No. _____

In the Supreme Court of the United States

JUSTIN MILES NESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED:

In this case, there was trial evidence presented regarding a bevy of days, times, and different implements in which the accused allegedly possessed firearms, ammunition, or both. Yet, the accused was only charged with possessing specific items on a specific day—September 8, 2021. Like most charging instruments, the indictment here qualified that date with the familiar "on or about" language. During deliberations, the District Court received a question from the jury that clearly was inquiring how far back in time alleged events of possession were permissible for its consideration—an obvious question in light of the trial evidence. The District Court simply repeated the familiar refrain of "You have all the evidence you need to render your verdict." Was this a plainly improper (and plainly erroneous) response?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Justin Miles Ness, respectfully petitions this Court to issue a Writ of Certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *United States v. Ness*, 124 F.4th 839, 840 (10th Cir. 2024).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *United States v. Ness*, 124 F.4th 839, 840 (10th Cir. 2024). *See* Appendix A.

JURISDICTION

The Tenth Circuit issued its opinion denying relief on December 31, 2024. Justice Gorsuch extended the time for filing certiorari to April 30, 2025 on March 31, 2025. 28 U.S.C. § 1254(1) gives this Court jurisdiction to decide this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "No person shall. . . be deprived of life, liberty, or property, without due process of law . . . " U.S. Const. amend. V. This includes the right to a fair trial, one important corollary of which is the rule expressed in *Bollenbach v. United States*, 326 U.S. 607 (1946).

STATEMENT OF THE CASE

Petitioner, Justin Ness, rented a trailer in Porum Landing, Oklahoma. R. Vol. III at 262. He was a truck driver who was often on the road for months at a time. *Id.* at 260. On September 8, 2021, law enforcement executed a search warrant at the trailer. *Id.* at 39. They found two ammunition cases, containing more than five hundred rounds of ammunition, and a Savage, Model 10, 6.5 Creedmoor rifle. *Id.* at 134-39; *see also id.* at 59-70, 80. Mr. Ness was not home at the time of the search, *id.* at 92, but was on the road driving his truck.

Mr. Ness had been convicted of a felony in California in 2004. He was indicted for possessing, after that felony conviction, the ammunition and the Creedmoor rifle, in violation of 18 U.S.C. § 922(g)(1). R. Vol. I at 11- 12. The indictment specified that the offense took place **"on or about September 8, 2001."** *Id.* at 11.

At trial, the Government would argue that Mr. Ness, as the sole person who lived in the trailer, possessed the Creedmoor rifle and the ammunition that was found there in the September 8, 2021 search. The Government would also rely on material from Facebook, the most recent of which was posted in late July 2021. The Facebook material included comments, replies to posts and exchanges.

Importantly, it also included photographic and video material. Government's Trial Exhibit 2 is a photograph of Mr. Ness with the Creedmoor

rifle across his shoulder. *See also* R. Vol. III at 260-61. There was evidence at trial tending to show when this photograph was posted to Facebook, or when it was taken. Government's Trial Exhibit 8 is a video of Mr. Ness firing the rifle. *See also id.* at 49-50, 265. It was posted to Facebook in December 2020. *See id.* at 49-50 (noting video was embedded in Government's Trial Exhibit 7); Government's Trial Exhibit 7 (dated December 27, 2020).

Geoffrey Irwin owned the Creedmoor rifle, which he had bought in May 2020 in Wyoming, where he was then living. R. Vol. III at 195-96. Mr. Ness admitted that, as the posted material showed, he had fired the rifle, *id.* at 265, 272, and that an exhibit showed him with the rifle across his shoulder, *id.* at 260-61, 272.

Mr. Ness and Mr. Irwin are good friends. Mr. Ness had trained Mr. Irwin to be a truck driver, *id.* at 234, 254, and the two had remained close since that time, *id.* at 254-57; *see also id.* at 233-34. Indeed, Mr. Irwin had lived in the trailer Mr. Ness was renting in September 2021, *id.* at 192, and had referred Mr. Ness to his former landlady, *id.* at 259. Mr. Irwin had a key to Mr. Ness's trailer. *Id.* at 206, 236.

Mr. Irwin explained that he had left his Creedmoor rifle and cans with ammunition in Mr. Ness's trailer. *Id.* at 201-05. He dated this to "like a week or two" before the search, though he "really [didn't] remember the exact length" of time. Id. at 224. Mr. Irwin had decided to remove his guns and ammunition

from his home because he had two young children, *id.* at 200, including one who was only a few months old, *id.* at 191, and no gun safe, *id.* at 200. What he left at Mr. Ness's trailer were items he could not take to his parents' home in California for storage there, because the items would not fit in the trunk of the car that he and his family drove on their visit. *Id.* at 205. Mr. Irwin was unable to reach Mr. Ness before he took the Creedmoor and the ammunition to the trailer. *Id.* at 206. He recalled telling Mr. Ness what he had done after the fact, a day or two after he put the items in the trailer. *Id.* at 206-07.

Mr. Ness insisted he was unaware the rifle and ammunition were in his trailer before September 8, 2021. He said he was driving his rig, about twelve-hundred miles from Porum, when his trailer was searched. *Id.* at 266. Only then did he learn from Mr. Irwin, who had called him to tell him about the search, that Mr. Irwin had put a firearm and ammunition in the trailer. *Id.* at 289-90.

Mr. Irwin recalled leaving the ammo cans and the Creedmoor in the middle bedroom of the trailer, with the rifle in its case and the magazine inside the rifle. *Id.* at 225-26, 231-32. A video law enforcement took of the trailer before the search showed the rifle out of the case. Government's Trial Exhibit 11; *see also* Government's Trial Exhibit 25 (photograph); Vol. III at 68 (describing circumstances of photograph). Agents testified there was no magazine in it, R. Vol. III at 139, and that a magazine that fit the rifle was

found in a storage bin in Mr. Ness's bedroom, id. at 66, 71, 138, and that ammunition was found there and in a case in the bedroom's closet, id. at 59-61, 65-66.

Agent Withem—an involved agent—testified at trial to the lead-up to the search. He had been at the trailer at about 5:30 in the morning each of the three days before the search, that is, on September 5, 6 and 7, 2021, in an effort to see what conditions might be like at the search planned for 6:00 a.m. on the 8th. *Id.* at 131. Each of the three mornings before the search, he saw both a Malibu and a Camaro parked there. *Id.* at 132, 133. But on September 8th, the Camaro was there and the Malibu was not. *Id.* The prosecution did not present any evidence linking the Malibu to Mr. Ness.

Agent Withem spoke with Mr. Ness by phone on September 8, a few hours after the search. *Id.* at 139-40, 145; *see also id.* at 267-68. He claimed that Mr. Ness, who was driving his truck, admitted to being at the trailer the preceding weekend, which was the long Labor Day weekend, *id.* at 152, and to leaving on September 7, id. at 164, which was the Tuesday after the weekend. Mr. Ness pointedly denied having told the agent he was at home that weekend. Id. He swore too that he had not been at his trailer then. *Id.* at 289.

The agent also maintained that, during that same conversation, Mr. Ness said he was holding the gun for someone. *Id.* at 146, 170. Mr. Ness insisted that he had not made any such statement either. *Id.* at 289.

Facebook messages and posts, attributed to Mr. Ness, included comments about guns and ammunition, with the last one being in mid-July 2021. Some related to a Smith & Wesson or, generally, to a pistol. See 75- 78 (discussing Government's Trial Exhibits 33, 34 and 36). No Smith & Wesson, or pistol, was found in the search, id. at 161, and Mr. Ness was not charged with possessing such a firearm, *see* R. Vol. I at 11-12.

Other comments referred to a Creedmoor or Savage. One spoke of a Savage as belonging to Mr. Ness: "'I have the 16x Viper on my Savage 6.5.'" R. Vol. III at 78 (quoting Government's Trial Exhibit 37). Four others referred to the inability to find Creedmoor ammunition, *id.* at 72-74 (discussing Exhibits 28-31), with Mr. Ness explaining that he did help Mr. Irwin try to locate the hard-to-find ammunition, *id.* at 263; 282; *see also id.* at 72, 231.

Also, a comment from December 2020 stated, "My way of acquiring weapons may have been more expensive than going into a store but you won't see the police or atf kicking in my door because of a registry." Government's Trial Exhibit 32; *see also* R. Vol. III at 283-84. Mr. Ness said that if this comment, which he did not recall, was his, it reflected only an effort to lead the other person to believe he was looking to own firearms, and not that was in fact his intent. R. Vol. III at 284. In an audio recording on Facebook, Mr. Ness spoke of the benefits of living in Oklahoma over California because of its better rents and open-carry laws, that he had guns, that he would not be caught

because he kept his vehicles clean and did not give police any reason to stop him, and that he would not use his guns for anything stupid. Government's Trial Exhibit 39.

The Government asserted at trial that these and other Facebook material showed Mr. Ness was a gun afficionado who did not accidentally have the Savage Creedmoor, and the ammunition, in his trailer on September 8th. Id. at 321. Defense counsel, on the other hand, argued that Mr. Ness was "windy" and a "blowhard." *Id.* at 329; *see also id.* at 263-64. The Facebook comments were, counsel urged, the stirring of the pot by a man who led the lonely life of a long-haul truck driver, and sought connection to others in his down time while on the road. Id. at 330; see also id. at 264.

The District Court instructed the jury that possession could be either actual or constructive, using the Tenth Circuit's pattern instruction. R. Vol. I at 98 (written instructions), R. Vol. III at 313 (reading of instructions). The jury was thus told that actual possession is when a person has "direct physical control over an object or a thing." R. Vol. III at 313. It was also told that one who does not have actual possession of an object can constructively possess it if he has the power and intent to exercise control over the object. *Id.* In its summation, the Government urged the jury that the case turned on whether possession was established under this instruction. *Id.* at 320. It had earlier urged the jurors that there was proof beyond a reasonable doubt that Mr. Ness

had committed the charged offense because he "admitted possession of a firearm, and you've seen photographs of possession of a firearm." *Id.* at 317. The Government then added that Mr. Ness possessed the trailer and that the firearm was in the trailer on September 8, 2021. *Id.* at 317-18.

Later, the Government again argued that as Mr. Ness was the only person who possessed the trailer, he thus possessed "everything in it," *id.* at 321, including the rifle and the ammunition, *id.* The Government's summation then briefly turned to the knowing aspect of Mr. Ness's possession, *id.*, before returning to how the evidence showed he had the necessary control over the rifle and the ammunition. In doing so, the Government pointed in part to the actual possession shown by the video, which was posted in December 2020, and photographs. This was, it said, in addition to Mr. Ness's dominion and control over the trailer :

> Constructive possession. You all saw that he had actual -- he had direct, physical control over the firearm from the photographs, from the video ***but also*** dominion and control over the premises. And again, just to -- you can use his words, but there's also a lot of evidence as far as he receives his mail there, all of his personal property is at that residence, at Trailer Number 17, there at Porum Landing. That's dominion and control. Everything he owns is right there in that house and around it. His car is outside.

Id. at 321 (emphasis added).

The District Court had also instructed the jury about the "on or about" language in the indictment. The District Court told the jury the prosecution

had to "prove beyond a reasonable doubt that the defendant committed this alleged crime reasonably near the alleged date" of September 8, 2021. *Id.* at 309.

The jury, after deliberating for about an hour and a quarter, sent out a note that asked two questions. *See* R. Vol. I at 104 (note at 3:36), R. Vol. II at 6 (jury excused to deliberate at 2:18). The jury first said it "need[ed] to know what was the timeline that the [sic] alleges that the charged offense was committed on or about September 8, 2021." R. Vol. I at 104. It also asked a question about how much leeway the concept of "on or about" allowed as to when the offense was committed: "**How far back do we go back on the dates[?]**" *Id.* at 104 (cross-out omitted & emphasis added); *see also* R. Vol. III at 340 (court reading note into record).

The District Court told the parties it was inclined to tell the jury it had all the evidence it needed. R. Vol. III at 341. The District Court also said the "other option" was to refer the jury back to the "on or about" instruction, adding that it did "not know whether [it] needed to do that or not." *Id.* The Government said the first of the two "would be fine as far as the government is concerned." *Id.* The court then asked defense counsel if he "h[ad] any thoughts on that." *Id.* Defense counsel stated, "No." Id. He then added, "I think what you've indicated is **probably** proper. They've got all the evidence they need." *Id.* (emphasis added).

The District Court then instructed the jury it had all the evidence it needed. It did not provide any guidance as to the reach of "on or about," or give any content about what the law said it meant for offense conduct to be "reasonably near" an on-or-about date charged in an indictment. The jury then returned a verdict convicting Mr. Ness of the felon-in-possession charge.

REASONS FOR GRANTING THE WRIT

Not surprisingly given the trial evidence, the jury indicated it was struggling with the issue of *what* possession *at what time* mattered. This Court has made clear that a jury is never "to be left wholly at sea, without any guidance as to the standard of conduct the law requires." *United States v. Park*, 421 U.S. 658, 682 (1975). This concept is also applicable—not only to the jury instructions themselves—but to a jury's written questions about them. Thus, this Court has long ago held that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). This is because it is a fundamental tenet of the established right to a fair trial that "[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Id.* at 613. That, however, happened here, given the District Court's failure to answer the jury's question to which there was a legally available (and legally required) answer.

Judge Federico put it well:

> When during deliberations the jury asks the court a question about the law, the court has a duty to respond that gives the jury as much clarity as the law provides. That did not happen here. When the jury asked the trial judge a somewhat unintelligible question, but one that with any close examination could only be about how to apply the law to the evidence, the court gave a written response that this panel all agree was nonresponsive.

Appendix A, at 19.

I. The District Court's Non-Responsive Answer to the Jury's Direct Question on an Obviously Key Issue was Plain Error.

As Judge Federico further clarified, "the majority [wrongly] conclude[d] 'the district court did not err by choosing not to inject more uncertainty into the jury's deliberations by using Ness's suggested clarifying instruction . . . .' Majority Op. at 14." Appendix A, at 20.

Moreover:

> Although [the Tenth Circuit's] pattern "on or about" instruction is purposefully opaque (more on this below), it is not enough to say the district court can satisfy its duty to instruct without at least trying to clarify the law when the jury asks a question about this instruction.
>
> It is axiomatic that "[i]t is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court." *Sparf v. United States*, 156 U.S. 51, 74 (1895). The court's duty to instruct is not simple because the law is complex. Even in a relatively straightforward criminal case, jury instructions can be lengthy, verbose, circular, and confusing. This is why courts spend so much time hashing out the jury instructions with the parties because single words can become magnified when delivered to the jury. And importantly, the court's duty to instruct on the law continues when the jury returns questions during its deliberation.

> Here, the jury's question included the language "on or about," which strongly suggested the jury needed clarification on the law, not the evidence. While recognizing that the question was ambiguous, the district court also properly recognized the jury's question concerned the "on or about" legal principle.

Appendix A, at 20-21.

> A bedrock legal principle is that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946). . . . [T[he court[] [always has a] duty to instruct on the law, even when a concrete legal answer may be somewhat elusive.
>
> This then begs the question as to what the trial judge should have done to avoid the error . . . . First, the trial court should have provided an answer that was responsive to the jury's question. As noted, the jury's question was somewhat unintelligible. But the best reading, and really the only fair reading, is that the jury needed guidance concerning the "on or about" instruction related to the trial evidence or, as the jury foreperson wrote: "How far back do we go back on the dates[,]" R. [Vol.] I at 104.
>
> The trial court's response was to tell the jury: "You have all the evidence you need to render your verdict." Id. This nonresponsive and confusing answer was erroneous, and it was plainly erroneous under *Bollenbach*. . . .
>
> Second, the trial court should have considered the evidence, the applicable law, and the instructions already given to the jury, and it should have taken a measured approach as to how to fulfill Bollenbach's directive to provide "concrete accuracy" to answer the jury's question. Consider a few points about this case that made the jury's confusion almost inevitable:
>
> - There was compelling video, photographic, and textual evidence from Facebook showing Ness in December 2020 shooting, possessing, and commenting on the Creedmoor rifle;

- The charged offense was possessing the Creedmoor rifle (and ammunition) "on or about" September 8, 2021;

- Ness was not present at his trailer on September 8, 2021 when it was searched and the Creedmoor rifle and ammunition were seized, giving rise to the charged offense; and

- The trial court gave three instructions relevant to this inquiry: "On or About" (R.I at 91); "Indictment – Consider Only Crime Charged" (R.I at 93), and "Count One – Felon in Possession of Firearm and Ammunition." (R.I at 94-95). In this last instruction, the date of the charged offense was not included in the elements of the offense.

Bearing in mind this evidence and the instructions given, the jury's question naturally arose from its difficulty figuring out what to do with the December 2020 Facebook evidence in relation to the charged offense. Put differently, the jury struggled to determine whether December 2020 was "on or about" September 8, 2021.

Appendix A, at 22-23.

The District Court's (non) response to the jury's question should have been found to be a plain error for essentially these reasons.

II. The District Court's Plain Error In Fact Did Affect Mr. Ness's Substantial Rights.

Under *Olano*, Mr. Ness was required to show that the District Court's plain error affected his substantial rights. *Olano*, 507 U.S. at 734. That is, he must show a reasonable probability that, had the district court not erred, the result would have been different. *United States v. Hasan*, 526 F.3d 653, 665 (10th Cir. 2008). This reasonable probability does not require him to make the showing by a preponderance of the evidence. *United States v. Bustamante-*

Conchas, 850 F.3d 1130, 1138 (10th Cir. 2017) (en banc); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). Rather, a reasonable probability is one sufficient to undermine confidence in the outcome; that is, one that causes this court to have doubts that the result would have been the same. *Hasan*, 526 F.3d at 665.

That doubt, in fact, existed here, and this Court should grant certiorari to so conclude. There is good reason to think the jury may have convicted based on possession of the Creedmoor rifle in December 2020. And there is also good reason to think that, had the District Court cleared up the jury's confusion, it would not have convicted based on what was found at the trailer on September 8, 2021, the only other path to conviction.

As an initial matter, the jury had to find that Mr. Ness possessed at least one of the items specified in the indictment—the Creedmoor rifle or the various types of ammunition, R. Vol. I at 11-12—to convict him of the charged offense. The only proof of his possession of the ammunition was what was found at his trailer in September 2021. As for the Creedmoor rifle, the jury could have looked to (a) possession based on what was found in his trailer in September 2021, or (b) actual possession as reflected in the video of Mr. Ness shooting the rifle posted to Facebook in December 2020 Facebook, and the posted photograph of him with the rifle, and Mr. Ness's testimony relating to them.

So, if the jury was not relying on possession at the trailer, it could only, consistent with the indictment, have been looking at the actual possession of the Creedmoor rifle in December 2020. In many cases, jurors might well think possession more than eight months before the charged date was not reasonably near to it. But that could not safely be thought to be true here for two reasons.

First, the Government made arguments based on Mr. Ness's actual possession of the Creedmoor rifle. The Government referred to the fact that Mr. Ness "admitted possession of a firearm, and you've seen photographs of possession of a firearm." R. Vol. III at 317. The only firearm for which this was true was the Creedmoor. Mr. Ness acknowledged having held and shot that firearm, which belonged to Mr. Irwin, and which was in the video posted to Facebook in December 2020. *Id.* at 265, 272 (check). And the only photograph of Mr. Ness with a firearm was of him with the Creedmoor. Government's Trial Exhibit 2.

Later in its summation, the Government's counsel again commented on Mr. Ness's actual possession of the firearm, as shown by the physical proof. The Government declared, "You-all saw he had actual -- he had direct, physical control over the firearm from the photographs, from the video, but also dominion and control over the premises." R. Vol. III at 322.

The jury could have understood these remarks as using this actual possession only as supportive of constructive possession at a later time. When

it first spoke of actual possession, the prosecution followed up by stating that Mr. Ness possessed the trailer and that the firearm was there on September 8. *Id.* at 317-18. And the second time the Government spoke of actual possession, it proceeded to spell out why Mr. Ness had dominion and control of the trailer, and its contents. *Id.* at 322. As well, just before stating that the photographs and video showed actual possession, it had stated "[c]onstructive possession." *Id.*

But the jury could also have taken what the Government said about actual possession as itself sufficient to show the only disputed element. Neither passage clearly limited actual possession in December as bearing only on later constructive possession. The first passage merely identified the actual possession shown by the photographs, before stating that Mr. Ness owned the trailer and that the firearm was found there. And in the second passage, the prosecution suggested this was not in fact the only relevance of the possession associated with the December Facebook post. There, it noted that Mr. Ness had the actual possession shown by the video and photographs "but also dominion and control over the premises." *Id.* at 322. The jury could well have understood this to be an argument for both actual possession (in December 2020) and constructive possession (based on what was found on the search of the trailer in September 2021), with the prefatory reference to constructive possession not

being a framing of what was to come, but a false start in light of the immediate turn to actual possession.

Second, the jury was not told it was to consider the December 2020 video involving the Creedmoor, and the photograph of Mr. Ness with the Creedmoor on his shoulder, only for what they said about whether Mr. Ness possessed that firearm in September 2021. With no such limitation imposed, the jury could reasonably think it could consider on its own terms actual possession associated with the video posted in December 2020.

Indeed, the jury might have wondered why it was instructed on actual possession if that was no part of the case, and the element of possession could only be found on a theory of constructive possession.

Of course, it is possible the jury was considering only any possession by Mr. Ness after Mr. Irwin put the Creedmoor and the ammunition in the trailer. Mr. Irwin though he stored the items in the trailer perhaps a week or two before the search on September 8. By his account, the rifle had been taken out of the case during this period, and the magazine had been removed from the rifle and moved from the middle bedroom to Mr. Ness's bedroom. Some of the ammunition had moved from the one bedroom to the other also. The jury might have thought this allowed for a finding that Mr. Ness possessed the firearm and ammunition during this roughly one-to-two-week period, and it might have wanted to be sure that this was reasonably near to September 8.

There is, however, good reason to doubt this. The jury would not need help with a "timeline," as its note sought, if it was considering this period (or only considering this period). The testimony about when Mr. Irwin left his rifle and ammunition in relation to the search of the trailer was brief and straight-forward, even if imprecise. And Mr. Ness' testimony that he was unaware Mr. Irwin had stored the rifle and ammunition at his home, and that he was not at home over the long, Labor Day weekend before September 8, 2021, was similarly abbreviated. It is only when the many dates from the Facebook comments, and the video and photographic evidence found on Facebook, are included that there would be need for assistance with a timeline.

In any event, Mr. Ness must only undermine the reviewing court's confidence that, were it not for the District Court's error in failing to clear up the jury's confusion on the on-or-about/reasonable-nearness concept that the outcome would have been different. The actual possession associated with what was posted to Facebook in December 2020 posts was by far the easiest path for the jury to find that Mr. Ness possessed anything charged in the indictment. Not only did it consist of documentary proof, but Mr. Ness also admitted he had carried and fired the rifle.

The jury also had good reason to think possession in December 2020 might, under the law, be reasonably near to the charged possession date of September 8, 2021. The jury could have looked as support for this to the

prosecution's argument as to actual possession of the Creedmoor rifle; the absence of any instruction not to consider this actual possession apart from what it might say about later, constructive possession; and the very fact that actual possession was submitted for its consideration.

In sum, there is good reason to think the jury was looking to the possession of the Creedmoor rifle as reflected in what was posted to Facebook in December 2020. The jury would have been exceedingly unlikely to have done that had the district court cleared up its difficulties with the "on or about" concept, and relatedly, what it means under the law to be "reasonably near" a charged date.

There is also good reason to doubt the jury would have convicted if it had focused solely on the possession of what was found in the trailer in September 2021. For starters, and again, the very fact that the jury wanted the court to provide a timeline raises serious question as to whether it would have done so. There was, to be sure, a divergence between what Mr. Irwin said about how and where he left the Creedmoor, the magazine and the ammunition, on the one hand, and how and where the agents said some of them were found, on the other hand. But Mr. Irwin and Mr. Ness were in synch on the big picture that the items were Mr. Irwin's and that he had put them in Mr. Ness's trailer. The jury could have had questions about the apparent movement of the items and might have therefore thought it was possible that Mr. Ness knew the rifle

and ammunition were in his trailer, and intended to control them, after Mr. Irwin left them there. But thinking this was possible (or even likely) would not have been enough for the jury to find he possessed the rifle and the ammunition on that basis.

By the same token, however, the jury could have wondered from other evidence whether Mr. Ness knew the items were in his trailer before the search. Mr. Irwin testified he had told Mr. Ness about putting the items in his trailer before the search. Mr. Ness, in contrast, swore he did not learn the Creedmoor and the ammunition were in his trailer until he was contacted in the aftermath of the search. The jury could have thought Mr. Ness was more credible on this point. But even if it was inclined to think Mr. Irwin had indeed told Mr. Ness what he had done, if Mr. Ness were on the road at that point, it would not equate to his possession of the items.

On that score, the only proof that Mr. Ness was home during the relevant period of time (apart from the apparent movement of the items just discussed) was Agent Withem's claim that Mr. Ness had said he was in town over the Labor Day weekend. Mr. Ness denied making the statement and denied being in town over that weekend. The prosecution produced no firm evidence, like records from the company for which Mr. Ness drove, that could have resolved dispute. And though the agent claimed Mr. Ness said on September 8th that he was holding the items for someone else, Mr. Ness pointedly denied this too.

From all of this, the jury might have thought it likely that Mr. Ness in fact knew the items were in his trailer, and that he was present after they were put there, and that he intended to control them. But of course, that would not be enough. The jury would have had to have believed beyond a reasonable doubt that this was the case for it to convict on such a theory. The proof was not so strong, as the jury's question itself suggests, to determine that the jury necessarily would have been so convinced, and convicted on that basis, were it not for the district court's error.

Accordingly, the Tenth Circuit should have harbored doubts as to whether the jury would have convicted Mr. Ness if the district court had not erred in failing to clear up the jury's confusion, which is all that is required to satisfy the third prong of *Olano*.

III. The District Court's Plain Error was Such that Discretion to Review Should have Been Exercised.

With the first three prongs of Olano satisfied, this court has discretion to notice the forfeited error and to grant Mr. Ness relief. *Olano*, 507 U.S. at 736. That discretion should be exercised wehre the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quotation omitted) (alterations by Court in *Olano*).

The error here had this affect. It allowed for conviction on a basis beyond what the indictment encompasses, and so for conduct the grand jury did not

charge. *See United States v. Musgraves*, 831 F.3d 454, 466 (7th Cir. 2016) (in felon-in-possession case, "possession no later than March 2013 cannot support a conviction for a charge of possession on or about November 17, 2013"); *see also United States v. Casterline*, 103 F.3d 76, 77-78 (9th Cir. 2000) (possession of firearm seven months before charged on-or- about date did not allow for conviction). And as explained, there is good reason to believe that this is in fact what happened.

Of course, ""it is a fundamental precept of the federal constitutional law that a "court cannot permit a defendant to be tried on charges that are not made in the indictment."" *United States v. Miller*, 891 F.3d 1220, 1237 (10th Cir. 2018) (quoting *Hunter v. New Mexico*, 916 F.2d 595, 598 (10th Cir. 1990) (internal quotation omitted)). The effect the error here had on this basic right both calls for less-rigid application of the plain-error test and also for application of the proposition that where a constitutional error has caused third-prong prejudice, this court will typically exercise its discretion and afford relief. See id. (granting relief on such a situation). This is, in such situations, "'it is ordinarily natural to conclude that the fourth prong is also satisfied and reversal is necessary in the interest of fairness, integrity, and the public reputation of judicial proceedings.'" *Id.* (quotation omitted).

In the circumstances here, this standard should have been found to be met. The jury had a directly on point question about a key issue in the case.

The District Court improperly responded with a courthouse myth about what the proper answer to a jury question essentially always is. Especially as the number of crimes mount and their legal complexity grows, these kind of questions will only grow and properly answering them will only grow in importance. This case presents a clear opportunity to draw such a line right now.

CONCLUSION

For the reasons detailed in this Petition, this Court should grant a Writ of Certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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