NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis Dean Neff,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In unpreserved claims of jury instruction error, what must an appellant show to demonstrate a "reasonable probability" of a different outcome at trial?

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Petition for a Writ of Certiorari

Petitioner, Dennis Dean Neff, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on July 29, 2022.

Opinion Below

The unpublished decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Neff*, No. 21-3013, 2022 WL 3010621 (10th Cir. July 29, 2022), is found in the Appendix at A1.

Jurisdiction

The United States District Court for the District of Kansas had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on July 29, 2022. On October 11, 2022, Mr. Neff received an extension of time until November 28, 2022, in which to file a petition for a writ of certiorari. (Appendix at A5.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Federal Provisions Involved

Federal Rule of Criminal Procedure 52 provides, in relevant part:

> Rule 52. Harmless and Plain Error
>
> . . .
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

18 U.S.C. § 922(g) provides, in relevant part:

> (g) It shall be unlawful for any person--
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(c)(1)(A), provides, in relevant part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> . . .

Statement of the Case

On November 27, 2018, Petitioner Dennis Neff went to visit and use drugs with two friends, Derrick Hainline, and Hainline's girlfriend, Valerie Matic. [1] (Vol. 3 at 496, 498-99.) Mr. Hainline and Ms. Matic lived with Mr. Hainline's mother at her house, and, at the time of Mr. Neff's visit, she'd become increasingly frustrated with how her son and his girlfriend had been living. (*Id.* at 454-55.) She'd been finding syringes around the property—in the laundry, out in the driveway (*id.* at 376, 441-42, 454, 604)—and watched as a cast of characters she believed were drug users came and went from her place. (*Id.* at 454-55, 481-82.)

That night, after seeing Mr. Neff, who she did not know who appeared to her to be homeless, she phoned the sheriff. (*Id.* at 431-33, 453-54, 465, 565). Officers arrived and ultimately arrested Mr. Hainline and Ms. Matic on marijuana-possession charges. (*Id.* at 330, 392, 437-38, 504.) They did not arrest Mr. Neff, but instead gave him a ride to the house of a friend nearby where he could stay the night. (*Id.* at 437-38, 568.) A later search of Mr. Hainline's bedroom discovered a handgun under a

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page, and are provided in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

coat on Mr. Hainline's bed, and drugs and drug paraphernalia in his closet. (*Id.* at 439-40, 446-48, 467-71, 477-78, 593-95).

In the ensuing investigation, Mr. Hainline and Ms. Matic faced significant criminal charges and sentences.[2] (*Id.* at 412-13, 512-13.) But the two pinned the blame on Mr. Neff (*id.* at 346-47), and as part of cooperation agreements with the government, each ultimately pled to a single count of misprision of a felony (*id.* at 356, 360, 513), capping their sentencing exposure at three years, instead of the ten or fifteen years to life they would have faced if charged federally with possessing the drugs and gun. (Vol. 3 at 414; Vol. 2 at 36-37 (noting mandatory minimums).)

A year later, Mr. Neff alone went to trial on a superseding indictment. (Vol. 1 at 32-35.) As pertinent here, two of the indictment's counts, violations of 18 U.S.C. § 922(g)(1) and § 924(c), involved the gun found in Mr. Hainline's bedroom on November 27th. (*Id.* at 32-34.) The principal trial testimony against Mr. Neff came from Mr. Hainline and Ms. Matic.

As for Mr. Hainline, he acknowledged he'd been a methamphetamine user for years, and claimed that a few months prior to the November incident he'd

[2] For instance, the house was across from a school, 21 U.S.C. § 860 and the drug quantity alone (73.8 grams) involved a ten-year mandatory minimum, 21 U.S.C. § 841(b)(1)(A)(viii). Both also were prohibited persons under federal firearms laws. *See* 18 U.S.C. § 922(g)(1), (g)(3).

started buying drugs from Mr. Neff. (*Id.* at 366, 399, 410.) On that night, he said, it was Mr. Neff who brought the drugs to his house. (*Id.* at 381-82.) He also said Mr. Neff brought the gun and had taken it out of his coat or waistband and put on the bed. (*Id.* at 381-82, 385.) He denied that he or Ms. Matic were selling drugs out of his mother's house (*Id.* at 375, 401-02) and further denied that the gun was his. (*Id.* at 377-78, 421). He acknowledged that he violated bond repeatedly, by using drugs after his November arrest by local deputies, and then again after his federal arrest in this case (*id.* at 379, 403, 424), and also by communicating with Ms. Matic prior to trial (*id.* at 403).

As for Ms. Matic, who appeared in prison clothes due to also having violated bond by using drugs and communicating with Mr. Hainline (*id.* at 489-490, 510, 514, 518-19), she said much of the same. The drugs in the closet weren't hers she said (*id.* at 519-20), but rather she'd seen Mr. Neff with the bag before and believed it to contain drugs, and so hid it after deputies arrived at the house. (*Id.* at 502, 516, 580-81.) The gun wasn't hers either, she explained, but she had quickly thrown a coat over it as well when law enforcement arrived. (*Id.* at 502.)

In its instruction on the legal definition of possession, the district court told the jury that constructive possession occurs when a person only "knowingly has the power at a given time to exercise dominion or control over an object." (Vol. 1 at

198; Vol. 3 at 644.) Defense counsel did not object to the instruction. The jury convicted Mr. Neff on all counts. (Vol. 1 at 220-23, vol. 3 at 697-98.)

On appeal, Mr. Neff argued that the jury instructions defining possession constituted plain error under Fed. R. Crim. P. 52(b), requiring reversal of his two convictions for possessing the firearm found on Mr. Hainline's bed. Specifically, he argued that while possession may be either actual or constructive, it was settled law that mere knowledge of the ability to exercise control over an object is not enough to establish constructive possession. Rather, the government must also prove (and the jury be instructed regarding) *intent*—that is, that the defendant "intended to exercise control" over the object. *See Henderson v. United States*, 575 U.S. 622, 626 (2015) ("Constructive possession is established when a person, though lacking such physical custody, still has the power *and intent* to exercise control over the object.") (emphasis added); *see also United States v. Little*, 829 F.3d 1177, 1182 (10th Cir. 2016) (adopting *Henderson*'s articulation of constructive possession in the Tenth Circuit).

And here, Mr. Neff explained, the possession instruction was wrong because it allowed the jury to find, for purposes of the firearms counts, that he constructively possessed the firearm found in Mr. Hainline's bedroom simply if he "knowingly ha[d] the power" to exercise control over it. (Vol. 1 at 198.) Because this instructional error was unpreserved, to prevail he had to establish four prongs of

plain error review: 1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano,* 507 U.S. 725, 735-37 (1993).

The Tenth Circuit agreed that a plain error had occurred. (Appendix at A2.) The court, however, concluded that the error did not satisfy the third prong of plain error review because the jury likely based its verdict on evidence that Mr. Neff actually possessed the handgun found in Mr. Hainline's bedroom, and not on the erroneous constructive possession instruction. (*Id.* at A2-A3.)

Reasons for Granting the Writ

To warrant reversal, a plain error must affect a defendant's substantial rights. *Olano,* 507 U.S. at 770. Here, that means Mr. Neff had to establish that if the district court had correctly instructed the jury on the possession element of the charged firearm offenses, there is a "reasonable probability" that he would have been acquitted. *See Greer v. United States*, 141 S. Ct. 2090, 2097 (2021). The Tenth Circuit concluded that showing was not made here because the jury's verdict likely rested on a theory of actual possession, rather than on the erroneous constructive possession theory the instructions also contemplated. For three reasons, this Court should grant review of that determination.

First, the third prong of plain error review is a highly fact intensive inquiry, and one without clear guideposts. *See United States v. Davila*, 569 U.S. 597, 611 (2013) (explaining that whether a defendant can show a reasonable probability of a different outcome depends on the "particular facts and circumstances" of each case). The way for this Court to give force and meaning to such fact-intensive legal standards is to periodically accept review of cases implicating them. *Compare, e.g.*, *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) (rejecting Fifth Circuit's approach to third-prong of plain error review for errors in calculating a defendant's applicable Sentencing Guidelines' range); *Greer*, 141 S. Ct. at 2100 (reviewing scope of third prong of plain error review for *Rehaif* errors). This case, in which the jury certainly could have followed the incorrect possession instruction presents a good opportunity to do just that.

Second, the Tenth Circuit's decision is wrong. Rather, had the jury been correctly instructed regarding intent there is a reasonable probability that it would have reached a different outcome as to possession of the firearm. This is so for a few reasons. For one thing, Mr. Neff jointly occupied the small bedroom with Mr. Hainline and Ms. Matic the evening of November 27, 2018. When an individual exclusively occupies a place, it generally follows that she intends to exercise control over the objects located there. But when the space is shared, it does not follow that

each occupant intends to exercise control over everything located therein. In that circumstance, intent is harder to prove so an instruction that omits the intent requirement is more likely to be harmful.

For another, the only witness who put a gun in Mr. Neff's hands was Mr. Hainline. But there was a bevy of reasons for a jury not to credit his testimony, most prominently that the gun was found in his room, on his bed, and he avoided significant prison time by cooperating; strong circumstantial evidence also provided good reason for him to have a gun at home as he'd been using his mother's house as a drug den. In concluding that the jury likely did credit Mr. Hainline's testimony, the court of appeals discounted these problems as issues the jury considered and rejected. But in doing so, it ignored the simple fact is that while that may have been possible, it also was reasonably probable that the jury would have taken the *other* path the instructions contemplated. Indeed, it would have been far easier for the jury to rely on the (erroneous) constructive possession instruction and conclude that whatever value Mr. Hainline's testimony may have had, Mr. Neff at least *knew* of the gun visibly sitting close by in a tiny room before Ms. Matic threw a coat over it, and that he, therefore, *could* have accessed it. But that readily-reached conclusion was only enough to convict on the gun possession counts *because* of the court's instructional error.

Third, the question is important. Rule 52(b)'s plain error standard is implicated in large numbers of appellate claims. And a lack of clear guideposts for evaluating when a defendant has made the third-prong showing risks inconsistent outcomes in the lower courts. Moreover, review is particularly important here because an instructional error is constitutional in nature—an erroneous instruction on the important element of intent violates a defendant's Sixth Amendment right to a jury trial. *See Neder v. United States*, 527 U.S. 1, 12 (1999) (explaining that "an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee").

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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