

NO. \_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JAMES KEITH BEIERLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether, after concluding that the district court plainly erred in its reasoning for applying an enhancement under the Sentencing Guidelines, a court of appeals nonetheless may affirm application of that enhancement on the third prong of plain error review based on an alternative ground, even when that alternative ground is factual in nature and the law governing its application changed during the pendency of the appeal?

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, James Keith Beierle, 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 November 29, 2017.

### **OPINION BELOW**

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United State v. Beierle*, 716 F. App'x 782 (10th Cir. Nov. 29, 2017), is found in the Appendix at A1.

### **JURISDICTION**

The United States District Court for the District of Wyoming 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 November 29, 2017. Justice Sotomayor extended the time in which to petition for certiorari by 60 days, to and including April 30, 2018. *See* Appendix at 15. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## FEDERAL PROVISIONS INVOLVED

### Federal Rule Involved

**Fed. R. Crim. P. 52. Harmless and plain error.**

- (a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

### Federal Sentencing Guideline Involved

**U.S.S.G. § 2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

...

#### **(b) Specific Offense Characteristics**

- (1) If the offense involved three or more firearms, increase as follows:

| Number of Firearms |     | Increase<br>in Level |
|--------------------|-----|----------------------|
| (A)                | 3-7 | add 2                |

...

## STATEMENT OF THE CASE

This is Mr. Beierle's second appeal of the sentence imposed in this case. His original sentence was vacated after this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because it was imposed under the unconstitutional residual clause of the Armed Career Criminal Act (ACCA). *See United States v. Beierle*, 810 F.3d 1193 (10th Cir. 2016).

In the instant case, Mr. Beierle appealed the sentence imposed at his April 19, 2016, resentencing hearing. Because that sentence involved a Sentencing Guidelines enhancement applied based in part on the record developed at trial and Mr. Beierle's original sentencing hearing, a brief discussion of those prior proceedings is necessary.

### **A. The events of January 2013.**

This case grew out of an incident that occurred over five years ago.

On January 13, 2013, Mr. Beierle met Richard Redfern, Chris Colvin, and another individual at a truck stop near his home in rural Wyoming. (Vol. 1 at 166.)<sup>1</sup> Mr. Beierle invited these new acquaintances out to his property that afternoon, where they shared drinks and conversation for a couple of hours in Mr. Beierle's workshop, which was an outbuilding on his property, while Mr. Beierle's daughter played with

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<sup>1</sup> Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

Redfern's daughter in Mr. Beierle's home, which was located nearby. (*Id.*; Vol. 2 at 11.)

After a couple of hours, Redfern and the other adult visitors left; unbeknownst to Mr. Beierle, however, Redfern left his daughter behind. (Vol. 1 at 166.) After discovering Redfern's daughter in his house, Mr. Beierle reached out and requested that Redfern and the others come back to get her. (*Id.*)

When Redfern returned over two hours later, it was already dark. (Doc. No. 135 at 36, 84.) Redfern acted aggressively towards Mr. Beierle, talking "trash" and "mumbo jumbo," and the situation escalated quickly. (Vol. 1 at 166; Vol. 2 at 11.)

According to the government, in order to get Redfern and the others off his property, Mr. Beierle retrieved a rifle from inside the doorway of his workshop and fired several rounds in Redfern's general direction. (Vol. 1 at 165-67.) Redfern eventually got in his car and drove off. (*Id.* at 167.) But as the car made its way down Mr. Beierle's long driveway, it stopped, at which time Mr. Beierle fired a few more rounds. (*Id.*) He then put the gun in a safe. (*Id.*)

Later that evening, deputies from the Laramie County Sheriff's Office ("LCSO") responded to a complaint from Redfern and Covalt, and tried to make contact with Mr. Beierle at his home. (*Id.* at 165-66.) They were unable to do so, but while looking around his property, they discovered six spent shell casings, the

locations of which they believed were consistent with the complaint they had received. (*Id.* at 166.)

Two days later, Mr. Beierle was interviewed by LCSO Deputy Kurt Wilson, and he provided an account similar to that described above. (*Id.* at 166-67.) He also provided a written statement at that time. (Government's Trial Exhibit 14.)<sup>2</sup>

Two weeks later, on January 30, 2013, Deputy Wilson and LCSO Sergeant Mark Hollanbach went out to Mr. Beierle's property to collect the rifle alleged to have been used on January 13, 2013, for evidence. (Vol. 1 at 167.)

According to the officers, Mr. Beierle led them to a gun safe that was stored in another outbuilding on his property, which building was used as a garage. (Vol. 1 at 167; Vol. 2 at 11; Doc. No. 135 at 140-41.)<sup>3</sup> The gun safe was owned by Mr. Beierle's father, who had brought it out to Wyoming when he moved from California; he had stored it in the garage while he constructed a home elsewhere on Mr. Beierle's land. (Doc. No. 135 at 140-41; 196-97.)

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<sup>2</sup> Mr. Beierle's written statements to police, introduced at trial as Government's Trial Exhibits 14 and 15, appear in the record below attached to Mr. Beierle's opening brief and in Supplemental Volumes filed November 16, 2016 and November 29, 2016.

<sup>3</sup> The trial transcripts—Doc. Nos. 134 (Trial Transcript Vol. Ib), 135 (Trial Transcript Vol. II), and 136 (Trial Transcript Vol. III)—were not included in the original appellate record below, but were subsequently added to the record in a supplemental volume filed November 29, 2016.

After seeking out the combination for the safe, which was written down somewhere behind it, Mr. Beierle opened the safe and retrieved the rifle, indicating to the officers that that was the firearm they sought. (Vol. 1 at 167-68; Doc. No. 135 at 45-46; 54-55, 122, 132, 171-72.) At this time, the officers also took possession of three additional firearms that were in Mr. Beierle's father's gun safe. (Vol. 2 at 11.)

Mr. Beierle also gave another written statement that day, explaining, as pertinent here, that the rifle from the January 13, 2013, incident had been left behind by his ex-wife following their divorce, and on "the evening in question when all of the trash talk became threatening, I grabbed and shot this gun." (Vol. 1 at 167-68; Government's Trial Exhibit 15.)

### **B. The prior proceedings.**

Mr. Beierle had prior felony convictions from decades earlier (Vol. 2 at 13-16), and so was eventually indicted on a single felon-in-possession count, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). (Vol. 1 at 20.) The only firearm identified in the indictment was the rifle alleged to have been fired the evening of January 13, 2013. (Vol. 1 at 20.) The reference to § 924(e)(1), of course, implicated the Armed Career Criminal Act ("ACCA"), which the government argued applied based on three felonies Mr. Beierle had committed nearly 30 years prior. (*See, e.g.*, Vol. 1 at 27.) Application of ACCA exposed Mr. Beierle to a mandatory minimum sentence of 15 years. (Vol. 2 at 26.)

Mr. Beierle went to trial in February 2014. (Vol. 1 at 165.) In light of the indictment, the rifle was the focus of trial, and no evidence was introduced with respect to the other three firearms seized from the safe. Indeed, the parties agreed to avoid introducing testimony and evidence about these additional weapons, expressly noting that neither party “want[ed] those firearms coming in.” *See* Doc. 135 at 26-27 (Trial Transcript Vol. II) (government and defense counsel discussion with court at jury instruction conference); *see also* Doc. 134 at 76-78 (Trial Transcript Vol. Ib) (Deputy Wilson testimony about seizing firearm charged in indictment from the gun safe), Doc. 135 at 45-46 (Trial Transcript Vol. II) (Sgt. Hollanbach testimony about same); *id.* at 82 (additional law enforcement agent testimony about investigatory interviews and who put firearm charged in indictment in gun safe); *id.* at 122-23 (Mr. Beierle’s testimony about placement of that firearm in the gun safe after the January 13, 2013, incident); *id.* at 132 (Mr. Beierle’s testimony about law enforcement seizing the firearm); *id.* at 203-04 (testimony of a friend of Mr. Beierle about how he placed the firearm in the safe after the January 13, 2013, incident).<sup>4</sup>

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<sup>4</sup> There was some limited testimony and argument about an additional rifle that Mr. Beierle’s ex-wife was alleged to have purchased, and which was left behind on his property after their divorce. But discussion of that firearm was largely limited to how and when it was obtained, and there also was no evidence presented with respect to Mr. Beierle’s actual possession of that firearm. *See, e.g.*, Doc. 135 at 150, 173-74 (mentioning this rifle); Doc. 136 at 37-40 (government closing argument mentioning this rifle); *see also* Doc. No. 135 at 178-79 (limiting instruction as to evidence of this rifle). In any event, testimony with respect to this rifle would not make a difference for purposes of applying § 2K2.1(b)(1)(A), the enhancement at issue here, as that

Mr. Beierle testified in his own defense. He recanted the prior statements to law enforcement from January 2013, explaining that an employee of his had actually fired the rifle the evening of January 13, 2013, and that he had made up the statements to law enforcement to protect that employee. (Vol. 1 at 169.)

As pertinent here, Mr. Beierle also testified that the gun safe belonged to his father, who stored it in Mr. Beierle's outbuilding while he built a home on Mr. Beierle's property. (Doc. No. 135 at 140-41.) Mr. Beierle's father also testified, explaining that he was the owner of the gun safe, and that he had brought it out from California when he had moved to Wyoming and stored it in Mr. Beierle's outbuilding. He also noted that Mr. Beierle did not know the combination and had only asked for it once, back in January 2013. (Doc. No. 135 at 196-98; Vol. 1 at 170.)

Mr. Beierle ultimately was convicted on the single-count indictment. (Vol. 1 at 51; 164.)

As pertinent here, his Presentence Investigation Report ("PSR") recommended application of a two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A),<sup>5</sup> because it

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guideline requires that the offense or relevant conduct involve between four and seven firearms.

<sup>5</sup> The PSR erroneously referenced § 2K2.1(b)(1)(B). (Vol. 2 at 12, 90.) That subsection, however, applies a four-level enhancement for unlawful possession of 8 to 24 firearms. It was undisputed below that the only enhancement under discussion was § 2K2.1(b)(1)(A), which applies a two-level enhancement for unlawful possession of four to seven firearms. (*See also* Vol. 1 at 34 (government's sentencing response noting error).)

was alleged that the offense involved four firearms possessed by the defendant.

(Vol. 2 at 12.) Mr. Beierle objected to the application of the enhancement. (Vol. 1 at 75-76, 98-99, & Vol. 2 at 30-31, 41-42, & Doc. No. 106 at 17-18.<sup>6</sup>)

At the same time, however, the PSR recommended that ACCA should be applied to Mr. Beierle—triggering a mandatory minimum of 15 years’ imprisonment, far above what it would be through operation of the sentencing guidelines. (Vol. 2 at 12-13, 26.) Accordingly, the parties, probation, and the court all recognized that any § 2K2.1(b) enhancement and objection were effectively irrelevant if ACCA applied. *See, e.g.*, Vol. 1 at 35 (government noting that the increase contemplated by enhancements was “immaterial because [Mr. Beierle] is subject to the ACCA, and therefore subject to an offense level of 34 under U.S.S.G. 4B1.4”); Vol. 1 at 95 (government noting that the sentencing enhancement challenges were “moot” if the court found ACCA applied); Vol. 1 at 128 (district court remarking that guideline objection was “immaterial as the defendant is subject to the ACCA”); Vol. 2 at 13 (PSR setting forth Chapter Four enhancement to level 34). The primary focus at Mr. Beierle’s original sentencing hearing was, therefore, whether or not ACCA

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<sup>6</sup> Doc. No. 106 is Mr. Beierle’s sealed sentencing memorandum, which was not part of the original appellate record, but was included in a supplemental volume submitted on November 29, 2016.

applied. (Vol. 1 at 67-76, 79-90, 108-22 (arguing ACCA applicability); 122-28 (court’s ruling on ACCA applicability).)

The district court ultimately found Mr. Beierle eligible under the ACCA residual clause (vol. 1 at 122-30), and imposed the mandatory minimum sentence of 15 years’ imprisonment, (*id.* at 52, 154-60). Because it was applying ACCA, the court paid little attention to resolving Mr. Beierle’s objections to the § 2K2.1(b) enhancement, making only limited comments that it believed the “multiple firearms” enhancement applied. (Vol. 1 at 128, 132.)

On direct appeal, the Tenth Circuit affirmed Mr. Beierle’s conviction, but vacated his ACCA sentence pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015).

### **C. Mr. Beierle’s resentencing.**

In anticipation of resentencing, the probation officer prepared an update to the PSR, recalculating Mr. Beierle’s offense level and advisory guideline range without application of ACCA. (Vol. 2 at 90-91.) This update calculated Mr. Beierle’s offense level as 26, based on a base offense level of 20, under U.S.S.G. § 2K2.1(a)(4)(B), and two enhancements, which now had a significant impact on Mr. Beierle’s sentencing range.

As pertinent here, one of those enhancements the PSR update applied was the two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A).<sup>7</sup> The update again alleged

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<sup>7</sup> As with the PSR, *see supra* n.5, the update also erroneously referenced

that “the offense involved four firearms possessed by the defendant.” (*Id.* at 90.) This was based on the firearm charged in the indictment, and the three additional firearms seized from Mr. Beierle’s father’s gun safe on January 30, 2013. (*Id.* at 11 ¶¶ 3, 5.)<sup>8</sup>

Mr. Beierle again objected to the application of the enhancement. (*Id.* at 92; Vol. 3 at 7-8.) The district court overruled the objection.

In so doing, the court found that Mr. Beierle *actually* possessed four firearms, namely: (1) the rifle that was the subject of Mr. Beierle’s indictment and conviction, and (2) the additional three firearms stored in Mr. Beierle’s father’s gun safe and seized by sheriff’s deputies on January 30, 2013.

In light of Mr. Beierle’s conviction, it is only the latter three firearms that are pertinent here. And with respect to these three firearms, the district court found that “the preponderance of the evidence shows actual possession by the defendant.” Specifically, the court ruled, in full:

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§ 2K2.1(b)(1)(B).

<sup>8</sup> The PSR update also applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) because it was alleged that Mr. Beierle had used the rifle charged in the indictment in connection with another felony offense on January 13, 2013. (Vol. 2 at 90.) The offense alleged again was aggravated assault and battery under Wyoming law, in violation of Wyo. Stat. § 6-2-502(a)(iii). (*Id.*) Mr. Beierle challenged the application of that enhancement below, but, in light of the circuit court’s disposition of that claim, does not press that challenge in this Petition.

[L]et's start with the four firearms or more than three, I guess, is more correctly stated, under Guideline 2K2.1(b)(1)(B).<sup>9</sup> I am not convinced that my prior determination on this was in error.<sup>10</sup> While it was perhaps not well stated because of everyone's perspective that these were objections that were to protect the record, with the biggest issue being around the Armed Career Criminal Act, I did state as reasoning that the offense involved four firearms. That remains my finding today. The defendant opened the safe. The assault weapon was handed over to the deputy or deputies that were present there. I think it was Deputies Wilson and Hollenbach, although I could be wrong. It could have been different deputies that were there to retrieve the weapon. The other weapons were in that same safe. They were as accessible as the assault rifle was to the defendant. And so my finding remains, as stated at the prior sentencing, is the two-level enhancement is

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<sup>9</sup> The court appears to have been recounting the PSR update's erroneous citation to subsection (1)(B). *See supra* nn.5, 7. Again, it is undisputed that the operative subsection here is the two-level enhancement under § 2K2.1(b)(1)(A).

<sup>10</sup> The court's reference to its "prior determination" was to the following remarks that the court made at Mr. Beierle's original June 20, 2014, sentencing, which are consistent with its expanded ruling at resentencing:

... I want to address the argument that the defendant is not subject to the enhancement for four firearms.

It is my conclusion that *the evidence from trial is sufficient to show actual possession of three or more firearms*. The defendant opened the safe after referring to the safe code once he was asked by law enforcement to retrieve the assault rifle. The assault rifle was in the same safe as the other guns that result in the enhancement.

(Vol. 1 at 128.) (Emphasis added.) The court recognized that resolution of the objection at that time, however, was "immaterial as the defendant is subject to the ACCA." (*Id.*)

properly applied because *the preponderance of evidence shows actual possession by the defendant.*

(Vol. 3 at 31-32 (April 19, 2016 Resentencing).) (Emphasis added.)

With this ruling, Mr. Beierle's total offense level remained at the PSR update's recommended offense level of 26, which corresponded to an advisory guidelines range of 92 to 115 months, with his criminal history category of IV. (Vol. 3 at 34; Vol. 2 at 90-91.) The court agreed to vary downward two levels, however, based on Mr. Beierle's post-offense rehabilitation and the fact that he had had no problems in the Bureau of Prisons while serving his sentence. (Vol. 3 at 60.)

The court sentenced Mr. Beierle to a new term of imprisonment of 77 months, the bottom of the post-variance guidelines range of 77 to 96 months. (*Id.* at 61.)

#### **D. Mr. Beierle appeals, and the Tenth Circuit affirms his sentence.**

Mr. Beierle appealed his sentence to the United States Court of Appeals for the Tenth Circuit.

As pertinent here, he argued that the district court erred in applying the § 2K2.1(b)(1)(A) multiple firearms enhancement based on his *actual* possession of the three firearms in his father's gun safe. This was so, he explained, because no record evidence supported that finding, and the district court's reasoning sounded in "accessibility," a concept that is relevant to (but not dispositive of) *constructive* possession, not *actual* possession.

He further argued that the circuit court could not affirm application of the multiple firearms enhancement on a *constructive* possession theory because the circuit's law on constructive possession had changed during the pendency of Mr. Beierle's appeal.

Specifically, at the time of Mr. Beierle's April 19, 2016, resentencing hearing, the Tenth Circuit had held that for purposes of constructive possession "[i]t is not necessary to show that the defendant *intended* to exercise . . . dominion or control." *United States v. Colonna*, 360 F.3d 1169 (10th Cir. 2004) (emphasis added). Accordingly, no evidence regarding Mr. Beierle's intent to possess those additional firearms was adduced at either his original sentencing or his resentencing.

A few months after his resentencing, however, the Tenth Circuit expressly overruled its prior precedent and held that *intent was required* to establish constructive possession. *United States v. Little*, 829 F.3d 1177 (10th Cir. July 19, 2016). The change was prompted by this Court's decision in *Henderson v. United States*, which explained that "[c]onstructive possession is established when a person, though lacking such physical custody, still has the power *and intent* to exercise control over the object." 135 S. Ct. 1780, 1784 (2015) (emphasis added)).

On appeal, the Tenth Circuit concluded that plain error review applied because Mr. Beierle had not challenged the district court's finding that he actually possessed the three firearms in his father's gun safe. Appendix at 5-6.

The court agreed with Mr. Beierle that the district court “legally erred by equating accessibility of the other three firearms with ‘actual possession,’ and that this error was plain.” *Id.* at 6 (citations omitted). Hence, the first two prongs of plain error review were satisfied. *Id.*

But the circuit court declined to reverse Mr. Beierle’s sentence, because it held that he had not satisfied the third prong of plain error review, that is, showing prejudice from the error, i.e., a reasonable probability that the error led to a different sentencing outcome. *Id.* at 6-7. This was so, the court explained, because in its view the record demonstrated that Mr. Beierle *constructively* possessed the three firearms in the safe; the court further concluded that the record evidence established Mr. Beierle’s intent to exercise control over the firearms, even though that issue had not been the subject of evidence or argument below in light of the recent change in circuit law. *Id.*

## **REASONS FOR GRANTING THE WRIT**

- I. The Tenth Circuit misapplied the third prong of plain error review when it concluded that the district court’s plain error in applying the two-level enhancement under U.S.S.G. § 2K2.1(b)(1)(A) was not sufficient to show a reasonable probability of a different outcome absent the error, and instead affirmed on an alternative ground.**

Here, Mr. Beierle’s resentencing was governed by section 2K2.1 of the Sentencing Guidelines. That guideline provides for a range of upward adjustments, from 2 to 10 levels, if a defendant unlawfully possessed multiple firearms as part of the offense conduct or as relevant conduct. *See* § 2K2.1(b)(1)(A)-(E) & cmnt. n.5. As

pertinent here, a two-level enhancement applies if the defendant unlawfully possessed between three and seven firearms. § 2K2.1(b)(1)(A).

To establish possession under this guideline, the government must show by a preponderance of the evidence that “the defendant actually or constructively possessed the guns.” *United States v. Gambino-Zavala*, 539 F.3d 1221, 1229 (10th Cir. 2008); *see also Henderson*, 135 S. Ct. at 1784 (noting that possession “encompass[es] what the criminal law recognizes as ‘actual’ and ‘constructive’ possession alike”). “Actual possession exists when a person has direct physical control over a thing. Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.” *Id.* (citations omitted).

Additionally, Federal Rule of Criminal Procedure 52(b) allows for correction of a “plain” error. This Court has explained that to prevail under the plain error standard, a defendant must show: (1) error, (2) that is plain, and (3) that affected his substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If the error meets these conditions, the reviewing court then may exercise its discretion to correct the error if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (citation and internal quotation marks omitted).<sup>11</sup>

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<sup>11</sup> This Court heard argument on February 21, 2018 about the scope of this “fourth prong” of plain error review in *Rosales-Mireles v. United States*, 16-9493.

Here, the Tenth Circuit agreed with Mr. Beierle that the district court legally erred in applying § 2K2.1(b)(1)(A) based on its conclusion that Mr. Beierle had *actually possessed* the three firearms seized from his father's gun safe. It further concluded that such error was plain. Appendix at 5-6. The circuit, however, declined to reverse Mr. Beierle's sentence because it found that he had not satisfied the third prong of plain error review, that is, that he had not established a reasonable probability of a different outcome. *Id.* at 6-7.

The circuit court was wrong, however, and there are four reasons why this Court should grant Mr. Beierle's petition for a writ of certiorari.

First, the circuit court misapplied the third prong of plain error review, which this Court recently considered in the context of the Sentencing Guidelines in *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347, 1349 (2016).

In *Molina-Martinez*, this Court held that when a plain error occurs in setting a defendant's Guidelines range, "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.* at 1345. This is so, even when, as here, the ultimate sentence falls within the correct Guidelines range. *Id.* Thus, consistent with *Molina-Martinez*, once the circuit court here determined that the district court's actual possession finding was legally erroneous, it should have concluded also that its application of the multiple firearms

enhancement—which was predicated on that actual possession finding—was itself in error. *See id.* at 1347.

Second, what the circuit court did instead to affirm on the third prong was inconsistent with its appellate function.

Instead of asking what the impact on Mr. Beierle’s sentence was from the district court’s “legally err[oneous]” actual possession finding, the court instead asked whether the enhancement could nonetheless be applied on a different theory, that is, constructive possession. Appendix at 6-7. The court found this inquiry appropriate based on the principle that a district court’s ruling may be affirmed on a ground not reached by the district court. *Id.* In support, it pointed to and quoted from this Court’s decision in *S.E.C. v. Chenery Corp.*, explaining that: “It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground *within the power of the appellate court to formulate.*” 318 U.S. 80, 88 (1943) (emphasis added). Appendix at 6.

But this last, italicized, phrase is critical, and demonstrates the problem with the circuit’s approach. Because whether Mr. Beierle constructively possessed the three firearms seized from his father’s gun safe was not a question for the circuit court to answer.

Indeed, as the very next sentence in *Chenery Corp.* makes clear, that broad principle of affirmance on an alternative ground is cabined in an important way: “But it is also familiar appellate procedure that where the correctness of the lower court’s decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.” *Id.*

Here, the district court was in the role of the fact finder at sentencing. *See generally Peugh v. United States*, 569 U.S. 530, 536 (2013) (noting role of district court judge as fact finder at sentencing). But it made no findings with respect to constructive possession, let alone about Mr. Beierle’s intent to possess the additional firearms that were seized from his father’s gun safe.

This is particularly problematic because the Tenth Circuit generally appears to treat constructive possession as a *factual finding* reviewable for clear error, i.e., a determination that should be made in the first instance by the sentencing court, not an appellate court. *See United States v. Eskridge*, 420 F. App’x 837, 843 (10th Cir. 2011) (unpublished) (suggesting that a district court’s conclusion that a defendant possessed firearms for purposes of applying the multiple-firearms enhancement under § 2K2.1(b)(1) is a factual finding reviewed for clear error). It is also problematic because the law of constructive possession in the Tenth Circuit changed after Mr. Beierle’s resentencing, and so the parties did not adduce any evidence or make any argument before the district court regarding Mr. Beierle’s intent.

Third, but for the error in applying § 2K2.1(b)(1)(A), Mr. Beierle’s offense level would have been two levels lower (24, not 26), corresponding to an initial guideline range of 77 to 96 months. Even though the 77-month sentence he ultimately received fell within that lower range, there is still a reasonable probability of a different outcome because absent the guidelines error, the district court’s decision to vary and by how much would have originated from a markedly lower range. *See Molina-Martinez*, 136 U.S. at 1345, 1347. That is particularly true here, where the basis for the court’s variance was Mr. Beierle’s post-offense rehabilitation, and there is no indication that the court would not have granted him a variance on that basis if the advisory guideline range had been lower.

Fourth, in its decision below, the Tenth Circuit off-handedly suggested that this Court’s articulation in *Henderson* of the definition of constructive possession might not apply to the Sentencing Guidelines. *See* Appendix at 9 n.8 (“Despite the government’s concession that *Little*<sup>12</sup> applies to Application Note 5 [of § 2K2.1], we don’t decide the issue today. Beierle’s inability to show the substantial-prejudice prong of plain error would subsume any ruling that we made on the matter.”) (citation omitted).

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<sup>12</sup> In *Little*, the Tenth Circuit followed *Henderson* and incorporated intent into the circuit’s constructive possession analysis in the context of the jury instructions applicable to a felon in possession charge under 18 U.S.C. § 922(g)(1). *See* 829 F.3d at 1182.

But *Henderson* spoke broadly, citing, *inter alia*, Black's Law Dictionary, and there is no reason why its definition of constructive possession should not apply to the Guidelines. Moreover, both before and after *Henderson*, other circuits have required a showing of intent to establish constructive possession under the Guidelines. *See, e.g., United States v. Williams*, \_\_\_ F. App'x \_\_\_, No. 17-20397, 2018 WL 1940409, at \*2 (5th Cir. Apr. 23, 2018) (unpublished); *United States v. Reilly*, 682 F. App'x 766, 767 (11th Cir. 2017) (unpublished); *United States v. Penaloza*, 648 F. App'x 508, 515 (6th Cir. 2016) (unpublished); *United States v. Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012); *United States v. Holmes*, 429 F. App'x 7, 8-9 (1st Cir. 2011) (unpublished). Accordingly, this Court also should grant certiorari to avoid the development of a future circuit split on the definition of constructive possession that is applicable to the Sentencing Guidelines.

\* \* \*

All told, the district court plainly erred in applying § 2K2.1(b)(1)(A), and the Tenth Circuit erred in its application of the third prong of plain error review. Mr. Beierle requests that this Court grant his petition, and, ultimately, vacate the decision of the Tenth Circuit and his sentence, and remand his case for resentencing.

## CONCLUSION

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

Respectfully submitted,

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