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

APPELLANT'S REPLY BRIEF

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Mr. Hebert notes that the District Court had jurisdiction pursuant to 18 U.S.C. §§ 1152(a) and 3231 because he was charged as a non-Indian person.

I. (Issue One) Mr. Hebert was entitled to judgment of acquittal based on the Government's failure to present adequate evidence concerning his non-Indian status. Even if this issue was not properly preserved for review, the District Court plainly erred in failing to enter judgment of acquittal.

The question before this Court is whether there was sufficient evidence to prove, beyond a reasonably doubt, that Mr. Hebert was a non-Indian person. This Court's test for Indian status consist of two prongs: To be an Indian, the person must (1) "[have] some Indian blood" and (2) "[be] recognized as an Indian by a tribe or by the federal government." *United States v. Prentiss*, 273 F.3d 1277, 1280 (10th Cir. 2001) (internal quotation marks omitted) (hereinafter *Prentiss III*). Sufficient proof that either prong is not satisfied will prove non-Indian status.

The Government cites to a published decision of this Court in *United States v. Walker*, 85 F.4th 973, 983 (10th Cir. 2023), for the premise that Mr. Hebert's stepdaughter's testimony was sufficient based upon her purported personal knowledge. (Govt's Resp. at 21). However, the sufficiency of the testimony to support the verdict was not tested in *Walker*; the only question in that case was whether the Government adequately demonstrated the witness's personal knowledge to render the evidence admissible under the Federal Rules of Evidence. *Id.* at 983.

Notably, another witness also testified that the defendant was not affiliated with a tribe based upon his personal knowledge of the defendant. *Id.* at 983–84.

1. Mr. Hebert's arguments are properly preserved because the District Court *sua sponte* addressed Mr. Hebert's Indian status as whole when it resolved Mr. Hebert's non-Indian status on the merits.

Whether Mr. Hebert's arguments are properly preserved for review by this Court is dictated by the decisions in *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003), *United States v. Buntyn*, 104 F.4th 805, 808 (10th Cir. 2024), and *United States v. Lowe*, 117 F.4th 1253, 1268–68 (10th Cir. 2024). In *Hernandez-Rodriguez*, the panel held:

> [W]hen the district court *sua sponte* raises and explicitly resolves an issue of law on the merits, the appellant may challenge that ruling on appeal on the ground addressed by the district court even if he failed to raise the issue in district court. In such a case, review on appeal is not for "plain error," but is subject to the same standard of appellate review that would be applicable if the appellant had properly raised the issue.

352 F.3d at 1328. In *Buntyn* and *Lowe*, panels of this Court held that where the district court's ruling "addressed all the elements," preservation is satisfied as to all of the elements even when the defendant's motion only raises some of the elements. 117 F.4th at 1270; 104 F.4th at 808. The premise of *Hernandez-Rodriguez* should provide the guiding principle: Where the district court *sua sponte* considers an element of the offense in resolving a motion for judgment of acquittal, even where that element was left unaddressed by the defendant's motion, the appellate challenge concerning that element is subject to the same standard of review as if the defendant

had properly raised the issue. Here, that principle is satisfied because the District Court discussed the element of Mr. Hebert's status as a whole, not merely Mr. Hebert's argument that membership in a federally-recognized tribe had not been established.[1] Therefore, this Court should apply a *de novo* standard of review.

2. Even if Mr. Hebert's appellate challenge to the sufficiency of the evidence is not preserved, the plain error standard is functionally identical in the context of Rule 29 motions for judgment of acquittal.

Normally, review for plain error consists of a four-prong test: "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 1130, 1137 (10th Cir. 2017). However, this Court has repeatedly explained that "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). In such cases, panels of this Court do not apply the four-prong test—they often do not even mention it.

[1] "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).

Instead, they simply apply the preserved-error *de novo* standard of review. *See*, *e.g.*, *United States v. Pritchett*, Case No. 23-7070, 2025 WL 48144, at *5 (10th Cir. Jan. 8, 2025); *United States v. Curry*, Case No. 23-1047, 2024 WL 3219693, at *1–2 (10th Cir. June 28, 2024); *United States v. Freeman*, 70 F.4th 1265, 1272–73 (10th Cir. 2023); *Otuonye*, 995 F.3d at 1210; *Gallegos*, 784 F.3d at 1359; *United States v. Rufai*, 732 F.3d 1175, 1189 (10th Cir. 2013) (mentioning, but not applying, the four-prong plain error standard and reversing defendant's convictions); *United States v. Duran*, 133 F.3d 1324, 1335 n.9 (10th Cir. 1998).

There is one unique exception to this practice: In *United States v. Goode*, the panel held that the fourth prong of plain error was not satisfied in a case where the defendant was charged with being a felon in possession of a firearm. 483 F.3d 676, 682 (10th Cir. 2007). The fourth prong was not met because, even though the evidence was not sufficient to satisfy the elements as set forth in the jury instructions, the evidence was clearly sufficient to satisfy all of the elements of the offense as charged in the indictment. *Id.* Where the jury instructions created a heightened burden on the government to present evidence, the fourth prong of plain error was not satisfied when the evidence was clearly and overwhelmingly sufficient as to the actual elements of the offense. *Id.*; *see also Rufai*, 732 F.3d at 1194–95 (explaining holding in *Goode*).

3. The Government's evidence fails, as a matter of law to prove that Mr. Hebert does not have "some Indian blood" because a person's self-reported racial or ethnic identity proves nothing about their biological ancestry.

The Government's argument seems to revolve around the premise that Mr. Hebert's choice to identify with a particular racial or ethnic background is proof that he has no Indian blood at all. But this ignores science and the realities of our society. Choices about self-identification of race or ethnicity do not preclude a person from belonging to other backgrounds as well.

Mr. Hebert's step-daughter, who knew him for an indeterminate period of time, testified that he racially self-identified as "part Mexican," which she explicitly qualified by saying "I think," demonstrating a lack of certainty on her part. (Vol. III, at 131). This answer was in response to a question about Mr. Hebert's racial identity, not to a question about his biological background. And it is equally important to remember that Mr. Hebert's stepdaughter had lived with Mr. Hebert only once, which was the brief period of time leading up to the charged events. (Vol. III, at 130).

When this Court formulated the two-part Indian status test, one question before it was whether it should retain the "some Indian blood" requirement. *Prentiss III*, 273 F.3d at 1280–82. This Court chose to retain that requirement for various reasons, including "the view of scholars that some demonstrable biological identification as an Indian is an important component of determining Indian status in this context." *Id.* at 1282 (internal quotation marks omitted). The Government

asserts that this Court's retention of the blood quantum requirement reflects a categorical rejection of Mr. Hebert's argument that a person's racial identity is not proof of blood status. (Govt's Resp. at 18–19). But the Government's argument misses the mark: *Prentiss III* adopted the position that Indian status requires proof of some degree of *biological identification* as an Indian. This is not the same as a person's racial or ethnic self-identity. A person may have multiple, even numerous, ancestral backgrounds and they may choose to self-identify as one or multiple; the Government's own witness acknowledged that a person can be *both* Hispanic and Native American. (Vol. III, at 266). In fact, it is common sense that most people *do* come from multiple ancestral backgrounds. That conclusion is supported by science. *See* Katarzyna Bryc et al., *The Genetic Ancestry of African Americans, Latinos, and European Americans across the United States*, THE AMERICAN JOURNAL OF HUMAN GENETICS, Volume 96, Issue 1, 37–53 (2015) (analyzing genetic prevalence of various ancestral backgrounds in Americans), *accessible at* https://www.cell.com/action/showPdf?pii=S0002-9297%2814%2900476-5 (accessed March 17, 2025). Perhaps most notably, the Bryc study shows that "On average, we estimate that [self-reported] Latinos in the US carry 18.0% Native American ancestry, 65.1% European ancestry, and 6.2% African ancestry." *Id.* at 43. This is the largest average percentage of Native American ancestry found among the three racial groups considered in the study. *Id.* at 42–46. Given the average ancestry of Latinos in the United States,

Mr. Hebert's reported self-identification as Latino would actually support the conclusion that he does have some amount of Indian blood.

The Supreme Court was categorical in its declaration that a person's legal status as an "Indian" is not racial in nature; it is a legal classification premised upon their affiliation with quasi sovereign tribal entities. *United States v. Antelope*, 430 U.S. 641, 645–46 (1977). Racial identity has no role to play in determining Indian status because "[r]ace is a social construct used to group people." National Institutes of Health, National Human Genome Research Institute, "Race," *accessible at https://www.genome.gov/genetics-glossary/Race* (last accessed March 17, 2025). The *Prentiss III* test is concerned with biological identification, not social construct identification. Even the *Prentiss III* test seems to recognize the premise that a person can have many ancestral backgrounds. The test merely requires "some" Indian blood, not "a lot" of Indian blood, not "mostly" Indian blood, and it certainly does not require that a person self-identify as Native American to satisfy the standard. Thus, the Government's proof, which exclusively relied upon Mr. Hebert's self-identifications as to his race, was not sufficient to prove as a matter of law that he does not have some Indian blood.

4. The Government's evidence fails, as a matter of law, to prove that Mr. Hebert was not recognized as an Indian, either formally or informally, because simply contacting five tribes in Oklahoma proves nothing when the testimony does not even demonstrate that investigators received responses from those tribes.

Here, the Government's evidence relies upon the testimony of Investigator Grantham and SA Sparke concerning their contacts with five particular tribes within Oklahoma as they investigated Mr. Hebert's potential tribal affiliation. Investigator Grantham testified that he never received "any written documentation as to Mr. Hebert's tribal status[.]" (Vol. III, at 267). SA Sparke similarly testified that he had not "received information from any source indicating [Mr. Hebert] is Native American or Indian[.]" (Vol. III, at 302).

While each witnesses' testimony supports the premise that they contacted five tribes, it does not indicate they ever even received a response from those tribes. Had Investigator Grantham or SA Sparke received responses indicating Mr. Hebert was not a member of those tribes, they would have said as much. But they did not. Instead, they both evasively testified that they had never received documentation or information concerning Mr. Hebert's status. Even taking their testimony as true, it would not be a permissible inference to conclude that these tribes had affirmatively declared Mr. Hebert was not an enrolled member of them; that could only be done through an impermissible assumption that they responded to the inquiries *and* those

responses stated Mr. Hebert was not an enrolled member. That assumption simply is not supported by the evidence.

Furthermore, even if the evidence did support those conclusions, evidence that a mere five tribes in Oklahoma—which is home to 36 federally-recognized tribes tribes[2]—did not have records of Mr. Hebert's enrollment proves nothing on its own. This approach would require an assumption that if a person is an Indian in Oklahoma, they must necessarily be a member of those tribes and, if they are not, then they are not enrolled members of a tribe. Even if the Government need not bring tribal officials in as witnesses, there must be a greater effort than simply contacting five "major" tribes and saying that is "good enough."

Assuming, *arguendo*, that contacting the "major" tribes is "good enough," the Government would need to show that the tribes contacted have a logical connection to the defendant. Simply residing in Oklahoma (or allegedly committing a crime in Oklahoma) does not mean that merely contacting five "major" tribes in Oklahoma is sufficient evidence to prove that a defendant lacks enrollment in a federally-recognized tribe. While a person born in Oklahoma might be more likely to have a connection to the five major tribes in Oklahoma, there is no reason at all to believe that someone born elsewhere would have such a connection. Instead, the rationale

[2] *See* Bureau of Indian Affairs, Tribal Leaders Directory, *accessible at* https://biamaps.geoplatform.gov/Tribal-Leaders-Directory/ (last accessed March 17, 2025).

the Government relies upon could only plausibly function where the major tribes associated with an individual's birthplace are contacted. Permitting the Government to prove an absence of enrollment in every Oklahoma case simply by reference to the enrollment registries of five local major tribes (even when the defendant's only connection to Oklahoma is that the crime was committed there) divorces the element from reality; the Government would obtain convictions based upon assumptions rather than proof. There was no evidence put forward in this case that would demonstrate these five tribes would necessarily be the most likely sources of recognition if Mr. Hebert were recognized as an Indian. Given the absence of such evidence, this evidence cannot stand as sufficient to prove beyond a reasonable doubt that Mr. Hebert was not recognized as an Indian, either formally or informally.

The government briefly complains that this Court's precedents place a burden upon the Government to disprove informal recognition. (Govt's Resp. at 20–21). Insofar as the Government asks this Court to shift the burden of proving status to Mr. Hebert as an affirmative defense, this Court has declined to do so, as demonstrated by the Petition for Rehearing En Banc which this Court denied. *United States v. Simpkins*, Case No. 22-7048, Documents 72 & 80 (April 22, 2024). The Government never sought to introduce, nor does it claim that it did introduce, evidence concerning informal recognition, and so it cannot be said that its complete

lack of evidence on the matter is sufficient to prove, beyond a reasonable doubt, the absence of informal recognition.

5. Out of an abundance of caution, Mr. Hebert will briefly address the four prongs of plain error review.

That there was error has been argued both in Mr. Hebert's Initial Brief and further explicated in this Reply. Thus, this section will focus on the three remaining prongs of plain error.

The error was plain: It has been a well-settled legal principle for more than twenty years that Indian and non-Indian statuses are elements of an offense and that Indian status has two elements that must be satisfied. *See Prentiss III*, 273 F.3d at 1280. By extension, it is well-established that the Government must prove the absence of one of those two elements to prove non-Indian status beyond a reasonable doubt. *Id.* To the extent this was not obvious from *Prentiss III*, it was made obvious by this Court's published decision in *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). It was further well-settled that a person's status as an Indian is not a racial classification. *Antelope*, 430 U.S. at 645–46. And it is a well-settled principle that the absence of enrollment in a particular tribe does not prove a person is not an Indian. *Prentiss III*, 273 F.3d at 1283.

The Government's failure to prove Mr. Hebert's non-Indian status affected his substantial rights because it resulted in a conviction on evidence that did not prove every element of the offense beyond a reasonable doubt.

Finally, the exception in *Goode* is rare, and it does not apply to this case. 483 F.3d at 682 ("[W]e deny relief because this is one of those rare cases in which the defendant's insufficient-evidence claim fails on the fourth element."). In that case, the fourth prong was not satisfied because the evidence was sufficient to prove all of the true elements of the offense, even where it was not sufficient to prove the heightened burden created by the jury instructions. *Id.* Here, the evidence fails to satisfy the elements of the offense. Thus, the fourth prong of plain error review is also satisfied.

This Court should vacate Mr. Hebert's conviction and remand for entry of judgment of acquittal.

II. (Issue Two) The District Court plainly erred when it failed to provide the jury with an instruction defining an element of the offense when that element concerns a term of law with a specific legal meaning that is not capable of commonsense or lay interpretation.

What does it mean to be Indian? The Court never answered that question when it instructed the jury in Mr. Hebert's case. The jury was tasked with determining if Mr. Hebert and K.D. were Indian or non-Indian persons, and it could only find Mr. Hebert guilty of the charged offense if it found, beyond a reasonable doubt, that he was a non-Indian person and K.D. was an Indian person. This failure to instruct was plain error that affected Mr. Hebert's substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

A sport cannot be played unless its rules are understood by the players and the officials. Where those rules use special terms, or they use terms that might have nonobvious meanings within the context of that sport, those terms must be explicitly and clearly defined. Without these explanations, the players are incapable of conforming their behavior to the rules, and officials cannot determine when the rules have been violated.

When a jury is tasked with finding a fact to be proven beyond a reasonable doubt, and that fact is a term of law with its own elements, that term and its elements must be explicitly and clearly defined. Otherwise, the jury has no ability to conform its decision to the law and make a determination as to whether that fact has been proven.

"Indian" is a term of law. It does not mean whatever someone thinks it should or might mean; its meaning is not obvious to a layperson (it is not even obvious to lawyers unless they are versed in this field of law). When the Government presented its case to the jury, it focused on racial and ethnic identity. But this is not the standard by which Indian status is determined. There are two elements that must be met to make a person an Indian; only one element need be disproven to prove that a person is not an Indian: (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 district court's failure to instruct the jury on these elements was plainly erroneous and that error affected Mr. Hebert's substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

The Government protests that Mr. Hebert does not cite a case supporting an "elements within elements" instruction. That is true, but such a case is not needed. Jury instructions should "correctly state the governing law and provide the jury with an ample understanding of the issues and the applicable standards." *United States v. Bader*, 678 F.3d 858, 868 (10th Cir. 2012). "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). A jury is not capable of determining Indian (or non-Indian) status beyond a reasonable doubt without having this term of law defined for them. That Indian status has two elements has been a well-settled legal reality for more than twenty years. *See Prentiss III*, 273 F.3d at 1280. That non-Indian status must be proven beyond a reasonable doubt has also been a well-settled legal reality for more than twenty years. *Id.* By extension, in cases where it must prove non-Indian status, the requirement that the Government must prove, beyond a reasonable doubt, that one of the two elements of Indian status is missing has been a well-settled legal reality for more than twenty years. *Id.* Therefore, it was plain and obvious error to fail to instruct the jury as to the elements of what makes a person an Indian and the Government's burden to prove the absence of one of those elements beyond a reasonable doubt.

The Government's citation to *United States v. Dennison*, 937 F.2d 559, 562–63 (10th Cir. 1991) is misplaced. (Govt's Resp. at 25). The Government quotes *Dennison* for the proposition that an instructional error "occurs only when the failure to give a requested instruction serves to prevent the jury from considering the defendant's defense." (*Id.* (quoting *Dennison*, 937 F.2d at 562–63)). But *Dennison* was concerned with whether evidence "was sufficient to warrant specific

instructions on the defense of mental illness." *Id.* at 562. Additionally, the panel in *Dennison* determined that the instructions given adequately conveyed the entirety of the law concerning the defendant's defense, which combined evidence of his intoxication with evidence that he had borderline personality disorder to claim he could not form the specific intent needed to commit the crime. *Id.* at 563. In *Dennison*, the jury was adequately instructed concerning intoxication as a defense to specific intent, and that instruction enabled the jury to consider evidence of the defendant's mental illness to determine if he was capable of forming specific intent. *Id*.

Unlike *Dennison*, this case involves the absence of an instruction defining a key legal term that was an element of the offense. Here, the meaning of the key legal term was not covered in other instructions, nor was its meaning ever explained by the district court. This legal term is not subject to commonsense or lay interpretation, and it must be defined if a jury is to make a determination as to whether the element is met. This failure by the district court was plainly erroneous.

The Government describes the evidence of Mr. Hebert's non-Indian status as "simple, but compelling," and it goes on to implicitly suggest that basic elements of the offense need not be defined where a defendant does not present evidence in his own defense to challenge that element. (Govt's Resp. at 25). But a person's status as an Indian or non-Indian is not an affirmative defense where the burden is on the

defendant to ensure there is sufficient evidence to support an instruction. *See United States v. Butler*, 485 F.3d 569, 573 & n.5 (10th Cir. 2007) (describing, with citation to *United States v. Bailey*, 444 U.S. 394, 415–416 (1980), the obligation of defendants to ensure the evidence supports an instruction on an affirmative defense). And this Court's own precedent in *United States v. Duran* explains that a defendant's substantial rights are affected when a plainly erroneous jury instruction "concerns a principal element of the defense or an element of the crime." 133 F.3d 1324, 1330 (10th Cir. 1998). Thus, there is ample reason to conclude that the error affected Mr. Hebert's substantial rights simply because it failed to provide a jury with a correct and adequate statement of the law concerning a necessary element of the offense.

Nor does the Government explain what makes the evidence compelling; it does not even identify which evidence is compelling. In reality, the evidence presented concerned only Mr. Hebert's purported racial or ethnic self-identity, not his biological status as a person with some degree of Indian blood. *See Prentiss III*, 273 F.3d at 1282 (noting that element of Indian status requiring some degree of Indian blood is part of a requirement to prove "demonstrable *biological* identification as an Indian" (emphasis added and internal quotation marks omitted)). As described above in an earlier section, not only do people regularly come from multiple ancestral backgrounds; how they self-report or self-identify does not change their biological ancestry. Bryc, *Genetic Ancestry*, THE AMERICAN JOURNAL OF

HUMAN GENETICS, at 42–46. Had the jury been instructed that the test for Indian status was concerned with blood ancestry and recognition, rather than being left with arguments concerning personal identity as a particular race or ethnicity, there is real and reasonable doubt whether a jury would have returned the same verdict in this case.

The Government also contends that there was no "reasonable threat of a damage to the reputation, fairness, or integrity of judicial proceedings," and it cites the "seriousness of the offense" as a basis for concluding that reversal "would damage of the judicial proceedings." (Govt's Resp. at 25). But this ignores a prior panel's warning: "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)). The Government's contention that the seriousness of the offense should weigh in favor of affirmance is concerning; the offense in question carries a mandatory minimum sentence of thirty years in prison, 18 U.S.C. § 2241(c), and the jury was not properly instructed on all of the elements. The notion that a person can be imprisoned for a minimum of thirty years and not obtain relief even when the jury was not properly instructed on the

fundamental and mandatory elements of the offense risks causing great harm to the fairness, integrity, and public reputation of judicial proceedings.

This Court should therefore vacate Mr. Hebert's conviction and sentence and remand for further proceedings.

III. (Issue Three) Two law enforcement officers unambiguously testified that Mr. Hebert not only never said he was (or was not) an Indian, but that he was never even asked if he was an Indian. The Government used this testimony as substantive evidence to prove an element of the offense and emphasized it in closing arguments. This was a violation of Mr. Hebert's constitutional rights and was plain error.

To begin, the Government has severely misconstrued at least one aspect of Mr. Hebert's arguments. The Government seems to think that, in setting forth the testimony of both Investigator Grantham and SA Sensor, Mr. Hebert believes it was somehow inappropriate for SA Sensor to state on cross-examination that he did not ask Mr. Hebert about Indian status. (Govt's Resp. at 27). This is not the case. SA Sensor's answer was indeed elicited by Mr. Hebert's counsel. However, SA Sensor's answer reveals the constitutional violation that occurred in his direct-examination testimony: The cross-examination of SA Sensor reveals that SA Sensor *never even asked* Mr. Hebert if he was Indian or Native American. Thus, when SA Sensor testified that Mr. Hebert did not identify himself as "Native American", that testimony was aimed at punishing Mr. Hebert for not spontaneously declaring himself to be Indian or Native American. This was not mere silence in the face of questioning (which is itself protected by the Fifth Amendment); it was silence in the absence of questioning.

The Government also mentions the fact that Investigator Grantham had given *Miranda* warnings to Mr. Hebert prior to questioning. (Govt's Resp. at 27). It mentions this fact as though it is helpful to the Government's position. It is the

opposite. This fact emphasizes, and exacerbates, the violation that occurred during Investigator Grantham's testimony. Again, Investigator Grantham did not ask Mr. Hebert about his Indian or tribal status. Again, the testimony aimed to punish Mr. Hebert for failing to make a spontaneous declaration of his status. But in this case, it is clear that Mr. Hebert had been read *Miranda* warnings in relation to the questioning.[3] By having *Miranda* warnings read to him, Mr. Hebert had been informed that anything he said could be used against him in a future prosecution. He remained silent, and nothing may be inferred from that fact. Moreover, his silence occurred in the absence of questioning. The testimony of SA Sensor and Investigator Grantham were flagrant violations of Mr. Hebert's due process rights.

During its closing arguments, the Government was not shy about using this testimony as substantive evidence of guilt as to the element of non-Indian status:

> 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.

[3] While it can reasonably be presumed that SA Sensor or someone else involved in Mr. Hebert's arrest in Pennsylvania also read *Miranda* warnings to Mr. Hebert, there is no testimony indicating this to be the case.

(Vol. III, at 396–97). The Government's aim in making these two statements—which occurred side-by-side—is no mystery: If Mr. Hebert were an Indian, he would have said so, therefore he is not an Indian and the jury should find that element to be met beyond a reasonable doubt. The Government argues that these comments were "limited." (Govt's Resp. at 27). The Government cannot escape simply because it did not harp on the issue for multiple pages of a transcript. These comments were not limited; they were laser-guided missiles that struck their target with precision.

1. There was error, and it was plain and obvious. This plain error was so egregious that it violated Mr. Hebert's substantial rights and seriously affects the fairness, integrity, or public reputation of judicial proceedings.

As the Government correctly points out in its response, had this issue been preserved, the standard of review would ask:

> [W]hether there has been an impermissible comment on a defendant's right to remain silent . . . by determining whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent. The contested use of the statement must be considered in the context in which the use was made.

Pickens v. Gibson, 206 F.3d 988, 998 (10th Cir. 2000) (internal quotation marks omitted). This rule was plainly and unambiguously violated here, both in the questioning of Investigator Grantham and SA Sensor, and again during closing arguments. But review here is for plain error. And given the flagrant nature of the violations, as outlined above, the question is not whether there was error or if it was

plain, the question is whether the third (substantial rights) and fourth (seriously affects judicial proceedings) prongs of plain error are satisfied in this case. But this Court "appl[ies] plain error less rigidly when reviewing a potential constitutional error," *United States v. Benford*, 875 F.3d 1007, 1016–17 (10th Cir. 2017) (internal quotation marks omitted). The error in this case is a violation of Mr. Hebert's due process rights. *Pickens*, 206 F.3d at 998; *United States v. Kee*, --- F.4th ---, Case No. 23-2189, 2025 WL 629969, at *2 (10th Cir. 2025) (finding plain error violation of due process rights when government impeached a defendant's credibility using post-arrest silence).

The Government simply waves its hand and dedicates a mere 48 words to arguing that there was no prejudice to Mr. Hebert. (Govt's Resp. 27–28). It says there was "sufficient" evidence to convict Mr. Hebert based upon the testimony of Kara Byers and Government's Exhibits 16 and 17. Even if this evidence were found to be "sufficient," it is anything but overwhelming. Weak evidence of an element undermines confidence in an outcome. *Benford*, 875 F.3d at 1018. Setting aside the testimony of Investigator Grantham and SA Sensor, the Government is left with this testimony from 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.

(Vol. III, at 131). It also has the racial identifications in two driving records, but there is no evidence in the record that Native American was an option to select in those states. Even if it were, personal racial or ethnic identity is not the same thing as the legally-defined status of being an Indian. And it bears emphasizing that if the Government believed this evidence was sufficient on its own to convince the jury, then its closing arguments would not have cut directly to the bone with its references to Investigator Grantham ("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.") and SA Sensor ("[T]here was no indication from the defendant that he was an Indian."). (Vol. III, at 396–97).

2. This Court's recent published decision in *United States v. Kee* supports Mr. Hebert's contention that his substantial rights were affected.

The government conspicuously provides no case law to support its contentions that the plain error in this case did not affect Mr. Hebert's substantial rights. Even more noticeable is the lack of any argument from the Government that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Days after the Government filed its response, another panel of this Court issued a published decision in *United States v. Kee*, --- F.4th ---, Case No. 23-2189, 2025 WL 629969. In that case, the panel notably declined to analyze the fourth prong

of plain error analysis; it concluded the Government "offer[ed] no argument" on that prong. *Id.* at *2. This panel should reach the same conclusion. Further, if oral argument is granted, the Government should not be permitted to make arguments concerning the fourth prong at that time. It has forfeited the opportunity to pursue that position. But even setting aside the Government's failure to raise the fourth prong, the Government cannot be allowed to obtain convictions by using a defendant's constitutionally-protected silence as substantive evidence of an element. To allow such actions would certainly call into question the fairness, integrity, or public reputation of judicial proceedings.

In *Kee*, the defendant testified and provided his version of events (including a claim of self-defense). 2025 WL 629969, at *2. On cross-examination, the government questioned the defendant about his failure to tell anyone about his side of the story until trial. *Id.* Then, in closing arguments, the government pointed out that the defendant shared his version of events for the first time at trial. As the panel pointed out: "It would be hard to find a more clear-cut violation" of the defendant's constitutional right to remain silent. *Id.*

The *Kee* panel then pointed to the absence of hard evidence to impeach the defendant's story. *Id.* While there was other evidence available to impeach the defendant, that evidence came with downsides for the government's case: Its own witness was subject to similar impeachment. Thus, the "government's repeated

reference to [defendant's] post-*Miranda* silence served only one purpose—to cause jurors to make a negative inference about [defendant's] truthfulness based on the mere fact that he asserted his constitutional right." *Id.* The panel concluded that, given the weak case against the defendant, the panel could not "be confident that the jury would have returned the same verdict had the [error] not occurred." *Id.* (setting forth standard for "reasonable probability" that error affected substantial rights).

Just as in *Kee*, it would be hard to find a more clear-cut violation of Mr. Hebert's right to remain silent. Two law enforcement officers, one of whom explicitly testified to giving Mr. Hebert *Miranda* warnings, each testified that Mr. Hebert never declared anything concerning his Indian status (and was never asked about it). The Government then used that testimony as affirmative evidence to prove his lack of Indian status, going so far as to emphasize it in closing arguments. And just as in *Kee*, the weak evidence, if it could be considered sufficient at all, combined with the Government's flagrant violation or Mr. Hebert's right to remain silent and its emphasis during closing arguments on Mr. Hebert's silence, raises real doubts that the jury would have returned the same verdict absent the violations.

Therefore, this Court should vacate Mr. Hebert's conviction and sentence and remand for further proceedings.

CONCLUSION

This Court should vacate Mr. Hebert's Judgement and Conviction and remand for entry of judgment of acquittal or for a new trial.

Respectfully submitted,

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s/ Jared T. Guemmer

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Date: March 17, 2025

s/ Jared T. Guemmer

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2025, 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