial evidence in the record that a person knew of the drug and entered into a conspiracy to distribute. See,. e.g., U.S. v. Beckman, 222 F.3d 512, 522 (8th Cir. 2000) where "the defendant was receiving methamphetamine and admitted purchasing it from a co-defendant." Fitz, supra at 881. There is nothing even close to this against Mendoza. Likewise, referring to United States v. Bass, 121 F.3d. 1218, 1220 (8th Cir. 1997), the Fitz court noted "...

five of Bass' co-conspirators testified against him; two confirmed they sold Bass large quantities of cocaine over an extended period of time, and two street-level dealers confirmed that they regularly purchased drugs from Bass for redistibution." Fitz, supra at 881. There was nothing like this presented at Mendoza's trial. The Fitz court also looked to United States v. Robinson, 217 F.3d. 560, 564 (8th Cir. 2000), and noted that, ". . . in Robinson, the co-defendant testified that Robinson agreed to give him a cut of the methamphetamine if it was acceptable as a finder's fee." Fitz, supra at 881-882. There was no evidence at all that Mendoza was to get a cut. All of these cases contained much more evidence of guilt and knowledge than Mendoza's.

The convictions of Fitz for conspiracy and possession with intent to distribute were reversed because ". . . there is no evidence in the record to indicated that Fitz knew there were drugs in a secret compartment in the Pathfinder's gas tank." Id, at 882. In this case involving Mendoza, he is in much the same position as Fitz. Mendoza, like Fitz, had no prior criminal record or any record of dealing in drugs. See, Fitz at 882. Mendoza, herein, admittedly was in the vehicle where the drugs were found, and this differs from the Fitz case. As that court said, "there is no evidence Fitz ever rode in

or drove the Pathfinder." Id, at 882. While this difference exits, and could distinguish Mendoza from Fitz, the court noted that, "even if Fitz had been in the Pathfinder, the methamphetamine was well hidden in the Pathfinder, and there was no evidence in the record that Fitz was aware of the existence of the drugs." Id. Mendoza is in precisely the same position as Fitz. The drugs in the vehicle Mendoza was in were well hidden also, and there is no evidence he was aware of the drugs. In this case, as in Fitz, ". . . the government failed to prove that . . . [the defendant] . . . was aware of the conspiracy, or that . . . [the defendant] . . . knowingly agreed to join the conspiracy. As the government cannot prove two of the three necessary elements of . . . [the defendant's] . . . alleged crimes, we cannot affirm his convictions." Id at 883.

Aside from the "mere presence" of Mendoza, there exist little or no evidence to outweigh the other significant doubts. Evidence showing that one defendant was "merely present" at the scene does not sustain a conspiracy conviction. U.S. v. Serrano-Lopez, 336 F.3d 628 (8th Cir. 2004). While it is understood that, ". . . the standard to be applied to determine the sufficiency of the evidence is a strict one, and the finding of guilt should not be overturned lightly [,]" United States v. Maynie, 257 F.3d. 908, 916 (8th

Cir. 2001), the gaps in the evidence in this case concerning Mendoza are so significant that this finding of guilt should be overturned because the district court erred in failing to grant a judgment of acquittal.

Trooper Oxner agreed under oath it was entirely possible Mendoza was on his way to pick up Naranjo's cousin. JT: 232. Trooper Oxner acknowledged Mendoza exhibited the following: a clean urine sample (JT: 236), a clean criminal history for drugs (JT: 226, 228), a cooperative attitude (JT: 240), a lack of nervousness (JT: 212-214), and lack of admissions of a criminal nature (MH: 82), as well as statements which do not in any way indicate criminal activity (JT: 231-232). These are all factors, he looks to in order to detect criminal activity. Favorable evidence regarding these factors point to innocence.

Based upon the officer's training as it related to fingerprints, the officer wanted the fingerprints taken off the packaing in an attempt to show Mendoza had knowledge. The officer agreed under oath that the existence of Mendoza's fingerprints on the packages would prove knowledge, and likewise agreed that the lack of Mendoza's fingerprints on the packages could disprove knowledge. JT: 244-245. The long and the short of it is the tests the trooper asked for were not conducted and the prosecutor agreed that

the jury should assume that Mendoza's fingerprints were not on the cocaine packages. JT: 452. This constitutes such a significant doubt that the jury's verdict should be overturned.

The importance of fingerprints has been addressed by the Eighth Circuit in assessing a sufficiency claim. In United States v. Huerta-Orozco, 272 F.3d 561, 568 (8th Cir. 2001) this court noted, ". . . the district court observed, however, that there was no physical or scientific evidence (such as fingerprints), or eyewitness testimony linking Huerta-Orozco with the blue duffle bag containing the drugs. As for Huerta-Orozco's knowledge that the blue duffel bag possessed drugs, the government presented evidence establishing only that Huerta-Orozco was acquainted (or, possibly, friends) with . . . [the co-defendant]." See, also, U.S. v. Mendoza-Gonzalez, 363 F.3d 788, 796 (8th Cir 2004), where this court noted the existence of defendant's palm prints on drugs found in truck regarding knowledge. In Mendoza's case herein there was no physical, scientific, or eyewitness evidence linking Mendoza to the drugs found in the dash.

In U.S. v. Hernandez, 301 F.3d 886 (8th Cir. 2002), a judgment of acquittal granted by the district court was affirmed by this court, because the evidence produced at trial established mere presence: "Under Rule 29(a) a

court shall enter a judgment of acquittal if the evidence presented at trial is insufficient to sustain a conviction . . . . 'In reviewing a judgment granting a motion for acquittal we view the evidence in the light most favorable to the government and affirm if a reasonable jury viewing the evidence in this light must have a reasonable doubt about the existence of an essential element of the crime.'" (citing United States v. Quigley, 53 F.3d 909 (8th Cir. 1995). ". . . Mere conjecture is not enough to overcome the burden of reasonable doubt." Id.

What it all comes down to in this case against Mendoza is the jury was truly allowed to guess whether or not Mendoza knew of the drugs, therefore possessed them, and therefore was in a conspiracy involved to distribute them. Other than the discrepancies in the stories, and surmise about the importance of paying for a hotel room or gas, or who wanted whom to go, there is no evidence in the record which, individually or combined, can prove up possession and knowledge beyond a reasonable doubt.

When you have a man who has a good character, no criminal history, clean urine, no record of drug transactions or involvements with the law, and with neighbors who will come and testify that he is an honest man, there is

significant doubt which any reasonable jury should have utilized to acquit. It is the jurisprudence of the Eighth Circuit in its present form, as this court has stated in U.S. v. Vazquez-Garcia, 340 F.3d 632, 638 (8th Cir, 2003), "even if the evidence establishes the existence of a conspiracy, there must be some evidence of knowing, affirmative cooperation in furtherance of the conspiracy's unlawful aim in order for a defendant to be convicted of conspiracy." (citing United States v. Brown, 584 F.2d 252, 262 (8th Cir. 1978)). In this instance there is no evidence even establishing knowledge of the existence of drugs or of a conspiracy during the indicted time frame. For all of these reasons his convictions should be vacated for insufficient evidence.

B. Whether the probable cause affidavit proffered pursuant to a request for a search warrant, when read with the omitted material, sets forth probable cause for the issuance of a search warrant.

Mendoza moved to suppress the results of the second search of the 1998 Chevrolet Malibu for material omissions in the probable cause affidavit proffered in support of a search warrant request. SR: 25. Both the federal magistrate and the district court found that the probable cause affidavit was drawn with reckless disregard of the actual facts by the trooper. SR: 37, 54. The magistrate court found that the matters left out of the

affidavit, " . . . would be highly relevant for the judge to determine probable cause." SR: 37 at 7. In that regard the Magistrate found, " . . . this affidavit was drawn with reckless disregard of these important facts . . ." Id. The district court agreed with the Magistrate's opinion in that regard. SR: 54 at 10.

A search warrant affidavit can be challenged ". . . on the ground that includes deliberate or reckless falsehoods . . ." Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 56 L.Ed. 667 (1978). This rule extends to challenges based upon deliberate omissions. United States v. Reivich, 793 F.2d 957, 960 (8th Cir. 1986). Two showings must be made before an omission in an affidavit is violative of the Franks standard. United States v. Jacobs, 986 F.2d 1231, 1234 (8th Cir. 1993). A showing must be made that the law enforcement officer ". . . omitted the information with the intent to make, or in reckless disregard of whether they made, the affidavit misleading." Id. Mendoza does not challenge the factual findings of the district court that the omissions of Trooper Oxner were made in reckless disregard and therefore made the affidavit misleading. Mendoza does challenge the findings of the district court not to include the majority of the omission in the reconsideration probable cause affidavit. Suppression issues are to be

reviewed ". . . under a two-prong standard of review: the district court's factual findings are reviewed for clear error; its legal conclusions are reviewed de novo." U.S. v. Sheikh, 367 F.3d 756, 762 (8th Cir. 2004) (citing United States v. Kelly, 329 F.3d 624, 628 (8th Cir. 2003)). The trooper omitted the following information from the probable cause affidavit (1) the fact that on two separate occasions he directed the dog's attention to the area for which he was seeking a search warrant and the dog did not indicate, alert, or show an interest in such at any time (MH: 52, 53); (2) the trooper is trained to utilize his dog in such a fashion to pinpoint the drugs inside a vehicle (MH: 53, 56); (3) that the occupants of the vehicle had a limited ability to speak English which could explain the inconsistencies in their statements (MH: 68); (4) the length of the initial detention was for over an hour and a half (MH: 80); (5) the vehicle had been thoroughly searched by both Trooper Oxner and Trooper Allen without finding any drugs or drug paraphernalia (MH: 80, 81); (6) that neither defendant made any admissions of a criminal nature or made any statements indicative of criminal activity (MH: 82); (7) the responses of the occupants to questions regarding drugs (MH: 82); and (8) the result of the background check of the suspects, showing a clean history (M: 83). SR: 54.

The district court found that all of those facts, with the exception of the failure of the dog to indicate on the dash, were not facts for which the omission would have made the application misleading. SR: 37, 54. Such is a legal finding which is to be reviewed de novo. Those facts, all taken together as the totality of the circumstances require, show how very misleading the probable cause affidavit was, and findings to the contrary are not supported by substantial evidence in the record or a correct application of the law of probable cause. It was more misleading than just leaving out the fact that the dog did not hit on the dash two separate times, at the coaxing of the trooper. The district court erred in separating these facts individually, without considering them in the totality of the circumstances and then reviewing the affidavit with all of those omitted facts present.

Under the Jacobs decision and Reivich as well, the totality of the circumstances, and all of the facts taken together must be viewed in determining the existence of probable cause. See, e.g., United State v. Jacobs, 793 F.2d 957, 959 (8th Cir. 1993) (citing Illinois v. Gates, infra. 462 U.S. at 233-35, 103 S.Ct. at 2329-30). From that standpoint the district court's mixed factual and legal findings that all but the failure of the dog to hit on the dash were not misleading, is in substantial contravention to the

record at the motions hearing. It is furthermore an improper recitation of the law of probable cause.

If all of those facts were to be included in the probable cause affidavit, as Jacobs would require, the omissions would be "clearly critical" to the finding of probable cause. Even when the verification exists that the airbag compartment was somehow modified, all of the omitted information would be critically important in determining whether a reasonable and prudent person would believe what contraband will be found, rather than contraband may be found. Probable as interpreted by Reivich, citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), reads as follows: "'probable cause' to issue a search warrant exists when an affidavit sets forth sufficient facts to justify a prudent person in a belief that contraband will be found in a particular place." Reivich, supra at 959. Even looking at the last line of the trooper's affidavit itself, which sets forth the officer's opinion, there is no contention that drugs or contraband will be found: "Based upon my training and experience illegal drugs and narcotics and U.S. currency have been found in hidden compartments in the passenger-side airbag of such vehicles." Appendix B. Adding the trooper's training regarding how his dog is to respond when pinpointed to a certain

location (MH: 20, 30, 39, 40) as well as the other facts that Mendoza was not nervous (JT: 214), was cooperative (Id,), had a clean record (JT: 224-226), made no criminal admissions (MH: 80), made no statements indicative of criminal activity (JT: 231-232), and the trooper's spontaneous statement out on the scene that "you'd think she [the dog] would indicate to it if it was in there," (MH: 58) would lead a reasonable magistrate or judge to conclude there did not exist probable cause. If the court would have applied the totality of the circumstances and included all of the information Trooper Oxner admittedly left out of the application for the search warrant, a reasonable and prudent person would not believe contraband will be found in the airbag compartment. A fair probability of such does not materialize when a trained drug dog will not alert on two separate occasions at the direction of the troopers, upon these attendant circumstances.

This case is analogous to United States v. Jacobs, 986 F.2d 1231 (8th Cir. 1993). There the applicant failed to tell the warrant magistrate of the failure of a dog to alert to the package the warrant was requested to search. Id. at 1231-32. The same thing happened in Mendoza's case. A positive indication alone. does not mean drugs are present (JT: 181), but a lack of a positive indication can mean drugs are not present. MH: 54. Franks and

Jacobs require suppression herein and a reversal of the probable cause determination of the district court for applying less than the totality of the circumstances.

X. CONCLUSION

For the reasons stated herein, Appellant Mendoza respectfully requests that this case be reversed and the judgments vacated.

Respectfully submitted this 20th day of December, 2004.

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XI. CERTIFICATE OF COMPLIANCE

I, Timothy J. Rensch, the undersigned attorney for Appellant Adan Mendoza, hereby certify this brief was prepared using WordPerfect for Windows 8.0 using Times New Roman Font Face in Font Size 14. The word processor used to prepare this brief indicates that there are a total of 7,306 words and 35,563 characters in the body of the brief. I further certify I have provided the Clerk of this Court with a computer disk containing a copy of the Appellant's Brief and that the disk was free of any virus which our system is capable of detecting.

Dated this 20th day of December, 2004.

Timothy J. Rensch
Attorney for Appellant Mendoza

XII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of Appellant's Brief upon the persons herein next designated all on the date shown by mailing said copy in the United States Mail, first-class postage prepaid, in an envelope addressed to said addressees; to-wit:

Mark Vargo
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which addresses are the last known addresses of the addressees known to the subscriber.

Dated this 20th day of December, 2004.

Timothy J. Rensch
Attorney for Appellant Mendoza

XIII. ADDENDUM/DISTRICT COURT OPINION: