No. 22-2142

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DOUGLAS D. SMITH,

Defendant-Appellant.

Appeal from the United States District Court for the District of New Mexico, the Honorable Judith D. Herrera
USDC NM CR No. 18-3495 JCH

APPELLANT'S REPLY BRIEF

(No Attachments)

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Defendant-Appellant Douglas D. Smith replies as follows to Appellee's Answer Brief ("AB").

ARGUMENT

I. Because Mr. Smith's Offense Was Not Committed in Indian Country under 18 U.S.C. § 1151, There Was No Federal Jurisdiction under 18 U.S.C. § 1152 and the Offense Was Not One Described in Chapter 53 of Title 18, United States Code. Consequently, There Was No Federal Jurisdiction under Subsection (c) of the 2005 Pueblo Lands Act Amendment.

The government does not show that Mr. Smith's land falls within any of the three 18 U.S.C. § 1151 Indian country definitions that determine whether there is federal criminal jurisdiction under 18 U.S.C. §§ 1152 and 1153. It also does not show that the § 1151 definitions do not apply. The State of New Mexico and the Pueblos also fail to explain how Mr. Smith's land meets any of the three Indian country definitions. They do not argue that the land is "within the limits of any Indian reservation," is a dependent Indian community under *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998), or is an Indian allotment. *See* Mr. Smith's opening brief ("OB") 21-25.

The Pueblos of Santa Clara, Acoma, Cochiti, Laguna, Isleta, Zia, the Zuni Tribe, and the All Pueblo Council of Governors assert in their amicus brief ("PB") that Pueblos and reservations are legally equivalent, should be treated the same, and that the same diminishment analysis should apply to Pueblos and reservations. PB 5. This Court has previously rejected similar claims. For example, as Mr. Smith explained in his OB 22, this Court noted in *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), that when Congress confirmed the Pueblo land claims in 1858, which include those of the Pueblo of Santa Clara, the United States relinquished "all title and claim . . . to any of said lands." 11 Stat. 374 (1858)."The Pueblos received fee simple title to their lands . . . [which is] logically inconsistent with the concept of a reserved right." *Aamodt*, 537 F.2d at 1111. *See also id.* ("A relinquishment of title by the United States differs from the creation of a reservation for the Indians. In its relinquishment the United States reserved nothing . . . ").

The Pueblos point to the Court's determination in *Solem v. Bartlett*, 465 U.S. 463 (1984), that Congress did not intend to diminish the Cheyenne River Reservation in the Cheyenne River Act. PB 23 n.11.

In addressing the1924 Pueblo Lands Act ("PLA") in *Mountain States Tel. & Tel. Co., v. Pueblo of Santa Ana*, 472 U.S. 237 (1985), however, the Court explained that Congress set out rules in the PLA for the Board to determine the validity of land claims by non-Indians within the boundaries of the Pueblo land grants. Pueblo title was extinguished to lands where such claims were found valid. *Id.* at 243-44. *See also United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006) (As Congress provided in the PLA, "[t]he Board issued patents to quiet title to land in favor of non-Indians" determined by the Board to have qualifying claims . . . "[t]he Pueblos' rights to such land were extinguished." (citing PLA § 4, 43 Stat. at 637; *Mountain States,* 472 U.S. at 244)).

This appeal presents statutory and constitutional interpretation issues, not policy issues. If Mr. Smith prevails on his jurisdiction claims, it will be up to Congress to address any law enforcement issues that arise.

1. Neither the government nor its amici show that the land where Mr. Smith's offense took place is Indian country under 18 U.S.C. § 1151 or that the § 1151 definitions do not apply.

The government cannot prevail on its jurisdiction argument because it fails to show that Mr. Smith's offense, which took place on private land in Espanola, New Mexico, was committed in Indian country. Under 18 U.S.C. § 1152, ". . . the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." Section 1152 "applies to crimes by or against Indians in Indian country." *McGirt v. Oklahoma,* 140 S.Ct. 2452, 2479 (2020). *See also* Att. B to Mr. Smith's OB at 2 (the district court recognized that "[i]n a criminal prosecution under 18 U.S.C. §§ 1152 or 1153, the United States has the burden to prove by a preponderance of the evidence that the land on which the crime is alleged to have occurred is Indian country under 18 U.S.C. § 1151."). In both the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, "Congress conferred on the federal courts special criminal jurisdiction over offenses committed in

Indian country." *Cohen's Handbook of Federal Indian Law*, § 9.01, at 736-37 (Neil Jessup Newton et al., eds. 2012).[1]

The government acknowledges that 18 U.S.C. § 1152 pertains to Indian country offenses, AB 19 n.10, and that "federal jurisdiction turns on whether the crime was committed on an Indian reservation, a dependent Indian community, or an Indian allotment." AB 16. While it charged Mr. Smith with committing second degree murder in Indian country, in violation of 18 U.S.C. §§ 1152 and 1111, I ROA 50, it did not establish that Mr. Smith's land falls within any of the three § 1151 Indian country definitions.

The government correctly points out that the New Mexico Pueblos have been recognized as dependent Indian communities, AB 16, but does not dispute Mr. Smith's argument that his private land does not meet the federal set-aside and federal superintendence requirements for a dependent Indian community under *Venetie*. OB 24-26. The government acknowledges that Pueblo title to Mr. Smith's land was

[1] Mr. Smith mistakenly stated in his OB 26 that the Indian Country Crimes Act is 18 U.S.C. § 1153. The Indian Country Crimes Act is 18 U.S.C. § 1152. The Major Crimes Act is § 1153.

extinguished under the Pueblo Lands Act, AB 20, and does not claim that the Pueblo of Santa Clara maintains any ties to Mr. Smith's land.

This Court recognized in *United States v. Antonio*, 936 F.3d 1117 (10th Cir. 2019), that "Indian country" is defined by 18 U.S.C. § 1151. *Id.* at 1120. It also recognized that non-Indian land within the exterior boundaries of a Pueblo may not fall within that definition. *See id.* at 1121 ("Although the Pueblo lands fell within Indian Country because the Pueblos were a dependent Indian community, 18 U.S.C. § 1151 did not account for tracts of land within the dependent Indian communities that were owned by non-Indians. Under § 1151, these private holdings would not necessarily be subject to federal jurisdiction.").

While this Court concluded that Mr. Antonio's offense fell within subsection (a) of the 2005 PLA Amendment because it occurred within the exterior boundaries of a grant from a prior sovereign that was confirmed by Congress, *id.* at 1122-23, it did not explain how it arrived at the conclusion that "the charged offense occurred in Indian country." *Id.* at 1124. It did not find that the land falls under any of the three § 1151 Indian Country definitions.

2. The government and its amici wrongly interpret the 2005 PLA Amendment to provide for federal criminal jurisdiction over all lands within the exterior boundaries of a Pueblo. It provides only for federal jurisdiction over "any offense described in chapter 53 of title 18, United States Code" and no statute in chapter 53 of title 18 describes Mr. Smith's offense.

The government misconstrues the 2005 PLA Amendment, as do the State of New Mexico and the Pueblos. The Amendment provides in subsection (a) that subsections (b), (c), and (d) apply to "offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress . . ." Pueblo jurisdiction applies under subsection (b); federal jurisdiction applies under subsection (c) to "any offense described in chapter 53 of title 18, United States Code . . . "; and state jurisdiction applies under subsection (d) to offenses "not subject to the jurisdiction of the United States." The government is plainly wrong in its contention, AB 15, that under the 2005 PLA Amendment, "[f]ederal criminal jurisdiction exists over any land within the exterior boundaries of the Pueblo."

The Pueblos similarly–and wrongly–claim that in the 2005 PLA Amendment, "Congress expressly stated that federal courts would have jurisdiction over crimes against Indians committed 'anywhere within

the exterior boundaries' of pueblo grants." The State of New Mexico makes a similar misrepresentation, declaring that "[b]ecause it is undisputed that the offense occurred within the exterior boundaries of the Santa Clara Pueblo, federal jurisdiction is appropriate." New Mexico Amicus brief ("NMB") 8.

In fact, the 2005 PLA Amendment clearly provides in subsection (a) that its jurisdiction provisions apply generally to "offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign . . ." It does not provide that federal jurisdiction applies to all such cases. Whether the Pueblo, the United States, or the State of New Mexico has jurisdiction under the Amendment must be determined under subsections (b), (c), and (d) of the Amendment. Federal jurisdiction applies under subsection (c) "over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian . . ." The State of New Mexico has jurisdiction under subsection (d) over crimes committed by non-Indians that are "not subject to the jurisdiction of the United States."

Mr. Smith's crime is not an "offense described in chapter 53 of title 18, United States Code" based on § 1152 because that statute applies

only to offenses committed in Indian country. His land is not Indian country because it does not fall within the Indian country definitions of 18 U.S.C. § 1151. It is not within an Indian reservation, is not a dependent Indian community, and is not an Indian allotment.

Neither the government nor its amici show that the offense in this case is described in any other statute included in chapter 53 of title 18, United States Code. The State of New Mexico points out that "the crimes of murder and manslaughter are described in Chapter 53 at 18 U.S.C. § 1153." NMB 3. Mr. Smith's offense is not described by § 1153 both because he is a non-Indian and his land is not Indian country under § 1151. Because this case does not involve an "offense described in chapter 53 of title 18, United States Code," subsection (c) of the 2005 PLA Amendment does not apply and there is no federal jurisdiction.

3. This Court did not address in *Antonio* the jurisdiction issue Mr. Smith has raised.

The government maintains that Mr. Smith's jurisdiction argument is foreclosed by this Court's *Antonio* decision and wrongly accuses Mr. Smith of seeking to relitigate issues this Court decided in *Antonio*. AB 24. The issue in *Antonio* was whether subsection (a) of the 2005 PLA

Amendment applied, which provides that the Amendment applies to "offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress." Mr. Smith does not dispute that his offense was committed within the exterior boundaries of a grant from a prior sovereign that was confirmed by Congress and agrees that the 2005 PLA Amendment applies.

Mr. Smith's argument in this appeal concerns the next step of the jurisdiction analysis under the 2005 PLA Amendment–whether there is federal jurisdiction under subsection (c) or state jurisdiction under subsection (d). As explained above, the United States lacks jurisdiction under subsection (c) of the 2005 PLA Amendment because his offense is not one "described in chapter 53 of title 18, United States Code." This Court did not address in *Antonio* the limitation of federal jurisdiction to offenses "described in chapter 53 of title 18, United states Code." Because Mr. Smith's land is within the exterior boundaries of a grant from a prior sovereign, as confirmed by Congress, and subsection (c) of the 2005 PLA Amendment does not authorize federal jurisdiction over murder and manslaughter crimes committed by non-Indians outside

Indian country, subsection (d) applies instead and provides for state jurisdiction.

II. Congress Lacked Constitutional Authority to Assert Federal Criminal Jurisdiction over Non-Indians Who Commit Offenses on Non-Indian Land in within the City Limits of Española, New Mexico.

The government argues that this Court need not address whether Congress had constitutional authority to enact the 2005 PLA Amendment because the 1924 PLA did not terminate federal jurisdiction over lands patented to non-Indians. AB 26. As this Court explained in *Antonio*, the PLA "quieted title to tracts of disputed land" and did not "even mention jurisdiction." 936 F.3d at 1124. It is undisputed that the PLA addressed land claims, not federal criminal jurisdiction.

As Mr. Smith explained above and in his OB 26-27, the 1924 PLA provided for the extinguishment of "all the right, title and interest" of the Pueblos and the United States to lands patented to non-Indians under the rules set out in the PLA. PLA § 13, 43 Stat. at 640. *See also Mountain States,* 472 U.S. at 244 (Congress plainly and unambiguously provided in the PLA for the extinguishment of Pueblo title to lands

patented to non-Indians); *Arrieta*, 436 F.3d at 1249 (same). The Supreme Court has repeatedly explained that there was a clear understanding prior to 1948 that the extinguishment of Indian title terminated federal jurisdiction. *See, e.g.,* cases cited at OB 30-31.[2] Congress would have understood when it enacted the PLA in 1924 that it would have the effect of terminating the Indian country status of the lands to which Pueblo title was extinguished.

The government does not address Mr. Smith's argument that Congress's "plenary power" under the Indian Commerce Clause, *U.S. Const.*, Art. I § 8, cl.3, to regulate trade "with the Indian tribes" does not give Congress authority over individuals, including non-Indian offenders who commit crimes outside Indian country. OB 38-39.

III. The District Court Wrongly Denied Mr. Smith a Downward Adjustment in his Sentencing Guidelines Offense Level for Acceptance of Responsibility.

The government ignores the extensive evidence of Mr. Smith's pretrial acceptance of responsibility, discussed at OB 42-45, and addresses only trial evidence. Under U.S.S.G. § 3E1.1, cmt. n.2, when a

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[2] The Pueblos acknowledge this was the common understanding when the PLA was enacted in 1924. PB 23 n.11.

defendant exercises his constitutional right to a trial, the acceptance of responsibility determination "will be based primarily upon pre-trial statements and conduct." *Id.* The government does not dispute that Mr. Smith's pretrial statements and conduct weigh heavily in favor of a reduction for acceptance of responsibility.

The FBI agents who interviewed Mr. Smith before trial, Special Agents Taylor and Cobb, plainly recognized that he explicitly accepted responsibility for his actions when he responded to their questions and related the circumstances of his offense. *See* OB 44-45. Special Agent Cobb responded to Mr. Smith's expressions of acceptance by stating, "taking responsibility is step number one, right, being open and honest, and, I mean, I think that's great." II ROA 99. Special Agent Taylor agreed.

Mr. Smith told the agents of his fear that he would be judged harshly in the afterlife for what he had done and would face eternal consequences for them. *See* OB 44. He had had a prior similar conversation with Detective Abeyta. *See* OB 43. Mr. Smith not only repeatedly admitted the seriousness of his conduct from the time of his offense; he also consistently expressed deep remorse. OB 43-44.

The government argues that Mr. Smith was properly denied a reduction for acceptance because he took issue with the government's intent theory. AB 30. But his conviction of the lesser included involuntary manslaughter offense shows the jury's agreement that he properly challenged the government evidence of intent and that there was insufficient evidence he intended to commit second degree murder.

Mr. Smith admitted at trial his failure to exercise reasonable care at the time of his offense, but argued that the legal element of intent was unmet because he acted out of intense fear. Although the district court denied a reduction for acceptance here, unlike in *United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999), this case is similar to *Gauvin* in that Mr. Smith disputed at trial whether the state of mind he acknowledged met the requisite intent standard. Mr. Smith was entitled to a reduction for acceptance of responsibility because he went to trial to contest not the fact of his mental condition, but "the *legal* ramifications of that condition." *United States v. Herriman*, 739 F.3d 1250, 1257 (10th Cir. 2014) (emphasis in original).

This Court should decide that the district court erred in denying Mr. Smith a reduction for acceptance because it failed to recognize that

he admitted his lack of due care and disputed whether it met the legally required intent standard. The district court also gave inadequate consideration to Mr. Smith's pretrial statements accepting responsibility and his deep remorse for what he had done.

CONCLUSION

For all the reasons argued above and those set forth in Mr. Smith's opening brief, this court should reverse Mr. Smith's conviction due to lack of jurisdiction. In addition, this Court should determine that the district court wrongly imposed denied Mr. Smith a reduction for acceptance of responsibility and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(g)

I, Aric G. Elsenheimer, counsel for Defendant-Appellant Douglas D. Smith, certify that this brief-in-chief conforms to the type-volume limitations of Federal Rule of Appellate Procedure 32(g). The brief is typed in a proportionally spaced 14-point type. Excluding table of contents, table of citations, and certificates of counsel, it contains 2856 words.

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