No. 24-2128

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOEL RUIZ,
Defendant-Appellant

On Appeal from the United States District Court
for the District of New Mexico
D.C. No. 22-CR-365 (The Hon. David Herrera Urias)

ANSWER BRIEF FOR THE UNITED STATES

ORAL ARGUMENT IS REQUESTED

June 2025

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There are no prior or related appeals.

ISSUES PRESENTED

Defendant Joel Ruiz was convicted at trial of one count of aggravated sexual abuse after the jury heard evidence that he lured Jane Doe 1 into his trailer with candy and abused her, touching her genitals with his hands when she was six or seven years old. Ruiz presents three issues on appeal. First, he argues the district court erred in denying his motion to dismiss the indictment, alleging that the time frame was too broad to provide sufficient notice and allow him to raise double jeopardy. Second, he argues that the government produced insufficient evidence to establish his non-Indian status. Finally, he argues that the timing and manner of the *Allen* instruction was coercive.

None of these issues has merit, and the Court should affirm Ruiz's conviction.

STATEMENT OF THE CASE AND THE FACTS

After a pair of cousins—Jane Does 1 and 2—reported that Joel Ruiz had molested them on the Jicarilla Apache reservation, Ruiz was charged with aggravated sexual abuse under 18 U.S.C. §§ 1152, 2241(c), and 2246(2)(D). 1R.22. Drawing from the children's allegations of their ages during the times they were abused, *see* 5R.38 (providing the children's birthdays), Count 1 of the indictment alleged that Ruiz had intentionally touched Jane Doe 1's genitalia, not through the clothing, between January

27, 2016, and January 27, 2020. *Id*. Count 2 alleged that he had done the same to Jane Doe 2 between February 13, 2013, and February 13, 2016. *Id*.

Prior to trial, Ruiz filed a motion to dismiss the indictment, alleging that its broad date ranges failed to provide him with fair notice of the allegations, allow him to present an adequate defense, or protect him from double jeopardy. 1R.56-66. The government responded that the indictment tracked Jane Doe 1 and 2's allegations about the abuse they had suffered, 1R.90-91, 95-96, which in Jane Doe 1's case she had alleged to be a pattern of repeated abuse. As to Ruiz's double-jeopardy argument, the government acknowledged that whether Ruiz was convicted or acquitted, he could not be charged with additional sexual acts against the Jane Does during the periods covered by the indictment. *Id*. at 94.

After a hearing on the motion, 5R.28-46, the district court ordered additional briefing, *id*. at 46. In that briefing, Ruiz admitted that "[d]espite extensive research, [he] could not identify any one case that was factually analogous to his own as it relates to his claim that the overbroad time frame in the indictment violates his right to due process." 1R.244. The district court subsequently denied the motion to dismiss, finding that the time frames alleged in the indictment were sufficient to provide notice and protect Ruiz from double jeopardy. 1R.366. It noted that "[i]n the absence of an express provision in the statute, proof of the specific date of the crime is not an

essential element so long as it is shown to have occurred after the prior conviction, within the statute of limitations, and before the indictment." *Id.* at 364-65 (quoting *United States v. Francisco*, 575 F.2d 815, 818 (10th Cir. 1978)).

A three-day trial was held in January 2024. Although Jane Doe 1 alleged that Ruiz had molested her many times, on the morning of trial the district court ruled that the government would be limited to proving one act of abuse because the indictment had only alleged "a" sexual act. 5R.249.

The evidence at trial showed that Jane Doe 1, who was born in 2012, had lived for years with her parents in Dulce, New Mexico on the Jicarilla Apache Nation reservation. 5R.329-31. They lived on the same piece of land as Defendant Joel Ruiz, who was married to Jane Doe's great aunt Celia. *Id.* at 332-37. There was an abandoned house on Celia's side of the property, but Ruiz could not live in that house because the tribe would not provide any water or electricity hookups. 5R.336. As a result, Ruiz would live in the trailer during the spring, summer, and fall months, but it was too cold for him to live there during the winter. 5R.337.

During the summer when Jane Doe 1 was six or seven, *id.* at 305, when she was playing outside alone, *id.* at 303, Ruiz called her over to his trailer, *id.* at 301. It was dark inside. *Id.* at 305. He offered her small candy bars if she would "stand there while he did something." *Id.* at 301-02. He then put

his hands in her pants, underneath her underwear, and touched her both inside and outside her vagina. *Id*. at 304. He told her not to tell anyone and gave her the candy. *Id*. at 306. Jane Doe 1 identified Ruiz in the courtroom. *Id*. at 300.

Jane Doe 2, born in 2010, testified that a similar thing happened to her when she was three or four years old. 5R.275.[1] She was playing hide and seek with her cousins when Ruiz beckoned her over to his trailer, where he offered her candy if she would pull down her pants. *Id*. at 271-72. He then touched her inside and outside of her vagina. *Id*. at 272-73. Jane Doe 2 was initially unable to identify Ruiz in the courtroom, *id*. at 265, though after being permitted to leave the witness box to look around, she did identify him, *id*. at 270-71.

The evidence at trial also included testimony from Rome Wager, a criminal investigator for the Jicarilla Apache Nation, and from FBI Special Agent Piere Himel as to the steps they took to determine that Ruiz was not

[1] During the investigation, the government learned that years earlier, another individual who was now an adult (Jane Doe 3) had reported that she, too, had been molested by Ruiz when she was a child. 2R.29. Although the district court determined by a preponderance of the evidence that Ruiz had indeed molested Jane Doe 3, it denied the government's motion to present this evidence to the jury under Rule 414, deeming its probative value to be outweighed by the danger of unfair prejudice. 6R.299-306.

an Indian under federal law. That evidence is described in detail in Argument II below.

Ruiz called one witness in his defense: a psychologist who testified as an expert in "children's suggestibility." 5R.504. He had reviewed materials related to Jane Doe 1 and 2's accounts, and he discussed several factors that he felt called into question their reliability. *See id.* at 511, 516-17, 519. 521-22, 524-25, 528.

The case was submitted to the jury at 2:53 p.m. on Thursday, January 18. 5R.596. The jury deliberated for two hours before being dismissed for the evening. *Id.* at 598-99. Approximately five hours into their deliberations on Friday, January 19, the jury sent out a note that read: "If we are divided on our decided votes and are not going to come to the conclusion of guilty, not guilty, are we a hung jury because we cannot come to a definite decision?" *Id.* at 605.

Ruiz opposed giving any form of additional instruction, but after consideration, the district court determined that it would give the Tenth Circuit's modified *Allen* instruction: "I think it's important to give the instruction. I'm not as convinced that they've been working hard or long enough to see whether or not they are truly deadlocked." *Id.* at 605-06. The court decided, however, to remove the pattern instruction's second paragraph,

which informs the jury that failure to reach a verdict means that the case must be tried again.[2]

The court thereafter called the jury back in and encouraged them to deliberate further. *Id*. at 613. The instruction reminded the jury that the defendant is presumed innocent and that the government bears the burden of proof beyond a reasonable doubt. *Id*. It also asked every juror, whatever side he or she was presently on, to reconsider his or her views but cautioned that no juror should surrender their "honest conviction" "solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." *Id*. The court assured the jury that the instruction was "not meant to rush or pressure you into agreeing on a verdict." *Id*. at 614.

Approximately two-and-and-half hours later, the jury returned a verdict of guilty as to Count 1, pertaining to Jane Doe 1, and a verdict of not guilty as to Count 2, pertaining to Jane Doe 2. 5R.615-16. The jury convicted Ruiz on Count 1 and acquitted him on Count 2.

[2] The second paragraph reads in full: "This is an important case. If you should fail to agree upon a verdict, the case is left open and must be tried again. Obviously, another trial would require the parties to make another large investment of time and effort, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you." Tenth Cir. Crim. Pattern Jury Inst. No. 1.42.

SUMMARY OF THE ARGUMENT

1. The district court did not err in denying Ruiz's motion to dismiss the indictment for insufficient temporal specificity. An indictment is sufficient where it is "reasonably" particular as to time, affords the defendant fair notice, and enables him to assert a double jeopardy defense. All those criteria were met here.

The indictment was reasonably particular because it was based on the allegations of the children who had reported that Ruiz had molested them. Children often have difficulty pinning down the date of an offense, particularly where, as in Jane Doe 1's case, an undifferentiated pattern of abuse was alleged. The government's ability to name specific dates is limited by a child's account, and courts have accordingly recognized in such cases that timespans as long as or even longer than those alleged here are permissible.

Next, the indictment permitted Ruiz to assert a defense, and he did so by attacking the credibility of Jane Does 1 and 2. Ruiz asserts that the breadth of the indictment prevented him from asserting an alibi defense, but such defenses are rarely available in cases where the accused molester lives in close proximity to the children he is accused of molesting, regardless of how narrowly the indictment is framed. Further, as to the sole abusive incident on which the district court permitted testimony, Jane Doe 1 testified

that the incident occurred during the summertime, which other evidence showed was not the time of year when Ruiz lived elsewhere.

Finally, as the district court found, Ruiz is protected from future prosecution for incidents of abusive sexual contact perpetrated against Jane Does 1 or 2 during the period covered by the indictment. This is the natural consequence of the indictment's breadth, and Ruiz has not suffered any deprivation of his double-jeopardy rights.

2. The district court correctly denied Ruiz's motion for acquittal for lack of proof of Ruiz's non-Indian status. The United States presented sufficient evidence through testimony that Ruiz was non-Indian. First, the jury heard from two law-enforcement witnesses who testified that they were able to determine that Ruiz was not Indian. Both officers regularly, as part of their job duties, have to determine whether an individual is Indian or non-Indian. Both testified that in making this determination, they will speak to those involved about possible tribal affiliations, and if they learn of one, they will follow up with that tribe's enrollment office. If that process does not yield any tribal affiliation, the person is not Indian. From this, the jury could easily infer that no one involved, including Ruiz, had disclosed that he had any tribal membership. The jury also heard that these two witnesses had reviewed information in government databases and government documents signed by Ruiz, which led them to conclude that he was not Indian. Finally,

the jury learned that Ruiz was born in Mexico, a fact which makes it substantially less likely that Ruiz is an Indian under federal law. Taking all of this information together in the light most favorable to the government, the jury acted rationally in determining that Ruiz was not an Indian.

3. Finally, the modified *Allen* charge was not coercive. The instruction provided to the jury, which was derived from this Court's pattern instructions, contained all of the standard coercion-dispersing components, to include a reminder about the burden of proof and presumption of innocence, and an admonition that the jurors should not abandon their "honest convictions" simply to return a verdict. The district court added nothing that could undercut those messages. Although it did not give the modified *Allen* charge with the initial set of instructions, it was not required to do so. Furthermore, the timing of the jury's verdict, rendered nearly two-and-a-half hours after the *Allen* charge, dispels any inference of coercion.

ARGUMENT

I. The district court correctly denied Ruiz's motion to dismiss Count 1 of the indictment for the breadth of its time frame.

A. An indictment is sufficient where it is "reasonably" particular as to time, affords the defendant fair notice, and enables him to assert a double jeopardy defense.

"An indictment is sufficient if it "sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense."

United States v. Dashney, 117 F.3d 1197, 1205 (10th Cir. 1997). "[T]he time or date an offense is committed is not an essential element of an offense unless the statute makes it so." *United States v. Davis*, 436 F.2d 679, 682–83 (10th Cir. 1971). In cases such as this, "where time is not an essential element of the offense, it is sufficient to charge facts which show that the offense was committed within the statutory period of limitation." *Butler v. United States*, 197 F.2d 561, 562 (10th Cir. 1952). In any event, an indictment's allegation of time need only be made with "reasonable particularity." *United States v. Cruikshank*, 92 U.S. 542, 544 (1875). Indeed, "within reasonable limits, an allegation about the date of the crime may be stated with great generality[.]" Charles Alan Wright & Arthur R. Miller et al., 1 Fed. Prac. & Proc. Crim. § 126 (5th ed.).

And "even if the indictment or information is deficient," "due process requirements may be satisfied if a defendant receives actual notice of the charges against him." *Parks v. Hargett*, 188 F.3d 519 (10th Cir. 1999) (cleaned up). That notice may be delivered at other hearings, for instance, *id.*, or it may come from discovery, *United States v. Ivy*, 83 F.3d 1266, 1282 (10th Cir. 1996). If notice is still insufficient, the defendant may seek additional clarification. When he "is entitled to further identification or specification, his

remedy is to apply for a bill of particulars," not dismissal of the indictment.[3] *United States v. Crummer*, 151 F.2d 958, 963 (10th Cir. 1945); *Durland v. United States*, 161 U.S. 306, 315 (1896) ("If defendant had desired further specification and identification he could have secured it by demanding a bill of particulars."); *Glasser v. United States*, 315 U.S. 60, 66 (1942) ("Such specificity of detail falls rather within the scope of a bill of particulars[.]").

"The sufficiency of an indictment is a question of law which [this court] review[s] de novo." *United States v. Kunzman*, 54 F.3d 1522, 1526 (10th Cir. 1995).

B. Broad time frames are reasonable in cases involving crimes against children.

What is "reasonabl[y] particular[ ]," of course, depends on the circumstances of the case and the allegations at hand. Because of "the inherent difficulties in investigating and prosecuting child abuse," courts have recognized that "[f]airly large time windows in the context of child abuse prosecutions are not in conflict with constitutional notice requirements." *United States v. Beasley*, 688 F.3d 523 (8th Cir. 2012) (quotation and citation omitted). These cases often involve "children of tender years who are simply

[3] For this reason, even if the Court were to agree that the indictment was impermissibly broad, dismissing the indictment is not an inappropriate remedy. And a bill of particulars—which Ruiz never requested in the first place—would deliver no benefit to him now, given the narrowness of the proof at trial.

unable to remember exact dates and times, particularly where the crimes involve a repeated course of conduct over an extended period of time." *State v. Mundy*, 99 Ohio App. 3d 275, 296 (1994). Certainly, "prosecutors should be *as specific as possible* in delineating the dates and times of abuse offenses, but [courts] must acknowledge the reality of situations where young child victims are involved." *Valentine v. Konteh*, 395 F.3d 626, 632 (6th Cir. 2005) (emphasis added).

Applying these principles, courts in child-abuse cases have countenanced indicted time spans that cover multiple years. In *Beasley*, for instance, the Eighth Circuit rejected the defendant's claim on direct appeal that "the admittedly broad time frame" of nearly seven years was "indefinite and overbroad." 688 F.3d at 533. Because the government had provided discovery detailing the allegations, the defendant was "not subject to unfair surprise at trial." *Id*. Nor was he prevented by the breadth of the allegation from presenting an alibi defense; what prevented that defense, rather, was his undisputed access and proximity to the child victims. *Id*. Finally, the Eighth Circuit rejected defendant's double jeopardy claim. *Id*.

Although the Tenth Circuit has not confronted facts similar to these on direct appeal, several of its decisions on habeas review support the district

court's ruling here.[4] To begin, in *Hunter v. State of N.M.*, 916 F.2d 595 (10th Cir. 1990), decided under pre-AEDPA standards, the Court rejected a defendant's claim that the three-year time span in his charging document for criminal sexual penetration violated his due process rights. *Id.* at 596, 600. Next, in *Burling v. Addison*, 451 F. App'x 761, 766 (10th Cir. 2011), the Court affirmed the denial of habeas relief to a defendant who challenged the six-year time span alleged in his indictment. Most recently, the Court did the same in *Eldridge v. Bear*, 833 F. App'x 736, 747 (10th Cir. 2020), where the state court called the child victim's allegations of abuse that occurred over a six-year period "as specific as could be expected under the circumstances."[5] Other courts are in accord. *See, e.g.*, *Tighe v. Berghuis*, No. 16-2435, 2017 WL 4899833, at *2 (6th Cir. Apr. 21, 2017) (unpublished) (six-year time period); *Brodit v. Cambra*, 350 F.3d 985, 988–89 (9th Cir. 2003) (two-and-a-half year time period); *United States v. Keys*, No. CR-21-332-RAW, 2022 WL 1572495, at *3 (E.D. Okla. May 18, 2022) (unpublished) (denying defendant a bill of particulars on an indictment alleging a span of "just under five years").

[4] Although habeas review, particularly after AEPDA, is highly deferential, none of these decisions suggest that they would have come out differently under a less deferential standard.

[5] This six-year period was reflected in the charging document. *See Eldridge v. Bear*, No. CIV-16-240-RAW-KEW, 2019 WL 4179517, at *13 (E.D. Okla. Sept. 3, 2019) (unpublished).

C. The time period of abuse alleged in Count 1 was reasonably particular given Jane Doe's allegations.

The four-year time frame alleged in Count 1 was reasonable considering the facts and circumstances in this case. That time frame was drawn from Jane Doe's allegations about the pattern of abuse she suffered: that Ruiz abused her 10 to 20 times beginning when she was 4 to 5 years old and ending when she was 7 or 8.[6] 1R.95-96; 5R.48. She could not provide any details to differentiate one incident from another. 5R.625. The indictment could not be more specific because Jane Doe was a child who could not herself be more specific.

It has long been recognized that an indictment need only be as specific as possible. An objection that an indictment lacks specifics "is satisfied by the allegation, if true, that such [facts] are to the grand jury unknown." *Durland v. United States*, 161 U.S. 306, 314 (1896). When witnesses are "unable to be more specific as to date," an indictment reflecting the witnesses' allegations is "reasonable." *United States v. Nunez*, 668 F.2d 10, 12 (1st Cir. 1981). In cases like this, where the facts and the investigation "demonstrate that the prosecutor has stated the date and time of the offense to the best of…her

[6] Although Jane Doe alleged that Ruiz molested her many times, on the morning of trial the district court ruled that the government would be limited to proving one act of abuse because the indictment (1R.22) had only alleged "a" sexual act. 5R.249.

knowledge," the courts should "be disinclined to hold that an information or bill of particulars was deficient for failure to pinpoint a specific date." *People v. Naugle*, 152 Mich. App. 227, 234 (1986). *See also Burling,* 451 F. App'x at 766 (quoting an unreported state court's decision rejecting the defendant's challenge on the grounds that "the prosecutor satisfied his duty to inform the defendant within reasonable limits and as best known by the State, the time frame in which these acts were believed to have occurred."); *Valentine*, 395 F.3d at 632 ("The Ohio Court of Appeals found that there was no evidence the state had more specific information regarding the time period of the abuse. Valentine's claims regarding the lack of time- and date-specific counts therefore fail.").

Under these principles, the indictment's framing was reasonable given the breadth and generality of Jane Doe's allegations.

D. The indictment provided sufficient notice to allow Ruiz to assert a defense.

Next, the indictment provided sufficient notice to allow Ruiz to assert a defense to the charges. Even in the absence of specific dates, "[d]efendants can take advantage of a variety of effective defenses[.]" *Brodit v. Cambra*, 350 F.3d 985, 988–89 (9th Cir. 2003). *See also United States v. Youngman*, 481 F.3d 1015, 1019 (8th Cir. 2007) (rejecting contention that a two-and-a-half-year period made it "all but impossible" to defend against the charges). In

this case, Ruiz simply denied that any inappropriate conduct had happened *at all* by suggesting that the accusations were the product of "child suggestibility," 5R.504, 533-534, a topic upon which he introduced expert testimony, *id*. at 465. As the Sixth Circuit put it in a different case, "[n]othing other than the nature of the conduct and the identity of the victim was required in order for him to fashion and assert this defense." *Bruce v. Welch*, 572 F. App'x 325, 329 (6th Cir. 2014). A "failure to allege specific dates" does not prejudice" a defendant's "ability to defend himself [when] his defense strategy center[s] on his claim that he never engaged in sexual conduct…regardless of the date or place she alleged the abuse took place." *Coles v. Smith*, 577 F. App'x 502, 509–10 (6th Cir. 2014).

The only particular impediment to his defense that Ruiz complains of is the unavailability of an alibi. But due process has never required that an indictment lend itself to any specific defense, let alone an alibi. The availability of an alibi defense, moreover, is not solely a function of the indictment's specificity but instead depends on the facts of the case. Even if Jane had pinpointed a specific month or year when the abuse occurred, that would only have helped Ruiz if he had been absent from Dulce that entire time. Alibi defenses are difficult in cases where a defendant lives near the child he is accused of molesting. *People v. Jones*, 792 P.2d 643 (Cal. 1990), *as modified* (Aug. 15, 1990) ("[O]nly infrequently can an alibi or identity defense

be raised in resident child molester cases."). But this is due to the nature of the facts and allegations, not the specificity of the indictment alone.

As it turned out, Ruiz had no alibi for the specific allegation presented at trial. Well before trial, Ruiz was on notice that Jane had alleged that one specific incident happened during summer break, 5R.39, and that she had also alleged abuse around the time she was in first grade, *id*. When the district court limited the trial evidence to one incident, this is the one Jane testified about: the incident that happened in the summer when she was 6 or 7. 5R.305-06, 318. If Ruiz had an alibi for this time frame, he would have presented it. But previous testimony had established that while Ruiz "lived in Colorado for some times out of the year," 5R.218, summer was not among them, 5R.337. The breadth of the indictment therefore did not prejudice Ruiz's alibi defense in any manner.

E. Ruiz is able to defend against double jeopardy.

Finally, the indictment permits Ruiz to defend against double jeopardy. The double jeopardy "protection applies both to successive punishments and to successive prosecutions for the same criminal offense." *United States v. Dixon*, 509 U.S. 688, 696 (1993). As the district court found, the government would "clearly be barred from later charging Defendant with sex crimes against Jane Does 1-2 that occurred within the same charging window as set forth in the Indictment." 1R.365 (quoting Doc. 58 at 5). Ruiz does not point to

any flaw in that conclusion, and the Court need go no further. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."). The government accepts that double jeopardy would preclude charging any other instances of Ruiz touching Jane Doe 1's or Jane Doe 2's genitals during the time frame alleged in the indictment. This is the natural consequence of charging a broad time frame: "[i]f the government sees fit to send an indictment in this general form…it must do so with the understanding that upon conviction or acquittal further prosecution…during the period charged is barred." *United States v. Broce*, 753 F.2d 811, 821 (10th Cir. 1985), *on reh'g*, 781 F.2d 792 (10th Cir. 1986) (quotation and citation omitted). Ruiz's double jeopardy rights have not been impaired.

II. The United States presented sufficient evidence for the jury to find that Ruiz was non-Indian for purposes of federal law.

This Court reviews "a district court's denial of a motion for a judgment of acquittal under a de novo standard." *United States v. Dewberry*, 790 F.3d 1022, 1028 (10th Cir. 2015). When reviewing the record, this Court must "view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government." *United States v. Haslip*, 160 F.3d 649, 652–53 (10th Cir. 1998). While conducting this review, this Court does not weigh conflicting evidence or consider the credibility of the witnesses

because "[i]t is for the jury, as the fact finder, to resolve conflicting testimony." *United States v. McKissick*, 204 F.3d 1282, 1289–90 (10th Cir. 2000). "The evidence necessary to support a verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *United States v. Wilson*, 182 F.3d 737, 742 (10th Cir. 1999) (quotation and citation omitted).

The ultimate question is not whether this Court would have reached the same conclusion as the jury but rather is whether, "'after reviewing 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. McPhilomy,* 270 F.3d 1302, 1307 (10th Cir. 2001) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

"To convict [a defendant] under § 1152, the government needed to prove, among other things, that (1) he is not an Indian and (2) his victims are Indians." *United States v. Simpkins*, 90 F.4th 1312, 1315 (10th Cir. 2024).[7] To be considered an Indian for purposes of federal law, an individual must meet two requirements: they must have "some Indian blood," and they must be

[7] The Tenth Circuit stands alone in treating the defendant's non-Indian status as an essential element, rather than an affirmative defense, of a Section 1152 offense. *See United States v. Haggerty*, 997 F.3d 292, 298-302 (5th Cir. 2021); *United States v. Hester*, 719 F.2d 1041, 1043 (9th Cir. 1983). The United States maintains that *Prentiss* and its progeny are wrongly decided but recognizes that this panel is bound by them.

"recognized as Indian by a tribe or by the federal government." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012). "A person satisfies the definition only if both parts are met; conversely the government can prove that a person is not Indian by showing that he fails either prong." *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012).

To establish non-Indian status, the government need not bring documentary proof; testimony alone can suffice. *United States v. Laskey*, No. 22-5115, 2024 WL 3898299, at *3 (10th Cir. Aug. 22, 2024). Further, the government does not have a duty to "bring forth tribal officials to *disprove* the [individual] was a member of their tribes." *Diaz*, 679 F.3d 1183, 1188.

Viewing the evidence in the light most favorable to the government, the evidence was sufficient to support the jury's conclusion that Ruiz was not an Indian. First, the jury heard from Criminal Investigator Wager. CI Wager works for the Jicarilla Apache Nation and holds a federal commission from the Bureau of Indian Affairs, one that requires training in federal law in Indian Country. 5R.170. As part of his duties investigating crime on the reservation, CI Wager has to determine whether any victims or suspects are Indian or not. *Id*. at 170, 189. In making this determination, CI Wager reaches out to the Jicarilla Apache enrollment office, *id*. at 190, and if the person is not enrolled there, he will speak with those involved in the alleged crime to find out what tribe they may be enrolled with, *id*. In this case, CI

Wager reached out only to the Caddo Nation of Oklahoma, where Jane Does 1 and 2 were enrolled. *Id*. The jury could readily infer from this that speaking to those involved in this case, including Ruiz himself, did not point to any tribal affiliation. CI Wager also "review[ed]" "databases to determine whether Joel Ruiz was a member of any federally recognized tribe." *Id*. at 191. From this inquiry, he learned that Ruiz had been born in Mexico, *id*. at 193, from which the jury could conclude it was unlikely that Ruiz was Indian. In addition, CI Wager also spoke to an agent from the Department of Homeland Security, after which he was able to determine Ruiz's Indian status. *Id*. at 194. His investigation did not uncover any information that indicated Ruiz was Indian. *Id*. Having thus made the determination that the matter was subject to federal jurisdiction based on the Indian or non-Indian status of the parties involved, CI Wager contacted the FBI. *Id*. at 196.

The jury also heard from FBI Special Agent Piere Himel. Before he became an FBI agent, Agent Himel worked as a police and correctional officer with the Bureau of Indian Affairs. 5R.367. He attended the Indian Police Academy, *id*. at 367, where "a large portion" of the curriculum involved "Indian Country criminal jurisdiction training," *id*. at 368. He also holds a Master of Legal Studies in Indigenous People's law, *id*., which included the study of Indian Country criminal jurisdiction. 5R.368.

Agent Himel explained that federal criminal jurisdiction in Indian Country depends on the Indian or non-Indian status of the suspect and victim. 3R.370-71. To determine someone's status, he will ask them "whether they're enrolled members of a tribe," *id*. at 375, and then "follow up" with the enrollment office, *id*. If that process does not reveal a tribal affiliation, "they wouldn't be considered a member of a federally-recognized tribe." *Id*. In investigating Ruiz's status, he also received information from a government agency, which contained Ruiz's identifiers. *Id*. at 385. Furthermore, he reviewed documents that Ruiz signed under penalty of perjury. *Id*. at 390. Based on his review of those documents, he was able to determine that Ruiz was a non-Indian. *Id*. His determination was based partly, but not entirely, on Ruiz's Mexican birth. *Id*. at 392.

Just as with CI Wager's testimony, the jury could infer from what Agent Himel said that an officer had asked Ruiz about tribal membership and received a negative answer. 5R.375. The jury could also infer that the content of the documents Ruiz signed was inconsistent with Indian status, given that Agent Himel testified that these documents led him to conclude that Ruiz was non-Indian. *Id*. at 390.

In addition to the relevant facts they relayed, each of these witnesses offered an opinion, one that the jury was entitled to accept: that Ruiz was not an Indian under federal law. 3R.194, 390. This was proper opinion testimony.

See Fed. R. Evid. 701, 704(a). A jury may accept the conclusion of two experienced law-enforcement agents who specialize in crime in Indian Country and who routinely are required in their jobs to determine the Indian or non-Indian status of victims and suspects. As this Court explained in *United States v. Walker*, 85 F.4th 973, 984 (10th Cir. 2023), a law enforcement agent's testimony about his job responsibilities and duty to inquire into Indian status may "provide[ ] sufficient basis for a rational jury to determine that he had personal knowledge of [defendant's] non-Indian status because he was required to undertake these inquiries as part of his job." Although *Walker* did not involve a challenge on appeal to the sufficiency of the evidence, *id.* at n.4, it nevertheless confirms that point the government is making here: a jury may rely on the personal knowledge and conclusion of experienced law-enforcement officers when it comes to the determination of Indian or non-Indian status. To the extent that Ruiz may respond that the testimony strayed into expert material, this point (which he has never made) is immaterial to the sufficiency inquiry, which considers *all* evidence admitted, whether or not its admission was proper. *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988).

In contending that the trial evidence on his non-Indian status was so thin that the jury acted *irrationally* in finding him guilty, Ruiz ignores every piece of information presented by these witnesses except his Mexican birth.

Def. Br. 30 (arguing the evidence "comes down to a single, irrelevant fact: that Mr. Ruiz was born in Mexico"). Furthermore, this fact is hardly "irrelevant." It is, of course, *possible* for a person born in a foreign country to be an Indian under federal law. Def. Br. 32-33. But a jury can reasonably assume that most American Indians are in fact born in America and that few Mexicans are members of federally-recognized Indian nations.[8] Overcoming reasonable doubt does not require disproving every possibility, no matter how unlikely—nor even does it require disproving "every other reasonable hypothesis." *Wilson*, 182 F.3d at 742. The evidence here, including but not limited to Ruiz's birth in Mexico, is sufficient to support the jury's verdict.

III. The *Allen* charge did not have a coercive effect on the jury.

An *Allen* instruction is a supplemental instruction given to a deadlocked jury to encourage further deliberation. Its name derives from *Allen v. United States*, 164 U.S. 492 (1896), the case in which the Supreme Court first approved such an instruction. *United States v. McElhiney*, 275 F.3d 928, 935 (10th Cir. 2001). "In the latter part of the twentieth century, courts became concerned that the *Allen* charge might have a coercive element-in other words, that a jury might interpret the instruction

[8] Further, the fact that Ruiz was described as a Spanish-speaker who "has troubles with English," 5R.219, tends to suggest that his presence in Mexico was more than fleeting.

encouraging a unanimous verdict as an order to agree." *Id*. at 937. Courts accordingly developed various guidelines to lessen any such effect. The use of an *Allen* charge is reviewed for an abuse of discretion. *United States v. Cornelius*, 696 F.3d 1307, 1321 (10th Cir. 2012).

This Court considers the following factors when assessing whether an *Allen* charge was coercive: "(1) the language of the instruction, (2) whether the instruction is presented with other instructions, (3) the timing of the instruction, and (4) the length of the jury's subsequent deliberations." *United States v. Arney*, 248 F.3d 984, 988 (10th Cir. 2001). An "*Allen* instruction is impermissibly coercive when it imposes such pressure on the jury such that the accuracy and integrity of their verdict becomes uncertain." *United States v. Zabriskie*, 415 F.3d 1139, 1148 (10th Cir. 2005).

Looking at these factors in their totality demonstrates that the district court did not abuse its discretion in delivering a modified *Allen* instruction. The first factor looks to the language of the instruction. "[A] proper *Allen* instruction should *include* all those elements of the original charge designed to ameliorate its coercive effect"—namely reminding the jury that the government bears the burden of proof and cautioning that no juror should surrender his or her conscientiously held convictions. *McElhiney*, 275 F.3d at 943. It should also "*avoid* language which might heighten" the coercive effect, *id*. at 943 (quotation marks and citation omitted), such as signaling the

court's distress over the difficulty in reaching a verdict, *id*. at 944, or emphasizing the expense that a new trial would entail, *id*. at 945.

The district court's instruction here comported perfectly with this guidance. Like the original *Allen* charge, it reminded the jury that the government bore the burden of proof and cautioned that no juror should surrender his or her conscientiously held convictions, 5R.612-13, which is an admonition "of great import." *McElhiney*, 275 F.3d at 944. The court did not add any language that could be construed by the jury as coercion; indeed, it even removed the second paragraph of this Court's pattern *Allen* instruction, which refers to the necessity of retrial. 5R.606-07. That pattern instruction itself removes language from the original *Allen* instruction so as to avoid conveying that only those in the minority should be open to reevaluating their views. *See United States v. Rivera*, 554 F. App'x 735, 742 (10th Cir. 2014) (describing the "approved, modified Tenth Circuit *Allen* instruction" as "faction-neutral").

The next factors consider the timing of the instruction and whether it was presented with other instructions. To be sure, the Court has encouraged district courts to include an *Allen* charge with the jury's initial set of instructions rather than being "issued as a supplemental charge after the jury reached an impasse." *McElhiney*, 275 F.3d at 942. But it has "given this counsel in the form of a suggestion," *Arney*, 248 F.3d at 989 (quotation and

citation omitted), and has "hasten[ed] to note" that giving the instruction on its own after the jury has announced a deadlock "does not by itself establish coercion," *McElhiney*, 275 F.3d at 942. *See also United States v. Porter*, 881 F.2d 878, 889 (10th Cir. 1989) ("[T]here is no per se rule against giving an *Allen* charge after a jury has commenced deliberations."). Indeed, this Court has previously "found on numerous occasions that *Allen* charges given to a jury during its deliberations were not unduly coercive." *Arney*, 248 F.3d at 989. It has also held "previously upheld *Allen* instructions even where the jury has indicated that it could not reach a verdict and the district court did not inquire whether the jury could overcome the impasse." *Id.* Here, the jury asked if they "were a hung jury" because they could not "come to a definite decision." 5R.605. The jury was not polled, and the note was phrased as a question rather than an explicit statement of irreconcilable impasse. There was nothing unusually coercive about the circumstances in which the modified *Allen* charge was given.

As to the final factor, the timing of the jury's verdict does not suggest coercion. The jury received the instruction and went back to deliberate at 2:32 p.m., and a verdict was received at 4:55 p.m. This timing is more than the two hours upheld in *Arney* and *Rivera*, where this Court remarked that "the time…was not so short as to make us suspicious of the *Allen* instruction's effect." *Rivera*, 554 F. App'x 735, 742. *See also Arney,* 248 F.3d

at 990 (collecting cases where *Allen* instructions were upheld after verdicts were reached eighty minutes, sixty minutes, and forty minutes after the instruction was given).

Considering these factors together, nothing suggests that the jury was coerced into reaching its verdict. In arguing otherwise, Ruiz suggests that by Friday afternoon the jury was likely "eager to wrap up deliberations and avoid extending its responsibilities into the following week." Def. Br. 37. But the mere arrival of Friday afternoon cannot constitute judicial coercion, and to suggest that the jurors just wanted to get on with their weekends disregards the solemnity of the oaths they took. Furthermore, the Court has previously rejected similar arguments, *see Arney*, 248 F.3d at 989 (instruction given between 5:00 and 5:30 in the evening), and has held that even far more extreme timing does not necessarily constitute coercion, *see Gilbert v. Mullin*, 302 F.3d 1166, 1175 (10th Cir. 2002) (*Allen* instruction given after 11 p.m. and jury returned its verdict after midnight).

In short, the modified *Allen* instruction was proper, and the district court did not abuse its discretion when it gave that instruction to the jury.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

The district court erred properly denied the motion to dismiss the indictment because the indictment provided sufficient notice. The government produced sufficient evidence to establish Ruiz's non-Indian

status. Finally, the *Allen* instruction did not have a coercive effect. This Court should affirm Ruiz's conviction.

Oral argument is requested to address any questions not resolved by the briefing.

Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 6,921 words. I relied on my word processor to obtain the count. My word processing software is Word 2016.

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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on June 18, 2025.

I ALSO CERTIFY that Violet Edelman, attorney for Defendant-Appellant Joel Ruiz, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

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