No. 24-7030

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

DENNIS HEBERT,
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
THE HONORABLE RONALD A. WHITE, U.S. DISTRICT JUDGE, PRESIDING
CASE NO. 6:22-CR-00106-RAW

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PRIOR OR RELATED APPEALS

No previous or related appeals exist.

STATEMENT OF JURISDICTION

Dennis Hebert, the Defendant/Appellant, was charged by superseding indictment with a criminal violation of United States law, over which the United States District Court for the Northern District of Oklahoma had jurisdiction pursuant to 18 U.S.C. §§ 1152(a) and 3242.

Mr. Hebert was convicted after a jury trial of Aggravated Sexual Abuse of a Minor under Twelve, in violation of 18 U.S.C. §§ 1151, 1152, and 2241(c). The district court sentenced Mr. Hebert to 360 months of incarceration in the Bureau of Prisons.

The district court entered its Judgment in a Criminal Case on April 1, 2024. (Vol. I, at 205–11).[1] The notice of appeal was timely filed on April 12, 2024 (Vol. I, at 212) ; *see* Fed. R. App. P. 4(b). This Court's jurisdiction derives from 28 U.S.C. § 1291, granting circuit courts power to review all final judgments of district courts.

[1] Record references in this brief, including transcript references, are based on volumes and page numeration in the record on appeal. Citations to the Supplemental Record on Appeal will be in the following form: (Supp. RoA Vol. I, at ##).

STATEMENT OF THE ISSUES

Issue One: Whether the District Court erred in concluding that the Government's evidence was sufficient to prove beyond a reasonable doubt that Mr. Hebert was a non-Indian person at the time of the alleged offense.

Issue Two: Whether the District Court plainly erred in failing to instruct the jury as to the two elements that must be considered in determining whether an individual is an Indian or non-Indian person when those two elements are essential elements to the resolution of an element of the offense.

Issue Three: Whether the District Court plainly erred in permitting the Government to both elicit testimony and emphasize to the jury during closing arguments that Mr. Hebert had remained silent as to whether he was an Indian person or not, resulting in a violation of his right to remain silent.

STATEMENT OF THE CASE

On July 26, 2022, the United States of America charged Appellant/Defendant Dennis Hebert by Indictment (6:22-CR-106-RAW) with one count of Aggravated Sexual Abuse of a Child under Twelve in Indian Country, in violation of 18 U.S.C. §§ 1151, 1152, and 2241(c). (Vol. I, at 13). The Government subsequently filed a Superseding Indictment on May 10, 2023. (Vol. I, at 113). The Government alleged that, between on or about July 20, 2021, and July 21, 2021, Mr. Hebert had engaged in, or attempted to engage in, a sexual act with K.D., a child under twelve years of age. (*Id.*). The Government further alleged that Mr. Hebert was a non-Indian person and K.D. was an Indian person. (*Id.*).

The parties subsequently litigated pretrial motions, the substance of which are not at issue in this appeal. Mr. Hebert then exercised his right to trial by jury. The jury trial began on May 15, 2023, and it concluded on May 17, 2023, when the jury returned a verdict of guilty. (Vol. I, at 142–45, 183).

The District Court held sentencing on March 28, 2024, and it sentenced Mr. Hebert to the mandatory minimum sentence of 360 months in the custody of the Bureau of Prisons to be followed by a lifetime term of supervised release. (Vol. I, at 205–11). Mr. Hebert subsequently timely filed his Notice of Appeal on April 12, 2024. (Vol. I, at 212).

1. Trial Evidence

The Government's evidence concerning Mr. Hebert's non-Indian status derived from four witnesses: Kara Byers, Investigator Dakota Grantham, Special Agent Chad Sensor, and Special Agent Paul Sparke. It also submitted two paper exhibits.

Kara Byers testified that she is Mr. Hebert's stepdaughter, but she never lived with him as a child. (Vol. III, at 129–30). In fact, although she was Mr. Hebert's stepdaughter, she had never lived with him until the events giving rise to these charges, and she lived with him for no more than two weeks. (Vol. III, at 130). The Government asked Kara Byers whether she had any knowledge that Mr. Hebert was a member of a Native American tribe, and she expressed that he was not to her knowledge, nor that he had ever claimed to be an Indian. (Vol. III, at 131). Kara Byers was then asked if Mr. Hebert had ever self-identified as any race, and she responded, "One time, I think, part Mexican." (Vol. III, at 131).

Dakota Grantham testified that he is an investigator with the Choctaw Nation Tribal Police, and that he investigated the allegations in this case. (Vol. III, at 227–29). On direct examination, Investigator Grantham testified that he did not recall whether he asked Mr. Hebert about any tribal affiliations, but he did ask Mr. Hebert for his "race." (Vol. III, at 258–59). Investigator Grantham testified that Mr. Hebert indicated his "race" was "Latino, Hispanic." (Vol. III, at 259). On cross examination,

Investigator Grantham could not recall whether he contacted local tribes about Mr. Hebert's status with them, but he testified that he never received documentation from those tribes concerning Mr. Hebert's status. (Vol. III, at 266–67). On redirect examination, the Government asked Investigator Grantham whether Mr. Hebert had ever "volunteer[ed]" information about his tribal status, even if he was not asked about his status, and Investigator Grantham responded, "No, sir." (Vol. III, at 274).

Chad Sensor testified that he was a former Deputy United States Marshal, and that he arrested Mr. Hebert in Pennsylvania. (Vol. III, at 281, 284). Special Agent Sensor testified that Mr. Hebert never declared or otherwise identified himself to be Native American while interacting with SA Sensor. (Vol. III, at 285). On cross examination, SA Sensor acknowledged that he never asked Mr. Hebert whether he was a member of a registered tribe. (Vol. III, at 285–86).

Paul Sparke testified that he is a Special Agent with the FBI, and that he was the case agent for this case. (Vol. III, at 297–98). He testified concerning Government Exhibits 16 and 17, which are driver's license records for Mr. Hebert from Florida and Alabama. (Vol. III, at 298–300). He testified that both of those records indicated that Mr. Hebert's "race" was "White," but he acknowledged on cross examination that he did not know if a person could select multiple races nor did he know if Native American was an option to be selected in those states. (Vol. III, at 299–301; Supp. RoA Vol. I, at 2–3).

2. Motion for Judgment of Acquittal

Mr. Hebert made a motion at the close of the Government's evidence for judgment of acquittal under Federal Rule of Criminal Procedure 29. (Vol. III, at 384). He specifically addressed the Government's evidence concerning non-Indian status. (Vol. III, at 384). The District Court denied that motion, stating: "With regard to Indian/non-Indian status, I think the government has put on sufficient evidence to get by a Rule 29 motion. It's a tough element, as you all know. I think it is. So we'll move on from there." (Vol. III, at 384).

3. Closing Arguments

During the Government's closing arguments, it summarized the evidence above, emphasizing Mr. Hebert's racial identity and his apparent silence concerning any tribal affiliation or Indian status he might have. (Vol. III, at 396–97). During its closing, the Government had the following to say about Mr. Hebert's silence:

> When Dakota Grantham testified, he said that the defendant identified himself to Investigator Grantham as Latino. He did not identify himself as Indian. And what's also significant about Investigator Grantham is that Dakota Grantham is a tribal police investigator. If there were ever an opportunity for the defendant to tell someone that he is an Indian, he would have told that to a tribal police investigator of all people.
>
> Chad Sensor was a former deputy U.S. Marshal at the time the defendant was arrested in Western Pennsylvania, and when he arrested Dennis Hebert on the warrant for this case, there was no indication from the defendant that he was an Indian.

(Vol. III, at 396–97).

4. Jury Instructions

The Government submitted proposed jury instructions to the District Court. (Vol. I, at 66–86). These included a proposed instruction concerning the elements to be proven beyond a reasonable doubt. (Vol. I, at 79). This proposed instruction said nothing about the elements of Indian and non-Indian status. The Government also submitted supplemental proposed jury instructions. (Vol. I, at 114–35). These supplemental instructions also included an elements instruction, which similarly lacked any mention of the elements of Indian and non-Indian status. (Vol. I, at 128).

The District Court's final jury instructions provided an elements instruction similar to that proposed by the Government. (Vol. I, at 170–71). The District Court did not provide an instruction informing the jury of the elements of Indian and non-Indian status or the requirement that such elements must be proven beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

Issue One: The evidence was insufficient to prove that Dennis Hebert was a non-Indian person at the time of the alleged offense. The Government's evidence revolved around Mr. Hebert's purported racial identity, which is not an element of Indian or non-Indian status. The Government never submitted any evidence that Mr. Hebert lacked either some degree of Indian blood or that he had not been recognized as an Indian by either the federal government or one of the 574 federally-recognized tribes in the United States. The Government further relied upon Mr. Hebert's apparent silence, and failure to spontaneously declare himself Indian, and the fact that of the five local Oklahoma tribes that may have been contacted, those five tribes had no information about Mr. Hebert.

Issue Two: The District Court plainly erred in failing to instruct the jury as to all of the elements of the offense. Specifically, the District Court provided no instructions to the jury concerning the elements of Indian status. Because Indian and non-Indian status are essential elements of the charged offense, the elements of Indian status also become essential elements to the charged offense. The error was plain, and it affected Mr. Hebert's substantial rights because the evidence was so weak that a properly instructed jury would have understood that it could not view a person's Indian or non-Indian status through the prism of race, but through whether the Government proved beyond a reasonable doubt that Mr. Hebert had no degree of

Indian blood or that he had not been recognized as an Indian by either the federal Government or one of the hundreds of federally-recognized tribes in the United States. Since the error affected Mr. Hebert's substantial rights, this Court should exercise its discretion to reverse and remand because a conviction obtained without requiring the jury to find Mr. Hebert guilty of every element of the crime beyond a reasonable doubt violates his Sixth Amendment right to a trial by jury and seriously calls into question the integrity of the judicial proceedings.

Issue Three: The District Court plainly erred when it allowed the Government to elicit testimony that Mr. Hebert had remained silent as to his Indian status and/or tribal affiliation, and that error was exacerbated, such that it affected Mr. Hebert's substantial rights, when the Government explicitly used that testimony to prove an essential element of the charge and emphasized during its closing arguments that, if Mr. Hebert were an Indian, he would have volunteered that information to law enforcement officers even without being asked about his Indian status or tribal affiliation. Since the error affected Mr. Hebert's substantial rights, this Court should exercise its discretion to reverse and remand because a conviction obtained based on improper testimony commenting on, and emphasizing, Mr. Hebert's silence violates his Fifth Amendment right to remain silent and seriously calls into question the integrity of the judicial proceedings.

ARGUMENT

I. (Issue One) Whether the District Court erred in concluding that the Government's evidence was sufficient to prove beyond a reasonable doubt that Mr. Hebert was a non-Indian person at the time of the alleged offense.

The Government's evidence relied, fundamentally, on the question of whether Mr. Hebert was non-Indian as a matter of *race* rather than as a matter of legal status. But even if Mr. Hebert has identified himself in the past as "white," "Latino," "Hispanic," or "part Mexican," none of those racial identities say anything about his status as an Indian person, which the Supreme Court has made clear is not a racial classification. Indian is a status derived from an association with a federally recognized tribe, not by one's racial identity. A person can be *both* an Indian and another race.

Moreover, Mr. Hebert's apparent failure to spontaneously declare himself to be Indian does not constitute proof that he is not an Indian. There was no evidence that Mr. Hebert was directly asked by law enforcement about his tribal status or affiliation, nor whether he had ever received benefits from the federal government or a tribe based on status as an Indian. Therefore, the absence of information on that topic from him neither proves nor disproves his status. Silence is simply silence.

The District Court should therefore have granted Mr. Hebert's motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a).

1. Standard of Review

This Court "review[s] de novo a district court's decision to deny a defendant's motion for acquittal under Rule 29." *United States v. Murphy*, 100 F.4th 1184, 1195 (10th Cir. 2024). "When faced with a sufficiency challenge, a court asks only 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Simpkins*, 90 F.4th 1312, 1315 (10th Cir. 2024) (emphasis omitted) (quoting *Musacchio v. United States*, 577 U.S. 237, 243 (2016)). "The reason for this standard is simple: 'allow[ing] a conviction to stand where the defendant's conduct fails to come within the statutory definition of the crime, or despite insufficient evidence to support it, would violate the Due Process Clause.' " *Id.* at 1316 (quoting *United States v. Hillie*, 14 F.4th 677, 683 (D.C. Cir. 2021).

Mr. Hebert adequately preserved an argument concerning the sufficiency of the evidence regarding his non-Indian status. Trial counsel discussed Mr. Hebert's non-Indian status in making her motion for judgment of acquittal, pointing out that the Government had not adequately proven, at a minimum, that Mr. Hebert was not a member of a federally-recognized tribe. (Vol. III, at 384). Further, the District Court, in its oral order on the Rule 29 motion, addressed the element of Mr. Hebert's status as a whole: "With regard to Indian/non-Indian status, I think the government

has put on sufficient evidence to get by a Rule 29 motion. It's a tough element, as you all know. I think it is. So we'll move on from there." (*Id.*).

This exchange was sufficient to preserve Mr. Hebert's challenge to the non-Indian status element as a whole. First, trial counsel alerted the Court to a challenge as to that element and, although she specifically discussed Mr. Hebert's purported lack of membership in a federally-recognized tribe, the District Court addressed the element as a whole and not only the issue trial counsel discussed. *See United States v. Lowe*, --- F.4th ---, 2024 WL 4246171, at *10–12, Case No. 23-1156 (10th Cir. 2024) (discussing application of *de novo* standard of review to sufficiency of the evidence claims in which defendant raised new challenges on appeal because district court was adequately alerted to issue and responded to the issue now raised on appeal).

However, should this Court conclude that Mr. Hebert did not adequately preserve this argument before the District Court, its standard of review is functionally unchanged: "An insufficient evidence claim not raised or preserved below is reviewed for plain error, but 'our review for plain error in this context differs little from our de novo review of a properly preserved sufficiency claim' because 'a conviction in the absence of sufficient evidence will almost always satisfy all four plain-error requirements.' " *United States v. Otuonye*, 995 F.3d 1191, 1210 (10th Cir. 2021) (quoting *United States v. Gallegos*, 784 F.3d 1356, 1359 (10th Cir.

2015). If the Government's response asserts that Mr. Hebert has not adequately preserved his claim of error, Mr. Hebert will address plain error in his reply brief. *See United States v. Isabella*, 918 F.3d 816, 845 (10th Cir. 2019) (permitting plain error to be raised in appellant's reply where appellee has chance to be heard and the adversarial process will be served); *United States v. Zander*, 794 F.3d 1220, 1232 n.5 (10th Cir. 2015) (declining to adopt rule prohibiting raising plain error in reply to United States' assertion that error was unpreserved).

2. Record References

The evidence at issue may be found in the record at the following locations: Testimony of Kara Byers (Vol. III, at 129–31); Testimony of Dakota Grantham (Vol. III, at 257–59; 266–67; 273–74); Testimony of Chad Sensor (Vol. III, at 285–86); Testimony of Paul Sparke (Vol. III, at 298–302); Government's Exhibits 16 and 17 (Supp. RoA Vol. I, at 2–3).

Mr. Hebert submitted a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, which the District Court denied. (Vol. III, at 384).

3. The Supreme Court has explicitly ruled that a person's status as an "Indian" or "non-Indian" person is not a racial classification, but it is instead a classification based upon association with a quasi-sovereign tribal entity.

It is well-established in this Circuit that, in criminal actions brought under 18 U.S.C. § 1152, the Government bears the burden to prove the status of both the defendant and the victim; where the defendant is alleged to be a non-Indian person, the Government must prove beyond a reasonable doubt that the defendant was a non-Indian person. *United States v. Prentiss*, 256 F.3d 971, 980 (10th Cir. 2001) (en banc), *overruled in part on other grounds by United States v. Cotton*, 535 U.S. 625 (2002) (hereinafter *Prentiss II*). In this Circuit, a person is an Indian if two elements are met: (1) the person must have *some* degree of Indian blood, and (2) the person must be recognized as an Indian by the federal government or a federally-recognized tribe. *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (hereinafter *Prentiss III*). The Government may prove a defendant's non-Indian status by proving beyond a reasonable doubt that he fails to satisfy either element.

The second element—recognition—is often analyzed under a totality of the circumstances test, which typically considers four non-exhaustive factors: (1) whether the person is an enrolled member of a federally recognized tribe; (2) whether the person has been recognized by the federal government as an Indian, either formally or informally, through the receipt of assistance reserved only to Indians; (3) whether the person has enjoyed the benefits of tribal affiliation; and (4) whether the

person has been socially recognized as an Indian through both residence on a reservation and participation in Indian social life. *See United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (unpublished). The first factor—enrollment—is dispositive to prove that a person *is* recognized as an Indian. *Id.* But the absence of enrollment would not be dispositive to prove lack of recognition; if it were, the remaining three factors would be surplusage. In fact, in *Prentiss III*, a panel of this Court stated explicitly, "the fact that a person is not a member of a particular pueblo does not establish that he or she is not an Indian under [Section] 1152." 273 F.3d at 1283.

In *United States v. Antelope*, 430 U.S. 641 (1977), the Supreme Court was confronted with the question of whether being an "Indian" for purposes of the Indian country statutes that establish federal authority to prosecute certain criminal offenses was based an on impermissible racial classification. In *Antelope*, the two defendants argued that Indian status was a racial classification and therefore violated substantive due process and equal protection. *Id.* at 643–44. The Supreme Court rejected this premise, pointing to the various ways in which federal laws single out Indian persons and tribes. *Id.* at 645–47. These laws all rely on the notion that tribes are "unique aggregations possessing sovereignty over both their members and their territory." *Id.* at 645. Thus, the singling out of Indian persons is not done because they are part of "a discrete racial group, but rather, [because they are] members of quasi-sovereign

tribal entities." *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974)). The federal regulation of Indians is not based upon a racial classification, but upon "the unique status of Indians as 'a separate people' with their own political institutions, and any such regulation must not be viewed as regulation of a racial group that happens to consist of Indians. *Id.* at 646.

In *Prentiss*, a panel of this Court confronted the seeming discrepancy between *Antelope*'s rule that Indian status is not a racial classification and the two-part test that requires a person to have some Indian blood. 273 F.3d at 1281–83. That panel ultimately concluded that the requirement of some amount of Indian blood did not amount to a racial classification, and that this requirement—initially established by the Supreme Court in *United States v. Rogers*, 45 U.S. (4 How.) 567, 572–73 (1846)—has not been explicitly overturned. *Prentiss*, 273 F.3d at 1282.

Race and racial identity are of no consequence to Indian/non-Indian status. Race and racial identity are not elements of Indian status. There is no element requiring a person to hold themselves out as Indian to be an Indian. A person can be White, Latino, or Hispanic, and also be an Indian so long as they have *some* Indian blood and receive recognition from either the federal government or a tribe. The inverse may also be true, a person who identifies as Native American, perhaps because they have a high degree of Native American blood and heritage, may not legally be an Indian because they lack the recognition necessary to satisfy the second

element. The lack of recognition does not change their race, ethnicity, or ancestry, but it does declare them to not be an Indian under the law.

Treating a person's expressions of racial identity as sufficient proof of Indian or non-Indian status, for purposes of federal criminal actions concerning crimes in Indian country, poses very real problems. The first is the problem *Antelope* sought to avoid: violations of Due Process and Equal Protection because of the use of racial classifications to decide which laws apply to certain people.

The second problem is less overt. There is an exception to the *Miranda* warning requirement when the custodial questioning concerns "routine booking questions." *United States v. Parra*, 2 F.3d 1058, 1067–68 (10th Cir. 1993) (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990)). "The underlying rationale for the exception is that routine booking questions do not constitute interrogation because they do not normally elicit incriminating responses." *Id.* at 1068. But that rationale falls apart when the questioning is "designed to elicit incriminating information," as the questioning becomes an interrogation subject to *Miranda*. *Id.* (citing *Muniz*, 496 U.S. 602 n.2). Where "questioning is reasonably likely to elicit incriminating information relevant to establishing an essential element necessary for conviction," a panel of this Court has held that an otherwise routine question becomes an interrogation under *Miranda*. *Id.* Given that a defendant's status as an Indian or non-Indian person is an essential element of every Indian country offense,

what would typically be a routine biographical question about racial identity would suddenly become an interrogation eliciting information that can be used to prove an element of the crime. Thus, treating a person's racial identity as proof of Indian or non-Indian status runs the risk of creating real legal problems in future Indian country cases where a defendant is asked about their racial identity by law enforcement.

4. The evidence concerning Mr. Hebert's purported non-Indian status revolved around his racial identity; there was no evidence that, taken as true, affirmatively demonstrated that he had a complete lack of Indian blood or that he had not been recognized as an Indian by either the federal government or a federally-recognized tribe.

This section will address the sufficiency of each type of evidence put forward by the Government individually, and then address the totality of that evidence. In doing so, Mr. Hebert will show that the Government's evidence was insufficient as a matter of law to enable a rational trier of fact to conclude that Mr. Hebert was a non-Indian person beyond a reasonable doubt.

To reiterate the rule above, Indian status comes with two elements, and non-Indian status may be proven by demonstrating that a person fails to satisfy either element: (1) the person must have *some* degree of Indian blood, and (2) the person must be recognized as an Indian by the federal government or a federally-recognized tribe. *Prentiss III*, 273 F.3d at 1280; *see also Simpkins*, 90 F.4th at 1318; *United States v. Walker*, 85 F.4th 973, 982 (10th Cir. 2023); *United States v. Diaz*, 679 F.3d

1183, 1187 (10th Cir. 2012) ("To find that a person is an Indian the [factfinder] must first make factual findings that the person has some Indian blood and, second, that the person is recognized as an Indian by a tribe or by the federal government."). As to the second element, there were 574 federally-recognized Native American tribes in the United States at the time the offense was alleged to have occurred. *See* 86 FR 18552 (April 9, 2021).

In *United States v. Diaz*, a panel of this Court had occasion to consider what kind of evidence was sufficient to prove non-Indian status. 679 F.3d at 1187–88. There, the victim's father testified about the extensive genealogy research he had done regarding both his and his wife's ancestry, which demonstrated that they had no Native American or Indian background at all. *Id.* Thus, there was clear evidence that would have allowed a jury to conclude, beyond a reasonable doubt, that the victim had no Indian blood at all. But just as significantly, the victim's father testified that the victim never had any association with any tribe or pueblo beyond his employment at a local casino. *Id.* at 1188. Thus, there was clear evidence that the victim had never been recognized, formally or informally, as an Indian by either the federal government or a recognized tribe. And the victim's father, due to his relationship with the victim, would absolutely be in a position to know with an extremely high degree of certainty whether his son had had ever been recognized as an Indian by a tribe or the federal government.

a. Testimony of Kara Byers (Vol. III, at 129–31)

Kara Byers is the stepdaughter of Mr. Hebert, but she never lived with him as a child. (Vol. III, at 129–30). In fact, she has only lived with Mr. Hebert once in her life, which was at the time of the incident giving rise to these charges; and she testified that she only lived with him for about a week or two. (Vol. III, at 130). The Government then had this exchange with Kara Byers:

> Q: Just from being the defendant's stepdaughter, I just want to ask you, if you know, is he a member of any Indian tribe?
> A: Not that I know of, no.
> Q: Did he ever mention to you being an Indian?
> A: No, never.
> Q: Do you know what race or races he self-identified as?
> A: One time, I think, part Mexican.

(*Id.* at 131).

First, absence of membership in a tribe is not proof that a person is not an Indian. Enrollment is dispositive to prove recognition, but its absence is not dispositive of lack of recognition. Thus, the fact that a woman who had only lived with Mr. Hebert for no more than two weeks believed Mr. Hebert was not a member of a Native American tribe is of no consequence. It does nothing to prove the absence of a degree of Indian blood or of recognition.

Second, the notion that Mr. Hebert never mentioned being an Indian to his stepdaughter is not proof that he lacked either a degree of Indian blood or recognition as an Indian. While Kara Byer's testified that "at the time, they talked regularly,"

there is no evidence as to what that meant. And given that Kara Byers, when asked about Mr. Hebert's racial identity, testified that he might have self-identified as part-Mexican "[o]ne time, I think," it is obvious that Mr. Hebert's racial identity was not a common or stand-out topic of conversation for them.

Third, even taking as true the premise that Mr. Hebert had, at some unknown point in the past, self-identified as part Mexican again does nothing to prove the absence of either a degree of Indian blood or recognition as an Indian. A person can be part-Mexican and Indian, just as they can be part-Mexican and White, and they could in fact be all three. Racial identity is not an element of Indian status.

Finally, there is no indication that either Mr. Hebert or Kara Byers knew what it meant to be an Indian insofar as the law was concerned. However, based on the way in which the Government conducted the trial and presented evidence throughout the trial, it appears this question was framed in the context of racial identity instead of legal status. And as pointed out above, racial identity is a wholly separate concept from Indian status. Thus, that Mr. Hebert apparently never declared himself to be Indian or Native American as a matter of racial identity proves nothing.

Kara Byers's testimony is almost the opposite of the testimony found in *Diaz*. Her knowledge base was extraordinarily limited, and she could express no basis for her knowledge beyond the fact that she was Mr. Hebert's stepdaughter. She had done no genealogical research, and there was no reason to believe she would necessarily

have passively learned that Mr. Hebert was recognized as an Indian were such an event have come to pass. On the other hand, in *Diaz* it was quite safe to conclude that a father would know if his own son had developed an association with an Indian tribe such that he was recognized as an Indian by that tribe. Thus, Kara Byers's testimony was not sufficient to prove Mr. Hebert was not an Indian person at the time of the offense.

b. Testimony of Dakota Grantham (Vol. III, at 257–59; 266–67; 273–74)

Dakota Grantham is an investigator with the Choctaw Nation Tribal Police who investigated the allegations against Mr. Hebert. (Vol. III, at 227–29). On direct examination, the Government asked Investigator Grantham about his ability to look into a person's tribal affiliation, and he stated that he can access the Choctaw Nation's membership database, and that every other tribe has such a database but that he would need to contact them and have them verify tribal status. (Vol. III, at 257–58). The following exchange then occurred:

> Q: Do you recall whether you asked Mr. Hebert whether he was a member of any - - Native American tribe?
> A: I don't recall specifically, no.
> Q: Did you ask what his race was?
> A: Yes, I believe so.
> Q: What did he say his race was?
> . . .
> Q: What did the defendant say as to his race when you asked him what that was?
> A: I believe he stated White, maybe Hispanic.
> . . .

> Q: What did the defendant tell you about his race?
> A: So it would be Latino, Hispanic.

(Vol. III, at 258–59).

On cross examination, the Counsel for Mr. Hebert questioned Investigator Grantham concerning his understanding of race and Indian status, as well as his work in investigating Mr. Hebert's status:

> Q: . . . You understand, obviously, that someone can be Hispanic and Native American?
> A: That's correct.
> Q: Okay. Did you specifically ask him if he was Native American?
> A: I don't recall.
> Q: Did you call all of the *McGirt* tribes in the area to see if he was a member of any of those tribes?
> A: Yeah. So, typically, we call the five majors, but there are, I want to say, hundreds of tribes across the nation. It doesn't matter what tribe you are as long as you're a member, you know, and recognized. If you're in the Choctaw Nation territory, it falls in our jurisdiction, so in order to do that would be nearly impossible.
> Q: Okay. . . . You said, typically, you call the five majors?
> A: Yes.
> Q: Do you recall whether or not you called the five majors in this case?
> A: I believe I did.
> Q: Are you sure or - -
> A: I don't want to tell you 100 percent sure. I'm not 100 percent sure I did.
> Q: Okay. We're calling it the five majors. What are the five majors?
> A: So the Choctaw - - Choctaw Nation, Cherokee Nation, Chickasaw Nation, Seminole, and Creek.
> Q: Okay. And did you obtain from them any written documentation as to Mr. Hebert's tribal status?
> A: No.

(Vol. III, at 266–67).

On redirect examination, the Government asked Investigator Grantham whether Mr. Hebert volunteered anything about tribal status:

> Q: And regardless of whether you asked the defendant whether he was Indian or Native American, did the defendant ever volunteer that he was Indian or Native American?
> A: No, sir.

(Vol. III, at 274).

First, as to Mr. Hebert's responses to questions about his racial identity: racial identity, whether White, Latino, Hispanic, or Native American, is not an element of Indian status. A person must have some degree of blood and be recognized by either the federal government or one of the 574 federally-recognized tribes. Thus, Mr. Hebert's statement saying he was Hispanic and/or Latino fails to prove he was not an Indian person.

Second, Mr. Hebert's apparent silence as to any tribal status—i.e., his failure to spontaneously declare himself to be Indian or Native American—proves nothing. Investigator Grantham apparently never asked Mr. Hebert if he had any tribal affiliations; had he done so, and had Mr. Hebert expressly disavowed any such affiliation, that would be a different discussion. But Investigator Grantham could not offer such testimony. It is not Mr. Hebert's burden to prove or declare himself to be an Indian, it is the Government's burden to prove, beyond a reasonable doubt, that Mr. Hebert was not an Indian.

Finally, whatever contact Investigator Grantham had with the five major tribes—if any—amounted to nothing at all. As he testified, he received no written documentation or answers concerning Mr. Hebert's status. Thus, there is no evidence in Investigator Grantham's testimony that those tribes even claimed he was not a member.

c. Testimony of Chad Sensor (Vol. III, at 285–86)

Special Agent Sensor is a former Deputy U.S. Marshal who arrested Mr. Hebert in Pennsylvania. (Vol. III, at 281, 284). Following Mr. Hebert's arrest, he was booked in Erie County, Pennsylvania. (Vol. III, at 285). Special Agent Sensor provided the following testimony:

> **Direct Examination**
> Q: During the booking-in process, do individuals provide information about their identity?
> A: Yes.
> Q: Do you also provide information about an individual's identity?
> A: I do.
> Q: At any point in your conversations or contact with the defendant that day, did he identify himself as a Native American?
> A: No.
> . . .
> **Cross Examination**
> Q: Did you ask Mr. Hebert if he was a member of a registered tribe?
> A: No.

(Vol. III, at 285–86).

Just as with Investigator Grantham's testimony, SA Sensor's testimony that Mr. Hebert did not spontaneously declare himself to be Native American does not prove Mr. Hebert was a non-Indian person. As demonstrated on cross examination, SA Sensor never asked Mr. Hebert if he was a member of a tribe. Mr. Hebert's apparent silence as to his tribal affiliation or Indian status does not prove he is not an Indian. The Government bears the burden to prove Mr. Hebert was a non-Indian person. It cannot meet that burden by shifting it to him, requiring him to declare himself an Indian, and using his silence as a weapon against him.

d. Testimony of Paul Sparke (Vol. III, at 298–302)

Paul Spark is a Special Agent with the FBI and the case agent in this case. (Vol. III, at 297–98). He obtained Government Exhibits 16 and 17 during his investigation and testified about those documents on direct and cross examination. (Vol. III, at 298–300). That testimony is discussed below. On re-direct examination by the Government, SA Sparke testified as follows, regarding contact with five major Native American tribes in Oklahoma:

> Q: Did you contact each of those five tribes?
> A: Yes, I did.
> Q: Over the course of your investigation, have you received any information from any source indicating the defendant is Native American or Indian?
> A: No.

(Vol. III, at 302).

This testimony suffers from a few problems. First and foremost, the Government's burden was to prove that Mr. Hebert was a non-Indian person. SA Sparke simply saying that he had not learned information that Mr. Hebert was Native American or Indian does nothing to move the needle regarding that burden. SA Sparke did not say that he received affirmative information indicating Mr. Hebert was a non-Indian person. Thus, even if the jury believed SA Sparke's testimony, it does not prove Mr. Hebert had no degree of Indian blood or had not been recognized as an Indian by either the federal government or one of the 574 federally-recognized tribes in the United States.

Second, the Government's reference to "any source" in its question is unclear in its scope, and the record does not divulge whether any such source to which it is referring would even have the requisite knowledge to inform SA Sparke whether Mr. Hebert was Native American or Indian.

Third, assuming that "any source" refers to the five tribes mentioned in the preceding question, those tribes are only capable of speaking to their own membership, and not to any other tribe's membership or to any non-member's degree of Indian blood. Thus, they would have no knowledge allowing them to address Mr. Hebert's degree of Indian blood or his recognition by either the federal government or one of the other 569 federally-recognized tribes in the United States.

Finally, the panel in *Prentiss III* explicitly rejected the premise that the absence of membership in any particular tribe—even the major local tribes—is proof that a person is a non-Indian. 273 F.3d at 1283 ("[T]he fact that a person is not a member of a particular pueblo does not establish that he or she is not an Indian under [Section] 1152.").

Therefore, even taking SA Sparke's testimony as true and giving it the benefit of all reasonable inferences, it does not suffice to prove Mr. Hebert was a non-Indian person.

e. Government Exhibits 16 and 17 (Supp. ROA Vol. I, at 2–3)

The Government submitted two paper exhibits discussed by SA Paul Sparke in his testimony. Exhibit 16 is a driver's license record for Dennis Hebert from Alabama, which indicates Mr. Hebert's race as "W" for "White." (Supp. ROA Vol. I, at 2; Vol. III, at 299–300). Exhibit 17 is a driver's license record for Dennis Hebert from Florida, which indicates Mr. Hebert's race as "W" for "White." (Supp. ROA Vol. I, at 3; Vol. III, at 300). According to SA Sparke, such information on race is typically provided by the licensee, in this case, Mr. Hebert. (Vol. III, at 299). However, on cross examination, SA Sparke explicitly stated that he did not know whether "Native American" was a selectable racial option in either Florida or Alabama, nor did he know whether those states allow a person to select more than one racial identity. (Vol. III, at 301).

Again, racial identity and Indian status are separate concepts, and a person may be both White and an Indian person. Moreover, there is no evidence in the record that a person who is both White and Native American could choose to self-identify as both on their driver's licenses in these two states. In fact, there is no evidence in the record that Native American was an option at all, with the only witness on this subject testifying that he did not know if it was an option. Thus, even if racial identity were sufficient evidence of Indian status, this evidence certainly does nothing to disprove either blood quantum or recognition.

f. The Evidence as a Whole

The Government's evidence as a whole regarding Mr. Hebert's status did not carry its burden to prove that he lacked either (1) *some* degree of Indian blood or (2) that he had not been recognized as an Indian by either the federal government or one of the 574 federally-recognized Indian tribes in the United States. Taken in the light most favorable to the Government, it proves the following things:

(1) Mr. Hebert has, at various times, chosen to express his racial identity as either White or Latino/Hispanic/Part-Mexican.

(2) Mr. Hebert never spoke about his tribal status or affiliation (or lackthereof) to any witness in this case, but there is also no evidence that any witness ever asked him about his tribal status or affiliation or sought to discuss it with him.

(3) Out of 574 federally-recognized tribes in the United States, five local to Oklahoma *might* have been contacted by investigators and, if they were contacted, they had no information to share about Mr. Hebert.

These things, even taken together and viewed in the light most favorable to the Government, simply do not prove Mr. Hebert was a non-Indian person. These things do nothing to address the two elements of Indian status. And it is not Mr. Hebert's responsibility or burden to declare himself an Indian.

Racial identity is not an element of Indian status, and making racial identity either an element of Indian status or using it as proof of Indian/non-Indian status comes with its own set of pitfalls. First, it risks running afoul of the Due Process and Equal Protection Clauses because now a person's racial identity becomes a determining factor in which laws apply to them. The Supreme Court clearly sought to avoid exactly that outcome in *Antelope* by explaining that Indian status was not a racial classification but was instead the result of an affiliation with a quasi-sovereign tribal entity. 430 U.S. at 645. It further creates the possibility that otherwise be routine booking questions about racial identity would become into interrogation questions subject to *Miranda* requirements because the answers suddenly provide proof that may be used to satisfy an essential element of Indian country offenses. And making racial identity either an element or a method of proving Indian/non-Indian status may have other dangers lurking behind unseen corners or unanticipated

scenarios. Meanwhile, keeping racial identity out of the analysis, at least without other evidence directly addressing the actual elements of Indian status, prevents these problems.

Because the evidence submitted by the Government completely failed to address the elements of Indian status, the evidence was insufficient to allow a rational jury to find beyond a reasonable doubt that Mr. Hebert was a non-Indian person.

II. (Issue Two) Whether the District Court plainly erred in failing to instruct the jury as to the two elements that must be considered in determining whether an individual is an Indian or non-Indian person when those two elements are essential elements to the resolution of an element of the offense.

1. Standard of Review

Where a defendant does not object to a district court's jury instructions, this Court's review is for plain error. *United States v. Flechs*, 98 F.4th 1235, 1252 (10th Cir. 2024). "To demonstrate plain error, a litigant must show: (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1137 (10th Cir. 2017). However, this Court "appl[ies] plain error 'less rigidly when reviewing a potential constitutional error,' which is the case here because 'an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee.' " *United States v. Benford*, 875 F.3d 1007, 1016–17 (10th Cir. 2017) (quoting *United States v. James*, 257 F.3d 1173, 1182 (10th Cir. 2001); *Neder v. United States*, 527 U.S. 1, 12 (1999)).

Errors are "plain" if they are contrary to well-settled law, and they are contrary to well-settled law if they are contrary to rulings by the Supreme Court, this court, or the weight of authority from other circuits. *United States v. Hill*, 749 F.3d 1250, 1257 (10th Cir. 2014). In the context of instructional error, an error is plain if "[t]he instructions did not 'correctly state the governing law,' and the error was 'clear or

obvious under current law.' " *United States v. Kalu*, 791 F.3d 1194, 1210 (10th Cir. 2015) (quoting *United States v. Bader*, 678 F.3d 858, 868 (10th Cir. 2012)).

To satisfy the third condition, the appellant "ordinarily must show a reasonable probability that, but for the error, the outcome of the proceedings would have been different." *Rosales-Mireles v. United States*, 585 U.S. 129, 134–35 (2018). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Hasan*, 526 F.3d 653, 665 (10th Cir. 2008).

As to the final prong, the Supreme Court has rejected a standard that limits relief to cases of actual innocence or to those that "shock the conscience of the common man," or that "serve as a powerful indictment against our justice system, or seriously call into question the competence or integrity of the district judge." *Rosales-Mireles*, 585 U.S. at 137–39. A prior panel of this circuit has explained that the third and fourth prongs share a notable relationship; in most circumstances, where an error does not affect a jury's verdict, it will not impugn the fairness, integrity, or public reputation of the judicial process. *United States v. Bader*, 678 F.3d 858, 868, 10th Cir. 2012).

2. Record References

The Government submitted proposed jury instructions, which are located in Volume I of the Record on Appeal at Pages 66–86. The Government submitted supplemental proposed jury instructions, which are located in Volume I of the Record on Appeal at Pages 114–35. The Court's final jury instructions are located in Volume I of the Record on Appeal at Pages 154–79. The Court invited objections on the record to its proposed jury instructions. (Vol. III, at 386). The Government had no objections. (Vol. III, at 386–87). Mr. Hebert, through counsel, expressed only one objection, which was overruled. (Vol. III, at 387–88).

3. The District Court plainly erred as a matter of law in failing to submit to the jury an instruction explaining the elements the Government must prove (or disprove) beyond a reasonable doubt to satisfy the element that Mr. Hebert was a non-Indian person at the time of the offense.

As a threshold matter, jury instructions should "correctly state the governing law and provide the jury with an ample understanding of the issues and the applicable standards." *Bader*, 678 F.3d at 868. "The purpose of jury instructions is to give jurors the correct principles of law applicable to the facts so that they can reach a correct conclusion as to each element of an offense according to the law and the evidence." *United States v. Freeman*, 70 F.4th 1265, 1280 (10th Cir. 2023). A jury verdict that is based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime, beyond a reasonable doubt, is error. *United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999).

In *United States v. Kalu*, a panel of this Court found that instructional error was plain where a district court, in explaining the mens rea applicable to the offense of bringing in and harboring certain aliens in violation of 8 U.S.C. § 1324, described a negligence standard rather than a knowing or recklessness standard. 791 F.3d 1194, 1208–10 (10th Cir. 2015). First, the *Kalu* panel concluded the instruction was erroneous because the statute at issue required the jury to find the defendant acted either with "actual knowledge or reckless disregard," and a "should have known" standard does not satisfy that element. *Id.* at 1208. It further noted that an en banc decision of this Court expressly stated the mens rea standard was actual knowledge of the alien's status or reckless disregard of the fact of the alien's status. *Id.* (citing *United States v. Barajas-Chaves*, 162 F.3d 1285, 1288 (10th Cir. 1999) (en banc). The *Kalu* panel then explained that the instructions did not correctly state the law and the misstatement was obvious under current law, rendering the error plain. *Id.* at 1210

Here, the answer to whether the District Court erroneously instructed the jury, and whether the error was plain, is equally straightforward. The District Court instructed the jury as to the elements of the offense with which Mr. Hebert was charged (Vol. I, at 170–71). The instruction as to those elements is set forth below:

> First: Between on or about July 20, 2021 and on or about July 21, 2021, the defendant knowingly engaged or attempted to engage in a sexual act with K.D.;

> Second: at the time the sexual act occurred, K.D. was younger than 12 years old;
>
> Third: K.D. is an Indian;
>
> Fourth: the defendant is a non-Indian; and
>
> Fifth: The sexual act took place within the Eastern District of Oklahoma in Indian Country, which is within the territorial jurisdiction of the United States.
>
> In this case, "sexual act" means penetration, however slight, between the penis of the defendant and the anus of K.D.

(*Id.*). While the instructions explain to the jury, and define the term, "sexual act" the instructions do nothing to inform the jury as to what makes a person an "Indian" or "non-Indian" person. The jury had no guidance in how it was supposed to find, beyond a reasonable doubt, whether a person was an Indian or non-Indian person. Yet both of those statuses had to be found as elements, Indian as to K.D. and non-Indian as to Mr. Hebert.

In this Circuit, a person is an Indian if two elements are met: (1) the person must have *some* degree of Indian blood, and (2) the person must be recognized as an Indian by the federal government or a federally-recognized tribe. *Prentiss III*, 273 F.3d at 1280. The second element also is often analyzed under a four-factor, totality-of-the-circumstances test, which was discussed more fully above in Part I.3 of this Brief.

To prove that a person is an Indian, the Government must prove, beyond a reasonable doubt, that both elements are satisfied. To prove that a person is a non-Indian, the Government must prove, beyond a reasonable doubt, that at least one of the elements is not satisfied. Since status is an essential element of the charged offense, the elements that must be satisfied to prove that status are necessarily essential elements of the offense as well. Thus, failure to instruct on the elements of Indian status was erroneous because the instructions failed to correctly state the applicable governing law, failed to provide the jury with the applicable standards to be used to determine if elements were met, and failed to enumerate the elements of Indian status. Thus, the jury's verdict was based on instructions that permitted them to find Mr. Hebert guilty without also requiring that they find all of the elements of the crime beyond a reasonable doubt.

The error was plain for the same reason the error was plain in *Kalu*: There are two elements that go to determining whether a person is an Indian, and this rule was clearly established in this Circuit's precedents going back to *Prentiss III*, which is more than two decades old. *See Simpkins*, 90 F.4th at 1318; *United States v. Walker*, 85 F.4th 973, 982 (10th Cir. 2023); *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) ("To find that a person is an Indian the [factfinder] must first make factual findings that the person has some Indian blood and, second, that the person is recognized as an Indian by a tribe or by the federal government."). A defendant's

Indian or non-Indian status being an essential element of an offense charged under Section 1152 has been the law of the Circuit since the en banc decision in *Prentiss II*. 256 F.3d at 980. Thus, the rule that the elements of Indian and non-Indian status are essential elements of the charged offense was clear, obvious, and plain under governing law. Therefore, this Court should find that the first two conditions of plain error are satisfied.

4. The error affected Mr. Hebert's substantial rights and seriously affected the fairness, integrity, or public reputation of the judicial proceedings in Mr. Hebert's trial.

"When a district court gives a legally incorrect jury instruction on the principal elements of the offense or a defense, [this Court has often] concluded that the legal error affected the outcome of the trial proceedings." *Benford*, 875 F.3d at 1017 (quoting *United States v. Duran*, 133 F.3d 1324, 1333 (10th Cir. 1998)). In *Duran*, a panel of this Court said: "A plainly erroneous jury instruction affects a defendant's 'substantial rights' if the instruction concerns a principal element of the defense or an element of the crime, thus suggesting that the error affected the outcome of the case." 133 F.3d at 1330.

Satisfying the third prong merely requires showing a reasonable probability that the outcome would have been different, and given the extraordinary weakness of the evidence, as outlined above, it seems reasonable to conclude that a properly instructed jury would have found the Government failed to prove its burden as to

Mr. Hebert's non-Indian status. A properly instructed jury would have been able to evaluate the evidence in a proper legal light instead of through the prism of race, as the Government wanted it to. The Government's arguments in closing reveal the harm done by the lack of an instruction on these elements: it emphasized the role of racial identity, that Mr. Hebert never declared himself to be an Indian or Native American (even though no one ever asked him), and that five out of 574 tribes apparently had no information about Mr. Hebert's status. (Vol. III, at 396–97). Weak evidence of an element undermines confidence in an outcome. *Benford*, 875 F.3d at 1018. The evidence here, if it was sufficient at all, was so weak that the improper instructions at to the elements of Indian status necessarily call the verdict into question and undermine confidence in the outcome.

As to the fourth prong, this Court has previously explained that "In light of the revered status of the beyond-a-reasonable-doubt standard in our criminal jurisprudence, a jury instruction that allows a conviction where one important element may not have been found against the defendant by such a standard cannot be overlooked," and an error may threaten the integrity of judicial proceedings "independent of a defendant's innocence." *Duran*, 133 F.3d at 1334 (quoting *United States v. Olano*, 507 U.S. 725, 736–37 (1993)). " '[A] district court's failure to instruct the jury on an essential element of the crime charged won't always satisfy the fourth prong of the plain-error test,' but [this Court has] before noted that reversal

is appropriate when evidence supporting the omitted element is 'neither overwhelming nor uncontroverted.' " *Benford*, 875 F.3d at 1021 (quoting *United States v. Wolfname*, 835 F.3d 1214, 1223 (10th Cir. 2016)).

In this case, the evidence was certainly not overwhelming. As Mr. Hebert has argued above, it was not even sufficient to support the verdict. But the Government's whole theory of Mr. Hebert's non-Indian status centered on his racial identity, which is not an element of Indian status. And while Mr. Hebert may not have actively sought to present evidence to rebut the Government's claims, it is not his burden to do so. However, Mr. Hebert did challenge aspects of the Government witnesses' testimony with respect to his purported non-Indian status, and he did point out the failings of the Government's evidence when cross examining those witnesses. Thus, the evidence was not uncontroverted.

An erroneous jury instruction that permits a jury to find a defendant guilty without also requiring it to find every essential element of the offense proven beyond a reasonable doubt violates a defendant's Sixth Amendment right to a jury trial. That occurred here. Therefore, this Court should find that Mr. Hebert's substantial rights were violated by the error and exercise its discretion to reverse and remand for a new trial on the ground that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

III. (Issue Three) Whether the District Court plainly erred in permitting the Government to both elicit testimony from witnesses and emphasize to the jury during closing arguments that Mr. Hebert remained silent as to whether he was an Indian person or not, resulting in a violation of his Fifth Amendment right to remain silent.

1. Standard of Review

Where a defendant fails to object to the eliciting of evidence concerning his silence, this Court's review is for plain error. *United States v. Espinoza-Mendoza*, 237 F. App'x 359, 361 (10th Cir. 2007) (unpublished) (engaging in plain error review where prosecution elicited testimony that defendant asserted right to remain silent without objection from defense). "To demonstrate plain error, a litigant must show: (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Bustamante-Concha*s, 850 F.3d at 1137. However, this Court "appl[ies] plain error 'less rigidly when reviewing a potential constitutional error,'" *Benford*, 875 F.3d at 1016–17 (quoting *James*, 257 F.3d at 1182, and *Neder*, 527 U.S. at 12), which is the case here because an improper comment on a defendant's decision to remain silent violates his Fifth Amendment right to remain silent. *See Pickens v. Gibson*, 206 F.3d 988, 998 (10th Cir. 2000).

Errors are "plain" if they are contrary to well-settled law, and they are contrary to well-settled law if they are contrary to rulings by the Supreme Court, this court, or the weight of authority from other circuits. *Hill*, 749 F.3d at 1257.

To satisfy the third condition, the appellant "ordinarily must show a reasonable probability that, but for the error, the outcome of the proceedings would have been different." *Rosales-Mireles v. United States*, 585 U.S. 129, 134–35 (2018). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Hasan*, 526 F.3d at 665.

As to the final prong, the Supreme Court has rejected a standard that limits relief to cases of actual innocence or to those that "shock the conscience of the common man," or that "serve as a powerful indictment against our justice system, or seriously call into question the competence or integrity of the district judge." *Rosales-Mireles*, 585 U.S. at 137–39. A prior panel of this circuit has explained that the third and fourth prongs share a notable relationship; in most circumstances, where an error does not affect a jury's verdict, it will not impugn the fairness, integrity, or public reputation of the judicial process. *Bader*, 678 F.3d at 868 (10th Cir. 2012).

2. Record references

The challenged testimony was elicited from Investigator Grantham (Vol. III, at 274) and SA Chad Sensor (Vol. III, 285–86). The statements by the Government occurred during its first closing argument. (Vol. III, at 396–97). Mr. Hebert did not object to either the testimony or to the comments in closing arguments.

3. The Testimony and the Government's Closing Argument

At trial, the Government elicited testimony from two separate law enforcement officers that Mr. Hebert never claimed to them to be either Native American or Indian, yet the evidence showed that neither officer asked Mr. Hebert about his status as an Indian. The following exchange was had with Investigator Grantham on redirect examination:

> Q: And regardless of whether you asked the defendant whether he was Indian or Native American, did the defendant ever volunteer that he was Indian or Native American?
> A: No, sir.

(Vol. III, at 274). And SA Chad Sensor provided the following testimony:

> Q: At any point in your conversations or contact with the defendant that day, did he identify himself as a Native American?
> A: No.
> . . .
> **Cross Examination**
> Q: Did you ask Mr. Hebert if he was a member of a registered tribe?
> A: No.

(Vol. III, at 285–86).

In closing arguments, the Government made the following statements to the jury:

> When Dakota Grantham testified, he said that the defendant identified himself to Investigator Grantham as Latino. He did not identify himself as Indian. And what's also significant about Investigator Grantham is that Dakota Grantham is a tribal police investigator. If there were ever an opportunity for the defendant to tell someone that he is an Indian, he would have told that to a tribal police investigator of all people.
>
> Chad Sensor was a former deputy U.S. Marshal at the time the defendant was arrested in Western Pennsylvania, and when he arrested Dennis Hebert on the warrant for this case, there was no indication from the defendant that he was an Indian.

(Vol. III, at 396–97).

4. The District Court erred, and the error was plain, because it is clearly established by the precedents of this Circuit that the Government may not elicit testimony concerning a defendant's silence and use that testimony to obtain a conviction.

A prosecutor may not elicit testimony that a defendant remained silent to obtain a conviction of that defendant. *Pickens*, 206 F.3d at 998. It is improper to use either pre-arrest silence or post-arrest silence to obtain a defendant's conviction. *Espinoza-Mendoza*, 237 F. App'x at 362 (citing *United States v. Burson*, 952 F.2d 1196, 1200–01 (10th Cir. 1991) (pre-arrest silence), and *Earnest v. Dorsey*, 87 F.3d 1123, 1135 (10th Cir. 1996) (post-arrest silence)).

In *Burson*, a panel of this Court found that testimony commented on a defendant's decision to remain silent where a defendant did not answer investigators' questions about his or another person's tax affairs. 952 F.2d at 1200. The testimony

regarding the defendant's refusal or failure to answer certain questions came in through the investigators and the testimony did not concern "what the defendant said; rather, it was what he did not say." *Id.*

In this case, Mr. Hebert remained silent as to his tribal affiliation pre-arrest during his interactions with Investigator Grantham, and he remained silent as to his tribal affiliation post-arrest during his interactions with SA Chad Sensor. Neither testified that they had asked Mr. Hebert about his status as an Indian or with any tribes. Moreover, the Government then exacerbated the violation of Mr. Hebert's rights by emphasizing this testimony in closing arguments. Just as in *Burson*, the testimony was not about what Mr. Hebert said, but what he did not say. The testimony was about Mr. Hebert's apparent failure to spontaneously declare himself an Indian, and the Government exploited that testimony during closing argument to emphasize not only that Mr. Hebert should have done so, but that he would have done so if he were in fact an Indian person.

Therefore, this Court should conclude that allowing the testimony, and subsequent comments by the Government during closing arguments, was plainly erroneous.

5. The elicited testimony, in conjunction with the Government's emphasizing that testimony and its import during closing arguments, affected Mr. Hebert's substantial rights and seriously affected the integrity of the judicial proceedings because it reasonably could be expected to impact the jury's deliberative process in resolving the question of Mr. Hebert's non-Indian status.

Satisfying the third prong of plain error merely requires showing a reasonable probability that the outcome would have been different, and given the extraordinary weakness of the evidence, as extensively discussed above, it is reasonable to conclude that a jury not influenced by the improper comment on Mr. Hebert's silence would have found that the Government failed to prove its burden as to Mr. Hebert's non-Indian status.

In *Espinoza-Mendoza*, the panel concluded that any error did not affect the defendant's substantial rights because (1) the defendant's silence was irrelevant to the charges brought against him and the district court explicitly instructed the jury to not infer anything about the defendant's citizenship because it was not relevant to charge, and (2) the uncontroverted evidence overwhelmingly demonstrated the defendant's guilt as to every element of the offense. 237 F. App'x at 362.

In *Burson*, that panel ultimately found the improper testimony harmless for, among other reasons, the fact the government "made no reference to [the defendant's] silence in closing argument or otherwise," and the apparently overwhelming evidence of the defendant's guilt. *Id.* at 1201. The panel also

recognized that the improper testimony came in "as an afterthought and as part of a larger story" concerning the defendant's tax evasion. *Id.*

Here, the Government not only elicited testimony about Mr. Hebert's silence as to his status when talking to two law enforcement officers—one pre-arrest, and the other post-arrest—but it then went on to rely upon that silence in its closing argument to convince the jury that an Indian person would not have remained silent about their status: "And what's also significant about Investigator Grantham is that Dakota Grantham is a tribal police investigator. If there were ever an opportunity for the defendant to tell someone that he is an Indian, he would have told that to a tribal police investigator of all people." (Vol. III, at 397).

The Government, through this closing argument, sought to penalize Mr. Hebert for his silence as to any tribal affiliation or Indian status. It sought to convince a jury that, obviously Mr. Hebert was a non-Indian person because, if he were Indian, he would have told the tribal investigator that he was an Indian. But there was no evidence that either Investigator Grantham or SA Sensor ever even asked Mr. Hebert about tribal affiliation. Thus, Mr. Hebert was not only being penalized for silence, but also for not spontaneously declaring himself to be an Indian.

Unlike *Burson* and *Espinoza-Mendoza*, the evidence here was emphasized in closing, it was not elicited as an afterthought but as part of an explicit effort to prove Mr. Hebert's non-Indian status, and the evidence concerning Mr. Hebert's non-

Indian status was not overwhelming. Weak evidence of an element undermines confidence in an outcome. *Benford*, 875 F.3d at 1018. The evidence here, if it was sufficient at all, was so weak that the Government's elicitation and emphasis of the improper evidence necessarily calls the verdict into question and undermines confidence in the outcome. Therefore, this Court should find that the plain error affected Mr. Hebert's substantial rights.

Finally, this Court should exercise its discretion to reverse and remand for a new trial on the ground that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. The evidence in question directly related to an essential element of the offense, it violated Mr. Hebert's rights under the Fifth Amendment, and the Government flagrantly and explicitly used it to obtain a conviction of Mr. Hebert. The Government benefitting from such flagrant disregard of a defendant's Fifth Amendment right to remain silent seriously calls into question the integrity of the judicial proceeding, especially when the remaining evidence of Mr. Hebert's non-Indian status was so extraordinarily weak.

CONCLUSION

This Court should reverse the District Court's ruling denying Mr. Hebert's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 and vacate Mr. Hebert's Judgment and Conviction because the evidence of Mr. Hebert's non-Indian status was insufficient to prove beyond a reasonable doubt that he was a non-Indian person.

Should this Court disagree and conclude that the evidence was sufficient, it should nonetheless reverse, vacate, and remand for a new trial because the District Court plainly erred in failing to properly instruct the jury as to all of the elements of the offense and because the District Court plainly erred in permitting the Government to elicit—and emphasize in closing arguments—testimony concerning Mr. Hebert's silence as to his Indian or non-Indian status.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. The issues presented involve substantial analysis of complex and developing issues of law, and Mr. Hebert received a thirty-year sentence following his conviction, which warrants the conclusion that oral argument would materially assist this Court's review.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

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s/ Jared T. Guemmer

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Date: October 11, 2024

s/ Jared T. Guemmer

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2024, I electronically filed this brief, with attachments, in the Tenth Circuit using the ECF System, which transmitted a Notice of Docket Activity to the following ECF registrant: Linda Epperley, Assistant United States Attorney, counsel for Plaintiff/Appellee.

s/ Jared T. Guemmer