No. 25-5014

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ADAM JOSEPH KING,
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
THE HONORABLE JOHN D. RUSSELL, U.S. DISTRICT JUDGE, PRESIDING
CASE NO. 4:24-CR-00081-JDR-1

APPELLANT'S OPENING BRIEF

JULIA L. O'CONNELL
Federal Public Defender

JARED T. GUEMMER
Asst. Federal Public Defender

OFFICE OF THE FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF OKLAHOMA
One West 3rd Street, Suite 1225
Tulsa, Oklahoma 74103-3532
(918) 581-7656

COUNSEL FOR DEFENDANT/APPELLANT
Oral Argument Is Requested
Attachments Electronically Filed in Native PDF Format

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PRIOR OR RELATED APPEALS

No previous or related appeals exist.

STATEMENT OF JURISDICTION

The United States charged Adam Joseph King by indictment with violations of United States law. In Counts 1 and 2, the United States charged Mr. King as a non-Indian with violations of 18 U.S.C. §§ 1151, 1152, 2241(c), and 2244(a)(5). (Vol. I, at 16–17)[1] The United States District Court for the Northern District of Oklahoma had jurisdiction over these offenses pursuant to 18 U.S.C. § 3231. In Counts 3 and 4, the United States charged Mr. King as an Indian with violations of 18 U.S.C. §§ 1151, 1153, 2241(c), and 2244(a)(5). (Vol. I, at 18–19). The United States District Court for the Northern District of Oklahoma had jurisdiction over these offenses pursuant to 18 U.S.C. § 3242.

Following a jury trial, Mr. King was found guilty as to Counts 1 and 2 and not guilty as to Counts 3 and 4. (Vol. I, at 1100–1101). The District Court entered a judgment of acquittal as to Counts 3 and 4, and it

[1] Record references in this brief, including transcript references, are based on volumes and page numeration in the record on appeal. References to the Supplemental Record on Appeal are similarly based on volumes and page numeration.

sentenced Mr. King to life imprisonment in the custody of the Bureau of Prisons as to Counts 1 and 2, to be followed by lifetime terms of supervised release. (Vol. I, at 1124–27).

The District Court entered its Judgment in a Criminal Case on January 22, 2025. (Vol. 1, at 1125; Attachment A). The notice of appeal was timely filed on February 3, 2025. (Vol. 1, at 1133); *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.

STATEMENT OF THE ISSUES

Issue One: Whether the District Court erred in failing to grant a Rule 29 judgment of acquittal as to Counts 1 and 2 because the United States failed to present evidence from which a jury could find beyond a reasonable doubt that Mr. King was not an Indian person and that MV was an Indian person at the time of the charged offenses.

Issue Two: Whether the District Court erred in refusing to order an election of charges, when Counts 1 and 2 charged precisely the same conduct as Counts 3 and 4, with the only distinction being the Indian and non-Indian statuses of Mr. King and MV.

STATEMENT OF THE CASE

1. Overview of the Case

On March 18, 2024, in Northern District of Oklahoma Case Number 24-CR-081-JDR, the United States charged Adam Joseph King by Indictment with violations of 18 U.S.C. §§ 1151, 1152, 1153, 2241(c), and 2244(a)(5). (Vol. 1, at 16–19). Specifically, the Indictment alleged that Mr. King engaged in a sexual act on MV[2], who had not attained the age of 12 years, and that Mr. King had engaged in and caused sexual contact with MV in the period from November 2017 to August 23, 2021. (Vol. 1, at 16–19).

Counts 1 and 2 alleged that Mr. King was a non-Indian person and MV was an Indian person. (Vol. 1, at 16–17). Counts 3 and 4 alleged that Mr. King was an Indian person. (Vol. 1, at 18–19). As acknowledged by the United States during a motions hearing, Mr. King could not be convicted of both sets of charges because they concern the same alleged conduct. (Vol. 3A, at 7–9).

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[2] The Indictment refers to the victim of the charged offense conduct as M.V.; the jury instructions in this case refer to her by her initials, X.B. (Vol. 1, at 1083). The parties agreed, for the purposes of the modified transcript in this case, to refer to the victim as MV in the transcript. This Brief refers to the victim of the charged offenses as MV throughout.

Following a jury trial, the jury found Mr. King guilty as to Counts 1 and 2 and not guilty as to Counts 3 and 4. (Vol. 1, at 1100–01). At sentencing, the District Court found that Mr. King's Sentencing Guidelines range was Life (Vol. 3A, at 987–88), and it imposed a sentence of Life imprisonment in the Bureau of Prisons to be followed by a Life term of supervised release (Vol. 1, at 1126–27).

2. Pretrial Motions

Mr. King filed a motion to dismiss the indictment for multiplicity on May 3, 2024. (Vol. 1, at 147–55; Attachment C). (Vol. 1, at 147–55). The United States filed its response on May 10, 2024. (Vol. 1, at 183–191).

That motion concerned the fact that Mr. King was charged twice based on exactly the same alleged conduct, with the only distinction being the statuses of himself and MV at the time of the charged offenses. Mr. King argued that, not only were the charges multiplicitous, but the prejudice arising from the multiplicitous charges compelled an election of charges prior to trial. The District Court denied Mr. King's motion during a motions hearing on May 13, 2024. (Vol. 3A, at 7–9; Attachment D).

3. Trial Testimony

Below is the trial testimony pertinent to Mr. King's claims.

a. Tammy Lee

Ms. Lee was a former child welfare worker for Oklahoma DHS. (Vol. 3A, at 123). Her testimony revolved around the Indian Child Welfare Act (ICWA) and its standards. (Vol. 3A, at 129–30). When asked if she determined whether Mr. King was an Indian person, she responded, "At that time, no. No, he was not, I mean." (Vol. 3A, at 145). She further stated that, "based on [DHS] policies and procedures," she "acknowledge[d] MV as an Indian person." (*Id.* at 149–50). On re-direct examination, Ms. Lee stated that, based on DHS policy, she treated MV as an Indian based on the child's mother indicating she was an Indian. (*Id.* at 163–64).

b. MV

During direct examination, MV refers to herself as an Indian person and that she considers herself an Indian person. (Vol. 3A, at 312). She explained that both her mother and biological father have tribal cards. (*Id.*). She further testified that she is attending a school that only admits Indian persons as students. (*Id.* at 313–14).

c. David Book

Officer Book testified that he interviewed Mr. King twice. (Vol. 3A, at 348). With respect to these interviews, the United States asked Officer Book if Mr. King ever said anything about having Indian status at either interview, and Officer Book indicated that Mr. King did not. (Vol. 3A, at 355). On cross-examination, Officer Book indicated his belief—to his knowledge—that neither Mr. King nor MV were recognized by a Native American tribe in 2021. (Vol. 3A, at 375). Upon further questioning, Officer Book indicated he did not recall when he asked about Mr. King or MV's status (nor did he indicate what investigation he did to determine their status). (Vol. 3A, at 375).

d. Derrick Vann

Mr. Vann is the Tribal Registrar and Executive Director of the Tribal Recognition Department for the Cherokee Nation. (Vol. 3A, at 388). Mr. Vann confirmed that MV was an enrolled member of the Cherokee Nation as of December 7, 2022. (Vol. 3A, at 391). Mr. Vann explained that the benefits of enrollment include healthcare, car tags, housing, and food assistance. (Vol. 3A, at 391). Mr. Vann, after refreshing his recollection, testified that a previous attempt to enroll MV had been

made, but that it was rejected for having improper documentation. (Vol. 3A, at 400). On cross-examination, Mr. Vann confirmed that MV was not a member of the Cherokee Nation in August 2021. (Vol. 3A, at 401). Mr. Vann further explained that he did not know the basis of MV's prior rejection other than improper paperwork. (Vol. 3A, at 402). Finally, cross-examination concluded with Mr. Vann agreeing that MV "was not recognized as an Indian before December of 2022." (Vol. 3A, at 403).

On re-direct, when the United States sought to claim MV had been "recognized" as an Indian prior to her enrollment, Mr. Vann expressed confusion and stated that MV was not a Cherokee Nation citizen prior to her enrollment. (Vol. 3A, at 404). When asked if MV was eligible for enrollment in 2022, Mr. Vann simply responded that she could submit an application. (Vol. 3A, at 405).

e. Kimberly Trammel

Ms. Trammel is the mother of Emily Anazagasty and the grandmother of MV. (Vol. 3A, at 406). She testified that MV's father is a deceased individual named Cody Bearden. (Vol. 3A, at 407). She is a citizen of the Cherokee Nation and her blood quantum is 1/256. (Vol. 3A, at 407). When asked about the benefits of citizenship that she uses, she

testified that she "mostly use[s] their healthcare" and that she has a special license plate for her car. (Vol. 3A, at 408–09).

Ms. Trammel testified that her daughter, Emily Anazagasty, was born at the Indian hospital in Claremore, Oklahoma. (Vol. 3A, at 409). According to Ms. Trammel, Emily also gave birth to MV at the Indian hospital in Claremore. (Vol. 3A, at 409). Ms. Trammel stated that MV was eligible to be enrolled in the Cherokee Nation following her birth but Emily did not enroll MV as a baby. (Vol. 3A, at 409–10). According to Ms. Trammel, MV received healthcare services at the Indian hospital in Claremore until she was 18 months old. (Vol. 3A, at 410). After MV entered Ms. Trammel's custody, she took MV to Hastings, which she testified was an Indian hospital. According to Ms. Trammel, she can take MV to an Indian hospital for healthcare "because her mother is a registered citizen of the Cherokee Nation," and since Emily Anazagasty is listed on MV's birth certificate as her mother, "MV is able to receive care under her mother." (Vol. 3A, at 411). As of the trial, MV is enrolled in the Cherokee Nation with a blood quantum of 1/1024. (Vol. 3A, at 411).

Ms. Trammel provided testimony concerning the guardianship proceedings, and she explained that she obtained the guardianship

through the Cherokee Nation because she is Native and MV is Native. (Vol. 3A, at 418–19). What Ms. Trammel meant by "Native" is unexplained.

f. Bill Trammel

Mr. Trammel is married to Kim Trammel. (Vol. 3A, at 425). Emily Anazagasty is his stepdaughter. (Vol. 3A, at 425–26). Mr. Trammel has known MV since she was born and, to his knowledge, she is Native American and a member of the Cherokee Nation. (Vol. 3A, at 426). Mr. Trammel testified that he and Ms. Trammel obtained a guardianship over MV because she is "Indian." (Vol. 3A, at 428). Mr. Trammel confirmed that MV was born at the Indian hospital in Claremore and that, since being in the custody of himself and Ms. Trammel, she has received health benefits at Hastings Hospital in Tahlequah, Oklahoma, which is an Indian hospital. (Vol. 3A, at 429). Mr. Trammel further testified that the Cherokee Nation has been involved in the guardianship of MV, that MV was eligible to enroll as a member of the Cherokee Nation, and that her enrollment took place after he and Ms. Trammel gained custody of her. (Vol. 3A, at 429–30). Mr. Trammel confirmed that "most of the healthcare [he's] talked about" happened after MV was

enrolled "because she was eligible for that healthcare." (Vol. 3A, at 430). Mr. Trammel also testified that MV may, in the coming schoolyear, be enrolled in a school called "Sequoyah," which only permits Indians to enroll. (Vol. 3A, at 431–32).

g. Emily Anazagasty

Ms. Anazagasty is the biological mother of MV. (Vol 3A, at 491). She confirmed that Cody Bearden is MV's biological father (Vol. 3A, at 491), and that she believed Cody Bearden was an enrolled member of a federally-recognized tribe (Vol. 3A, at 547). Ms. Anazagasty testified that she is an enrolled member of the Cherokee Nation, that she uses her membership primarily for healthcare benefits, and that MV was both born in the Indian hospital in Claremore and that she took MV there for checkups as a baby. (Vol. 3A, at 521). When Ms. Anazagasty and MV returned from New York, she believes she took MV to the Indian hospital once (she does not specify which hospital), and then she got herself and MV "set up with Cherokee Nation Health Services," and she considered the Cherokee Nation to be the primary source of MV's medical care thereafter. (Vol. 3A, at 522, 524). This involved taking her tribal ID, along with MV's birth certificate, to the Cherokee Nation. (Vol. 3A, at 522). Ms.

Anazagasty stated that she previously attempted to enroll MV in the Cherokee Nation but that it failed because Ms. Anazagasty's birth certificate was not accepted. (Vol. 3A, at 523).

The United States presented Ms. Anazagasty with Government's Exhibit 46 and asked if the messages in that document reflected a conversation she had with Mr. King in which Mr. King expressed a belief that MV was "tribal." (Vol. 3A, at 529; Supp. Vol. 1, at 64). Government's Exhibit 46 reflects Mr. King's belief that MV's ability to receive medical care made her "tribal," and that he believed the tribe was "claiming her." (Supp. Vol. 1, at 64).

Ms. Anazagasty indicated she understood that Mr. King was an enrolled member of a tribe, which happened the previous April, but that she was unaware of the lineage that would provide the basis for that enrollment. (Vol. 3A, at 535). Ms. Anazagasty testified that she was aware of Mr. King's motion to dismiss the state charges against him on the basis of being an Indian, and she further explained that they pursued that "until [they] found out that it was based on the time that the accusations were made and not the current standing as of when the charges were filed." (Vol. 3A, at 536). Ms. Anazagasty further confirmed

she was aware of the Cherokee Nation charges against Mr. King, that he sought to have those charges dismissed, and her understanding that this decision came about once he realized the prosecutor's claim of jurisdiction was based upon his status at the time the charges were filed rather than his status at the time of the offense. (Vol. 3A, at 536–37).

On cross-examination, Ms. Anazagasty further explained the nature of MV's receipt of healthcare services through the Cherokee Nation. (Vol. 3A, at 553). She explained that her tribal documentation is what needed to be provided, and the only document of MV's that was necessary was her birth certificate to show that she was the daughter of Ms. Anazagasty. (Vol. 3A, at 553). Ms. Anazagasty confirmed that MV "qualified to get services" "through [her]." (Vol. 3A, at 553).

h. Krystal Dunckel

Ms. Dunckel is Mr. King's biological sister, and she is six years older than him. (Vol. 3A, at 565). Ms. Dunckel confirmed that she and Mr. King are the children of Janice King and Timothy Carson, and that they were adopted by Clarence King. (Vol. 3A, at 565–66). Ms. Dunckel stated that she is enrolled in the Delaware Tribe of Indians based upon her adoptive

father's lineage, but that she has no Indian blood as to that tribe. (Vol. 3A, at 566–67).

Ms. Dunckel then testified that, to her knowledge, her mother, and her mother's aunt and uncle were all members of an Indian tribe. (Vol. 3A, at 567–68). While Ms. Dunckel agreed she had no proof concerning either blood or which tribe they might be enrolled in, she did not waver in her belief that these individuals have a degree of Indian blood and are members of an Indian tribe based on what she has been told. (Vol. 3A, at 569–70). She testified that "we [were] told about the heritage," but she denied engaging in "powwows or anything like that." (Vol. 3A, at 573).

i. Kellie Guess

Ms. Guess is also Mr. King's biological sister, she is four years older than him, they are the biological children of Tim Carson, and they were both adopted by Clarence King. (Vol. 3A, at 576–77). Ms. Guess indicated that, although she submitted an application to become enrolled in the Delaware Tribe of Indians, she has not received a response on that application. (Vol. 3A, at 577–78). When asked if she was aware of anyone in her biological family having Indian lineage, her response was "Nothing that is – that I'm aware of, no." (Vol. 3A, at 578–79). When asked if her

mother, Janice King, has any tribal heritage, Ms. Guess responded, "I don't know." (Vol. 3A, at 579). Ms. Guess further stated that she does not "have any information or proof that [she has] any quantum of Indian blood." (Vol. 3A, at 580).

j. Emily Haney

Ms. Haney is the enrollment director for the Delaware Tribe of Indians, which is a federally-recognized tribe. (Vol. 3A, at 581). Ms. Haney's testimony may be summarized succinctly: Mr. King's enrollment in the Delaware Tribe of Indians was premised upon his submission of his birth certificate indicating that he was the son of Clarence King. (Vol. 3A, at 586–88; Government's Exhibit 40; Supp. Rec. Vol. 1, at 40). This enrollment was not proper because Mr. King was the adopted son of Clarence King and thus lacked a blood quantum traceable to the Delaware Tribe of Indians base roll of members. (Vol. 3A, at 589). Had this been known to the tribe, Mr. King's application for enrollment would not have been granted. (Vol. 3A, at 590).

k. Special Agent Tiffany Harrison

Special Agent Harrison's testimony concerning Indian status was limited to Mr. King's status, and she never addressed MV's status. Special Agent Harrison testified that the FBI reached out to unnamed tribes regarding Mr. King's maternal lineage and found that no one on that side of his family was enrolled in those unnamed tribes. (Vol. 3A, at 600). Further, Special Agent Harrison stated that she had not "receive[d] information that any of those people had a degree of Indian blood." (Vol. 3A, at 601).

The testimony then shifted to the filings by Mr. King's attorneys in his Oklahoma state court Cherokee Nation cases. (Vol. 3A, at 603, 605–06). Special Agent Harrison confirmed that the motion filed in state court asserted Mr. King was an Indian and could not be prosecuted there (Vol. 3A, at 603; Government's Exhibit 41; Supp. Rec. Vol. 1, at 41–46) while the Cherokee Nation motion asserted he was not an enrolled member of a federally-recognized tribe (Vol. 3A, at 605–06; Government's Exhibit 42; Supp. Rec. Vol. 1, at 47–51). On cross-examination, Special Agent Harrison confirmed that Mr. King withdrew his state court motion, but the basis of that withdrawal was unstated (Vol. 3A, at 608–09).

SUMMARY OF THE ARGUMENT

Issue One: As to MV, the evidence demonstrated that any benefits or assistance she received was a result of her mother's status rather than her own status. Specifically, the children of Indians may receive federal healthcare services regardless of whether they are themselves Indians. For example, a child who is adopted by an Indian person can receive the same healthcare services from IHS as the natural-born child of an Indian. Therefore, any healthcare services MV received were not on a basis reserved solely for Indians but on a basis available to a wide variety of children who no rational person would believe was being recognized as an Indian. Insofar as the evidence showed MV received healthcare services through the Cherokee Nation, those services were explicitly provided based upon her mother's tribal affiliation rather than MV's own tribal affiliation. The evidence showed that tribal healthcare services are a benefit of citizens, but MV was categorically not a citizen of the Cherokee Nation at the time of the charged offense conduct. MV's mother, however, was a Cherokee Nation citizen and the testimony explicitly stated that MV's ability to obtain healthcare was the result of her mother's tribal citizenship. MV cannot be considered "recognized" as an

Indian when her healthcare was based upon her relationship to her mother rather than her affiliation to the tribe.

As to Mr. King, Mr. King's older sister testified unwaveringly that they have Indian blood through their maternal lineage, and no evidence meaningfully contradicted that claim. As to recognition, the United States merely proved that Mr. King was not an enrolled member of a federally-recognized tribe at the time of the charged offense conduct, but it never presented any evidence concerning whether Mr. King had received any benefits or services. The United States cannot rely only upon Mr. King's lack of enrollment to prove an absence of recognition. The burden does not shift to Mr. King to present evidence of recognition when he is not enrolled. The United States must carry that burden to disprove recognition. Its failure to even attempt to address those factors of recognition means that it failed to present sufficient evidence to prove beyond a reasonable doubt that Mr. King was not recognized as an Indian.

Issue Two: The District Court erred in refusing to order the United States to elect between two sets of charges before trial. The charges were multiplicitous and the United States admitted that it could not obtain convictions on both sets of charges. The charging approach in this case amounts to the United States declaring "Heads I Win, Tails You Lose," by forcing Mr. King to abstain from trying to prove his status as an Indian or non-Indian. Mr. King was prejudiced by multiplicitous charges that ensured he could not make any form of affirmative defense as to his status. By proving he was a non-Indian, Mr. King would be assisting the United States in proving Counts 1 and 2. By proving he was an Indian, he would be assisting the United States as to Counts 3 and 4.

ARGUMENT

I. (Issue One) The evidence was insufficient to prove the statuses of Mr. King and MV.

Since the law and the evidence concerning Mr. King's status and MV's status are closely tied to one another, this brief addresses them together.

The United States charged this case in an odd manner. It did not know Mr. King's status, so it charged him under both 18 U.S.C. §§ 1152 and 1153. As to two counts, the Indictment alleged Mr. King was a non-Indian person and MV was an Indian person. (Vol. 1, at 16–17) As to the remaining two counts, it charged that Mr. King was an Indian person. (Vol. 1, at 18–19). These charges concerned exactly the same alleged conduct. (Vol. 3A, at 8). Thus, Mr. King was placed in the position of not putting up too much of a fight to prove his status as either an Indian or non-Indian person lest he prove an element of the United States' charges against him. This context is necessary to understand the evidence as it came in during trial.

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).

2. Record References

Mr. King made a general motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 at the close of the United States' evidence, which the District Court denied. (Vol. 3A, at 800–02). Mr. King renewed that motion at the close of his evidence (Vol. 3A, at 856), and again following the close of all evidence (Vol. 3A, at 872). (Attachment B)

3. The Law Concerning Indian Status

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 United States 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. The Ninth Circuit treats

these factors as having descending order of importance, which makes sense because the factors become increasingly abstract. *United States v. Cruz*, 554 F.3d 840, 846 (9th Cir. 2009). In discussing these factors, the Ninth Circuit emphasized the importance of the burden of proof—rather than a mere burden of production—in determining whether evidence was sufficient to prove status. *Id.* at 850–51.

A person must have their particular status before/at the time of the charged offense conduct. This is for two reasons: First, the *en banc* Ninth Circuit appropriately pointed out the possibility of jurisdictional gamesmanship and uncertainty that might arise based on the possibility of a person's Indian status changed after an offense occurred. *See United States v. Zepeda*, 792 F.3d 1103, 113 (9th Cir. 2015). Moreover, as an element of the offense to be proven by the United States, the element must have been true at the time the crime was committed. Since status of both the defendant and victim are part of the actus reus of the charged offense, those statuses must exist at the moment the crime is committed rather than coming into existence at some other point in time. For example, if Debra assaults Victor, and Victor is then sworn in as a police officer a few days later, Debra cannot be charged with assaulting a law

enforcement officer because Victor was not a police officer at the time of the offense.

Further, mere eligibility for tribal membership and eligibility for benefits does not satisfy the recognition test. The Ninth Circuit has explicitly rejected the premise that mere "descendent" status or eligibility to become a member or to receive benefits is sufficient to prove recognition as an Indian. *Cruz*, 554 F.3d at 846–49. The *Nowlin* factors require the person actually receive (or be provided) assistance reserved only to Indians or to actually enjoy the benefits of tribal affiliation, not merely be eligible for them. *See Nowlin*, 555 F. App'x at 823.

This is an important distinction. The Supreme Court has expressly held that "Indian" status is not a racial status or classification. *United States v. Antelope*, 430 U.S. 641 (1977). 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. To reduce recognition as an Indian to mere eligibility for assistance, services, or benefits would reduce Indian status to a racial classification because it would be based upon descendancy rather than on their decision to associate themselves with a quasi-sovereign tribal entity.

4. The Evidence Presented

a. Tammy Lee

Ms. Lee's testimony does nothing to prove that Mr. King was a non-Indian person at the time of the offense or that MV was an Indian person at the time of the offense. She never discussed the legal standard applicable to determining Indian status with respect to criminal offenses in Indian country. In fact, she never explicitly described the standard for

what makes someone an Indian person at all. Nor did she testify as to any facts that would disprove an element of Indian status as to Mr. King or prove the elements of Indian status as to MV. Looking to the context of her testimony, it is apparent that her understanding of whether a person was an Indian or non-Indian person was premised upon ICWA, which relies upon membership and eligibility for membership in an Indian tribe. *See* 25 U.S.C. § 1903(3)–(4), (8).

ICWA does not provide the standard for what makes a person an Indian within the meaning of 18 U.S.C. § 1152. This Court's prior ruling in *Prentiss III* provides that standard.

As to MV's status, Ms. Lee could only testify that MV was treated as an Indian under the ICWA standard because her mother was an Indian. (Vol. 3A, at 143–45, 149–50, 163–64). She did not know if MV was an enrolled member of the Cherokee Nation or merely eligible to be a member. The standard for recognition does not include mere eligibility. *Cruz*, 554 F.3d at 846–49.

With respect to Mr. King, although Ms. Lee said he was not an Indian person at the time, nothing in her testimony indicates he failed to satisfy either element of Indian status. Her testimony cannot provide a

basis for a finding by the jury because it was not premised upon the law. She was not asked if she determined whether he had any Indian blood or if he had been recognized as an Indian. Moreover, insofar as her testimony could be understood to mean he was not a member of a tribe at the time, her testimony does not reflect what investigation she did to make that determination. There were 575 federally-recognized Native American tribes in the United States when the offenses allegedly occurred, *see* 86 FR 18552 (April 9, 2021), and there are more than thirty such tribes in Oklahoma, *see* Bureau of Indian Affairs, Tribal Leaders Directory, *accessible at* https://biamaps.geoplatform.gov/Tribal-Leaders-Directory/ (last accessed July 28, 2025). Ms. Lee's testimony provides no basis for her assertion. Even so, Mr. King's lack of membership in a tribe would not mean he was not an Indian within the meaning of Section 1152 because he could have been recognized in other manners.

b. MV

Whether MV considers or considered herself an Indian is irrelevant to this analysis. No one disputes that MV has some degree of Indian blood; she is the biological daughter of Emily Anazagasty, who is an enrolled member of the Cherokee Nation. The dispute is whether the

evidence is sufficient to demonstrate she was recognized as an Indian *at the time of the charged offense conduct*, not at some point after the conduct. And whether a person considers themselves an Indian is not a factor. Thus, MV's testimony does nothing to demonstrate that she was an Indian at the time of the charged conduct.

c. David Book

As to Mr. King's apparent silence concerning his status, that silence is not evidence that he is, or is not, an Indian. It is merely silence. Mr. King was under no legal obligation to disclose his status as Native or non-Native, and his failure to do so means nothing with respect to the evidence. Further, while Office Book indicated a belief that neither Mr. King nor MV were recognized by a Native American tribe in 2021, there is no evidence that he knew what recognition meant and that he investigated those factors. His testimony is devoid of factual information that would prove (or disprove) any element of Indian status. Thus, Officer Book's testimony similarly does nothing to assist the United States in meeting its burden.

d. Derrick Vann

Mr. Vann's testimony never actually addresses MV's recognition status prior to her enrollment. Nor does it explain that she was eligible to be the beneficiary of IHS or Cherokee Nation healthcare services prior to her enrollment. Mr. Vann's testimony indicates that a benefit of *citizenship*—not mere eligibility to enroll as a citizen—includes healthcare services. (Vol. 3A, at 391). And Mr. Vann's testimony explicitly declared that MV was not a citizen of the Cherokee Nation prior to her enrollment. (Vol. 3A, at 404). Moreover, Mr. Vann's testimony never explicitly declares MV eligible to enroll prior to her actual enrollment date. (Vol. 3A, at 404). Insofar as Mr. Vann said MV could submit an application, so could anyone else; it does not mean the application will be granted. Mr. Vann's testimony proves, categorically, that MV was not an enrolled member or citizen of the Cherokee Nation at the time of the alleged offense conduct.

e. Kimberly Trammel

Ms. Trammel's testimony is very enlightening, but not in a manner favorable to the United States. Ms. Trammel explained that MV received healthcare at Indian hospitals because of her mother's affiliation with the Cherokee Nation, not because MV was herself affiliated with the Cherokee Nation. Taking this testimony alongside Derrick Vann's testimony, it becomes apparent that MV would only receive healthcare services based upon her own status as an Indian once she was an enrolled member (i.e., a citizen) of the Cherokee Nation. Prior to that point in time, her receipt of healthcare services was premised on her mother's affiliation and enrollment.

Insofar as Ms. Trammel testified that the guardianship was handled through the Cherokee Nation because MV was "Native," that testimony can only be understood as an extension of Tammy Lee's testimony regarding ICWA. Even so, the guardianship proceedings occurred after the charged offenses, not before, and therefore cannot prove recognition at the time of the offenses.

f. Bill Trammel

Mr. Trammel's testimony provides no basis to conclude that MV was recognized as an Indian at the time of the charged offense conduct. As explained earlier, the guardianship occurred after the charged conduct, and so it plays no role in the recognition analysis. Further, MV's eligibility to enroll as a member of the Cherokee Nation means nothing for her recognition at the time of the charged conduct. And the healthcare services Mr. Trammel spoke of occurred after MV's enrollment as a member of the Cherokee Nation. Mr. Trammel characterizes MV's eligibility of healthcare services as being "because she was eligible for that healthcare" after she was enrolled. (Vol. 3A, at 430). This would align with Kim Trammel's testimony insofar as MV's receipt of services, prior to her enrollment, was premised upon her mother's association with the Cherokee Nation rather than her own association with it, which did not come into play until she had been enrolled. And Mr. Trammel's discussion of *future* school options means nothing for MV's recognition at the time of the charged offense conduct.

g. Emily Anazagasty

Ms. Anazagasty's testimony reveals little that was not already known from the testimony of Kim Trammel, and her testimony concerning the basis of MV's receipt of healthcare services is consistent with Kim Trammel's testimony. Specifically, Ms. Anazagasty had to provide her own tribal verification documents and then proof that MV was her own child. In other words, MV received healthcare services, not through her own association with the Cherokee Nation or her own recognition as an Indian by the tribe, but through her mother's association with the Cherokee Nation and her mother's recognition as an Indian by the tribe.

Ms. Anazagasty's testimony concerning her communications with Mr. King do nothing to prove the status of Mr. King or MV. Mr. King's belief that MV was "tribal" does not prove she was, in fact, recognized as an Indian at the time of the charged offense conduct. His belief is irrelevant. The only thing that matters is whether the federal government or a federally-recognized tribe recognized her as an Indian. Further, the discussions regarding Mr. King's shifting status with regard to the state and tribal charges does not prove that he was not an Indian

person at the time of the offense. As those court filings show, the jurisdictional focus was on his membership in the Delaware Tribe; once it was revealed that he was not a tribal member prior to the charged offense conduct, the Cherokee Nation charges were dismissed. (Government's Exhibit 42, Supp. Rec. Vol. 1, at 47–51; Defendant's Exhibit 20, Supp. Rec. Vol. 2, at 22). Similarly, he withdrew his motion in Oklahoma state court because his original motion was premised solely on his enrollment status. (Government's Exhibit 41, Supp. Rec. Vol. 41–46; Vol. 3A, at 608–09). Neither these conversations nor motions demonstrate that Mr. King lacked a degree of Indian blood or that he had not been recognized in some other fashion; indeed, there is no basis to conclude that he even knew how courts determined if someone was recognized an Indian beyond enrollment. Moreover, the basis for whatever beliefs Mr. King may have held regarding the appropriate jurisdiction are unknown. A reasonable interpretation of the evidence before the jury is that Mr. King believed his lack of enrollment was the key jurisdictional factor.

h. Krystal Dunckel

First, while Mr. King may not have any Indian blood as to the Delaware Tribe of Indians, that does not exclude the possibility that he has Indian blood from another tribe. The United States's burden is to prove, beyond a reasonable doubt, that Mr. King either has no degree of Indian blood at all or has not been recognized as an Indian by either the federal government or a federally-recognized tribe. The testimony of Ms. Dunckel fails to do either; indeed, her testimony indicates that Mr. King has some degree of Indian blood.

Additionally, the United States conspicuously never asked about benefits or services that Ms. Dunckel or Mr. King might have received as children. The United States operated under the theory that MV's receipt of benefits or services through her mother's affiliation with the Cherokee Nation constitutes recognition of MV as an Indian; that being the case, it was incumbent upon the United States to prove that Mr. King did not receive benefits or services through his association with Clarence King or other family members because such services would also constitute recognition of him as an Indian. The United States never asked that

question, and Mr. King was under no obligation to pursue that avenue of questioning.

Ms. Dunckel's testimony, if anything, tends to contradict the United States' theory that Mr. King was not an Indian because she explicitly indicated that her mother (and by extension herself and Mr. King) have Indian blood and the United States failed to further inquire about potential avenues of recognition to disprove that recognition occurred.

i. Kellie Guess

With respect to her own biological heritage (and by extension, Mr. King's heritage), Ms. Guess's testimony amounts to little more than "I don't know." She denied knowledge of biological Indian heritage; she did not deny that it existed. She denied knowledge of her mother's Indian heritage; she did not deny that it existed. She denied having knowledge or proof that she has any degree of Indian blood; she did not deny having a degree of Indian blood. While it was likely the United States' goal to use this testimony to disprove Mr. King having a degree of Indian blood, it does nothing of the sort. The absence of knowledge is not proof that there is no blood quantum, particularly when Mr. King's other sister

affirmatively indicated a belief that she and Mr. King have Indian blood through their mother.

j. Emily Haney

Ms. Haney's testimony does nothing beyond prove that Mr. King lacks a degree of Indian blood traceable to the Delaware Tribe of Indians. But the absence of Indian blood traceable to a particular tribe does not serve as proof that Mr. King has no degree of Indian blood at all. Ms. Haney did not testify, nor could she testify, about Mr. King's blood quantum more generally, nor did she testify about whether he ever received any benefits or assistance that might have constituted a form of recognition prior to the charged offense conduct.

k. Special Agent Tiffany Harrison

Special Agent Harrison's testimony proves nothing regarding Mr. King's status. Her testimony does not indicate which tribes were contacted regarding Mr. King's maternal lineage and, even if it did, it provides no basis for why those tribes were contacted to the exclusion of others. There were 575 federally-recognized tribes in the country at the time of the charged offense conduct. At a minimum, the United States must provide a rational evidentiary basis for why the tribes contacted are

the most likely to have information regarding Mr. King's Indian status or heritage.

5. The evidence was insufficient to permit a rational jury to conclude, beyond a reasonable doubt, that Mr. King was a non-Indian person and that MV was an Indian person at the time of the charged offense conduct.

This case poses interesting questions about Indian status and how it is proven, particularly when the United States is not entirely certain as to whether any particular person is an Indian. At the outset, it must be recognized that there are scenarios in which the United States may fail to prove that a person is an Indian and also fail to prove that same person is a non-Indian. Because the United States bears the burden to prove the status element beyond a reasonable doubt, daylight exists between each status where the United States' evidence may fail to prove either status with respect to a given person. The jury's finding that Mr. King was not guilty as to Counts 3 and 4 (which relied upon him being proven, beyond a reasonable doubt, to be an Indian person at the time of the charged offense conduct) did not compel it to necessarily find that the United States proved beyond a reasonable doubt that Mr. King was a non-Indian person as to Counts 1 and 2.

a. The evidence fails to prove MV was recognized as an Indian at the time of the charged offense conduct.

There is no dispute that MV has a degree of Indian blood. The question this Court must resolve is whether the evidence was sufficient to allow a rational jury to conclude, beyond a reasonable doubt, that MV was *recognized* as an Indian at the time of the offense by either the federal government or a federally-recognized tribe. It was not.

The United States' theory was fundamentally premised upon her eligibility to enroll as a member of the Cherokee Nation and her receipt of healthcare services and benefits prior to her enrollment. The problem, however, is that the United States bore the burden to demonstrate, beyond a reasonable doubt, that those services or benefits were, beyond a reasonable doubt, a form of recognition of MV as an Indian in her own right rather than a recognition of her mother's Indian status and MV's association with her mother. The *Nowlin* factors require that the *person be recognized* by the federal government as an Indian by its providing services to the person that are *reserved only to Indians*, or that *the person* enjoy the benefits *of tribal affiliation*. To be clear, the United States' evidence never specified which healthcare services were provided by the federal government and which services were provided by tribal entities.

That, in and of itself, hinders the United States' case because those standards are different.

The United States bore the burden to show, insofar as it claimed MV's receipt of assistance from the federal government constituted recognition, the assistance she received was reserved solely for Indian persons. It did not. As 25 U.S.C. §§ 1603 and 1680c show, healthcare services provided by IHS facilities can be provided to not just the natural-born children of "eligible Indians,"[3] but also to the stepchildren, adopted children, foster children, legal wards, and orphans of eligible Indians. 25 U.S.C. § 1680c. No one would rationally conclude that the stepchild or adopted child of an Indian person is being recognized as an Indian in their own right because they received healthcare services from an IHS facility. These services, if provided on the basis of a child's relationship to a tribal member, do not constitute a form of assistance that is reserved only to Indians.

[3] "Indians" are defined for the purposes of Sections 1603 and 1680c as "any person who is a member of an Indian tribe," and Indian tribes are those tribes "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 1603(13) & (14).

Similarly, insofar as the United States contends that MV enjoyed the benefits of tribal affiliation, it bore the burden to show that she received the benefits of *her own tribal affiliation* rather than her mother's tribal affiliation. This distinction is necessary because tribal affiliation impacts how the law treats an individual. "Indians" are treated differently by the law "[because they are] members of quasi-sovereign tribal entities," and they bear "the unique status of . . . a separate people with their own political institutions. . . ." *Antelope*, 430 U.S. at 645–46 (internal quotation marks omitted). Thus, to treat MV as an Indian not because she was affiliated with a tribe, but because her mother was affiliated with a tribe, is to reduce her status to a racial classification and to revoke her (and her mother's) ability to decide if she would personally be affiliated with the tribe. Further, the United States did not show that a child receiving healthcare benefits through a parent's tribal affiliation would reflect that the tribe was itself recognizing the child as an Indian. If a given tribe, such as the Cherokee Nation, chooses to adhere to federal IHS standards for children of tribal members receiving healthcare services, then it would provide those same services to stepchildren,

adopted children, foster children, and legal wards of the tribal member without regard to their own tribal status.

Under this framework, consider a hypothetical scenario where a tribal member adopts a child from Africa or China. That child would be able to obtain the same healthcare services as the natural-born child of the Indian person. No rational understanding of this scenario would lead to the conclusion that the foreign adopted child is being recognized as an Indian. Instead, they are receiving the healthcare on the basis of their relationship to their adoptive parent, who is an Indian.

While it was Mr. King who sought to introduce IHS and Cherokee Nation Health Service standards for the eligibility of children to receive healthcare services (Supp. Rec. Vol. 2, at 153–262; Supp. Rec. Vol. 3, at 2–49), it was truly the United States' burden to make those showings. The District Court excluded the evidence of the IHS manual and the Cherokee Nation Health Service manual. (Vol. 3A, at 814). Thus, they are not available for this Court's consideration as to this issue.

The United States cannot simply hang its hat on the notion that MV received healthcare services, *ipso facto* she was receiving benefits that demonstrated recognition as an Indian. This is particularly true where the evidence itself indicates she was not receiving these benefits based on her own status.

Derrick Vann's testimony indicates that MV would not have received such services based upon her own status or affiliation because "she was not a Cherokee Nation citizen," (Vol. 3A, at 404) and the Cherokee Nation confers healthcare benefits on citizens/enrolled members (Vol. 3A, at 391).

Kim Trammel's testimony was unambiguous: MV was able to receive healthcare services at an Indian hospital "because her mother is a registered citizen of the Cherokee Nation," and since Emily Anazagasty is listed on MV's birth certificate as MV's mother, "MV is able to receive care under her mother." (Vol. 3A, at 411). Thus, it is Emily Anazagasty's tribal affiliation which leads to MV's healthcare services, not MV's tribal affiliation (because, as Mr. King asserts, the evidence demonstrates she had none prior to the charged offense conduct).

Bill Trammel characterized MV's eligibility of healthcare services as being "because she was eligible for that healthcare" after she was enrolled. (Vol. 3A, at 430). Which is consistent with the testimony of both Derrick Vann and Kim Trammel, in that any healthcare prior to her enrollment was the result of her Emily Anazagasty's tribal affiliation.

Emily Anazagasty's testimony was consistent with that of Kim Trammel. Specifically, she testified that MV received tribal healthcare services only after Emily provided tribal documentation for herself and proof that MV was her daughter.[4] In other words, MV received healthcare services, not through her own association with the Cherokee Nation or her own recognition as an Indian by the tribe, but through her mother's association with the Cherokee Nation and her mother's recognition as an Indian by the tribe.

[4] Emily Anazagasty's testimony reveals merely that she needed to provide MV's birth certificate to Cherokee Nation Health Services. As demonstrated concerning Mr. King's own birth certificate, Oklahoma places adoptive parents on a birth certificate in place of biological parents. (Vol. 3A, at 586–89; Supp. Vol. 1, at 40). Thus, MV's birth certificate merely demonstrated that she was, at a minimum, the adopted child of Emily Anazagasty and would not have proven categorically that she was Emily's natural-born child. Thus, the evidence itself creates the possibility that the Cherokee Nation would provide healthcare services to adopted children.

Mr. King is conscientious of this Circuit's prior decisions in *United States v. Drewry* and *United States v. Nowlin*, as well as the Eighth Circuit's ruling in *United States v. Stymiest*.

In *Drewry*, the child victims were held to be recognized as Indians based not merely on the provision of medical care, but also on their attendance at a summer camp open only to Comanche children (which was permitted because the tribal chairman indicated the children were Comanche), they participated in social life such as powwows, and they were taken into tribal custody after the abuse was reported. 365 F.3d 957, 961 (10th Cir. 2004), *vacated on other grounds by* 543 U.S. 1103 (2005). Notably, the panel in *Drewry* pointed out that the evidence showed that the childrens' "receipt of such [health]care was not predicated on a determination that they fell within one of the two exceptions allowing for the provision of care to non-Indians." *Id.* In fact, the evidence in *Drewry* indicated the provision of medical care "was based on an assumption that they were Indians eligible for such treatment." *Id.*

Drewry does not stand for the proposition that the Government itself may rely upon an assumption that all medical care provided to children by Indian hospitals is reserved to Indian persons or those with

tribal affiliations. At most, it stands for the proposition that if the Government can affirmatively prove that the medical care was provided based on the child being an IHS eligible Indian (or at least that the facility assumed the child was an IHS eligible Indian), then that may serve as evidence of receipt of assistance reserved only to Indian persons. But that is not necessarily adequate, on its own, to provide a sufficient basis for a guilty verdict. The Tenth Circuit's recitation of the facts demonstrates more bases of recognition than the mere provision of medical services based upon a belief the children were eligible Indians.

Insofar as *Drewry* relied upon subsequent events to prove recognition, it was wrong to do so because the fact of recognition must exist prior to the criminal offense, but this Court is not bound by *Drewry* because it was vacated. The decision in *Drewry* was reinstated in an unpublished decision, which is necessarily not precedential or binding on this Court. *See United States v. Drewry*, 133 F. App'x 543, 543 n.* (10th Cir. 2005).

In *Nowlin*, the evidence of the defendant's Indian status bordered on overwhelming. 555 F. App'x at 823–24. There, he received free healthcare from the Indian Health Service, he obtained fishing permits available only to Indians, he participated in powwows, had children with an enrolled tribal member, and held himself out to be an Indian.[5] *Id.* Perhaps most importantly, the defendant in *Nowlin* had previously made a court statement (presumably a guilty plea) during which he declared himself under penalty of perjury to be an Indian person, a member of the Shoshone Tribe, that he attended reservation schools as a child, and that he previously submitted himself to the jurisdiction of a tribal court. *Id.* at 824. It is clear that *Nowlin* involved evidence far more conclusive of recognition than mere receipt of healthcare services as a child based upon a parent's tribal affiliation. Thus, it is a deeply unhelpful opinion in

[5] The *Nowlin* panel did not elaborate on how the decision to procreate with an enrolled Indian makes one, themselves, an Indian. Many tribes would likely look askance at such an approach to finding Indian status. Nor does the panel explain how merely holding oneself out to be an Indian would establish recognition. However, the act of holding oneself out to be an Indian for the purpose of receiving benefits from the federal government or a federally-recognized tribe, and actually receiving such benefits on that basis, might plausibly constitute recognition.

resolving this case and whether MV was recognized as an Indian at the time of the charged offense conduct.

In *Stymiest*, the Indian defendant had been prosecuted in tribal court on multiple occasions, held himself out as an Indian regularly in social gatherings, he had worked on the reservation, and he held himself out as not only an Indian to the IHS facility, but held himself out as an enrolled member of a recognized tribe in order to obtain the medical services. *See United States v. Stymiest*, 581 F.3d 759, at 764–65 (8th Cir. 2009). Put simply, it was not the provision of medical services alone that made the defendant an Indian, but how he obtained them and the various other factors such as being successfully prosecuted in tribal court on multiple occasions. This case bears no meaningful resemblance to the facts of Mr. King's case.

Our justice system does not assume people into prison. The Due Process Clause of the Fifth Amendment to the United States Constitution requires that the United States prove beyond a reasonable doubt every element of an offense before a person may be convicted of a crime. This burden upon the United States serves as the "prime instrument" to ensure convictions do not rest upon factual error and to jealously guard

the presumption of innocence, which is itself a "bedrock axiomatic and elementary principle" upon which "the foundation of the administration of our criminal law" lies. *In re Winship*, 397 U.S. 358, 363 (1970) (internal quotation marks omitted). The "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). While society may have a widely held misunderstanding of how something works—such as for whom Indian Health Services and tribes reserve their healthcare services—but that does not mean the United States is entitled to rely upon that assumption to send a man to prison for the rest of his life. The United States must carry its burden to prove, beyond a reasonable doubt, that the healthcare services MV received were provided on a basis that constitutes recognition of her as an Indian, and not merely on the basis that she is the child of someone who is an Indian.

Ultimately, the law does not support a conclusion that the evidence of MV's receipt of healthcare services was sufficient to permit a rational jury to conclude, beyond a reasonable doubt, that she was recognized as an Indian at the time of the charged offense conduct. The evidence not

only does not show that she received the services on a basis reserved exclusively for Indians or on the basis of her own tribal affiliation, it affirmatively shows that she received it based upon her mother's tribal affiliation. The United States cannot rest upon its laurels after showing that MV received benefits or services and claim that this is "good enough." The burden does not shift to Mr. King to prove the services were on a basis that would not demonstrate recognition. The burden always rested with the United States to prove that any benefits or services MV received were on a basis that would prove recognition. And unlike in *Drewry*, the United States cannot even claim that the services were provided based upon an "assumption" by the providers that the children were Indians because the evidence showed the services were provided based upon MV's mother's tribal status rather than her own. Therefore, this Court should conclude that the evidence was insufficient to support a finding by the jury that MV was an Indian at the time of the charged offense conduct.

b. The evidence fails to prove Mr. King neither possessed any degree of Indian blood nor that he had not been recognized as an Indian at the time of the charged offense conduct.

The evidence of Mr. King's status does little to enlighten anyone as to whether he was an Indian or not at the time of the offense. To prove Mr. King's status as a non-Indian, the United States bore the burden to prove that either one of two things was true beyond a reasonable doubt: Mr. King had no degree of Indian blood or Mr. King was not recognized as an Indian at the time of the charged offense conduct. *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012); *Prentiss III*, 273 F.3d at 1280.

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.

To begin, Mr. King must address Special Agent Harrison's testimony regarding FBI contacts with tribes concerning Mr. King's maternal lineage. While she says that "the FBI reached out to various other tribal entities" concerning his mother's lineage (Vol. 3A, at 600), her testimony does not explain which tribes were contacted or whether the tribes contacted made logical sense to contact. There were 575 federally-recognized tribes in the country at the time of the offense. While the United States need not contact every single tribe in the country to confirm a lack of enrollment status, it needs to explicitly indicate what tribes were contacted and it needs to demonstrate that those tribes rationally would be more likely to have some connection to Mr. King's family than the others it did not contact. Thus, insofar as this testimony might be cited by the United States as proof that Mr. King either lacked

Indian blood or recognition through his maternal lineage, it fails to actually prove anything because it fails to provide any meaningful information the jury could use to resolve the elements before it.

Emily Anazagasty's testimony would not permit a jury to find, beyond a reasonable doubt, that Mr. King was a non-Indian person, either. While her testimony indicated that Mr. King had some belief that state court was the appropriate jurisdiction, nothing in the record indicates the basis for that belief beyond the fact he was not enrolled in the Delaware Tribe of Indians at the time of the charged offense conduct. Given that the standard for Indian status goes beyond enrollment, Mr. King might not have held those same beliefs were he to have known those standards, and there is no proof that he was familiar with those standards.

With respect to Mr. King's degree of Indian blood, there is no requirement that the Indian blood itself derive from a federally-recognized tribe. *See Zepeda*, 792 F.3d at 1113 (rejecting requirement that an individual's Indian blood must be traceable to a federally-recognized tribe). While the testimony of Emily Haney makes clear that Mr. King has no apparent Indian blood traceable to the Delaware Tribe

of Indians (Vol. 3A, at 586–89), the testimony of Krystel Dunckel makes clear her belief that she (and by extension, Mr. King) both have some degree of Indian blood through their mother's family (Vol. 3A, at 567–68 and 569–70). Mr. King's other sister, Kellie Glass, merely indicated she had no information as to whether she (and by extension, Mr. King) have Indian blood. (Vol. 3A, at 578–80). Thus, the evidence fails to permit a reasonable jury to conclude, beyond a reasonable doubt, that Mr. King lacks a degree of Indian blood. Special Agent Harrison merely stated that she had not received information that Mr. King had Indian blood through his maternal lineage (Vol. 3A, at 600–01), which is not that same as affirmative declarations that the lineage had no Indian blood and, even if it did, her testimony does not indicate that whoever she contacted possessed the knowledge necessary to make that declaration.

Mr. King's recognition poses different questions. We know that Mr. King was not an enrolled member of the Delaware Tribe of Indians at the time of the charged offense conduct because his enrollment occurred after the relevant dates. (Government's Exhibit 41; Supp. Rec. Vol. 1, at 45). We also know that Mr. King was not an enrolled member of a federally recognized tribe during the relevant dates because of the

filing made in Cherokee Nation District Court. (Government's Exhibit 42; Supp. Rec. Vol. 1, at 47). But the absence of enrollment, without also proving the absence of recognition in its other forms, is not proof beyond a reasonable doubt that Mr. King was not recognized. If the United States may prove MV's recognition at the time of the offense by showing her receipt of assistance or benefits from federal or tribal entities, then the United States must necessarily also prove Mr. King did not receive assistance or benefits in order to prove, beyond a reasonable doubt, he had not been recognized as an Indian. The only evidence that came in concerning the other recognition factors was Krystel Dunckel's testimony that they never participated in powwows.

The filings from the Oklahoma state court and the Cherokee Nation District Court do not disclaim other forms of recognition. The Cherokee Nation motion to dismiss is explicitly premised upon Mr. King not having been a member of a federally-recognized tribe at the time of the charged offense conduct. (Government's Exhibit 42; Supp. Rec. Vol. 1, at 47). The Oklahoma state court motion to dismiss was explicitly premised upon Mr. King being a member of the Delaware Tribe of Indians. (Government's Exhibit 41; Supp. Rec. Vol. 1, at 41–42). That motion's subsequent

withdrawal is noted during Special Agent Harrison's testimony (Vol. 3A, at 608–09), but the basis for that withdrawal is unknown; rationally, it was likely withdrawn because Mr. King was not an enrolled member at the time of the charged offense conduct.

The United States would not have been hard-pressed to present evidence concerning benefits or assistance. In fact, it had precisely the three witnesses it needed in order to address these issues. The United States had both of Mr. King's older sisters testify. At no point did the United States ever ask the very simple question of whether Mr. King, as a child or as an adult, received benefits, services, or assistance from the federal government or a tribe. Since they were both Mr. King's older sisters, they are the two most likely people (other than Mr. King's own mother) who would be in a position to provide this information. Yet the United States did not ask. Perhaps it believed the answer would be unfavorable to its position concerning MV's recognition. The other witness in a position to answer this question was Emily Anazagasty who, due to her close relationship with Mr. King, would have been the best person to ask if he received benefits or services during the period she had known him. The United States never asked her those questions.

Just as the United States may not rest upon assumptions regarding MV's status, it could not rely upon assumptions as to Mr. King's status. It needed to present evidence concerning Mr. King's potential receipt of assistance or benefits that might have been a form of recognition as an Indian. It failed to do so. Therefore, this Court should hold that the evidence was insufficient to permit a reasonable jury to find, beyond a reasonable doubt, that Mr. King was a non-Indian person at the time of the charged offense conduct.

II. (Issue Two) The District Court erred in declining to order an election of charges given the prejudicial effect of the multiplicitous charges in the Indictment.

The District Court erred in denying Mr. King's Motion to Dismiss the Indictment for Multiplicity. Specifically, it should have ordered an election of charges. The United States brought the charges in the manner it did because, put simply, it did not know whether Mr. King was or was not an Indian person. To alleviate the burden of trying to prove one or the other, it opted for a different approach: Heads I Win, Tails You Lose. The United States sought to cut Mr. King off from raising a defense concerning his Indian status by ensuring that if he aimed to present evidence one way or another as to his status, he would be assisting the

United States in proving an element of its case. If Mr. King sought to prove his status as an Indian to defeat the charges brought under 18 U.S.C. § 1152, then he would be proving an element of the charges brought under 18 U.S.C. § 1153, and vice versa. Strangely enough, the United States' own waffling throughout the trial concerning the status of Mr. King and MV may have led to it failing to prove status as to one or both of them.[6] But the trial also demonstrates that Mr. King was prejudiced by the multiplicitous charges and the United States should have been compelled to make an election of charges prior to trial.

1. Standard of Review

This Court reviews claims of multiplicity de novo. *United States v. Benoit*, 713 F.3d 1, 12 (10th Cir. 2013). This Court reviews a district court's denial of an election of charges for abuse of discretion. *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997). "A court abuses its discretion when it renders a judgment that is arbitrary, capricious, whimsical, or manifestly unreasonable," or its ruling is based "on an

[6] Mr. King has presented argument that the evidence was insufficient as a matter of law to prove, beyond a reasonable doubt, that he was a non-Indian person and MV was an Indian person at the time of the charged offense conduct.

erroneous view of the law or on a clearly erroneous assessment of the evidence." *United States v. Martinez*, 92 F.4th 1213, 1227 (10th Cir. 2024).

2. Record References

Mr. King filed his Motion to Dismiss on May 3, 2024. (Vol. 1, at 147–55; Attachment C). The United States filed its response on May 10, 2024. (Vol. 1, at 183–191). The District Court held a motions hearing on May 13, 2024, during which it ruled on Mr. King's motion by denying it. (Vol. 3A, at 7–9; Attachment D).

3. The District Court erred in refusing to order an election of charges because the United States' manner of charging Mr. King had the extremely prejudicial effect of preventing him from raising a defense regarding his Indian status.

An indictment is multiplicitous when multiple counts cover the same criminal behavior. *United States v. Frierson*, 698 F.3d 1267, 1269 (10th Cir. 2012); *United States v. Jenkins*, 313 F.3d 549, 557 (10th Cir. 2002) ("Multiplicitous counts are separately charged counts that are based on the same criminal behavior."). There are two theories under which an indictment may be multiplicitous: The "same elements test, *United States v. Isabella*, 918 F.3d 816, 847 (10th Cir. 2019), and the "unit of prosecution" test, *United States v. Elliott*, 937 F.3d 1310, 1313 (10th

Cir. 2019). Strictly speaking, Mr. King's charges may not satisfy the same elements test, so Mr. King's appeal focuses on the unit of prosecution test.

A unit of prosecution is "the minimum amount of activity a defendant must undertake, what he must do, to commit each new and independent violation of a criminal statute." *Id.* (internal quotation marks omitted). The question to be resolved under this test is whether, when the same statutory violation is charged twice, "the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." *Id.* Two cases are key to this test: The first is *United States v. Jackson*, 82 F.4th 943 (10th Cir. 2023), and the other is *United States v. Johnson*, 130 F.3d 1420.

In *Jackson*, a panel of this Court held that two counts of violations of 18 U.S.C. § 2252(a)(4), one premised on Indian country jurisdiction and the other premised on interstate commerce jurisdiction, were multiplicitous and the convictions violated the defendant's rights under the Double Jeopardy Clause. 82 F.4th at 947–49. The panel was not asked to determine whether an election of charges should have been ordered prior to trial. *Jackson* demonstrates that, where two charges concern the same conduct, the charges are multiplicitous even when the

jurisdictional hook is different. *Id.* at 947–48. In this case, the United States brought two counts of violations of 18 U.S.C. §§ 2241(c) and 2244(a)(5). (Vol. 1, at 16–19). The United States conceded during the motions hearing that these charges concerned the same conduct and could not obtain convictions on all four counts; if it were to prevail, it could only be on Counts 1 and 2 or Counts 3 and 4.[7] (Vol. 3A, at 8). Thus, there can be no dispute that the charges were multiplicitous. The question is whether an election of charges should have been ordered.

Mr. King agrees that district courts have discretion in determining whether an election of charges is warranted concerning a multiplicitous indictment. *Johnson*, 130 F.3d at 1426. Typically, "[t]he risk of a trial court not requiring pretrial election is that it may falsely suggest to a jury that a defendant has committed not one but several crimes." *Id.* (internal quotation marks omitted). The District Court believed that a jury instruction could alleviate the danger posed by this scenario, and the parties submitted a proposed preliminary jury instruction that addressed it. (Vol. 1, at 804–05; Vol. 3A, at 9). The problem, however, is that the

[7] The District Court mistakenly references the charge pairings to be Counts 1 and 3 or 2 and 4. (Vol. 3A, at 8).

United States' charging approach creates a very different kind of prejudice: If Mr. King sought to defend against the allegation he was an Indian, he would be compelled to prove his non-Indian status; if he sought to defend against the allegation that he was a non-Indian, he would be compelled to prove his Indian status. This placed Mr. King in the position of having to walk a tightrope or having to choose which status to assist the United States in proving.

As a matter of practicality, Mr. King was forced to favor a theory that he was not an Indian person because, at the least, he could attempt to challenge MV's status as an Indian at the time of the offense. If he claimed to be an Indian, MV's status was irrelevant. Nonetheless, as extensively discussed earlier in this Brief, Mr. King believes the evidence elicited during the trial failed to prove Mr. King's status as a non-Indian person. Multiple people in the trial could plausibly have testified definitively about Mr. King's status, but they did not, and Mr. King did not seek to elicit such definitive testimony because it would have helped only the United States.

The District Court's refusal to order an election of charges was not harmless. This "Heads I Win, Tails You Lose," approach by the United

States is prejudicial to defendants because it prevents them from raising a defense to the charges. Where the charges are multiplicitous under a unit of prosecution theory of multiplicity, that multiplicity cannot be used as a weapon against the defendant. While the United States complained of Mr. King seemingly playing jurisdictional games with his status, there is no proof that he was directing his attorneys to file those motions on his behalf. And even if he were, the United States bears the burden to determine and prove Mr. King's status; if it does not know what his status is, the proper course is additional investigation, not throwing spaghetti at the wall. The District Court should have ordered an election of charges rather than allowing all four to go to trial and forcing Mr. King to not put on a defense as to the element concerning his own status.

CONCLUSION

As to Issue One, Mr. King requests that this Court vacate his convictions, order that judgment of acquittal be entered as to Counts 1 and 2, and remand for further proceedings consistent with its ruling. Alternatively, as to Issue Two, Mr. King requests that this Court vacate his convictions and remand for a new trial and proceedings consistent with its ruling.

STATEMENT REGARDING ORAL ARGUMENT

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

Respectfully submitted,

Julia L. O'Connell, Federal Public Defender

s/ Jared T. Guemmer
Jared T. Guemmer
Assistant Federal Public Defender
Mo. Bar. No. 69109
Office of the Federal Public Defender
Northern District of Oklahoma
1 West Third Street, Ste. 1225
Tulsa, OK 74104
(918) 571-7656 / Fax (918) 581-7630
Counsel for Defendant/Appellant

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTION

I hereby certify that the digital version of this brief and attachment is an exact copy of any paper copy required to be submitted to the court. It has been scanned by the most recent version of Apex One Security Agent and according to the program is free of viruses. All required privacy redactions have been made.

s/ Jared T. Guemmer

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the type-volume limitations of Fed. R. App. P. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12802 words.

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Date: August 6, 2025

s/ Jared T. Guemmer

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 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: Elliot Anderson, Assistant United States Attorney, counsel for Plaintiff/Appellee.

s/ Jared T. Guemmer

ATTACHMENT A

JUDGMENT IN A CRIMINAL CASE

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA
v.
ADAM JOSEPH KING

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:24CR00081–1

USM Number: 02736-511
Lindsey Hanna Holguin, Jared Guemmer, Gabrielle Kolencik, and Robert Allen Ridenour
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☒ was found guilty on counts One and Two of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1151, 1152, and 2241(c)	Aggravated Sexual Abuse of a Minor Under 12 Years of Age in Indian Country	8/22/21	1
18 U.S.C. §§ 1151, 1152, and 2244(a)(5)	Abusive Sexual Contact with a Minor Under 12 Years of Age within Indian Country	8/25/21	2

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

January 22, 2025
Date of Imposition of Judgment

Signature of Judge

John D. Russell, United States District Judge
Name and Title of Judge

January 23, 2025
Date

AO 245B (Rev. 10/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Life, per count as to each of Counts One and Two. Both counts shall run concurrently, each with the other.

☒ The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be placed in a Bureau of Prisons' facility as close to Tulsa, Oklahoma, as possible.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____

_____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Life, per count as to each of Counts One and Two. Said counts shall run concurrently, each with the other.

MANDATORY CONDITIONS

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

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

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

STANDARD CONDITIONS OF SUPERVISION

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

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

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abide by the "Special Sex Offender Conditions" previously adopted by the Court, as follows:

1. The defendant shall register pursuant to the provisions of the Sex Offender Registration Notification Act (SORNA) (Public Law 109-248) and any applicable state registration law.
2. The defendant shall participate in and successfully complete sex offender treatment, to include a risk assessment and physiological testing, at a program or by a therapist and on a schedule approved by the probation officer. The defendant shall abide by the rules, requirements, conditions, policies and procedures of the program to include specific directions to undergo periodic polygraph examinations or other types of testing as a means to ensure that the defendant is in compliance with the requirements of his/her supervision or treatment program. The defendant shall waive any right of confidentiality in any treatment or assessment records to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant may be required to contribute to the cost of services rendered (co-payment) in an amount to be determined by the probation office, based on the defendant's ability to pay.
3. Except for immediate family members,[1] the defendant shall have no contact with persons under the age of 18 unless approved by the probation officer. The defendant will immediately report any unauthorized contact with persons under the age of 18 to the probation officer. The defendant will not enter or loiter within 100 feet of schools, parks, playgrounds, arcades, or other places frequented by persons under the age of 18.
5. The defendant shall submit his person, property, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), electronic communication devices, data storage devices, or media, to a search, conducted by the probation officer at a reasonable time and in a reasonable manner, based on a reasonable suspicion of contraband or evidence of a violation of a condition of release (except as set forth in the Computer and Internet Restriction Condition (Paragraph 7(b)), if imposed). Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.
7. The defendant shall abide by the following computer restrictions and monitoring conditions:
    a. The defendant shall disclose all electronic communications devices, data storage devices, e-mail accounts, internet connections and internet connection devices, including screen names, user identifications, and passwords, to the probation officer; and shall immediately advise the probation officer of any changes in his/her email accounts, connections, devices, or passwords.
    b. The defendant shall allow the probation officer to install computer monitoring software on any computer, as defined by 18 U.S.C. § 1030(e)(1), that the defendant owns, utilizes or has the ability to access. The cost of remote monitoring software shall be paid by the defendant. To ensure compliance with the computer monitoring condition, the defendant shall allow the probation officer to conduct periodic, unannounced searches of any computer subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. Additionally, the defendant shall warn other people who use these computers that the computers may be subject to searches pursuant to this condition.
    c. The defendant shall not access any on-line service using an alias, or access any on-line service using the internet account, name, or designation of another person or entity; and shall report immediately to the probation officer access to any internet site containing prohibited material.
    d. The defendant is prohibited from using any form of encryption, cryptography, stenography, compression, password protected files or other methods that limit access to, or change the appearance of, data and/or images.
    e. The defendant is prohibited from altering or destroying records of computer use, including the use of software or functions designed to alter, clean or "wipe" computer media, block monitoring software, or restore a computer to a previous state.

[1] "Immediate family member" is defined as siblings, children, grandchildren, persons to whom the offender stands in *loco parentis,* and persons living in the offender's household and related by blood or marriage.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 3B — Supervised Release

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

SPECIAL CONDITIONS OF SUPERVISION

2. The defendant shall submit his person, property, residence, office, vehicle, cellular telephone, computer, or any other electronic communication device, to a search conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

3. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the cost of the program or assist (co-payment) in payment of the costs of the program if financially able.

4. The defendant is prohibited from attempting or having any contact whatsoever with the victim X.B., directly or indirectly, in person, through others, or by telephone, mail, electronic means, or any other manner, at any time or place unless specifically authorized by the Court and the probation office. The defendant shall remain 100 yards away from her, her place of residence, and her place of employment or school at all times.

5. The defendant shall not possess or view any video or visual depiction, as defined at 18 U.S.C. § 2256(5), displaying a sexual act, as defined at 18 U.S.C. § 2246(2), or child pornography, as defined at 18 U.S.C. § 2256(8).

U.S. Probation Officer Use Only

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

Defendant's Signature _____ Date _____

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$200	Not Ascertainable	N/A	N/A	N/A

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

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to Plea Agreement $ _____

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Adam Joseph King
CASE NUMBER: 4:24CR00081-1

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $ 200 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 90 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

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

Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of $50 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

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

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

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

ATTACHMENT B

RULE 29 MOTIONS AND RULINGS

element is proven beyond a reasonable doubt, and the government need not present any further evidence that the locations of the conduct alleged in the indictment are within Indian Country in the Northern District of Oklahoma.

This is dated the 27th of June, 2024. It's signed by Ms. Luster, Ms. Holguin, and by the defendant, Adam Joseph King.

All right. Having read that, Government proceed.

MS. LUSTER: The government rests, Your Honor.

THE COURT: All right. The government has rested. It's -- which is a good time for us to take our lunch break. So we've got some additional matters that we need to take care of. We'll allow you to go to lunch. I'm going to suggest that you be back in about 90 minutes, and we will be ready to start promptly at that time.

So we'll all remain seated while the jury leaves for their lunch break.

(Jury out at 11:52 a.m.)

A. All right. We're outside the presence of the jury.

There are some additional matters that we need to take up at this time with respect to -- well, we've got several matters we need to take up at this time, so we'll start -- how do the parties wish to proceed?

MS. LUSTER: I have no preference, Your Honor.

MS. KOLENCIK: Your Honor, we leave it to the Court's

discretion, but Mr. King has a motion to make under Federal Rule of Criminal Procedure 29, if we may be heard on that.

THE COURT: You may. We can just go ahead and do that at this time.

MS. KOLENCIK: Your Honor, at this time, Mr. King moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 as the government has failed to meet its burden as to all counts.

THE COURT: All right. Is there any additional argument you wish the make?

MS. KOLENCIK: I rest on the motion, Your Honor.

THE COURT: All right. Thank you.

Do you wish to be heard, Government?

MS. LUSTER: Your Honor, based on the evidence presented at trial, the government submits that there is more than sufficient evidence on all counts of the indictment to give them to the jury.

THE COURT: All right.

In considering the motion for judgment of acquittal, the Court views the evidence in the light most favorable to the government. The judgment of acquittal is proper only if the evidence, and all the inferences to be drawn from it, is insufficient to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. The evidence must be substantial and not raise a mere suspicion of

guilt.

The Court finds that there is substantial evidence from which a rational trier of fact could find the essential elements for each offense beyond a reasonable doubt. The motion will be overruled.

At this time, should we take up the evidentiary issues that the parties wanted to have addressed before we start the defense case?

MS. LUSTER: Yes, Your Honor. We have two objections to witnesses to their amended witness list. They purported to offer an investigator who interviewed a minor, the minor outcry witness, as well as the outcry witness himself. The government provided notice of that minor child through discovery on June the 20th; yet that minor was not contacted or interviewed until the Saturday before jury trial.

The only believed evidence that this minor could offer that has not already been heard from MV herself is that he lied about his -- his own disclosure of abuse. This would be incredibly inappropriate to offer. It would be prejudicial and certainly more prejudicial than probative.

That child's recantation of his abuse is irrelevant and completely irrelevant to MV's claim of abuse. And, frankly, the only reason that the defense would be calling him would be to ask him if he told MV that he was abused and if that was true; and, therefore, they would only be calling this witness

okay? -- and once we do that, we would like to reurge our Rule 29.

THE COURT: I understand. We can do that at sidebar.

MR. RIDENOUR: Yes, sir.

THE COURT: All right. Thank you.

Bring the jury back in, please.

(Jury in at 3:00 p.m.)

THE COURT: All right. Defense can call your next witness.

MS. HOLGUIN: At this time, Defense would rest.

THE COURT: All right. Do the parties wish to be heard?

MS. HOLGUIN: Yes, Your Honor.

THE COURT: All right.

(Bench conference on the record outside the hearing of the jury:)

MS. KOLENCIK: Your Honor, at this time, Mr. King moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

THE COURT: All right. The Court finds that there is substantial evidence from which a rational trier of fact could find the essential elements of the offenses in this case, so the motion will be overruled.

MS. KOLENCIK: Understood. Thank you.

THE COURT: Okay. Anything further?

the jury.

It's now 3:25. I don't know how much time the parties have had to review the draft instructions, but I think that if we could, would it be appropriate for us to come back at, say, 4:00 to -- we could have our instruction conference at that time, and we can determine whether or not there are any changes that need to be made to the instructions?

MS. LUSTER: Yes, Your Honor.

THE COURT: Does that work for the defense?

MS. HOLGUIN: Yes, Your Honor.

THE COURT: Okay.

MS. HOLGUIN: We have one matter to address very briefly, Judge.

THE COURT: All right.

MS. KOLENCIK: I apologize, Your Honor, but now that all evidence has been submitted, Mr. King moves for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29.

THE COURT: Understood. The Court finds that there's been substantial evidence that a rational trier of fact could find the elements of these offenses beyond a reasonable doubt, so the Court overrules the motion.

MS. KOLENCIK: Understood. Thank you.

THE COURT: All right. If the parties are ready before 4:00, let me know and we can go ahead and get started. And also be thinking about how much time you want for closing

ATTACHMENT C

MOTION TO DISMISS INDICTMENT

FOR MULTIPLICITY

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 24-CR-081-JDR**
	)	
ADAM JOSEPH KING,	)	
	)	
Defendant.	)	

DEFENDANT'S OPPOSED MOTION TO DISMISS INDICTMENT FOR MULTIPLICITY

COMES NOW, Defendant Adam Joseph King, by and through undersigned Counsel, and hereby respectfully moves this Court for dismissal of the Indictment on the grounds that its charges are multiplicitous in violation of Federal Rule of Criminal Procedure 12(b)(3)(B)(ii).

The charges in the Indictment are multiplicitous under the "unit of prosecution" analysis, which does not permit multiple counts if each count punishes the same conduct that constitutes a single unit of prosecution. In this case, the Government has charged Mr. King with two counts of Aggravated Sexual Abuse of a Minor under 12 in Indian country, and two counts of Abusive Sexual Contact with a Minor under 12 in Indian country. The only factor that distinguishes one charge from its twin is the alleged status of Mr. King and the alleged victim. A person's Indian status is not the unit of prosecution that determines whether a person may face multiple individual counts, instead the conduct that constitutes the criminal offense is the unit of prosecution. Thus, each set of charges is multiplicitous.

Moreover, the Court should compel the Government to elect which charges it wishes to continue pursuing and take to trial. To allow the Government to proceed to trial with the multiplicitous charges would be extraordinarily prejudicial to Mr. King.

BACKGROUND

On March 18, 2024, the Government filed an Indictment charging Mr. King with four counts:

- Count One: Aggravated Sexual Abuse of a Minor under 12 in Indian country in violation of 18 U.S.C. § 1152 and 18 U.S.C. § 2241(c)
  - Alleges criminal conduct occurred between November 2017 and August 23, 2021
  - Alleges that Mr. King is a Non-Indian person and M.V. is an Indian

- Count Two: Abusive Sexual Contact with a Minor under 12 in Indian country in violation of 18 U.S.C. § 1152 and 18 U.S.C. 2244(a)(5)
  - Alleges criminal conduct occurred between November 2017 and August 23, 2021
  - Alleges that Mr. King is a Non-Indian person and M.V. is an Indian

- Count Three: Aggravated Sexual Abuse of a Minor under 12 in Indian country in violation of 18 U.S.C. § 1153 and 18 U.S.C. § 2241(c)
  - Alleges criminal conduct occurred between November 2017 and August 23, 2021
  - Alleges that Mr. King is an Indian

- Count Four: Abusive Sexual Contact with a Minor under 12 in Indian country in violation of 18 U.S.C. § 1153 and 18 U.S.C. § 2244(a)(5)
  - Alleges criminal conduct occurred between November 2017 and August 23, 2021
  - Alleges that Mr. King is an Indian

DISCUSSION

An indictment is multiplicitous when multiple counts cover the same criminal behavior. *United States v. Frierson*, 698 F.3d 1267, 1269 (10th Cir. 2012); *United States v. Jenkins*, 313 F.3d 549, 557 (10th Cir. 2002) ("Multiplicitous counts are separately charged counts that are based on the same criminal behavior."). There are two primary theories that provide a basis for finding an indictment to be multiplicitous, and just because an indictment is not multiplicitous under one theory does not preclude it from being multiplicitous under the other. Each theory is focused on determining whether Congress intended to allow a defendant to be convicted of both counts.

The first theory is the most well known, as it derives from the *Blockburger* double-jeopardy test announced in *Blockburger v. United States*, 284 U.S. 299 (1932). That theory says that counts

in an indictment are not multiplicitous if each charge requires proof of an element unique to that charge. *Id.* at 304. This rule is also called the "same elements test." *United States v. Isabella*, 918 F.3d 816, 847 (10th Cir. 2019). In a very strict sense, the charges against Mr. King do not satisfy the same-elements test because each set of charges requires proof of a different element; in this case, the Indian status of either Mr. King or M.V. However, the second theory for multiplicity does apply, and it does compel a finding that the Indictment is multiplicitous in violation of Rule 12(b)(3)(B)(ii).

The second theory is called the "unit of prosecution" test. "If the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." *United States v. Elliott*, 937 F.3d 1310, 1313 (10th Cir. 2019) (internal quotation marks omitted). A unit of prosecution is "the minimum amount of activity a defendant must undertake, what he must do, to commit each new and independent violation of a criminal statute." *Id.* (quoting *United States v. Rentz*, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc)). In *Rentz*, the en banc Tenth Circuit utilized a "verb test" to determine what the unit of prosecution was in a statute. 777 F.3d at 1109. It explained that a statute's unit of prosecution, the minimum activity a defendant must engage in to commit an independent violation, can often (but not always) be discerned by looking to the statute's verb. *Id.* The Supreme Court has also found value in such a test. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 279–80 (1999). And this approach is sensible, because the verb in a statute is usually the defining feature of what act is prohibited. Importantly, where "Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." *Bell v. United States*, 349 U.S. 81, 84 (1955), *accord Elliott*, 937 F.3d at 1313 and *Rentz*, 777 F.3d at 1113.

In *Rentz*, the Tenth Circuit examined 18 U.S.C. § 924(c)(1)(A), which criminalizes using, carrying, or possessing a firearm in furtherance of a crime of violence. 777 F.3d at 1109. The en banc court in *Rentz* explained that, while Section 924(c)(1)(A) punished using, carrying, or possessing during or in relation to a crime of violence or drug trafficking crime, it did not allow for multiple charges based on a single instance of using, carrying, or possessing even when multiple crimes of violence were committed. *Id.* "[I]f a law's verb says it's a crime to kill someone, we usually think a defendant must kill more than one person to be found guilty of more than one offense. That's the action necessary to support each and every unit of prosecution." *Id.* "[I]magine Congress passed a statute . . . imposing special penalties for 'any person who, during a holiday, murders another.' In a year when Hanukkah and Christmas happen to fall on the same day, a man is arrested for shooting a single victim. Does the statute allow the government to bring *two* charges because of the calendar's curiosities?" The *Rentz* court answered in the negative, concluding that "murders" is the operative verb, which "focuses our attention on the operative act" rather than the number of holidays upon which the act occurred. *Id.* at 1110. The holiday requirement placed a limitation on the availability of the charge, it did not create a basis for multiple charges. *Id.*

In *United States v. Johnson*, the Tenth Circuit applied a unit of prosecution approach to 18 U.S.C. § 922(g). 130 F.3d 1420, 1414–26 (10th Cir. 1999). The question before the *Johnson* panel was whether an individual could be charged with multiple counts of violation Section 922(g) based on a single frame of time during which he possessed a handgun when he satisfied multiple prohibited status requirements. *Id.* at 1424. The defendant was both a felon and an unlawful user of controlled substance, placing him in violation of both Sections 922(g)(1) and 922(g)(3), and he was charged with violating each provision. *Id.* He was alleged to have possessed a firearm from on or about July 1, 1995, up to and including on or about October 18, 1995. *Id.* After some

discussion of how other circuits interpreted Section 922(g), the Tenth Circuit concluded that the charges were multiplicitous. *Id.* at 1426. The charges here bear great similarity to those in *Johnson*.

For a conviction to be sustained under Section 1152, the Government must prove that the defendant and victim have different statuses; one must be Indian and the other must be non-Indian. *See* 18 U.S.C. § 1152 (prohibiting application of Section 1152 to offenses committed in Indian country by one Indian against another). Under Section 1153, the defendant must be Indian. 18 U.S.C. § 1153(a) (applying to Indians who commit certain crimes against the person or property of any other person). Counts One and Two are brought under Section 1152, while Counts Three and Four are brought under Section 1153. In this case, the fundamental question before the Court is whether Mr. King and M.V.'s statuses are part of the unit of prosecution or if they are mere limitations on the availability of the charge, much like the holidays in the *Rentz* example. The answer seems obvious in light of *Rentz* and *Johnson*.

Counts One and Three charge Mr. King with a violation of 18 U.S.C. § 2241(c). Each charges identical conduct during identical time frames, with the only distinguishing factor being Mr. King's and M.V.'s alleged statuses at the time of the offense. Section 2241(c) punishes any person who, in the special territorial jurisdiction of the United States, "knowingly engages in a sexual act with another person who has not attained the age of 12 years." Using the *Rentz* approach, the verb test indicates that the unit of prosecution is engaging in a sexual act. The requirement that it be done knowingly, with a child under the age of 12, and in the special territorial jurisdiction of the United States are limitations on the charge's availability. Similarly, the requirement that Mr. King have a particular status (or that M.V. have a particular status) is a limitation on the charge's availability.

Just as in *Johnson*, where a defendant being both a felon and an unlawful user of a controlled substance did not allow the Government to charge him with two violations of Section 922(g), the Government cannot here rely upon allegations in one count that Mr. King is a non-Indian and that he is an Indian in the other count as a basis to charge him twice for the same conduct occurring in the same timeframe. Therefore, Counts One and Three are multiplicitous to each other.

Counts Two and Four charge Mr. King with violating 18 U.S.C. § 2244(a)(5). Each charges the exact same conduct during identical time frames, with the only distinguishing factor being Mr. King's and M.V.'s alleged statuses at the time of the offense. Section 2244(a) punishes any person who, in the special territorial jurisdiction of the United States knowingly engages in or causes sexual contact with another person. If the sexual contact would have constituted a sexual act in violation of Section 2241(c), the punishment is any term of years up to life. 18 U.S.C. § 2244(a)(5). Under the *Rentz* approach, the verb test indicates that the unit of prosecution is engaging in or causing sexual contact. The requirements that it be done knowingly and with another person is a limitation on the charge's availability. Similarly, the requirement that Mr. King have a particular status (or that M.V. have a particular status) is a limitation on the charge's availability. The range of punishment available for the conduct is dictated by what statute would have been violated if the contact had instead been a sexual act.

Again, just as in *Johnson*, the Government cannot rely upon allegations in one count that Mr. King is a non-Indian and that he is an Indian in the other count as a basis to charge him twice for the same conduct occurring in the same timeframe. Therefore, Counts Two and Four are multiplicitous to each other.

While Mr. King's position is that the unit of prosecution is obvious under the *Rentz* and *Johnson* analyses, and that the charges are clearly multiplicitous, Mr. King should prevail even if the Court disagrees. Because, at a minimum, the Court should find there is ambiguity regarding the unit of prosecution, and an ambiguity must be resolved in Mr. King's favor. *See Rentz*, 777 F.3d at 1113 ("Our job is always in the first instance to follow Congress's directions. But if those directions are unclear, the tie goes to the presumptively free citizen and not the prosecutor.").

One matter remains to be resolved: Whether the Government must elect which charges to pursue or if it may proceed to trial on the Indictment as presented. Multiplicity is not necessarily fatal to an indictment. *Johnson*, 130 F.3d at 1424. However, the Tenth Circuit in *Johnson* acknowledged that requiring an election of charges may be appropriate in some cases, and it concluded that the district court has the discretion to compel the Government to elect which charges to pursue. *Id.* at 1426. The Tenth Circuit noted that reasons to require an election of charges would include prejudice to the defendant where the indictment improperly suggests to the jury that the defendant committed more crimes than he can actually be convicted of committed, or the risk of a compromise verdict. *Id.*

Both issues are particularly concerning in this case. On the one hand, Mr. King is charged with four counts (instead of two counts) of heinous acts against a young child. Tacking on multiplicitous counts presents a real risk that the jury will view him in a poor light even with the Court's reminder that Mr. King is innocent until proven guilty beyond a reasonable doubt. Additionally, should Mr. King's guilt as to any particular count come down to his status, and the jury finds itself unsure which status Mr. King satisfies, it could decide to just pick one and find him guilty because it concluded he committed the heinous acts for which he has been charged.

There further remains the reality that the Government cannot factually or legally obtain a conviction on both sets of charges. In order to prove Mr. King guilty of Counts One and Three, it must prove beyond a reasonable doubt that he was not an Indian, which means it must disprove an element of Counts Two and Four. To obtain a conviction on Counts Two and Four, it must prove beyond a reasonable doubt that Mr. King was an Indian, which means it must disprove an element of Counts One and Three. It appears that the Government aims to cut off avenues of defense for Mr. King; if he attacks his alleged status in either direction, he admits his status as to the remaining count. This raises a question of fundamental fairness, especially given the Government's obligations as set out in the Department of Justice's own standards, which provide that prosecution for a charge may commence "only if [the prosecutor] believes that the person will more likely than not be found guilty beyond a reasonable doubt by an unbiased trier of fact and that the conviction will be upheld on appeal." DOJ Justice Manual § 9-27.220, Principles of Federal Prosecution, Grounds for Commencing or Declining Prosecution, Comment to § 9-27.220.

The Government should be compelled to elect which charges it intends to pursue at trial. The multiplicitous charges are highly prejudicial to Mr. King and requiring the Government to elect which charges to pursue at trial does not prejudice the Government. If the Government for some reason remains unsure of Mr. King's status, it should conduct further investigation rather than subject Mr. King to a prejudicially multiplicitous indictment.

CONCLUSION

WHEREFORE, Defendant respectfully requests that this Court grant his Motion to Dismiss Indictment for Multiplicity under Federal Rule of Criminal Procedure 12(b)(3)(B)(ii).

Respectfully submitted,

OFFICE OF THE FEDERAL PUBLIC DEFENDER
Julia L. O'Connell, Federal Public Defender

By: *s/Jared T. Guemmer*
Jared T. Guemmer, Mo. Bar No. 69109
Assistant Federal Public Defender
Office of Federal Public Defender
One West Third St., Ste. 1225
Tulsa, Oklahoma 74103
(918) 581-7656
Jared_Guemmer@fd.org
Counsel for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2024, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmitted a Notice of Electronic Filing to the following ECF registrants:

Valeria Luster, Assistant United States Attorney.

s/Jared T. Guemmer
Jared T. Guemmer
Assistant Federal Public Defender

ATTACHMENT D

RULING ON MOTION TO DISMISS INDICTMENT

P R O C E E D I N G S

MAY 13, 2024:

THE DEPUTY COURT CLERK: Call Case No. 24-CR-81-JDR, *United States of America vs. Adam Joseph King*. Counsel, make your appearance for the record.

MS. LUSTER: Valeria Luster and Matthew Cyran for the government.

THE COURT: Good afternoon.

MS. HOLGUIN: Lindsey Holguin and Jared Guemmer on behalf of Mr. King who is present in the courtroom in custody.

THE COURT: Good afternoon. Okay. We've got a number of things in front of us today, and I've had a chance to read through everything that's been provided, so I think if -- let's just start with the top of my stack, unless the parties have some plan for how they think we should proceed today. Let me just toss it out there.

Ms. Luster?

MS. LUSTER: I have zero problems with how Your Honor wants to proceed. I have no ideas on how to conduct this more or less effectively than another.

THE COURT: All right. Ms. Holguin?

MS. HOLGUIN: Same answer.

THE COURT: Okay. So I have the defendant's motion for an order to disclose grand jury testimony, and I have the motion to dismiss the indictment on multiplicity grounds.

I guess I should be directing this to you, Ms. Holguin. Are those essentially connected, I guess, for lack of a better term?

MS. HOLGUIN: I would direct you to Mr. Guemmer.

MR. GUEMMER: They are closely connected, Your Honor. I do believe if the Court were to order an election of charges, that would solve the bulk of the problems related to the grand jury transcripts as well.

THE COURT: All right. Well, let's address -- I guess let me do this. Let me address the multiplicity motion first.

So the way that I see the multiplicity motion is the Tenth Circuit seems to have clearly decided -- or indicated that the problem is not multiplicity from the standpoint of can it be charged? Of course, the question is it whether it can be convicted.

And it seems to me -- and I guess I will direct this question to the government, but it seems to me that nobody is suggesting that Mr. King is guilty of the four counts of the indictment -- of all fours counts, correct?

MS. LUSTER: Absolutely correct.

THE COURT: Right. So at best, if Mr. King is guilty of any counts of the indictment, it would be either One and Three or Two and Four. Is that right?

MS. LUSTER: Yes, Your Honor.

THE COURT: Okay. So I think that under the *Jackson*

case, you know, we are here with the question of is Mr. King an Indian or is he not an Indian? And that seems to be the -- the question. And I guess I'm not -- I don't have a full record here with respect to whether Mr. King is playing hot potato with whether or not he is or isn't an Indian or when it was that he was or was not an Indian; but one way or the other, if he is guilty of what he's charged with in either One and Three or Two and Four, it would be one or the other, one set of those two counts or the other.

And so I'm going to deny the defendant's motion to dismiss the indictment for multiplicity found at Docket Number 39. The government's response at Docket Number 43. I have reviewed those, and I believe on the basis of the *Jackson* case that it is permissible for the government to move forward.

I do recognize the issue raised by the defense that there is some concern of prejudice of there being four counts. I think that can clearly be resolved by a jury instruction indicating that it would be impossible to find the defendant guilty of all four counts of the indictment. It is, as I said, Counts One and Three or Two and Four. So on that basis, the motion at Docket Number 39 will be denied.

So that then takes us to the question of the motion for the order to disclose the grand jury testimony. Mr. Guemmer, I'll let you be heard with respect to that. I think that -- well, I'll let you be heard with respect to that motion.