No. 23-7046

IN THE

United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LLOYD RAY HATLEY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Oklahoma
No. 6:21-cr-00271-CBG-1
The Honorable Judge Charles B. Goodwin

BRIEF FOR APPELLANT LLOYD RAY HATLEY

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Issue I herein relates to an issue presented in *United States v. Harper*, No. 23-5091 (10th Cir., argued Aug. 21, 2024) (Bacharach, Moritz, and Federico, Circuit Judges)

INTRODUCTION

This appeal concerns an inscrutable conviction for involuntary manslaughter in Indian Country arising from a tragic car accident. Appellant Lloyd Hatley, a local retiree, was indicted and convicted on the twin theories that the accident occurred while he was "in the commission of an unlawful act not amounting to a felony, that is[,] operating a motor vehicle while failing to devote his full time and attention to driving," a misdemeanor under Oklahoma law, and "in the commission in an unlawful manner and without due caution and circumspection of a lawful act which might produce death[.]" I-ROA-223.[1]

At the threshold, the only evidence that proved Mr. Hatley's Indian status *on the day of the accident*—proof of which was necessary for the government to establish federal jurisdiction—was inadmissible hearsay: a letter written by a non-testifying third party for the purpose of this prosecution and the testimony of a witness who lacked personal knowledge. The erroneous admission of this key evidence requires reversal.

[1] "I" references the volume number of the Record on Appeal. "539" indicates the page number within that volume.

Both predicate theories alleged in the indictment were invalid. The first predicate—the Oklahoma driving misdemeanor statute—is void for vagueness. As that state's appellate court has held, the statute fails to create a fixed and objective legal standard, and Mr. Hatley's alleged conduct—becoming distracted for several seconds by a parked vehicle in his peripheral vision on the roadside ahead of him—does not clearly and unambiguously violate the terms of the statute. The second predicate was insufficient to state a claim in the indictment. The absence of any particulars as to the "lawful act" Mr. Hatley allegedly committed or the "unlawful manner" in which he allegedly committed it left Mr. Hatley ill-prepared to defend against the accusation. Even today, he has no way to know what conduct provides the basis for this part of his conviction. His conviction must be vacated and the indictment dismissed.

The indictment was deficient for the additional reason that it failed to allege two essential elements of the offense: the *mens rea* of "gross negligence" and "actual knowledge." The district court then gave incorrect jury instructions as to those same two elements, failing to require a nexus between the "gross negligence" requirement and the predicate acts, and permitting a conviction if Mr. Hatley should have

foreseen the risk of harm occasioned by his actions, when the law required a finding of actual knowledge. These two elements were the government's evidentiary weak spots, and the multiple errors regarding these elements lightened the government's burden, such that a properly instructed jury may not have returned a conviction.

Finally, the district court erred in assigning Mr. Hatley the higher base offense level applicable to "reckless" conduct under U.S.S.G. § 2A1.4. As defined in the Application Note and this Court's precedent, the term requires a conscious awareness of, and conscious disregard for, an extreme and probable risk—which the facts as found by the district court do not support here. The district court should have applied the lower base offense level for "criminally negligent" conduct.

The Court should reverse Mr. Hatley's conviction and remand for the dismissal of Count 4 or a new trial. Alternatively, the Court should vacate Mr. Hatley's sentence and remand for resentencing

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 1153. This Court's jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The district court issued its final judgment on June 21, 2023,

which the clerk docketed on June 25. I-ROA-539. Mr. Hatley timely noticed this appeal on June 25, 2023. I-ROA-546; *see* FED. R. APP. P. 4(b)(1)(A)(i).

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion in admitting, to establish Mr. Hatley's Indian status, a "verification letter" created for the purpose of this prosecution by a non-testifying third party to prove the truth of the information therein, and the hearsay testimony of the interim tribal registrar about its contents, where no exception to the hearsay bar applied in either case and the tribal registrar also lacked personal knowledge.

II. Whether the first of Count 4's predicate offenses, "failing to devote one's full time and attention to driving," Okla. Stat. 47 § 11-901b, is unconstitutionally vague as applied, where Mr. Hatley's alleged conduct—looking for several seconds at a parked vehicle on the roadside ahead of him, within his peripheral vision—is not unambiguously within the scope of the statute.

III. A. Whether the district court plainly erred in failing to require that the indictment, for the second of Count 4's predicate offenses, specify the "lawful act" Mr. Hatley was allegedly undertaking and the "unlawful manner" in which he undertook it.

B. Whether the district court plainly erred in failing to require that the indictment set forth the essential elements of "gross negligence" and "actual knowledge."

IV. Whether the district court plainly erred in instructing the jury on Count 4 by (1) failing to require a nexus or concurrence between the "gross negligence" *mens rea* and the commission

of one or both predicate acts, *i.e.*, that the predicate act charged was the result of gross negligence or was itself grossly negligent conduct, and (2) allowing the jury to convict upon the mere foreseeability of harm rather than actual knowledge that Mr. Hatley's conduct was a threat to the lives of others.

V. Whether the preserved and unpreserved errors above, considered cumulatively, deprived Mr. Hatley of a fair trial.

VI. Whether the district court erred in applying, under U.S.S.G. § 2A1.4, the higher base offense level applicable to "reckless" driving instead of the lower level applicable to "criminally negligent" conduct, where the facts as found are insufficient to establish recklessness.

STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. § 1112(a), which provides:

> Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary—[omitted]
>
> Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

This case also involves 18 U.S.C. § 1153(a), which provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, … manslaughter, … shall be subject to the same law and penalties as all other persons committing any of the above

> offenses, within the exclusive jurisdiction of the United States.

Finally, this case involves § 11-901b of Title 47 to the Oklahoma Annotated Statutes, which provides, in pertinent part:

> The operator of every vehicle, while driving, shall devote their full time and attention to such driving.

STATEMENT OF THE CASE

A. The Accident.

This case arises from a car accident that occurred on February 22, 2017, on a highway outside Ada, Oklahoma, within the Chickasaw reservation. III-ROA-350, 509. A black 2013 Dodge Ram pickup truck driven by Mr. Hatley, a then-62-year-old retiree, collided with the rear of a white 2002 four-door Pontiac Grand Am driven by Gay Ott and carrying passengers Stephen Ott and Mary Nappa. II-ROA-12; III-ROA-240. Ms. Nappa died at the scene. III-ROA-188.

B. Indictment.

The Government ultimately lodged four counts against Mr. Hatley in a second superseding indictment (the "indictment"): two for involuntary manslaughter (both concerning Ms. Nappa, each under a different theory), in violation of 18 U.S.C. §§ 1112, 1151, and 1153, and

two for driving under the influence resulting in great bodily injury (one for each of the Otts), in violation of 18 U.S.C. §§ 13, 13(b)(2)(A), 1151, and 1152, and Okla. Stat. 47 § 11-904(B).

In each of Counts 1, 2, and 3, the Government alleged that Mr. Hatley "operat[ed] a motor vehicle under the influence of any intoxicating substance other than alcohol which may render such person incapable of safely driving or operating a motor vehicle and while having any amount of a Schedule I chemical or controlled substance [as defined by Oklahoma law] and one of its metabolites in his blood," contrary to Oklahoma law. I-ROA-221–23.

Count 4—the sole offense of conviction (I-ROA-487)[2]—did not involve any DUI allegations. *See* III-ROA-165. Instead, for Count 4, the Government alleged that Mr. Hatley

> unlawfully kill[ed] Mary Nappa[] in the commission of an unlawful act not amounting to a felony, that is[,] operating a motor vehicle while failing to devote his full time and attention to driving, and in the commission in an unlawful manner and without due caution and

[2] Before trial, the court dismissed Count 3 on the Government's unopposed motion. CR-87, 100. The jury acquitted Mr. Hatley of Counts 1 and 2. I-ROA-485–86.

> circumspection of a lawful act which might produce death[.]

I-ROA-223. Count 4 did not allege a *mens rea*.

C. Motion to Dismiss.

Mr. Hatley moved to dismiss Count 4 as void for vagueness. I-ROA-224. He argued that the predicate "unlawful act" of "operating a motor vehicle while failing to devote his full time and attention to driving" (which the Government subsequently identified in a bill of particulars as Okla. Stat. 47 § 11-901b (I-ROA-252)) failed to provide fair notice that the specific conduct in which he had allegedly engaged was prohibited, and that the Oklahoma statute invites arbitrary and discriminatory enforcement. I-ROA-224–29. The district court denied the motion in a written order. I-ROA-419–27.

D. Trial.

1. The Government's Case.

The Government's primary theory was that, at the time of the accident (a little before 2pm (III-ROA-183)), Mr. Hatley was under the influence of marijuana and Xanax, which he had admitted to taking the night before. III-ROA-160, 162. Secondarily, the prosecutor argued that Mr. Hatley "simply wasn't paying attention" when he rear-ended the

Pontiac (III-ROA-160), which had slowed to 4 mph in the middle of the highway—"likely attempting to turn onto a private drive so they could make a U-turn," the prosecutor postulated (III-ROA-163).

Much of the evidence relevant to the Count 4 conviction was undisputed.[3] Both vehicles were traveling east on State Highway 1, a public two-lane highway separated by double-solid yellow lines (a no-passing zone). III-ROA-208–09, 241, 298–99. There was no designated left-hand turn lane. III-ROA-209, 219, 299. There were no homes or businesses on the left (north) side of the road; it was abutted only by grass and trees. III-ROA-209, 219, 299. The only interruption in the grass was "a paved drive of some sort" that appeared to lead nowhere, stopping at the trees. III-ROA-219, 299; *see* III-ROA-253–54, 440–41, 443; Gov't Trial Exs. 22, 27; Def. Trial Exs. 79, 88, 133, 134.

It was a warm, clear afternoon, with no precipitation; the roadway was dry. III-ROA-194, 510, 658. The speed limit at the section of road

[3] Because Mr. Hatley was acquitted of Counts 1 and 2, relating to driving under the influence as to both Ms. Nappa and Ms. Ott, and the Government dismissed Count 3, relating to Mr. Ott, Mr. Hatley does not relay here the evidence pertaining solely to the those counts, including the evidence of intoxication that the jury necessarily rejected by acquitting on Counts 1 and 2.

where the accident occurred was 65 mph. III-ROA-193–94, 198, 240, 510. The rear of the Pontiac was crushed in the collision with the Dodge, and Ms. Nappa, who was in the backseat, expired while first responders were trying to extricate her. III-ROA-183–84, 186–88, 193–94, 198; *see also* III-ROA-311. The Pontiac came to rest on the northbound shoulder, facing west (the opposite direction from that in which both cars had been traveling), while the Dodge stopped facing southeast, on the eastbound shoulder. III-ROA-240–41; *see also* III-ROA-300–301 (discussing Def. Ex. 82).

Former State Trooper and lead investigator Brian Bagwell described the crash scene. *See* III-ROA-239-57, 264–71. His investigation concluded that the Pontiac slowed attempting to make illegal left turn across the double-yellow lines. III-ROA-299–302. He did *not* conclude that Mr. Hatley was at fault, much less that he caused the accident through distracted driving or by turning his head away from the road. III-ROA-303. According to family members, he said, Ms. Ott "did not recall what had … happened." III-ROA-300.

State Trooper Justin Pope spoke very briefly with Mr. Hatley at the scene. III-ROA-201–02. Pope testified that Mr. Hatley "seemed kind of,

I guess, dazed or stunned." III-ROA-202; *see also* III-ROA-243, 295–96. (similar testimony of Trooper Bagwell). But he agreed it is not unusual for someone involved in a violent collision to be shaken up and react in that manner. III-ROA-207. Reviewing photographs, Pope further testified that a black pickup truck similar to the Dodge was parked ahead of where the accident occurred, off the right-hand side of the road. III-ROA-210–16. He did not arrest Mr. Hatley or cite him, i.e., for distracted driving. III-ROA-205.

At the hospital, State Trooper Joshua Christian heard Mr. Hatley say that the Pontiac "had stopped in front of him, that he believed they were making a right turn," and that the crash was his fault. III-ROA-362–63. Mr. Hatley said "that he wishe[d] he were dead and not them." III-ROA-374, 377. According to the trooper, Mr. Hatley told him—after receiving a *Miranda* warning, and while wearing a neck brace at the medical center—"that he observed a vehicle that matched his vehicle off to the right that he was looking at, and then when he looked back all he remember[ed] seeing were brake lights." III-ROA-367. Trooper Christian, too, noted that Mr. Hatley seemed to have difficulty comprehending questions and articulating his responses, which "raised

concerns about his mental fitness." III-ROA-382–83. Mr. Hatley dated his blood kit "2/14/17," even thought it was February 22, 2017, and he signed below the signature line instead of on it. III-ROA-365; *see* Gov't Ex. 52.

State Troopers Kenneth Duncan and Trent Cagle discussed each vehicle's event data recorder ("EDR"). III-ROA-427–45, 450–71, 479–82. The EDR for the Pontiac indicated that Ms. Ott began to brake eight seconds before the crash, decelerating to 4 mph two seconds before. III-ROA-461–64. But it did not reflect whether the brake lights were functional or if a turn signal was employed. III-ROA-485, 489. As for the Dodge, the EDR showed a speed of 69 mph a second before the crash, slowing to 56 mph on impact, with sharp evasive steering as Mr. Hatley applied the brake. III-ROA-465–70. But the EDR did not reflect the time it would have taken for Mr. Hatley to perceive the need to react and make the decision to do so. III-ROA-488. Cagle agreed that the evasive steering suggested Mr. Hatley was "trying to avoid a collision" because "something unexpected … had just occurred[.]" III-ROA-487.

To prove Mr. Hatley's Indian status, the Government produced two witnesses and two documents. Through Trooper Bagwell, it introduced

a document from an Oklahoma state case, filed on Mr. Hatley's behalf by his attorney on July 6, 2020, which states (as relevant here) that Mr. Hatley "is a citizen of the Cherokee Nation." Gov't Ex. 51; *see* III-ROA-754–55.

Derrick Vann, the interim tribal registrar for the Cherokee Nation, testified on April 27, 2022. *See* III-ROA-220–27. After explaining that he was "the custodial person for all of our Cherokee Nation records," which "includes information about who's a member of the Cherokee Nation," he testified that Mr. Hatley was "a blood member of the Cherokee Nation." III-ROA-221; *see* III-ROA-177. He was asked the location of his office, but no additional foundational questions.

When the government asked—over the defense's objection to lack of foundation—if Mr. Hatley was a blood member of the Cherokee Nation, Mr. Vann answered, "Yes." III-ROA-221. The following colloquy then occurred:

> Q. Can you tell the jury when he formally enrolled in the tribe?
>
> A. I can't recall the day, but I think it was in November of 2013.

> Q. If we can have shown to the witness, please, what's been marked for identification as No. 50, just shown to the witness, please.
>
> All right. Sir, if you—please read that first paragraph to yourself and see if that refreshes your memory about his date of enrollment.
>
> Oh, yes. "This letter shall verify that Lloyd Ray Hatley[,] citizen number—
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: All right. Before you start reading the letter or explaining it, is there a motion?
>
> Q. (BY THE PROSECUTOR) Sir, don't read what the letter says, I'm just asking if this refreshes your memory as to the date of enrollment.
>
> A. Yes.
>
> Q. What is the date of enrollment for Lloyd Ray Hatley, date of birth [redacted],[4] 1954?
>
> A. October 31st, 1984.

III-ROA-221–22.

The Government then sought to authenticate the same letter, Exhibit 50, which Mr. Vann described as "our standard document that

[4] Mr. Hatley's month and day of birth are redacted pursuant to Circuit Rule 25.5.

we give for anyone asking—any legal team asking for citizenship information on a citizen." III-ROA-223. Mr. Vann confirmed it "correctly reflects the information that is on file with the Cherokee Nation[.]" III-ROA-224.

Exhibit 50 (the "Verification Letter" or "Letter") is an unsigned letter, dated March 24, 2021, on letterhead of the "Cherokee Nation, Office of the Attorney General." Supp.I-ROA-1. The first line reads: "This letter shall verify that Lloyd Ray Hatley., [sic] (Citizen ID: 4702) born [redacted], 1954, is a registered citizen of the Cherokee Nation as of October 31, 1984." *Id.* Further down, the letter reads, "The response in this letter is based on information exactly as provided by the requesting party. Any incorrect or incomplete information may invalidate the above determination." *Id.* The last line instructs that any questions be directed to the Cherokee Nation Office of the Attorney General. *Id.*

Over the defense's foundation and hearsay objections, the district court admitted the exhibit. III-ROA-224.

2. The Defense Case.

The defense theory was the accident was just that—an accident. III-ROA-165. Mr. Hatley could not have been under the influence of the Xanax and marijuana he had ingested the night before due to the amount of time that had passed. III-ROA-167–68. Nor could the crash have been caused by Mr. Hatley taking his eyes off the road to look at the black pickup truck on the roadside—which the Government claimed would have constituted "distracted driving"—because, given the position of the pickup up ahead, Mr. Hatley would not have needed to turn his head to see it. III-ROA-168. It was also possible "that Ms. Ott's car had unexpectedly merged over from the right shoulder seconds preceding the impact." III-ROA-169. Either way, the accident "was caused by one driver not knowing what the other was about to do" (III-ROA-168) and "could have happened to anyone" (III-ROA-169).

The defense called Mr. Hatley. He testified that he smoked one joint and took two small Xanax pills at about 7pm the night before the accident and woke up around 9am feeling "[r]ested and refreshed." III-ROA-499–501. He went into town to run errands and was on the way home with groceries—about two miles from his house—when the

accident occurred. III-ROA-502–03. He was "familiar with Highway 1[,]" as he had "been driving it for 45 years." III-ROA-503.

On that afternoon, "as soon as I rounded that curve and the hill," he testified, "I saw a little while car on the shoulder, and she was probably going about 20 miles an hour. That's about 150 yards there. And about 200 yards out, she just swerved into my lane, and there was a truck coming westbound lane, so she kind of squeezed me out and I didn't have anyplace to go." III-ROA-504. He wasn't expecting her to merge, he said, because, "[w]ell, nobody's every turned left there before in 45 years, and there's no place to turn left to." III-ROA-505; *see also* III-ROA-506. He didn't recall seeing a turn signal, either. III-ROA-504.

When asked about the "patch of pavement" on the left side of the road that the government hypothesized Ms. Ott was trying to turn in to, he explained, "I think that's just an access road to a telephone transformer, and then it just dead ends into the woods." III-ROA-506.

As for the black truck similar to his, Mr. Hatley said, "Oh, it's there about half the time I come by there." III-ROA-507. He remembered seeing it that day in his peripheral vision and admitted that he glanced at it for "probably" a "split second." III-ROA-508.

On cross-examination, Mr. Hatley conceded that he had not told Trooper Christian at the hospital that the Pontiac had pulled off the shoulder into his lane or that there had been an oncoming truck in the westbound lane. III-ROA-514–15. He explained that he had been knocked unconscious and still "wasn't thinking right" at the time. III-ROA-515.

Mr. Hatley also agreed that he was "an Indian[,]" had "Cherokee blood[,]" and was currently a "[m]ember of the Cherokee Nation[.]" III-ROA-509. He was not, however, asked his date of enrollment or whether he was a member on the date of the accident, which had occurred more than five years earlier, on February 22, 2017.[5]

E. Jury Instructions.

Mr. Hatley requested, as the first element of Count 4, an instruction that he "caused the death of Mary Nappa by operating a motor vehicle while [he] failed to devote his full time and attention to driving." I-ROA-387. The instruction would have precluded the government's alternative theory that he caused the death during "a lawful act in an unlawful

[5] The defense also presented expert testimony relevant to the DUI allegations. III-ROA-524–69.

manner, or without due caution and circumspection, which act might produce death." I-ROA-279.

The district court rejected the defense proposal and instructed the jury as follows:

> To find the defendant guilty of this crime you must be convinced that the government proved each of the following beyond a reasonable doubt:
>
> *First:* the defendant caused the death of Mary Nappa, while the defendant was committing one or both of the following acts:
>
> (a) a violation of Title 47, Oklahoma Statutes, Section 11-901b by failing to devote his full time and attention to driving; or
>
> (b) a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death;
>
> *Second:* the defendant knew that his conduct was a threat to the lives of others or it was foreseeable to him that his conduct was a threat to the lives of others;
>
> *Third:* the killing took place within Indian Country; and
>
> *Fourth:* the defendant is an Indian.
>
> In order to prove this offense, the government need not prove that the defendant specifically intended to cause the death of the victim. But it must prove more than that the defendant was merely negligent or that he failed

> to use reasonable care. The government must prove gross negligence amounting to wanton and reckless disregard for human life.

I-ROA-470–71; *accord* III-ROA-593–94. The instruction did not require the jury to find, as an element, that the underlying predicate act was committed with, or resulted from, gross negligence.

F. Verdict.

The jury acquitted Mr. Hatley of Counts 1 and 2 but found him guilty of Count 4. I-ROA-485–87; III-ROA-635. It also made special findings that, at the time Ms. Nappa was killed, Mr. Hatley was engaged in both "an unlawful act not amounting to a felony, that is operating a motor vehicle while failing to devote his full time and attention to driving" and "a lawful act, in an unlawful manner or without due caution and circumspection, which act might produce death[.]" I-ROA-487–88; *see* III-ROA-635.

G. Sentencing.

Section 2A1.4 of the U.S. Sentencing Guidelines governs involuntary manslaughter. The probation officer recommended a base offense Level of 22, which applies "if the offense involved the reckless operation of a means of transportation." U.S. SENT'G GUIDELINES MANUAL ("U.S.S.G.") § 2A1.4(a)(2)(B) (U.S. SENT'G COMM'N 2021); II-

ROA-17–18. With no other adjustments, for Criminal History Category I, the probation officer calculated the Guidelines imprisonment range at 41 to 51 months.

The defense objected to the application of subsection (a)(2)(B). II-ROA-25–26. Under the same guideline the base offense level is only 12 if Mr. Hatley was "criminally negligent," but not "reckless." U.S.S.G. §2A1.4(a)(1).

At sentencing, the district court ruled:

> In the instructions to the jury regarding Count 4, the offense of conviction, the Court explained that the jury must find as an element of that crime that the defendant knew that his conduct was a threat to the lives of others or it was foreseeable to him that his conduct was a threat to the lives of others.
>
> Further, the Court instructed that the government must prove more than that the defendant was merely negligent or that he failed to use reasonable care. The government must prove gross negligence amounting to wanton and reckless disregard for human life.
>
> While the lines drawn by the instruction may not be an exact match with the lines drawn in … Section 2A1.4(a), the instruction does require a finding of awareness, or at least foreseeability, of the risks of the conduct at issue and, most notably to me, that the defendant acted with a wanton and reckless disregard for human life. The jury's

> finding of guilt on Count 4, therefore, includes, in my view, a finding that the defendant's conduct was reckless.
>
> To the extent that the question is unresolved by the jury's verdict, I would also find by a preponderance of the evidence that the defendant's conduct was reckless. The evidence was that the defendant was traveling at approximately 70 miles per hour and that he looked away from the highway for a significant period of time, and by the time that he saw the victim's car in front of him, he was unable to avoid it. The risks of looking away from the highway while traveling at 70 miles per hour is plain and was certainly known to the defendant. Further, this was a risk of such a nature and degree that to disregard it constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.
>
> Based on that finding of fact, I would also overrule the defendant's objection and, again, find that the offense at issue involved the reckless operation of a means of transportation and, therefore, a base offense level of 22 applies pursuant to Section 2A1.4(a)(2)(B) of the guidelines.

III-ROA-933–34.[6]

[6] The court said it "did not place any reliance on any of the acquitted conduct, and in particular the allegations of some continuing intoxication as a result of drugs or alcohol." III-ROA-941–42; *see also* III-ROA-964.

The court sentenced Mr. Hatley to 48 months' imprisonment and three years of supervised release, and it ordered him to pay $9,761.44 in restitution. III-ROA-964–67.

Mr. Hatley appeals. I-ROA-546.

SUMMARY OF ARGUMENT

I. The district court abused its discretion in admitting the Verification Letter and accompanying testimony of Derrick Vann regarding Mr. Hatley's enrollment date with the Cherokee Nation. Both were hearsay, and no exception rendered them admissible; the Letter was not a business record, and Mr. Vann's testimony was based solely on what he had read. Because no other evidence proved that Mr. Hatley was a member of a federally recognized tribe on the date of the offense, five years before the trial, the erroneous admission of this critical evidence requires reversal.

II. The indictment charged, as the first of two predicate acts in Count 4, that Mr. Hatley killed Ms. Nappa "while failing to devote his full time and attention to driving," in violation of Okla. Stat. 47 § 11-901b. That statute is void for vagueness as applied to Mr. Hatley because, as the Oklahoma Court of Appeals has concluded, it sets no

fixed, objective standards, and Mr. Hatley's conduct does not unambiguously fall within its ambit. The charge must be dismissed in full because the second predicate act is also invalid (*see* Issue III.A.)

III. A. The second predicate act charged in Count 4—that Mr. Hatley killed Ms. Nappa "in the commission in an unlawful manner and without due caution and circumspection of a lawful act which might produce death"—is invalid because it fails to specify the "lawful act" at issue and the "unlawful manner" in which Mr. Hatley undertook it. The absence of this critical information deprived him of fair notice of the accusation, hampering his ability to prepare for trial and nullifying his right to have the charge determined by a grand jury.

B. The district court plainly erred in failing to require the indictment allege two essential elements of involuntary manslaughter: gross negligence and actual knowledge. This basic omission denied Mr. Hatley his rights under the Fifth and Sixth Amendments.

IV. The district court plainly erred in its Count 4 jury instructions, in two respects. *First*, it failed to include the "gross negligence" *mens rea* in the numbered list of elements and require a nexus between that mens rea and the predicate acts, such that the jury

may have disregarded the "gross negligence" requirement or assumed "gross negligence" implicit in the commission of the predicate acts. In other words, the jury may have convicted Mr. Hatley on a finding that he failed to devote his full time and attention to driving without further considering whether his failure was grossly negligent or resulted from gross negligence. *Second*, the court erroneously instructed that a conviction was permissible as long as the risk of harm was "foreseeable" to Mr. Hatley. But involuntary manslaughter requires that the defendant have actual knowledge of the risk itself or of circumstances that made the risk foreseeable. The jury may have erroneously convicted Mr. Hatley on a finding that he should have foreseen the risk occasioned by his conduct, rather than the necessary finding that he had actual knowledge.

V. The trial errors, considered cumulatively, reinforced each other to deprive Mr. Hatley of a fair trial.

VI. The district court erred in applying the 22-point base offense level under U.S.S.G. § 2A1.4 for "reckless operation of a means of transportation" because the facts as found by the district court do not support a finding that Mr. Hatley "consciously disregarded" a risk, much

less a risk that was extreme and probable, all of which are required for the base offense level enhancement under § 2A1.4. Because Mr. Hatley's conduct qualifies only for the 12-point base offense level for "criminal negligence," he must be resentenced.

ARGUMENT

I. The district court abused its discretion in admitting critical evidence of Indian status.

A. Standard of review.

The court reviews the district court's "evidentiary decisions for an abuse of discretion[,] … recognizing that a legal error constitutes an abuse of discretion per se." *United States v. McFadden*, -- F.4th --, No. 23-1089, 2024 WL 3998904, at *4 (10th Cir. Aug. 30, 2024) (citations omitted).

B. Argument.

The admission of the Verification Letter and the accompanying testimony of Derrick Vann require reversal. The letter was inadmissible hearsay, as was Mr. Vann's testimony because he lacked personal knowledge. The Letter and Mr. Vann's testimony constituted the only evidence that Mr. Hatley was recognized as an Indian *at the time of the*

offense because the remaining evidence of Indian status said nothing about his citizenship on the date of the accident, in February 2017.

The government's exercise of jurisdiction under 18 U.S.C. § 1153 required it to prove that Mr. Hatley was an Indian. *United States v. Wood*, 109 F.4th 1253, 1257 (10th Cir. 2024). This burden required it to show that Mr. Hatley (1) "has some Indian blood"; and (2) "was, at the time of the offense, recognized as an Indian by a federally recognized tribe or by the federal government." *Id.* at 1267 n.15 (quoting *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) ("*Prentiss II*") (in turn quoting *Scrivner v. Tansy,* 68 F.3d 1234, 1241 (10th Cir. 1995)).

Trial did not take place until April 2022, more than five years after the February 22, 2017 accident. The government was therefore required to prove that Mr. Hatley was recognized as an Indian on or before February 22, 2017.

1. The Verification Letter was inadmissible hearsay.

As Mr. Hatley asserted (III-ROA-224), the Verification Letter was hearsay: an out-of-court statement "offer[ed] in evidence to prove the truth of the matter asserted" therein, FED. R. EVID. 801(a), (c)—i.e., that

Mr. Hatley was, inter alia, "a registered citizen of the Cherokee Nation as of October 31, 1984." Supp.I-ROA-1.

The district court presumably relied on Rule 803(6) of the Federal Rules of Evidence, which exempts from the hearsay bar "records of a regularly conducted activity." FED. R. EVID. 803(6). To satisfy the "business records exception," "the proposed document must '(1) have been prepared in the normal course of business; (2) have been made at or near the time of the events recorded; (3) be based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) indicate the sources, methods and circumstances by which the record was made trustworthy.'" *United States v. Rogers*, 556 F.3d 1130, 1136 (10th Cir. 2009) (quoting *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008)). "The proponent of the document must … lay this foundation for its admission." *Ary*, 518 F.3d at 786.

Both Mr. Vann's testimony and the Verification Letter itself make clear that this exception did not apply to the Letter, as it meets *none* of the four necessary criteria. *First*, Mr. Vann testified that the Letter "is our standard document that we give for anyone asking—any legal team

asking for citizenship information on a citizen" (III-ROA-223)—not that it was prepared in the normal course of business. Indeed, the Letter itself indicates that it was not prepared in the normal course but rather in response to a request "based on information exactly as provided by the requesting party[,]" who is unnamed. Supp.I-ROA-1. "It is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business." *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995). On this basis alone, the business records exception does not apply.

Second, the Letter was not made at or near the time of the events recorded. The Letter itself is dated March 24, 2021 (Supp.I-ROA-1)—nearly forty years after the alleged registration date of October 31, 1984.

Third, the Letter's author is unidentified. Mr. Vann did not testify that he created the Letter or identify who did. The Letter is printed on the letterhead of the Cherokee Nation Office of the Attorney General, not the tribal registrar's office. *Id.* There was no testimony as to the basis for the author's personal knowledge of Mr. Hatley's enrollment date or that the information was transmitted to the author by someone with knowledge. *See Rogers*, 556 F.3d at 1136. Nor was there evidence as to

any "business duty" by the author "to transmit the information" accurately to the recipient. *Id.*

Fourth, in qualifying its own accuracy, the Letter indicates that it is untrustworthy. It reads, "The response in this letter is based on information exactly as provided by the requesting party." Supp.I-ROA-1. But there was no evidence as to the identity of the requesting party or "exactly" what "information" the requesting party provided. Without that baseline, the district court was in no position to evaluate the reliability of the enrollment information it purported to relay regarding Mr. Hatley.

The Letter thus fails to satisfy *any* of Rule 803(6)'s four requirements, much less *all* of them. It is not a business record but instead a hearsay report of other records that were not introduced into evidence. The district court erred in admitting it.

Nor does the policy rationale underlying the business records exception support its application here. "The business records exception is based on a presumption of accuracy, accorded because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because

of the accuracy demanded in the conduct of the nation's business." *Timberlake Constr. Co.*, 71 F.3d at 341. "If any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails." *Id.* The business' self-interest in maintaining accurate records of its own activities reflects a unique incentive that entitles certain records, under certain conditions, to a presumption of accuracy.

The Verification Letter, by contrast, was not created by the Cherokee Nation for use in conducting its own affairs, but rather is directed solely at unnamed external parties. The Letter is addressed to "To Whom It May Concern" and concedes its own potential inaccuracy. Supp.I-ROA-1. The Letter's purpose was not to further any business interest of the tribe but instead to satisfy the needs of a third party—the government—in a criminal prosecution. Extending the business records exception to cover the Verification Letter would flout the exception's policy purpose.

2. Mr. Vann's testimony about Mr. Hatley's enrollment date was inadmissible as hearsay and for lack of personal knowledge.

Mr. Vann's testimony as to the enrollment date was similarly inadmissible. His knowledge of Mr. Hatley's enrollment date was based exclusively on his review of tribal records, as "refreshed" by the Verification Letter. *See* III-ROA-221–24. But his review of those records did not bestow him with "personal knowledge" of the truth of the facts therein within the meaning of the Rules of Evidence. *See* FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). As the advisory committee notes to Rule 602 explain, the Rule "prevents [a witness] from testifying to the subject matter of the hearsay statement" because "he has no personal knowledge of it." FED. R. EVID. 602, advisory committee's note (1972). In other words, knowledge of what the tribal records said did not constitute "personal knowledge" under Rule 602. For this reason alone, the objection to Mr. Vann's testimony regarding Mr. Hatley's enrollment date should have been sustained.

Mr. Vann's testimony on that score was also hearsay. *See* FED. R. EVID. 801. The courts of appeals have uniformly rejected the proposition that testimony as to the content of a business record may be admitted in the absence of the record itself. *See, e.g.*, *United States v. Wells*, 262 F.3d 455, 460 (5th Cir. 2001); *FDIC v. Houde*, 90 F.3d 600, 606 (1st Cir. 1996); *United States v. Florez*, 516 F. App'x 790, 794 (11th Cir. Apr. 9, 2013); *see also* FED. R. EVID. 1002.

The district court erred in admitting the testimony.

* * *

Because the Verification Letter and Mr. Vann's related testimony were inadmissible, and no other evidence showed that Mr. Hatley was recognized as an Indian by a tribe or the government as of the offense date, the Court must reverse Mr. Hatley's conviction.

II. The Count 4 predicate "failing to devote [one's] full time and attention to driving," Okla. Stat. 47 § 11-901b, is unconstitutionally vague as applied.

A. Standard of review.

The Court "review[s] de novo questions regarding a statute's constitutionality." *United States v. Saffo*, 227 F.3d 1260, 1267 (10th Cir. 2000).

B. Argument.

The district court erred in refusing to dismiss the part of Count 4 that alleges Mr. Hatley killed Ms. Nappa "in the commission of an unlawful act not amounting to a felony, that is, operating a motor vehicle while failing to devote his full time and attention to driving[.]" I-ROA-223. This language, as used in the Oklahoma statute, is so unduly vague, and Mr. Hatley's conduct so on-the-margins, that it cannot be said his actions clearly fall within the statute's ambit.[7] The court's refusal to dismiss violated Mr. Hatley's due process rights under the Fifth Amendment.

"[T]he curative aim of the void for vagueness doctrine is vital and twofold, seeking to ensure that penal statutes 'define the criminal offense with sufficient definiteness' in order both to apprise the citizenry of what conduct is prohibited and to prevent police from arbitrarily enforcing the laws and thereby effectuating a form of state-sanctioned discrimination."

[7] Vagueness challenges that do not implicate the First Amendment "cannot be aimed at the statute on its face but must be limited to the application of the statute to the particular conduct charged." *United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997). Because such a challenge rests on the evidence admitted at trial, it does not ripen until the trial evidence has concluded. *Id.* at 1070–71.

United States v. Cardenas-Alatorre, 485 F.3d 1111, 1114 (10th Cir. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Either of these reasons renders a criminal statute invalid. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality op.). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Palmer v. City of Euclid, Ohio*, 402 U.S. 544, 546 (1971) (per curiam).

The "unlawful act not amounting to a felony" alleged in the indictment was the Oklahoma misdemeanor offense titled "Full Time and Attention to Driving[.]" That statute provides, in pertinent part:

> The operator of every vehicle, while driving, shall devote their full time and attention to such driving.

Okla. Stat. 47 § 11-901b.

The Oklahoma Court of Appeals has already held that § 11-901b sets no fixed and objective standard by which a driver's conduct can be measured. *Smith v. Barker*, 419 P.3d 327, 333 (Okla. Ct. App. 2017). That was so, the court of appeals explained, because "[t]he statutory duties imposed upon the operator of a vehicle are undefined or defined only in abstract general terms[.]" *Id.* In turn, because the statute did

not "impose positive objective standards[,]" the trial court did not err in refusing to give an instruction on negligence *per se*. *Id.* In other words, as a matter of law, the statute was so standardless that no jury could determine whether plaintiff violated it. *See Chicago, R.I. & P. Ry Co. v. Pitchford*, 143 P. 1146, 1150 (Okla. 1914) (cited in *Smith*, 419 P.3d at 333). Relying on *Smith*, the district court for the Western District of Oklahoma has reached the same conclusion. *Kittles v. Harav, L.L.C.*, No. CIV-18-720-D, 2020 WL 1159396, at *4 (W.D. Okla. Mar. 10, 2020).

On the *Smith* Court's reasoning, § 11-901b is likely unconstitutional on its face. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."). But because the law permits Mr. Hatley to assert only an as-applied challenge to his criminal conviction, this Court must assess, in light of the evidence, whether his conduct unambiguously fell within the scope of the statute. *See Reed*, 114 F.3d at 1071.

Even under the government's theory, it did not. The evidence indicated that Mr. Hatley's gaze was captured for several seconds by a vehicle ahead of him, parked on the roadside. But drivers are expected to be aware of their surroundings, including the roadside up ahead. As defense counsel argued in closing, "[e]very driver is taught to look at … roadways signs off to the right and off to the left, and we look at billboard signs as we drive, and we look at other vehicles on the road. Nothing about taking a glance at another truck on the side of the road is unnatural driving behavior." III-ROA-619. That the statute "makes criminal activities which by modern standards are normally innocent," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972), strongly suggests that it cannot survive constitutional muster.

At best for the government, Mr. Hatley's conduct falls on the margins. And because § 11-901b is a *state* statute, this Court is "without authority" to adopt a narrowing interpretation. *Smith v. Goguen*, 415 U.S. 566, 575 (1974). As the Supreme Court explained in striking down another Oklahoma statute,

> The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that

> they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation.

Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926) (quoting *United States v. Cap. Traction Co.*, 34 App. D.C. 592, 598 (1910)). Accordingly, § 11-901b is unconstitutionally vague as applied to him, and, in turn, it is not a valid predicate theory for his federal involuntary manslaughter conviction.

Because the remaining factual predicate theory is also invalid, as explained in Section I.B.1, below, the Court must reverse, and Count 4 must be dismissed.

III. Fatal defects in the indictment require dismissal.

A. Standard of review.

This Court reviews a claim, raised for the first time on appeal, that an indictment fails to charge an offense for plain error. *United States v. Powell*, 767 F.3d 1026, 1029 (10th Cir. 2014). This standard requires the defendant to show: "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights." *Id.* "Although Rule 52(b) [of the Federal Rules of Criminal Procedure] is permissive, not mandatory, it is well-established that courts 'should' corrected a forfeited plain error that affects substantial rights 'if the error

seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Rosales-Mireles v. United States*, 585 U.S. 129, 137 (2018) (quoting *United States v. Olano*, 507 U.S. 725, 735 (1993)). "This [C]ourt applies these requirements less rigidly in cases, such as this one, that involve potential constitutional error." *Powell*, 767 F.3d at 1029–30 (citation omitted).

B. Argument.

The Fifth Amendment mandates that "'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' alleging all elements of the crime…." *Russell v. United States*, 369 U.S. 749, 760 (1962) (quoting U.S. CONST. amend. V). The Sixth Amendment guarantees that, "[i]n a criminal prosecution, the accused shall enjoy the right … to be informed of the nature and cause of the accusation …." *Id.* (quoting U.S. CONST. amend. VI).

Three independent defects in the indictment violated these requirements. *First*, the part of Count 4 that alleged Mr. Hatley killed Ms. Nappa "in the commission in an unlawful manner and without due caution and circumspection of a lawful act which might produce death"

(I-ROA-223) failed to provide Mr. Hatley fair notice of the charges against him. *Second* and *third*, the indictment failed to allege essential elements of the offense: Mr. Hatley's *mens rea* and that he had actual knowledge that his conduct was a threat to the lives of others, respectively. These plain errors, separately or in conjunction with like errors in the jury instructions (*see infra* Section IV), require the reversal of Count 4.

1. The indictment fails to allege the "lawful act" or the "unlawful manner" in which it was allegedly committed.

For Count 4, the government alleged two separate theories of involuntary manslaughter under which it claimed Mr. Hatley killed Ms. Nappa: that he did so (1) "in the commission of an unlawful act not amounting to a felony, that is, operating a motor vehicle while failing to devote his full time and attention to driving," and (2) "in the commission in an unlawful manner and without due caution and circumspection of a lawful act which might produce death[.]" I-ROA-223; *see* 18 U.S.C. § 1112. Having failed to specify the "lawful act" that Mr. Hatley allegedly committed or the "unlawful manner" in which he engaged in it, the second predicate act was fatally deficient.

"It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species[']—it must descend to particulars." *Russell*, 369 U.S. at 765 (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)). "For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." *Cruikshank*, 92 U.S. at 558.

The Georgia Supreme Court's reasoning in *Haisman v. State*, 252 S.E.2d 397 (Ga. 1979), is on target. There, it rejected a challenge to an indictment that charged defendant with involuntary manslaughter by causing the victim's death, "without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death, or great bodily harm, said act being *the administration of an overdose of chloral hydrate* to said [victim]." *Id.* at 399 (emphasis added). The Court held that the indictment was sufficient precisely because the italicized

language "meets the due process requirement that the indictment inform appellant of the charge against her." *Id.*

The charge here is insufficient for the same reason the indictment in *Haisman* was not. Here, the indictment does *not* specify the "lawful act" that Mr. Hatley allegedly committed "in an unlawful manner." Indeed, in *United States v. Pride*, No. 22-CR-159-JFH, 2023 WL 3649813 (E.D. Okla. May 25, 2023), the Eastern District of Oklahoma dismissed an indictment for that exact deficiency.[8] The Government did not appeal. *Pride* is on point.

This error, together with the unconstitutional vagueness of the first predicate theory (*see supra* Section II), requires reversal. The error was plain because it is clear under longstanding Supreme Court precedent, *see supra*, that the indictment was required, but failed, to allege the "lawful" act Mr. Hatley undertook and the "unlawful manner" in which he undertook it. And the deficiency affected Mr. Hatley's substantial rights because it left him unable to ascertain and thereby to defend

[8] The government's failure there to define the non-felony offense allegedly committed makes no difference because, by its plain terms, the non-felony offense could not have constituted the "lawful act" upon which the second part of the charge was predicated.

against the charge against him or for the court to determine what the government was required to prove in order to evaluate a Rule 29 motion. *See, e.g.*, *United States v. Hathaway*, 318 F.3d 1001, 1009 (10th Cir. 2003) (reversing for dismissal where indictment failed to allege essential element that the offense was a felony or provide factual details so indicating, because it "did not put [defendant] on fair notice that he needed to defend against the felony charge); *cf. Giaccio*, 382 U.S. at 404–05 ("It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct,' or 'reprehensible conduct.'"). Even today, Mr. Hatley is left to guess what conduct underlies this part of his conviction.

Not only was he deprived of the right to have the charged determined by a grand jury, Mr. Hatley's trial and conviction for this still-undefined conduct was unfair and lacked integrity, in violation of due process. "Given [the] relaxed standard in the plain error analysis when reviewing a potential constitutional error," *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018), this second part of the charge must be dismissed. And because the first predicate theory must also be dismissed

as void for vagueness, Mr. Hatley's conviction must be reversed and remanded for dismissal.

2. The indictment fails to allege the essential elements of gross negligence and actual knowledge.

It is blackletter law that an indictment must allege each and every element of the offense. *United States v. Carll*, 105 U.S. 611, 612 (1881); *Prentiss II*, 206 F.3d at 964–65. Where "the statute alone does not set forth all the essential elements of the offense, the indictment is insufficient which simply tracks the language of the statute." *United States v. Opsta*, 659 F.2d 848, 850 (8th Cir. 1981); *see Carll*, 105 U.S. at 612–13.

One essential element of involuntary manslaughter is intent: "the defendant's acts must amount to 'gross negligence[.]'" *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000) (citations omitted). Relatedly, the defendant must have "had actual knowledge that his conduct was a threat to the lives of others … or he had knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others." *United States v.*

Benally, 756 F.2d 773, 776 (10th Cir. 1985) (quoting *United States v. Keith*, 605 F.2d 462, 463 (9th Cir. 1979)).

The elements of gross negligence and actual knowledge are both missing from the indictment. This Court's sister circuits have squarely held that the omission of one or both renders an involuntary manslaughter charge insufficient. *See Opsta*, 659 F.2d at 850–51 (both omitted); *Keith*, 605 F.2d at 463–65 (same); *United States v. Denmon*, 483 F.2d 1093, 1096–97 (8th Cir. 1973) (gross negligence omitted).[9] There is no convincing reason for this Court to depart from the consensus.

These errors, independently and together, are plain because the law is clear they are essential elements of involuntary manslaughter and therefore must be alleged in the indictment but were not. They also affected Mr. Hatley's substantial rights, independently and together, because the evidence of either was "far from 'overwhelming' and 'essentially uncontroverted.'" *Miller*, 891 F.3d at 1237. Gross negligence entails a "wanton or reckless disregard for human life[,]" *Wood*, 207 F.3d at 1229 (quoting *United States v. Bryant*, 892 F.2d 1466, 1470 (10th Cir.

[9] *See also United States v. Parisien*, 515 F. Supp. 24, 26 (D.N.D. 1981) (gross negligence omitted).

1989)), and "describes a degree of culpability *far* more serious than tort negligence[,]" *id.* (emphasis added). "If the resultant death[] [was] merely accidental or the result of a misadventure or due to simple negligence, or an honest error of judgment in performing a lawful act, the existence of gross negligence should not be found." *United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966).

The actual knowledge element, meanwhile, does *not* equate to mere foreseeability. It requires that the defendant be either (1) subjectively aware of the risk brought about by his conduct or (2) subjectively aware of specific circumstances that would have made the risk foreseeable to him. *See United States v. Gaskell*, 985 F.2d 1056, 1064 (11th Cir. 1993),; *United States v. Escamilla*, 467 F.2d 341, 346–47 (4th Cir. 1972).

The evidence of both gross negligence and actual knowledge was weak. Under the government's theory and construing the evidence in the light most favorable to it, the evidence showed that Mr. Hatley, driving only 4 mph over the speed limit, was distracted for a maximum of six or seven seconds by the black pickup truck parked on the roadside up ahead of where he was driving, and, as a result of that distraction, failed to see that Ms. Ott's car was unexpectedly braking until it was too late. But

whether being distracted by a roadside vehicle within his peripheral vision constituted a "reckless and wanton disregard for human life" as opposed to inadvertence or a mistake—i.e., simple negligence—was a close question. That is particularly so since it was a clear afternoon, the road was dry with no obstructions, they were on a highway with a relatively high speed limit of 65 mph, Mr. Hatley was familiar with the road, and Ms. Ott's driving behavior—braking to a near stop to make an illegal left or an illegal U-turn across double-solid yellow lines on a two-lane 65 mph highway with nowhere to turn—could not have been expected by a reasonable driver. Nor was it expected by Mr. Hatley in his long experience driving that stretch of highway. That Mr. Hatley had actual knowledge of specific circumstances giving rise to a risk of collision was not a given.

Because neither element is included in the statute, defense counsel could not have simply ascertained the elements from the statutory citation. It does not appear, moreover, that defense counsel appreciated the meaning of "actual knowledge" as defined by this Court's case law, given counsel's failure to object to the erroneous jury instruction on that subject. *See infra* Section IV.B. Applying the "relaxed" standard

applicable to constitutional plain errors, *Miller*, 891 F.3d at 1230, these significant pleading defects, separately and together, necessitate reversal.

IV. Fatal flaws in the jury instructions require a new trial.

A. Standard of review.

An unraised challenge to the jury instructions is reviewed for plain error. *United States v. Samora*, 954 F.3d 1286, 1293 (10th Cir. 2020). However, that standard is relaxed here "because an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee." *Id.* (quoting *United States v. Neder*, 527 U.S. 1, 12 (1999)).

B. Argument.

The jury instructions suffer fatal defects with respect to the same two elements missing from the indictment: (1) the instructions relieved the government of its burden to prove, as an element of the offense, that the gross negligence must occur with respect to the conduct charged; and (2) they permitted a conviction based on the mere foreseeability of harm rather than on proof Mr. Hatley was actually aware of circumstances that made the risk foreseeable to him.

First, the district court instructed the jury that the government was required to prove "each of" four elements to convict Mr. Hatley on Count

4. For the first element, it required the jury to find that Mr. Hatley "caused the death of Ms. Nappa while committing one or both of (a) a violation of Okla. Stat. 47 § 11-901b "by failing to devote his full time and attention to driving; or (b) a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death[.]" And none of three others was that Mr. Hatley acted with gross negligence. Instead, *after* instructing on the four numbered elements, the court added that "[t]he government must prove gross negligence amounting to wanton and reckless disregard for human life." I-ROA-471.

In *Benally*, which also arose under §§ 1112 and 1153, this Court reversed for a nearly identical error. 756 F.2d at 776. There, the government alleged the defendant killed the victim while committing the state law offense of driving while intoxicated. *Id.* at 775–76. "[T]he court properly instructed the jury on gross negligence" but went on to define the underlying state crime, explaining that driving while intoxicated meant that, "as a result of drinking … [the defendant] is less able, to the slightest degree, … to exercise the clear judgment and stead hand necessary to handle a vehicle with safety …." *Id.* at 776. Because the state law was "inconsistent with federal law requiring a finding of gross

negligence[,]" the Court held that the giving of both instructions was error. *Id.*

In *United States v. Pardee*, 368 F.2d 368 (4th Cir. 1966), cited with approval in *Benally*, 756 F.2d at 776, the Fourth Circuit considered the nexus between the underlying unlawful act and the gross negligence requirement. *Id.* at 373–75. The court explained that, where the defendant was alleged to have been engaged in the unlawful act of wrong-way driving, the jury was required to find either that the wrong-way driving was the result of gross negligence or that the wrong-way driving was, itself, grossly negligent conduct. *Id.* at 375.

Here, as in *Benally*, the first numbered element, requiring a finding that Mr. Hatley "failed to devote his full time and attention to driving" or committed "a lawful act in an unlawful manner, or without due caution and circumspection," conflicted with, and potentially usurped, the statement at the end of the instruction that "the government must prove gross negligence." I-ROA-470–71. Absent the inclusion of gross negligence as an element and/or guidance as to just what conduct the gross negligence applied to, the jury may have convicted Mr. Hatley on the incorrect understanding that a failure to devote one's full time and

attention to driving, or committing a lawful act in an unlawful manner, or without due caution and circumspection, are *necessarily* grossly negligent acts, or the jury may have disregarded the statement regarding gross negligence in favor of the numbered element. *See Benally*, 756 F.2d at 776. The jury should have been required to find that Mr. Hatley's commission of one of the underlying predicates constituted gross negligence, or that those acts resulted from his gross negligence. *See Pardee*, 368 F.2d at 375. As given, the instruction permitted an inference that simple negligence was enough to convict.

Second, the Count 4 instruction erroneously permitted a finding of guilt based on the mere foreseeability of harm rather than on Mr. Hatley's actual "knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others." *Benally*, 756 F.3d at 776. Instead, as to that element (the second), the instruction required only a finding that "the defendant knew that his conduct was a threat to the lives of others *or it was foreseeable to him* that his conduct was a threat to the lives of others." I-ROA-471 (emphasis added).

This distinction matters. In *Gaskell*, the district court had given an instruction which similarly permitted a conviction for involuntary manslaughter where the defendant "knew *or should have foreseen* that such conduct was a threat to the lives of others." 985 F.2d 1056 at 1064. The Eleventh Circuit held that, by eliminating the requirement that the defendant actually "knew of circumstances" that made the risk foreseeable to him, the instruction effectively relaxed the *mens rea* threshold from gross negligence to simple negligence. *Id.*; *accord Escamilla*, 467 F.2d at 346–47. And the involuntary manslaughter conviction could not lie if the defendant "did not know of the risks involved in shaking an infant's head," even if he "'should have foreseen' [the] risks." *Gaskell*, 985 F.2d at 1064; *see, e.g.*, *Escamilla*, 467 F.2d at 347 (reversing because erroneous instruction may have permitted jury to convict even if defendant lacked knowledge that gun was capable of accidental discharge); *United States v. Red Eagle*, 60 F. App'x 155 (9th Cir. 2003) (holding evidence insufficient to prove defendant was subjectively aware of the risk posed by sharing a bed with his infant while intoxicated). Finding plain error, the Eleventh Circuit reversed. *Gaskell*, 985 F.2d at 1064–65.

The errors here as to both elements were plain. It is well-established that gross negligence and actual knowledge are elements of the offense, and *Benally* is on point. Although "delivering a jury instruction that matches the pattern instructions weighs against a finding of plain error[,]" *United States v. Kepler*, 74 F.4th 1292, 1315 (10th Cir. 2023), "a proposed pattern jury instruction is not legal authority." *United States v. Ledford*, 443 F.3d 702, 717 (10th Cir. 2005), *abrogated on other grounds by Henderson v. United States*, 575 U.S. 622 (2015). It is the Court's decisions that are binding. *Id.*; *see also* 10th Cir. Crim. Pattern Jury Instructions at v (2021) ("[T]his resolution shall not be construed as an adjudicative approval of the content of [these] instructions, which must await case-by-case review by the Court."). Because the case law in this Circuit contravenes the pattern instructions, the pattern instructions do not preclude a finding of plain error.

The errors, independently and together, also affected Mr. Hatley's substantial rights. "In the case of an erroneous jury instruction 'on the principal elements of the offense,'" the Court "often conclude[s] that the error affected the outcome of the proceedings." *Samora*, 954 F.3d at 1293 (quoting *United States v. Benford*, 875 F.3d 1007, 1017 (10th Cir. 2017))

(in turn quoting *United States v. Duran*, 133 F.3d 1324, 1333 (10th Cir. 1998)). That is the case here. The evidence of both gross negligence and actual knowledge was weak, for the reasons explained in Section III.B.2, *supra*. The erroneous jury instructions lowered the bar for conviction.

The prosecutor also incorrectly stated the law regarding actual awareness, arguing in closing that Mr. Hatley "knew his conduct was a threat to the lives of others, *or it was foreseeable that he should have known that his conduct was a threat to the lives of others*." III-ROA-610 (emphasis added). This argument contributed to the likelihood that the jury convicted under an impermissible "foreseeability" theory instead of under the correct but higher "actual awareness" standard, thereby heightening the prejudice to Mr. Hatley.

A properly-instructed jury could easily have concluded that Mr. Hatley, even if negligent, was not grossly negligent or that he lacked actual knowledge of the circumstances that gave rise to the risk of a collision. The plain error in either or both instructions warrants reversal.

V. Considered cumulatively, the trial errors denied Mr. Hatley a fair trial.

A. Standard of review.

The court reviews cumulative preserved errors in the aggregate to determine "whether their cumulative effect on the outcome of the trial is such that *collectively* they can no longer be determined to be harmless." *United States v. Starks*, 34 F.4th 1142, 1169 (10th Cir. 2022). If they are, and unpreserved error also exists,

> the court should consider whether those preserved errors, when considered in conjunction with the unpreserved errors, are sufficient to overcome the hurdles necessary to establish plain error. In other words, the prejudice from the unpreserved error is examined in light of any preserved error that may have occurred. … [T]he defendant may not be able to establish prejudice from the cumulation of all the unpreserved errors, but factoring in the preserved errors may be enough for the defendant to satisfy his burden of showing prejudice. If so, the fourth prong of plain-error review must then be examined.

Id. at 1170 (quoting *United States v. Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008)).

B. Argument.

The errors here, considered collectively, denied Mr. Hatley a fair trial. The errors in the indictment and instructions—especially those

pertaining to "gross negligence" and "actual knowledge," the weakest links in the government's evidentiary chain—reinforced each other, increasing the likelihood of conviction even though the evidence of those elements was de minimis. Those errors are further magnified when the vagueness of the second part of the charge (commission of a lawful act in an unlawful manner) is considered; it is unclear what the jury believed he did that was lawful, what he did that was unlawful, and how he was grossly negligent with respect to that unknown act or had actual knowledge of the risk the unknown act created. Those plain errors, considered together and/or with the preserved error concerning the evidence of Indian status, undermine confidence in the verdict.

VI. The district court erred in applying the higher base offense level under U.S.S.G. § 2A1.4 for "reckless" conduct instead of the lower level for "criminally negligent" conduct.

A. Standard of review.

The Court reviews de novo the district court's interpretation of the Sentencing Guidelines section providing for a base-offense level enhancement. *United States v. Gonzalez*, 931 F.3d 1219, 1221 (10th Cir. 2019). The Court also reviews de novo whether "the facts found by the district court are insufficient as a matter of law to warrant an

enhancement[.]" *United States v. Irvin*, 682 F.3d 1254, 1276–77 (10th Cir. 2012) (citation omitted).

B. Argument.

The district court erred in concluding that Mr. Hatley operated his vehicle "recklessly" within the meaning of U.S.S.G. § 2A1.4 and, in turn, applying a base offense level of 22 pursuant to subsection (a)(2)(B). III-ROA-933–34. The court should instead have held that he was "criminally negligent" and, accordingly, applied a base offense level of 12 under subsection (a)(1).

The 2021 Sentencing Guidelines Manual offers three different base offense levels for involuntary manslaughter, the sole offense under § 2A1.4: "12, if the offense involved criminally negligent conduct" or the greater of "18, if the offense involved reckless conduct; or 22, if the offense involved the reckless operation of a means of transportation." § 2A1.4(a). Because there is no dispute that the offense involved the "operation of a means of transportation," the only question is whether Mr. Hatley's conduct was "criminally negligent" or whether his operation of his vehicle was "reckless."

The Application Note defines both *mens rea*:

> "***Criminally negligent***" means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is *not* reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.
>
> ***
>
> "***Reckless***" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. "Reckless" includes all, or *nearly* all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving a means of transportation, or similarly dangerous actions, *while under the influence of alcohol or drugs* ordinarily should be treated as reckless.

§ 2A1.4 app. n.1 (emphases added).

"Reckless conduct, in the criminal context, is considered a form of intentional conduct because it includes an element of deliberateness—a *conscious acceptance* of a known and serious risk." *United States v. Serawop*, 410 F.3d 656, 663 n.4 (10th Cir. 2005) (citation omitted; emphasis added); *see also Medina v. City & Cnty. of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) ("[R]eckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly

probable that serious harm would follow and he or she proceeded *in conscious and unreasonable disregard* of the consequences"). "An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example 'when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death' or grievous bodily injury." *Id.* (citation omitted).

The Application Note instructs that both *mens rea* involve "a gross deviation from the standard of care that a reasonable person would exercise under the circumstances[.]" U.S.S.G. § 2A1.4 app. n.1. But recklessness requires more: the defendant must have been "*aware* of the risk created by his conduct" and consciously "disregard[ed]" it, although the risk was extreme. *See id.* (emphasis added). Thus, "[t]he key distinction between criminal negligence and recklessness is whether an unreasonable risk is *consciously* disregarded (which makes the *mens rea* recklessness) or whether the guilty party is *not* conscious of the unreasonable risk but *should* be (in which case the *mens rea* is criminal negligence)." *Ibarra v. Holder*, 736 F.3d 903, 915 n.16 (10th Cir. 2013) (emphases added).

Although the Application Note states that "'[r]eckless" includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112[,]" § 2A1.4 applies *only* to involuntary manslaughter cases. *See* § 2A1.4; *United States v. Medina*, No. CR-13-4066-JB/KBM, 2014 WL 6983232, at *7 (D.N.M. Dec. 4, 2014). "If the Sentencing Commission did not intend for courts to apply the base offense level of 12 to cases like this—where the Defendant's conduct is criminally negligent even when analyzed under a preponderance standard—such a provision would be meaningless." *Id.* Indeed, the Application Note clarifies the need for conscious awareness of the danger in the vehicular manslaughter context in the very next sentence: "a homicide resulting from driving a means of transportation … *while under the influence of alcohol or drugs* ordinarily should be treated as reckless." U.S.S.G. § 2A1.4 app. n.1 (emphasis added).

Of course, when it comes to the act of driving, "[e]very passenger traveling on our highways faces a small, but non-trivial, risk of death or injury." *United States v. Torres-Flores*, 502 F.3d 885, 889 (9th Cir. 2007). The Application Note thus makes clear that not *all* vehicular homicides

are reckless; only where the defendant's awareness of the danger is akin to that of a drunk driver does his conduct rise to that level.

The district court rested its "recklessness" determination on the jury instructions for involuntary manslaughter. Although it recognized that "the lines drawn by the instruction may not be an exact match with the lines drawn in … Section 2A1.4," because the instruction "require[d] a finding of awareness, or at least foreseeability, of the risks of the conduct at issue and, most notably to [the court], that the defendant acted with a wanton and reckless disregard for human life[,]" the court concluded that the guilty verdict standing alone included "a finding that the defendant's conduct was reckless." III-ROA-933.

But "[c]ourts are not bound at sentencing by the terms of a criminal liability statute." *United States v. Fortier*, 180 F.3d 1217, 1228 (10th Cir. 1999); *see, e.g.*, *Medina*, 2014 WL 6983232, at *4. That is so because "[t]he principles and limits of sentencing accountability" in the Guidelines, including for the purpose of determining the base offense level, "are not always the same as the principles and limits of criminal liability." U.S.S.G. § 1B1.3 app. n.1. And the district court acknowledged here that the jury instructions and § 2A1.4 are not "an exact match[.]"

III-ROA-933. If the elements for involuntary manslaughter were determinative, then *all* involuntary manslaughter convictions—and, in turn, *all* conduct under § 2A1.4—would qualify as reckless, rendering subsection (a)(1) nugatory. The district court erred in relying on the jury instructions to interpret the Guideline. *Fortier*, 180 F.3d at 1228; *see, e.g.*, *Medina*, 2014 WL 6983232, at *4.

Applying the correct standard, the facts as found by the district court are insufficient to establish recklessness. The court held that Mr. Hatley's conduct rose to that level because he "was traveling at approximately 70 miles per hour and … looked away from the highway for a significant period of time, and by the time that he saw the victim's car in front of him, he was unable to avoid it." III-ROA-933–34.

But "the proper focus is the conduct that led" to Mr. Hatley being unable to avoid Ms. Ott's nearly-stopped vehicle on the 65-mph speed-limit highway—not his inability to avoid the accident. *See United States v. Aranda-Flores*, 450 F.3d 1141, 1146 (9th Cir. 2006) (citation omitted). And, even accepting the facts as found by the district court, the relevant facts are insufficient to demonstrate that, when Mr. Hatley looked at the pickup truck on the side of the road up ahead for several seconds, he was

actually "aware" "it was highly probable that serious harm would follow[,]" *and*, knowing this, that he looked away anyway "in conscious and unreasonable disregard of the consequences[,]" *Medina*, 960 F.2d at 1496; *see Aranda-Flores*, 450 F.3d at 1144–45. That he was driving 69 mph in a 65 mph zone hardly suggests otherwise, given that his speed was only 4 mph in excess of the limit, it was a clear day, the road conditions were good, and there was a double-solid yellow line and no indication from the surroundings that would yield an expectation that a driver would slow to 4 mph to make an illegal left or illegal U-turn. Ms. Ott undertook a dangerous and illegal maneuver that Mr. Hatley could not have expected.

Common sense dictates that a reasonable driver *should* stay alert to activities or possible hazards on the roadside up ahead. Mr. Hatley was inadvertently distracted by what he saw for several seconds longer than he should have been. But even if his conduct amounts to criminal negligence under § 2A1.4—i.e., "a gross deviation from the standard of care that a reasonable person would exercise under the circumstances"—the facts do not show he was aware he was probably risking serious harm but then consciously chose to do it anyway. *See, e.g.*, *Aranda-Flores*, 450

F.3d at 1144–46 (holding that defendant's conduct did not "recklessly creat[e] a substantial risk of death or bodily injury" under the Guidelines, where he "fell asleep at the wheel of his Ford Thunderbird after driving on a two-lane highway at night for eight-and-a-half hours with one break[,]" as these were not "extreme and obviously dangerous conditions" resulting from his conduct).

The evidence is therefore insufficient to establish that the offense "involved the *reckless* operation of a means of transportation," as necessary to justify the base offense level of 22. § 2A1.4(a)(2)(B) (emphasis added). Should the Court decline to order an acquittal or a new trial, it must order Mr. Hatley resentenced with a base offense level of 12, pursuant to § 2A1.4(a)(1).

CONCLUSION

The conviction should be reversed and the case remanded for the dismissal of Count 4 or a new trial. Alternatively, the sentence should be vacated and the case remanded for resentencing.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary because this case raises important and recurring questions about the admissibility of evidence to prove Indian

status, the constitutionality of a charge where the predicate act or crime is vague, and the correctness of the pattern instructions for involuntary manslaughter as to two separate elements. These issues—particularly those involving the pattern jury instructions—have the potential to recur in every federal involuntary manslaughter case in this Circuit.

Dated: September 3, 2024

Respectfully submitted,

JON M. SANDS
Federal Public Defender

/s/ Molly A. Karlin

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a) (7)(B), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,926 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface (Century Schoolbook) using Microsoft Word version 2311, in 14-point font.

Dated: September 3, 2024

/s/ Molly A. Karlin

MOLLY A. KARLIN
Assistant Federal Public Defender

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that, with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program and according to the program are free of viruses.

Dated: September 3, 2024

/s/ Molly A. Karlin

MOLLY A. KARLIN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that, on September 3, 2024, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to, and thereby serve, opposing counsel, Assistant United States Attorney Linda Epperley, who is a registered CM/ECF user. 10th Cir. R. 31.5.

Dated: September 3, 2024

/s/ Molly A. Karlin
MOLLY A. KARLIN
Assistant Federal Public Defender

RULE 28.2(A) ATTACHMENT

UNITED STATES DISTRICT COURT

Eastern District of Oklahoma

UNITED STATES OF AMERICA
v.
LLOYD RAY HATLEY

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-21-00271-001-CBG

USM Number: 62512-509

Susan E. Anderson, AFPD
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 4 of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1112, 1151 & 1153	Manslaughter in Indian Country	February 22, 2017	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 1 & 2 of the Second Superseding Indictment

☒ Count(s) 1, 2 & 3 of the Indictment and 1, 2 & 3 of the Superseding Indictment, 3 of Second Superseding Indictment previously dismissed ☐ is ☒ are dismissed on the motion of the United States.

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

June 1, 2023
Date of Imposition of Judgment

Charles B. Goodwin
CHARLES B. GOODWIN
United States District Judge

June 21, 2023
Date

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Lloyd Ray Hatley
CASE NUMBER: CR-21-00271-001-CBG

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

48 months on Count 4 of the Second Superseding Indictment.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the Bureau of Prisons evaluate the defendant and determine if the defendant is a suitable candidate for the Intensive Drug Treatment Program. Should the defendant be allowed to participate in the program, it is further recommended that the defendant be afforded the benefits prescribed and set out in 18 U.S.C. § 3621(e) and according to Bureau of Prisons' policy.

That the defendant be placed in a federal facility in Oklahoma.

That the defendant participate in the Federal Bureau of Prisons Inmate Financial Responsibility Program at a rate determined by the Bureau of Prisons staff in accordance with the program.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .
☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Lloyd Ray Hatley
CASE NUMBER: CR-21-00271-001-CBG

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
3 years on Count 4 of the Second Superseding Indictment.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: Lloyd Ray Hatley
CASE NUMBER: CR-21-00271-001-CBG

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: Lloyd Ray Hatley
CASE NUMBER: CR-21-00271-001-CBG

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program approved by the United States Probation Office for the treatment of narcotic addiction, drug dependency, or alcohol dependency, which will include testing to determine if he has reverted to the use of drugs or alcohol and may include outpatient treatment.

2. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of probation. Failure to submit to a search may be grounds for revocation.

DEFENDANT: Lloyd Ray Hatley
CASE NUMBER: CR-21-00271-001-CBG

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 9,761.44	$ 0.00	$ 0.00	$ 0.00

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

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed on separate payee list.

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
C.N. (See SEALED Schedule A Confidential Restitution Payees)	$9,300.34	$9,300.34	
A.N. (See SEALED Schedule A Confidential Restitution Payees)	$461.10	$461.10	

TOTALS	$ 9,761.44	$ 9,761.44

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

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

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

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

DEFENDANT: Lloyd Ray Hatley
CASE NUMBER: CR-21-00271-001-CBG

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

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

Said special assessment of $100 is due immediately. Said restitution of $9,761.44 is due and payable immediately.

Said special assessment and restitution shall be paid through the United States Court Clerk for the Eastern District of Oklahoma, P.O. Box 607, Muskogee, OK 74402.

If the defendant's financial condition does not allow for immediate payment of the restitution, the defendant shall make monthly installments of not less than $100 beginning sixty days from the defendant's release from custody. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon non-exempt property of the defendant discovered before or after the date of this judgment. In the event the defendant receives any federal or state income tax refund during the period of supervision, the defendant shall pay 50% of the total refund toward said restitution.

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

THE COURT: Sir, thank you for your time and testimony. You are excused.

The government may call its next witness.

MR. GROSS: Thank you, sir. Our next witness is Derrick Vann.

THE COURT: Sir, please come forward and be sworn.

(WITNESS SWORN.)

DERRICK VANN

DIRECT EXAMINATION

BY MR. GROSS:

Q. Good morning, sir.

A. Good morning.

Q. Please state your name for the jury.

A. Derrick Vann.

Q. Please spell your name for the court reporter.

A. D-E-R-R-I-C-K. Vann, V-A-N-N.

Q. What is your job, sir?

A. I'm the Cherokee Nation tribal registrar.

Q. Associate tribal registrar or the tribal registrar?

A. I'm the interim tribal registrar currently.

Q. For the entire Cherokee Nation?

A. Yes.

Q. And what does that mean? What exactly are your job duties?

A. I am the custodial person for all of our Cherokee Nation

records.
Q. Does that include information about who's a member of the Cherokee Nation?
A. Yes.
Q. Where is your office?
A. In Tahlequah, Oklahoma, at the Cherokee Nation Complex.
Q. And that's the capital of the Cherokee Nation?
A. Yes.
Q. Lloyd Ray Hatley with a date of birth of September 15th, 1954, is he a blood member of the Cherokee Nation?
A. Yes.
MS. ANDERSON: Objection; Your Honor, foundation.
THE COURT: Overruled.
Q. (BY MR. GROSS) You said Lloyd Ray Hatley, date of birth September 15th, 1954, is a blood member of the Cherokee Nation?
A. Yes.
Q. Does he have Indian blood?
A. Yes.
Q. Can you tell the jury when he formally enrolled in the tribe?
A. I can't recall the day, but I think it was in November of 2013.
Q. If we can have just shown to the witness, please, what's been marked for identification as No. 50, just shown to the witness, please.

All right. Sir, if you -- please read that first paragraph to yourself and see if that refreshes your memory about his date of enrollment.

A. Oh, yes. "This letter shall verify that Lloyd Ray Hatley citizen number --

MS. ANDERSON: Objection, Your Honor.

THE COURT: All right. Before you start reading the letter or explaining it, is there a motion?

Q. (BY MR. GROSS) Sir, don't read what the letter says. I'm just asking if this refreshes your memory as to the date of enrollment.

A. Yes.

Q. What is the date of enrollment for Lloyd Ray Hatley, date of birth September 15th, 1954?

A. October 31st, 1984.

Q. And in order to enroll, would he have needed to provide some family information?

A. Yes.

Q. And can you explain that, please?

A. In order to be a member with the Cherokee Nation, you have to trace back to a Dawes enrollee, and for that lineage to be proven you have to submit death or birth records for each individual going all the way back to the Dawes enrollee.

Q. And are you aware from your records and in your capacity as the custodian of records how Lloyd Ray Hatley traced his

lineage?
A. No, but he did submit all the required documents to become a tribal member.
Q. Do you recall if he would have provided information about who his father was, for example?
A. Yes.
Q. And who his paternal grandmother was?
A. Yes.
Q. Do you recall if the paternal grandmother was the original member?
A. Yes.
Q. She was?
A. She was.
Q. And do you recall which town or city Lloyd Ray Hatley was living in when he applied?
A. I do not.
MR. GROSS: Your Honor, we would move --
Q. (BY MR. GROSS) And let me ask you another question about what's on the screen in front of you. Do you recognize that document?
A. Yes.
Q. What is that document, sir?
A. It is our standard document that we give for anyone asking - any legal team asking for citizenship information on a citizen.

Q. And this is a -- this information correctly reflects the information that is on file with the Cherokee Nation?
A. Yes.
MR. GROSS: Your Honor, we would move Exhibit 50 into evidence.
MS. ANDERSON: Objection as to foundation and hearsay.
THE COURT: Overruled. It will be admitted.
MR. GROSS: We would ask that Exhibit 50 be published, please.
(Exhibit published.)
MR. GROSS: May I approach defense counsel for a moment, please?
THE COURT: Yes.
MR. GROSS: May we approach, Your Honor?
THE COURT: Yes.
(The following bench conference was held outside the hearing of the jury.)
MR. GROSS: Your Honor, the next set of questions that I was going to be asking Mr. Vann about is about -- and I recognize he doesn't have firsthand information about this, this is a certified copy of a document in the Lloyd Hatley state case where it says the defendant is a citizen of the Cherokee Nation. And so to the extent that the defense is not stipulating or conceding that the defendant is Indian, we want

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CR-21-271-CBG**
	)	
LLOYD RAY HATLEY,	)	
	)	
Defendant.	)	

ORDER

Now before the Court is Defendant's Motion to Dismiss (Doc. No. 69), filed through counsel by Defendant Lloyd Ray Hatley. The Government has filed a Response in opposition (Doc. No. 75). In his Motion to Dismiss, Defendant seeks to dismiss Count Four of the Second Superseding Indictment, arguing that title 47, section 11-901b of the Oklahoma Statutes—Count Four's underlying predicate offense—is unconstitutionally vague as applied to Defendant. *See* Def.'s Mot. at 2. Alternatively, Defendant moves to dismiss either Count One or Count Four of the Second Superseding Indictment on the basis of multiplicity. *See id.* at 6.

I. Background

On February 22, 2017, a Dodge Ram driven by Defendant, an Indian, rear-ended a Pontiac Grand Am on State Highway 1 in Pontotoc County, Oklahoma, in Indian Country as defined by federal law. The Pontiac's backseat passenger, Mary Nappa, a non-Indian, died at the scene. The other occupants of the Pontiac, both non-Indians, sustained serious injuries. The Oklahoma Highway Patrol responded to the accident and conducted a

subsequent investigation. The investigation resulted in state charges against Defendant in Pontotoc County District Court, which were dismissed pursuant to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and later federal charges brought in this Court.

A Second Superseding Indictment was returned on February 22, 2022 (Doc. No. 57), charging Defendant with the following crimes:

1. Count One: Manslaughter in Indian Country, in violation of 18 U.S.C. §§ 1112, 1151, and 1153;
2. Count Two: Driving Under the Influence Resulting in Great Bodily Injury, in violation of 18 U.S.C. §§ 13, 13(b)(2)(A), 1151, and 1152; and 47 O.S. § 11-904(B);
3. Count Three: Driving Under the Influence Resulting in Great Bodily Injury, in violation of 18 U.S.C. §§ 13, 13(b)(2)(A), 1151, and 1152; and 47 O.S. § 11-904(B); and
4. Count Four: Manslaughter in Indian Country, in violation of 18 U.S.C. §§ 1112, 1151, and 1153.

Second Superseding Indictment (Doc. No. 57).

Count One and Count Four refer to the same victim: Mary Nappa. *See* Second Superseding Indictment at 1, 3. Count One charges in relevant part that Ms. Nappa was killed while Defendant committed an unlawful act not amounting to a felony by driving under the influence of a controlled substance. *See id.* at 1. Count Four charges in relevant part that Ms. Nappa was killed while Defendant committed an unlawful act not amounting to a felony by failing "to devote his full time and attention to driving," taking the quoted

language from title 47, section 11-901b of the Oklahoma Statutes. *Id.* at 3; *see* Bill of Particulars at 2 (Doc. No. 81).

II. Discussion

A. Void-for-Vagueness Doctrine

Defendant contends that the Court must dismiss Count Four because section 11-901b "is not sufficiently defined to give [Defendant] reasonable notice of what conduct it prohibited and thus creates a danger of arbitrary and discriminatory enforcement." Def.'s Mot. at 2. Specifically, Defendant argues that "nowhere in this statute has the legislature defined what it means to devote one's full time and attention to driving," and so section 11-901b risks criminalizing driving behavior that may be necessary for safety reasons, such as taking one's eyes off the road to check a blind spot. *Id.* at 4. Defendant also contends that section 11-901b "fails to provide police officers, prosecutors, juries, and courts with minimal guidelines to govern enforcement," and so is susceptible to arbitrary enforcement. *Id.* at 5.

The Government responds that section 11-901b is not unduly vague as applied to Defendant because "the application of 47 Okla. Stat. § 11-901b to the facts of this case is clear." *See* Gov't's Resp. at 6. Specifically, in its Bill of Particulars, the Government states that it intends to rely on the following evidence to prove that Defendant failed to devote his full time and attention to driving in violation of section 11-901b:

a. Defendant crashed into the rear of the Pontiac;
b. The roadway was dry;
c. The weather was clear;
d. Defendant admitted the crash was his fault;

e. Defendant admitted that he looked away from the road;

f. The crash data shows that the Pontiac's brakes were applied beginning approximately eight seconds before the crash;

g. Defendant admitted that the Pontiac's brake lights were working when he stated that he saw the Pontiac's brake lights before the crash;

h. Given the grade of the roadway, Defendant should have been able to see the Pontiac's brake lights activated the entire approximately eight seconds;

i. The crash data shows that the Pontiac had decelerated almost to a stop before the crash;

j. The crash data shows that Defendant, despite driving nearly 70 miles per hour, did not begin braking until less than one second before he crashed into the rear of the Pontiac;

k. Defendant was driving in excess of the 65 mile per hour speed limit; and

l. Crash reconstruction shows that the Pontiac did not abruptly pull onto the road in front of Defendant, but rather that Defendant simply crashed directly into the rear of the Pontiac.

Bill of Particulars at 2-3.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "[J]udicial review of a penal statute generally is restricted to consideration of the statute as applied in a particular case," *United States v. Welch*, 327 F.3d 1081, 1094 (10th Cir. 2003), and so "ordinarily, one to whose conduct a statute clearly applies may not successfully challenge it for

vagueness." *United States v. Platte*, 401 F.3d 1176, 1190 (10th Cir. 2005) (alteration and internal quotation marks omitted).

"When considering a vagueness challenge to a penal statute, courts begin with the presumption that the statute comports with the requirements of federal due process and must be upheld unless satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution." *Welch*, 327 F.3d at 1094 (internal quotation marks omitted). "Due process requirements are not 'designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.'" *Id.* (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). "The Constitution does not, however, impose impossible standards of specificity," and "general statements of the law are not inherently incapable of giving fair and clear warning." *Platte*, 401 F.3d at 1189 (alteration and internal quotation marks omitted).

Title 47, section 11-901b of the Oklahoma Statutes, the statute that provides the underlying predicate offense for Count Four, prescribes that:

> The operator of every vehicle, while driving, shall devote their full time and attention to such driving.
>
> No law enforcement officer shall issue a citation under this section unless the law enforcement officer observes that the operator of the vehicle is involved in an accident or observes the operator of the vehicle driving in such a manner that poses an articulable danger to other persons on the roadway that is not otherwise specified in statute.

Okla. Stat. tit. 47, § 11-901b.

Although the duty is stated in general terms, section 11-901b provides fair warning to ordinary drivers that certain driving behavior is prohibited. The Oklahoma legislature need not foresee and detail every potential factual situation for section 11-901b to pass constitutional muster. *See Welch*, 327 F.3d at 1094. As applied to the instant case, based on the Government's allegations, an ordinary driver would understand that taking one's eyes off the road for an extended amount of time while driving at a high rate of speed is a violation of traffic laws that can result in a serious accident. Failing to see that the Pontiac was braking in front of Defendant for approximately eight seconds is not analogous to Defendant quickly checking a blind spot or a rearview mirror. Defendant had fair warning that his alleged behavior was prohibited by section 11-901b.

Additionally, section 11-901b does not encourage arbitrary and discriminatory enforcement. By its own terms, section 11-901b limits an officer's ability to cite a driver under the statute to two specific situations: (1) where "the law enforcement officer observes that the operator of the vehicle is involved in an accident;" or (2) where the officer "observes the operator of the vehicle driving in such a manner that poses an articulable danger to other persons on the roadway that is not otherwise specified in statute." Okla. Stat. tit. 47, § 11-901b. Without any authority, Defendant suggests that section 11-901b is being enforced arbitrarily in this case because prosecutors originally charged Defendant under a theory predicated on the allegation that Defendant was driving under the influence at the time of the collision. Adding a charge premised on section 11-901b in a superseding indictment does not demonstrate arbitrary enforcement of the statute. *Cf. United States v.*

Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.").

B. Multiplicity

Defendant alternatively argues that the Court should direct the Government to dismiss either Count One or Count Four because those charges are multiplicitous and may improperly suggest to the jury that Defendant is guilty of at least one of the charges. *See* Def.'s Mot. at 6.

The concept of multiplicity "refers to multiple counts of an indictment which cover the same criminal behavior." *United States v. Johnson*, 130 F.3d 1420, 1424 (10th Cir. 1997); *see also United States v. Ganadonegro*, 854 F. Supp. 2d 1088, 1099 (D.N.M. 2012). "[M]ultiplicitous counts which may result in multiplicitous convictions are considered improper because they allow multiple punishments for a single criminal offense." *United States v. McCullough*, 457 F.3d 1150, 1162 (10th Cir. 2006) (internal quotation marks omitted). The Tenth Circuit's "jurisprudence establishes that multiplicitous sentences violate the Double Jeopardy Clause." *Id.* (internal quotation marks omitted).

"A decision of whether to require the prosecution to elect between multiplicitous counts before trial is within the discretion of the trial court." *Johnson*, 130 F.3d at 1426. "[T]he government may submit multiplicitous charges to the jury," but "if a defendant is convicted of both charges, the district court must vacate one of the convictions." *United States v. Frierson*, 698 F.3d 1267, 1269 (10th Cir. 2012) (internal quotation marks omitted); *see also United States v. Barrett*, 496 F.3d 1079, 1095 (10th Cir. 2007).

The Tenth Circuit has noted the potential risks of presentment of multiplicitous counts to a jury:

> The risk of a trial court not requiring pretrial election is that it may falsely suggest to a jury that a defendant has committed not one but several crimes. Once such a message is conveyed to the jury, the risk increases that the jury will be diverted from a careful analysis of the conduct at issue, and will reach a compromise verdict or assume the defendant is guilty on at least some of the charges.

Johnson, 130 F.3d at 1426 (citation and internal quotation marks omitted).

The Government concedes that Counts One and Four are multiplicitous. *See* Gov't's Resp. at 8 ("Should Defendant be convicted of both Counts One and Four, the Government recognizes that one of the counts will need to be dismissed."). The Government argues, however, that the risk of juror confusion or a compromised verdict is minimal in this case because: (1) the Government does not intend to rely on inconsistent evidence or legal theories to prove the counts; (2) the underlying facts are not complex given that the charges involved the same incident and victim; and (3) the jury could convict on one, both, or neither of the relevant counts. *See id.*

Having reviewed the parties' contentions, and "given that the concern is with only two counts," the Court concludes that requiring an election of counts is not appropriate at this time. *United States v. Presley*, No. CR-21-49-RAW, 2021 WL 4303494, at *3 (E.D. Okla. Sept. 21, 2021). The Court will permit the Government to attempt to address the multiplicity of Counts One and Four through the submission of appropriate proposed jury instructions. *See United States v. Hicks*, No. CR-21-379-BMJ (E.D. Okla.), Order of Jan.

21, 2022, at 2 (citing *United States v. Bolt*, 776 F.2d 1463, 1467 (10th Cir. 1985)); *United States v. Redbird*, No. CR-19-347-F (W.D. Okla.), Order of May 22, 2020, at 5.

The Court will consider the parties' proposed jury instructions, as well as additional argument from counsel if appropriate, "before determining whether both counts should go to the jury." *United States v. Martin*, No. CR-20-81-RAW, 2020 WL 7029145, at *2.

CONCLUSION

The Court therefore DENIES Defendant's Motion to Dismiss (Doc. No. 69).

IT IS SO ORDERED this 22nd day of April, 2022.

Charles B. Goodwin

CHARLES B. GOODWIN
United States District Judge

Title 18, United States Code, Sections 13, 13(b)(2)(A), 1151, and 1152 and Title 47, Oklahoma Statutes, Section 11-904(B).

COUNT FOUR

MANSLAUGHTER IN INDIAN COUNTRY
[18 U.S.C. §§ 1112, 1151, & 1153]

On or about February 22, 2017, within the Eastern District of Oklahoma, in Indian Country, the defendant, **LLOYD RAY HATLEY**, an Indian, did unlawfully kill Mary Nappa, in the commission of an unlawful act not amounting to a felony, that is operating a motor vehicle while failing to devote his full time and attention to driving, and in the commission in an unlawful manner and without due caution and circumspection of a lawful act which might produce death, in violation of Title 18, United States Code, Sections 1112, 1151, and 1153.

A TRUE BILL:

Pursuant to the E-Government Act, the original indictment has been filed under seal in the Clerk's Office.

s / Foreperson
FOREPERSON OF THE GRAND JURY

CHRISTOPHER J. WILSON
United States Attorney

Kevin Gross, VA Bar # 72990
Assistant United States Attorney

Instruction No. ____

COUNT FOUR: MANSLAUGHTER IN INDIAN COUNTRY

The defendant is charged in Count Four with a violation of 18 U.S.C. sections 1112, 1151, and 1153.

Section 1112 makes it a crime to unlawfully kill a human being without malice and doing so either while: (1) committing an unlawful act not amounting to a felony, or (2) committing a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death.

In Count Four, the government alleges that the defendant killed Mary Nappa while both (1) committing an unlawful act not amounting to a felony: the misdemeanor offense of operating a motor vehicle while failing to devote his full time and attention to driving, in violation of Title 47, Oklahoma Statutes, Section 11-901b; and (2) committing a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death.

To find the defendant guilty of this crime you must be convinced that the government proved each of the following beyond a reasonable doubt:

First: the defendant caused the death of Mary Nappa, while the defendant was committing one or both of the following acts:

(a) a violation of Title 47, Oklahoma Statutes, Section 11-901b by failing to devote his full time and attention to driving; or

(b) a lawful act in an unlawful manner, or without due caution and circumspection, which act might produce death;

Second: the defendant knew that his conduct was a threat to the lives of others or it was foreseeable to him that his conduct was a threat to the lives of others;

Third: the killing took place within Indian Country; and

Fourth: the defendant is an Indian.

In order to prove this offense, the government need not prove that the defendant specifically intended to cause the death of Mary Nappa. But it must prove more than that the defendant was merely negligent or that he failed to use reasonable care. The government must prove gross negligence amounting to wanton and reckless disregard for human life.

MS. ANDERSON: I would urge that that, too, sounds in criminal negligence. The definition of involuntary manslaughter itself generally is considered to be gross negligence standard. It's not a recklessness standard, it's a gross negligence standard. And I think recklessness could be sufficient, but is not necessary.

And if you compare the heartland of the guideline at offense level 22, it's meant to apply to DUI accidents, driving under the influence. That is where the guidelines say that should be treated as reckless, offense level 22. Otherwise the guidelines say that nearly all involuntary manslaughter would count under recklessness, but not all. And there are -- there's an example in my objection, in my letter, where a court found, not in an accident case, but a shooting, that offense level 12 applied. So it is available for a federal conviction of involuntary manslaughter.

That's all. Thank you.

THE COURT: Thank you. Okay. I appreciate the good presentation there.

There's one point that I wanted to run down and I need to go back to my chambers in order to do that. I'm going to do that now, so let's just go ahead and take a recess. We'll be back in 15 minutes.

(Break taken.)

THE COURT: Thank you.

We're back on the record in the case of the United States vs. Lloyd Ray Hatley, Case No. CR-21-271.

I apologize that that recess took a bit longer than estimated. I did want to look in particular at the jury instructions relevant to Count 4 and consider the issues that are raised by the defendant's objection.

The defendant objects to application of a base offense level of 22 in Paragraph 24 of the presentence report. I overrule that objection and find that the offense at issue involved the reckless operation of a means of transportation and, therefore, that a base offense level of 22 applies pursuant to Section 2A1.4(a)(2)(B) of the guidelines.

Section 2A1.4(a) provides for a base offense level of 12 if the offense involved criminally negligent conduct, or a base offense level of 22 if the offense involved the reckless operation of a means of transportation. Criminally negligent means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless.

According to the application notes, reckless means a situation in which the defendant was aware of the risks created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

In the instructions to the jury regarding Count 4, the offense of conviction, the Court explained that the jury must find as an element of that crime that the defendant knew that his conduct was a threat to the lives of others or it was foreseeable to him that his conduct was a threat to the lives of others.

Further, the Court instructed that the government must prove more than that the defendant was merely negligent or that he failed to use reasonable care. The government must prove gross negligence amounting to wanton and reckless disregard for human life.

While the lines drawn by the instruction may not be an exact match with the lines drawn in -- pardon me -- the lines drawn in Section 2A1.4(a), the instruction does require a finding of awareness, or at least foreseeability, of the risks of the conduct at issue and, most notably to me, that the defendant acted with a wanton and reckless disregard for human life. The jury's finding of guilt on Count 4, therefore, includes, in my view, a finding that the defendant's conduct was reckless.

To the extent that the question is unresolved by the jury's verdict, I would also find by a preponderance of the evidence that the defendant's conduct was reckless. The evidence was that the defendant was traveling at approximately 70 miles per hour and that he looked away from the highway for

a significant period of time, and by the time that he saw the victim's car in front of him, he was unable to avoid it. The risks of looking away from the highway while traveling at 70 miles per hour is plain and was certainly known to the defendant. Further, this was a risk of such a nature and degree that to disregard it constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

Based on that finding of fact, I would also overrule the defendant's objection and, again, find that the offense at issue involved the reckless operation of a means of transportation and, therefore, a base offense level of 22 applies pursuant to Section 2A1.4(a)(2)(B) of the guidelines.

So that's my ruling on that issue.

As for a fine, I don't know that any specific finding is required, but I will make one anyway. I do overrule rule the defendant's objection. I think the financial information as presented indicates that the defendant is at least capable of paying some amount of the fine.

I will certainly hear the defendant's arguments, though, as to whether a fine should be imposed, or I say I will hear them if the government requests a fine, which it has indicated it will not. And so the point of -- at that moment will become moot.

All right. Let me ask, did I cover all of the defendant's