UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 22-2142

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
District Court No. 1:18-CR-03495-JCH
Hon. Judith C. Herrera, Senior United States District Judge

APPELLEE'S ANSWER BRIEF – NO ATTACHMENTS

ORAL ARGUMENT IS NOT REQUESTED

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There are no prior or related appeals. *IK6yh5tg4rf

INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

Defendant/Appellant Douglas D. Smith, a non-Indian, shot and killed Maria Gallegos, an Indian, on his property in Española, New Mexico. A federal indictment charged Smith with one count of second-degree murder in Indian country under 18 U.S.C. §§ 1111 and 1152. Smith moved to dismiss the indictment, arguing that the district court lacked jurisdiction over the prosecution because his property was not Indian country. After the district court denied his motion, Smith proceeded to trial. The jury found him not guilty of second-degree murder, but convicted him of the lesser-included offense of involuntary manslaughter in violation of 18 U.S.C. § 1112. At sentencing, the district court denied Smith a reduction in his offense level for acceptance of responsibility and sentenced him to 27 months' imprisonment, the bottom of his guideline range. Smith appeals, raising two issues:

1) Is Smith's property Indian country for purposes of federal criminal jurisdiction where it falls within the exterior boundaries of the Pueblo of Santa Clara but is privately owned by Smith and his brothers?

2) Did the district court clearly err in finding that Smith did not accept responsibility for involuntary manslaughter when he went to trial and argued for acquittal on the theory that he lacked the requisite mens rea for involuntary manslaughter?

STATEMENT OF THE CASE AND THE FACTS

I. Smith shoots and kills Maria Gallegos on his property.

In the middle of the night on May 5, 2018, the motion sensors on Smith's property alerted.[1] 6R.4 ¶ 6, 5 ¶ 8.[2] Smith had previously experienced break-ins on his property, which included the Western Winds motel[3] along with his residence. *Id.* He had engaged with at least three prior trespassers and had shot his handgun when encountering a trespasser the month before. *Id.* at 5 ¶ 12.

After the motion sensors alerted, Smith took his handgun and ammunition and stepped onto his porch. 6R.5 ¶¶ 8–9. From there, Smith saw a shadowy figure standing near the door of a camper trailer on his property, about 30 to 40 feet away. *Id.* at 5 ¶ 9. Without saying anything, Smith shot his handgun once in the direction of the camper trailer. *Id.* Smith testified that he shot to miss. *Id.* Smith explained that he saw the shadow take off running and waited until he believed the person had left his property. *Id.* He

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[1] The facts recounted here are taken from the second revised Presentence Investigation Report (PSR), which at the direction of the district court included a description of the offense conduct agreed to by both parties. 6R.16; 7R.222–23.

[2] Citations to the record take the form [vol.]R.[page]. Where both a redacted and unredacted volume exits, citations are to the unredacted volume. The opening brief is cited as "Op. Br."

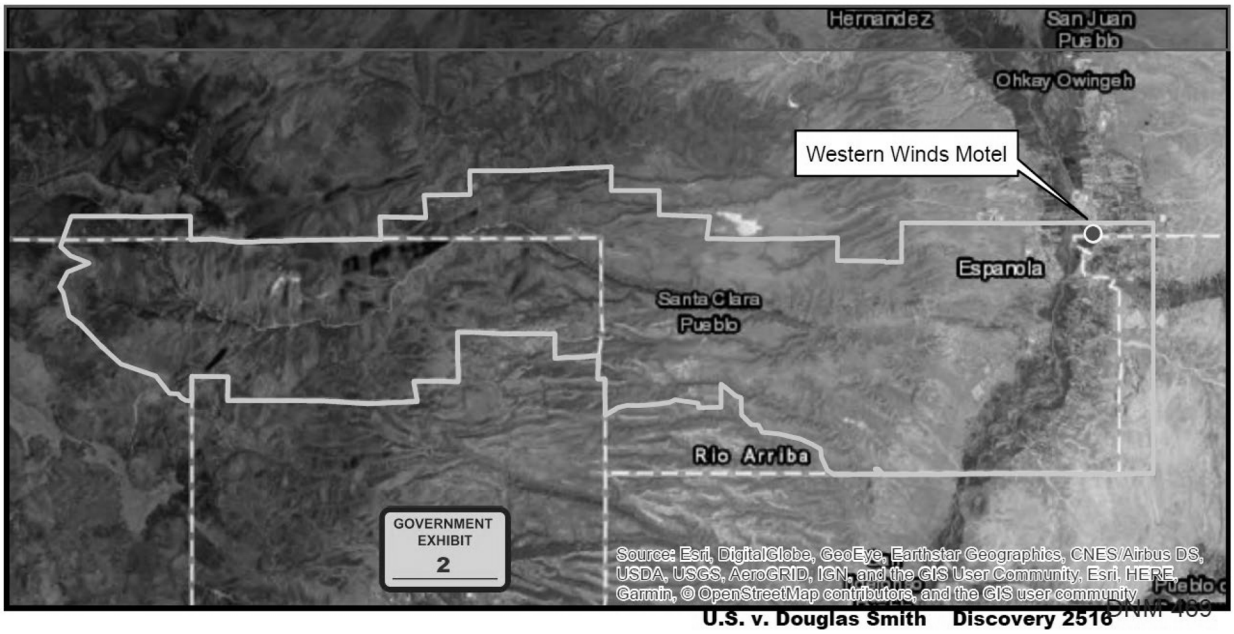
[3] Smith maintained that the motel was no longer operational. 1R.932.

testified that he then fired warning shots to scare the person away. *Id.* Smith fired a total of four shots, and his line of fire followed the direction in which the person had run. *Id.* at 4 ¶ 7.

After firing the shots, Smith began to search the area. 6R.5 ¶ 11. He discovered a body lying face down with a gunshot wound. *Id.* Smith did not try to render aid or call for help until his tenant told him to call 911. *Id.* Smith immediately did so. *Id.*

Law enforcement responded and identified the victim as Maria Gallegos, a 36-year-old enrolled member of the Pueblo of Santa Clara. 6R.4 ¶ 6, 6 ¶ 17. An autopsy revealed that Ms. Gallegos died of a gunshot wound to her left temple. *Id.* at 5 ¶ 10.

Smith's property, identified below with the red dot as Western Winds Motel, is located within the exterior boundaries of the Pueblo of Santa Clara, which are marked with the yellow-green line.



1R.469. Smith himself is not an Indian. 6R.4 ¶ 6.

The grand jury issued an indictment charging Smith with second-degree murder in violation of 18 U.S.C. § 1111. 1R.50. The indictment alleged federal jurisdiction under § 1152, which applies to Indian country, based on Smith's status as a non-Indian, and Ms. Gallegos's status as an Indian. 1R.50.

II. Smith moves to dismiss the indictment, asserting that his property is not Indian country.

Smith filed a motion to dismiss the indictment for lack of federal jurisdiction. 1R.126–38. In support of the motion, he submitted the deed to his property, indicating that the land he owned jointly with his brothers lay within the Santa Clara Pueblo Grant. *Id.* at 150–51. He also submitted a land patent for the property issued by President Franklin D. Roosevelt

pursuant to the 1924 Pueblo Lands Act (PLA),[4] quieting title to the property against the Pueblo and in favor of Alfredo Lucero, Antonia F. de Lucero, and Pleasant Henry Hill, Junior. *Id.* at 146. The patent stated that it had "the effect only of a relinquishment by the United States of America and the Indians of said Pueblo." *Id.*

Smith contended that the issuance of the land patent extinguishing Pueblo title to his property pursuant to the PLA unambiguously served to terminate federal criminal jurisdiction over it, pointing to language in the PLA stating that the Pueblo's rights and claims to the patented land were "extinguished" or "relinquished." 1R.131–35, 255–61. Smith also relied on a district court order from 2000, finding that private land for which the PLA quieted title was no longer Indian country subject to federal jurisdiction. *Id.* at 134–35; *see id.* at 147–48 (order of dismissal in *United States v. Gutierrez*, No. CR 00-M-375-LH (D.N.M. 2000).

Although acknowledging that Congress's enactment of the 2005 Amendments to the Pueblo Lands Act[5] provided for federal criminal jurisdiction over offenses committed on any land within the exterior

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[4] Indian Pueblo Lands Act of June 7, 1924, ch. 331, 43 Stat. 636, *codified at* 25 U.S.C. § 331 Note. A more comprehensive summary of the history of Pueblo lands and the PLA is provided in the argument section below.

[5] 2005 Amendments to the Indian Pueblo Lands Act, Pub. L. No. 109-133, 119 Stat. 2573 (Dec. 20, 2005), *codified at* 25 U.S.C. § 331 Note.

boundaries of the Pueblo, 1R.131, Smith argued that the 2005 Amendments unconstitutionally sought to "reclaim" jurisdiction over private properties within Pueblo boundaries that were no longer Indian country after the PLA quieted title against the Pueblo, *id.* at 135. Smith contended that the 2005 Amendments exceeded Congress's authority under Article I of the U.S. Constitution or its plenary power to regulate tribal government by reasserting federal jurisdiction over land for which Indian title had been extinguished. *Id.* at 135–37, 261–65. Smith pointed out that he pays county taxes, is subject to state real property law, and his property lies within the boundary of the town of Española. *Id.* at 137.

III. The United States opposes dismissal based on the 2005 Amendments to the Pueblo Lands Act that provide federal criminal jurisdiction over all lands within the exterior boundaries of the Pueblo.

The United States opposed Smith's motion.[6] 1R.231–42. To resolve any factual question of jurisdiction, the United States submitted maps and land status reports demonstrating that Smith's land was located within the exterior boundaries of the Pueblo of Santa Clara, but was privately owned. *Id.* at 242, 469–71. It also provided testimony from Iva Shije, Geographic Information System technician for the Santa Clara Pueblo realty department,

[6] The United States also moved for a pretrial determination on the Indian country status of Smith's land, and additional briefing was completed on the issue. 1R.285–89, 428–36, 505–08.

and Jesse Gutierrez, realty director of Santa Clara Pueblo, that Smith's property fell within the exterior boundaries of the Pueblo. 7R.29–48.

In response to Smith's jurisdictional arguments, the United States relied on *United States v. Antonio*, 936 F.3d 1117 (10th Cir. 2019), which held that all lands, including privately owned lands, within a Pueblo's exterior boundaries are subject to federal criminal jurisdiction. *See* 1R.235–36. Based on *Antonio*, the United States contended that the PLA did not plainly and unambiguously terminate federal jurisdiction over any land within such boundaries but rather addressed how land disputes should be resolved by narrowly focusing on quieting title. *Id.* at 235–36, 505.

The United States maintained that the 2005 Amendments set forth the test for whether federal criminal jurisdiction existed over Smith's property. 1R.236–37. Because Smith's land is located within the exterior boundaries of the Pueblo of Santa Clara, the United States argued that the 2005 Amendments provide for federal jurisdiction over Smith's land, regardless of whether the PLA had previously divested Smith's land of its Indian country status. *Id.*

The United States further argued that Congress constitutionally acted within its plenary power over Indian affairs, rooted in the Indian Commerce Clause, to amend the PLA to clarify that federal criminal jurisdiction

extended to all lands within the exterior boundaries of a Pueblo. *Id.* at 236–40.

IV. The district court concludes it has jurisdiction over the prosecution because Smith's land is Indian country.

After holding a hearing on the issue, 7R.23–59, the district court denied the motion to dismiss. 1R.525–42. The district court began by considering this Court's opinion in *Antonio*, emphasizing *Antonio*'s conclusion that the PLA "'only addressed how land disputes were to be resolved'" and it did not "'exempt any specific properties *or terminate federal jurisdiction.*'" *Id.* at 534 (quoting *Antonio*, 936 F.3d at 1123) (italics added by district court). The district court also quoted from *Antonio* to explain the two-part analysis for federal criminal jurisdiction that applies after the 2005 Amendments to the PLA. *Id.* Under this test, if the land "'was part of a grant from a prior sovereign and Congress confirmed the boundaries,'" federal criminal jurisdiction exists regardless of whether the land is privately owned. *Id.* (quoting *Antonio*, 936 F.3d at 1124). Noting that *Antonio* did not examine the factors for diminishment of a reservation identified in *Solem v. Bartlett,* 465 U.S. 463, 470–72 (1984), or consider the constitutionality of the 2005 Amendment, the district court found *Antonio* "instructive on the issue of congressional intent in passing the PLA—resolving Pueblo land disputes, not terminating federal jurisdiction." *Id.* at 534.

The district court proceeded to consider the three *Solem* factors. First, looking to the statutory language of the PLA, the district court found that the purpose of the PLA was, as stated in the statute, "[t]o quiet the title to lands within Pueblo Indian land grants." 1R.534–35 (quoting 43 Stat. 636). The court recognized that the terms "extinguish" and "relinquish" in the PLA lent support to Smith's diminishment argument, but it concluded that it was "not clear that Congress meant the present and total surrender of all tribal interests to that land, rather than merely a change of title thereto." 1R.535–36. The district court further pointed out that the PLA did not direct the Executive to purchase property for a sum certain, a factor that would weigh in favor of diminishment. *Id.* at 537–38.

Moving to the second *Solem* factor, events surrounding the passage of the PLA, the district court observed that the history of the PLA showed that it was enacted to settle land disputes and quiet title, not to diminish tribal and federal authority over Pueblo lands. 1R.538.

As to the third *Solem* factor, post-legislative events, the district court recognized that the federal government historically exercised criminal jurisdiction over lands within the exterior boundaries of the Pueblo. *Id.* at 538. It pointed out that shortly after a federal district court judge ruled in 2000 that it had no jurisdiction over crimes occurring on private land within the Pueblo boundaries, Congress enacted the 2005 Amendments to "clarify

the uncertainty and correct the void of jurisdiction." *Id.* at 539. The court found that the location of Smith's property within the city or county did not affect the question of congressional diminishment, and the assessment and payment of county taxes and imposition of state and local regulation was not enough to overcome the presumption against diminishment in light of the textual and legislative history. *Id.* Accordingly, the district court concluded that Smith had not overcome the presumption against diminishment. *Id.* at 540.

Finally, the district court rejected Smith's constitutional claim. 1R.540–42. The court concluded that as the PLA did not diminish Pueblo lands, "Congress retained authority under its plenary powers and the Indian Commerce Clause to enact the 2005 Amendment." *Id.* at 541. Relying on *Hilderbrand v. Taylor*, 327 F.2d 205, 206 (10th Cir. 1964), which upheld Congress's power to assert federal jurisdiction over crimes committed on private, patented land within a reservation, the district court found the 2005 Amendments to be a constitutional exercise of Congress's authority. 1R.542. The district court thus denied Smith's motion to dismiss for lack of federal jurisdiction. *Id.*

V. A jury convicts Smith of involuntary manslaughter.

Following the denial of the motion to dismiss, Smith's case proceeded to trial. Smith did not stipulate to any element of his second-degree murder

charge, not even his status as a non-Indian or Ms. Gallegos's status as an Indian. Instead, he held the United States to its burden to prove each element of the charge beyond a reasonable doubt. *See* 8R.773–779 (closing argument summarizing evidence presented). At the close of the three-day trial, the jury was instructed to consider both the second-degree murder charge in the indictment and involuntary manslaughter, a lesser-included offense. *Id.* at 753–60. Smith, who testified in his defense, argued for acquittal on both charges based on his claim that he lacked the requisite mens rea for either offense. *Id.* at 784–86. On June 18, 2021, the jury returned a verdict of not guilty on the second-degree murder charge, but found Smith guilty of involuntary manslaughter. 1R.925.

VI. The district court sentences Smith to 27 months' imprisonment, with no offense-level reduction for acceptance of responsibility.

A Presentence Investigation Report was prepared.[7] 6R.1–17. Based on an offense level of 18 and a criminal history category of I, the PSR calculated a guideline range of 27 to 33 months. *Id.* at 12 ¶ 54. The PSR did not reduce Smith's offense level by two levels as provided for in USSG § 3E1.1, for defendants who clearly demonstrate acceptance of responsibility for their offenses, because the PSR concluded that Smith had not made this showing.

[7] The PSR was revised in response to objections made by both parties and at the direction of the district court. 5R.85–89; 6R.16; 7R.222–23. The original PSR is located at 5R.22–36, and the Second Revised PSR is at 6R.1–17.

6R.8 ¶ 28. Smith did provide the Probation Office with a statement of acceptance of responsibility, 5R.86–87, but Probation noted that it was provided after conviction at trial and following disclosure of the initial PSR. *Id.* at 87; 6R.7 ¶ 19.

Smith objected to the PSR's denial of the offense-level reduction for acceptance of responsibility.[8] 1R.929–30. As evidence of his acceptance of responsibility, Smith cited his actions in (1) calling 911 and telling dispatch that he had shot someone, (2) complying with arrest, (3) making statements to law enforcement recounting what had happened, (4) testifying regarding the events at trial, and (5) submitting a statement to probation accepting responsibility. *Id.*; *see* 5R.86–87 (quoting statement submitted to probation). He moved for a downward variance and requested a sentence of three years' probation and one year of home confinement due to his age, the nature of the offense, and his lack of criminal history. 1R.948–55.

The United States requested an upward variance or departure to 60 months' imprisonment based on the recklessness of Smith's conduct, the danger it posed to the public, the need to provide both general and specific deterrence, and the significant harm caused to Ms. Gallegos and her children and other family. 1R.935–46. The United States opposed a reduction in

[8] Both parties raised additional objections to the offense level calculated in the PSR, which are not relevant for purposes of this appeal.

offense level for acceptance of responsibility because Smith went to trial and contested that he had the requisite *mens rea* for the offense. *Id.* at 937–38.

At the first sentencing hearing on September 15, 2022, the district court heard arguments from the parties, including on acceptance of responsibility. 7R.208–12, 215–16. The district court noted that Smith argued against a finding of guilt on involuntary manslaughter at trial. *Id.* at 218–20. Acknowledging that Smith had admitted to firing at the person on his property, the court nonetheless concluded that he never accepted responsibility for the offense of involuntary manslaughter. *Id.* at 218. At the conclusion of the first hearing, the district court calculated the guideline range as 27 to 33 months and indicated its intention to impose a sentence of 27 months. *Id.* at 236. It granted Smith the opportunity to submit additional briefing on whether a variance was appropriate based on Smith's age of 72. *Id.* at 237–41.

After additional briefing on Smith's age and vision problems, 5R.90–99, 117–26, the district court held a second sentencing hearing on November 10, 2022. The district court considered the sentencing factors of 18 U.S.C. § 3553(a), emphasizing the serious nature of the offense that resulted in Ms. Gallegos's death. 8R.919–31. Based on these factors, the district court imposed a sentence of 27 months' imprisonment, followed by two years of supervised release. *Id.* at 930–31.

Judgment was entered on November 17, 2022, 1R.972, and Smith timely appealed, *id.* at 979.

SUMMARY OF THE ARGUMENT

The district court properly found federal criminal jurisdiction over Smith's prosecution for involuntary manslaughter for the killing of Maria Gallegos, an Indian, by Smith, a non-Indian, within the exterior boundaries of the Pueblo of Santa Clara. The 2005 Amendments to the Pueblo Lands Act provide federal jurisdiction over offenses committed by or against an Indian "anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress . . . to a Pueblo Indian tribe of New Mexico." Applying the 2005 Amendments, this Court held that federal jurisdiction extends to private properties within a Pueblo patented to non-Indians under the Pueblo Lands Act of 1924. *United States v. Antonio*, 936 F.3d 1117 (10th Cir. 2019). Smith's case is identical to *Antonio*—Smith's offense was committed on patented, private land within the exterior boundaries of the Pueblo of Santa Clara, as confirmed by Congress. Accordingly, *Antonio* controls and forecloses Smith's jurisdictional claim. Smith's constitutional attack on the 2005 Amendments likewise fails because it is premised on his theory that his land is not Indian country, a faulty premise after *Antonio*.

Nor did the district court clearly err in denying Smith a two-level reduction in his offense level under USSG § 3E1.1. This reduction is not available to defendants who go to trial to challenge the factual element of intent. This is precisely what Smith did. Smith stipulated to nothing and held the United States to its burden. At trial, he disputed the United States' evidence that he tracked his victim with his gunfire and argued that he instead shot to miss. Smith argued for acquittal on the involuntary manslaughter charge based on his claim that he lacked the requisite mens rea. The district court did not clearly err in concluding that Smith never accepted responsibility for the involuntary manslaughter offense of which the jury convicted him.

ARGUMENT

I. The 2005 Amendments to the Pueblo Lands Act establish federal jurisdiction over Smith's prosecution.

A. Federal criminal jurisdiction exists over any land within the exterior boundaries of the Pueblo.

The United States has jurisdiction to prosecute crimes committed within "Indian country." Section 1151 of Chapter 18 of the United States Code defines Indian country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Accordingly, federal jurisdiction turns on whether the crime was committed on an Indian reservation, a dependent Indian community, or an Indian allotment. *Antonio*, 936 F.3d at 1120. This court reviews the district court's determination of whether there is federal jurisdiction *de novo*. *United States v. Arrieta*, 436 F.3d 1246, 1248 (10th Cir. 2006).

The Supreme Court and this Court have both recognized Pueblos as dependent Indian communities subject to federal jurisdiction. *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (holding that the Pueblos are "dependent communities entitled to [the United States'] aid and protection"); *Arrieta*, 436 F.3d at 1249. The Pueblos were formally granted title to their lands by the King of Spain in 1689. *Id.* In 1848, Mexico ceded the territory of New Mexico, which included the Pueblo lands, to the United States in the Treaty of Guadalupe Hidalgo. *Id.* Therein, "the United States agreed to protect the rights of Indians recognized by prior sovereigns." *Id.* In legislation enacted in 1858, Congress confirmed the land claim of the Santa Clara Pueblo, the Pueblo within which Smith's property lies. Act of December 22, 1858, Ch. 5,

11 Stat. 374 (1858); *see Sandoval*, 231 U.S. at 39; *Antonio*, 936 F.3d at 1122–24.

The history of land ownership of Pueblo lands was complicated by the belief held between 1849 and 1910 that Pueblo Indians had the unrestricted power to dispose of their lands, just as non-Indians could. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240 (1985). During this time, approximately 3,000 non-Indians acquired putative title to land located within the boundaries of the Pueblo land grants. *Arrieta*, 436 F.3d at 1249. When the Supreme Court later recognized the Pueblos as dependent Indian communities in *Sandoval*, the validity of the titles transferred to non-Indians came into question. *Id.*; *see Antonio*, 936 F.3d at 1121.

To resolve conflicting land claims, Congress enacted the Indian Pueblo Lands Act of 1924, which established the Pueblo Lands Board "to investigate, determine and report" the ownership status of lands lying within the exterior boundaries of the Pueblo. PLA, ch. 331 § 2, 43 Stat. 636; *Arrieta*, 436 F.3d at 1249. The Board issued patents to quiet title to land in favor of non-Indians who could demonstrate valid land claims. *Arrieta*, 436 F.3d at 1249. As a result, "pockets of privately owned, non-Indian land lie amidst Pueblo lands." *Id.* at 1249–40.

In 2000, concerns regarding federal jurisdiction over these privately-owned tracts of land within Pueblo boundaries arose after a federal district court in the District of New Mexico granted a motion to dismiss for lack of jurisdiction in a case where the offense occurred on privately-held land within the boundaries of the Pueblo of Santa Clara. *See Gutierrez*, No. CR 00-M-375 LH; 1R.147–48; S. Rep. No. 108-406, at 3 (2004); 151 Cong. Rec. H11046-01, H11047 (2005). The district court in *Gutierrez* held that while the land in question may have been Indian country at one time, the title was quieted against the Pueblo of Santa Clara pursuant to the PLA and thus the privately-held land no longer qualified as Indian country for purposes of federal jurisdiction. 1R.147–48. New Mexico state courts, on the other hand, had held that such privately-held land was Indian country where the state had no jurisdiction to prosecute crimes. *See State v. Romero*, 142 P.3d 887, 895 ¶ 21, 896 ¶ 26 (N.M. 2006).[9] Concerned that the federal district court's interpretation would create a jurisdictional gap where neither the state nor federal government could exercise criminal jurisdiction, Congress enacted the

[9] *Romero* predated application of the 2005 Amendments and *Oklahoma v. Castro-Huerta*, --- U.S. ----, 142 S. Ct. 2486, 2504–05 (2022), which held that states have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. The impact of these developments on state jurisdiction has not yet been addressed by this Court, but they do not impact the question of federal jurisdiction presented here.

Indian Pueblo Lands Act Amendments of 2005. S. Rep. No. 108-406, at 3; 151 Cong. Rec. H11046-01.

The 2005 Amendments sought to avoid the problem of "checkerboard jurisdiction." *Antonio*, 936 F.3d at 1121. The Amendments clarify that "anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico," the United States has jurisdiction over "any offense described in chapter 53 of title 18, United States Code [18 U.S.C.A. § 1151 et seq.], committed by or against an Indian." 119 Stat. 2573. An exception is made if "otherwise provided by Congress." *Id.* Murder and manslaughter are offenses described in chapter 53. *See* 18 U.S.C. §§ 1152, 1153.[10]

In short, the 2005 Amendments created a "simple, two-part analysis" for determining jurisdiction. First, the United States must show that "the land was part of a grant from a prior sovereign." *Antonio*, 936 F.3d at 1124. And second, it must prove that "Congress confirmed the boundaries." *Id.* If these two steps are met, the United States has criminal jurisdiction over any offense (described in chapter 53) that was committed by or against an Indian

[10] Section 1152 extends general federal criminal law to offenses committed in Indian country, including the murder and manslaughter offenses contained in 18 U.S.C. §§ 1111 and 1112. Section 1153 provides federal jurisdiction over murder and manslaughter offenses committed by Indians in Indian country.

anywhere within the exterior boundaries of the Pueblo, without regard to land ownership. *Id.*

B. *Antonio* held that privately-held land within Pueblo boundaries, like Smith's property, is Indian country.

With that background in mind, we turn to the jurisdictional question presented here. The relevant jurisdictional facts of this case are undisputed. Smith concedes that the offense occurred on his property, which falls entirely within the exterior boundaries of the Pueblo of Santa Clara. Op. Br. 11–12, 21. Smith does not dispute that, as a property within the Pueblo of Santa Clara, his land was part of a grant from a prior sovereign that was confirmed by Congress in 1858. Op. Br. 17. In 1937, however, the Pueblo's title to the property was extinguished when it was patented to non-Indians Alfredo Lucero, Antonia F. de Lucero, and Pleasanty Henry Hill, Jr., pursuant to the PLA. 1R.162. Ultimately, title to the property passed to Smith, a non-Indian, and his brothers. *Id.* at 160–72; 6R.4. Because there are no factual disputes, the jurisdictional question presented here is a purely legal one—does federal criminal jurisdiction exist over a privately-owned property located within the exterior boundaries of the Pueblo?

United States v. Antonio answers this question. Just as in Smith's case, the offense in *Antonio* occurred within the exterior boundaries of the Sandia Pueblo on a privately-owned tract of land for which a land patent was issued

pursuant to the PLA. *Antonio*, 936 F.3d at 1121–22. And, like Smith's case, the question presented in *Antonio* was whether the privately-owned tract of land was Indian country under § 1151 for purposes of federal criminal jurisdiction. *Id.* at 1120–24.

Antonio began its analysis with § 1151. It recognized that § 1151 "did not account for tracts of land within the dependent Indian communities that were owned by non-Indians" and thus these tracts "would not necessarily be subject to federal jurisdiction." 936 F.3d at 1121. It noted, however, that Congress enacted the 2005 Amendments to the Pueblo Lands Act to clarify this issue. *Id.* Applying the two-part test from the 2005 Amendments, *Antonio* concluded that the private property in question was subject to federal jurisdiction because it fell within the exterior boundaries of the Pueblo, and the boundaries were confirmed by Congress in the 1858 Act. *Id.* at 1124.

In reaching that conclusion, *Antonio* determined that the PLA did not affect the congressional confirmation of the Pueblo boundaries in 1858, or otherwise terminate federal jurisdiction. 936 F.3d at 1123. *Antonio* described the purpose of the PLA as "'to resolve conflicting claims to Pueblo lands and to award compensation for the extinguishment of Pueblo land rights.'" 936 F.3d at 1123 (quoting *Cohen's Handbook of Federal Indian Law* § 4.07[2][b], at 316 (Neil Jessup Newton et al. eds., 2012)). Pursuant to the PLA, the

Pueblo Lands Board was created "to 'determine the exterior boundaries of the lands' and 'the status of all lands within those boundaries.'" *Id.* Accordingly, *Antonio* found that the PLA "only addressed how land disputes were to be resolved." *Id.* It did not "exempt any specific properties or terminate federal jurisdiction." *Id.*

Antonio further concluded that the 2005 Amendments "granted federal jurisdiction over land within an exterior boundary of a grant from a prior sovereign that was also confirmed by Congress" and thus supported the district court's finding of federal jurisdiction. 936 F.3d at 1123. In Antonio's opening brief, he argued that the land in question fell within the "otherwise provided" exception to the jurisdictional provisions of the 2005 Amendments. *United States v. Antonio,* Op. Br., 2019 WL 763742, at 33–34. He contended that through the PLA, Congress removed the land from federal jurisdiction "[b]y extinguishing Pueblo title to the [private] tract and relinquishing all federal interest." *Id. Antonio* rejected that argument. 936 F.3d at 1123–24. It determined that the otherwise-provided-by-Congress exception required "a clear directive by Congress exempting certain lands from jurisdiction." *Id.* at 1124. The 1924 PLA did not provide a clear directive, as "it does not even mention jurisdiction but rather quieted title to tracts of disputed land." *Id.* Thus, *Antonio* concluded that the relevant parcel of land was Indian country, regardless of whether it was privately owned, because it fell "within the

boundaries of a grant from a prior sovereign that were confirmed by Congress." *Id.*

Antonio squarely held that an offense happened in Indian country where it occurred within the exterior Pueblo boundaries on land privately patented to a non-Indian under the PLA. 936 F.3d at 1123–24. This Court has subsequently concluded that it is bound to follow *Antonio*'s holding "absent en banc reconsideration or intervening Supreme Court authority." *United States v. Vigil*, No. 20-2160, 2021 WL 4888616, at *2 (10th Cir. Oct. 20, 2021) (unpublished). Neither of these circumstances has occurred. If anything, the Supreme Court confirmed *Antonio* when it determined in *McGirt v. Oklahoma* that disestablishment or diminishment of an Indian reservation cannot be accomplished "simply by allowing the transfer of individual plots, whether to Native Americans or others." --- U.S. ----, 140 S. Ct. 2452, 2464 (2020).

Antonio controls the outcome here.[11] Just like the privately-held tract of land in *Antonio*, Smith's land meets the two-part test required by the 2005

[11] The district court found *Antonio* instructive, but did not appear to treat it as binding, 1R.533–35, suggesting that *Antonio* "did not examine the *Solem* factors or consider the constitutionality of the 2005 Amendment." *Id.* at 534. In fact, *Antonio* did consider the first *Solem* factor, the statutory language in the PLA, and found that it did not clearly exempt patented lands from federal jurisdiction. *Antonio*, 936 F.3d at 1123–24. And as the Supreme Court has more recently recognized, the remaining *Solem* factors are not "an alternative means of proving disestablishment or diminishment." *McGirt*¸ 140 S. Ct. at

Amendments because his land was within the exterior boundaries of a land grant from a prior sovereign that was confirmed by Congress. Accordingly, Smith's land, too, is Indian country and subject to federal criminal jurisdiction.

C. Smith's jurisdictional claims do not survive *Antonio*.

Smith does not attempt to distinguish *Antonio* or explain why it does not apply. Instead, he attempts to relitigate the issues *Antonio* resolved and reverts to the law as it existed before the 2005 Amendments. To this end, he argues, as did Antonio, that the PLA extinguished Pueblo title when a patent was issued for his property, and thus his property is not Indian country under § 1151. Op. Br. 20–25. He contends that Congress would have understood the PLA to extinguish federal jurisdiction over patented lands, and the issuance of a patent for his land was a congressional, and not an executive, act. *Id.* at 26–35. In his view, because his land was not Indian country before the enactment of the 2005 Amendments, the Amendments and their two-part test have no application here. *See id.* at 20–21, 25. All of these

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2469. Nor is it clear that the *Solem* factors apply in the same way to dependent Indian communities as they do reservations. *Id.* at 2474. In any event, even if the district court might have analyzed the issue differently, it was no less bound by *Antonio*'s holding. As to the constitutional claim, the United States agrees that *Antonio* does not directly address it. But because that claim depends on an interpretation of the 1924 PLA that is at odds with the reading adopted in *Antonio*, it also fails. *See* section I.D, *infra*.

arguments would require this panel to reconsider *Antonio*'s conclusion that the PLA did not terminate federal jurisdiction over patented lands and the 2005 Amendments supply the applicable test for federal criminal jurisdiction. Because this panel cannot do so, *Antonio* forecloses Smith's claims.

Smith raises one argument that, at first blush, appears rooted in the language of the 2005 Amendments. He argues that the 2005 Amendments authorize jurisdiction only over offenses "described in chapter 53 of title 18, United States Code, committed by or against an Indian," and murder and manslaughter are not described in chapter 53. *See.* Op. Br. 25. But, in fact, murder and manslaughter *are* described in chapter 53 in sections 1152 and 1153. Murder and manslaughter are enumerated offenses in section 1153, which applies to offenses committed by Indians within Indian country. Murder and manslaughter are also included in section 1152, which extends general federal criminal law (to include murder and manslaughter in 18 U.S.C. §§ 1111 and 1112) to Indian country. In the end, the crux of Smith's argument appears to be that *his* offense is not described in §§ 1152 and 1153, because those sections only apply to offenses committed in Indian country, and his land is not Indian country. *See* Op. Br. 26. But under *Antonio*, it is. Because this argument relies on the same premise as all the others, it, too, is foreclosed by *Antonio*.

D. Smith's constitutional claim also fails under *Antonio*.

Smith presents one argument not presented, and not explicitly resolved, in *Antonio*. He argues that Congress lacked constitutional authority to enact the 2005 Amendments because the Amendments exercise criminal jurisdiction over non-Indians on non-Indian lands. Op. Br. 38. He contends that this exercise involves neither commerce nor Indian tribes and thus is not authorized under the Indian Commerce Clause. *Id.* But again, this argument depends on the conclusion that the 1924 PLA terminated federal jurisdiction over the patented land, a conclusion that *Antonio* rejected. Because the 1924 PLA did not "terminate federal jurisdiction" over any property within the confirmed boundaries of a Pueblo, *Antonio*, 936 F.3d at 1123, as discussed above, Smith's constitutional argument cannot be reconciled with *Antonio*. Even if Smith is correct that Congress cannot exercise jurisdiction over lands previously under Pueblo control even when an Indian victim is involved (a question this Court need not resolve), he cannot avoid the controlling effect of *Antonio*. Because Congress never relinquished federal jurisdiction over the lands in question, it did not exceed its constitutional authority when it made that jurisdiction clear in the criminal setting.

II. The district court did not clearly err in denying Smith a reduction in his offense level for acceptance of responsibility.

The Sentencing Guidelines allow for a two-level decrease in the offense level if "the defendant clearly demonstrates acceptance of responsibility for his offense." USSG § 3E1.1. Application note 2 explains that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." USSG § 3E1.1 cmt. n.2. Even so, the note makes clear that trial is not an automatic bar. *Id.* It provides that a defendant who exercises his or her right to trial may merit this reduction "in rare situations" where the "defendant goes to trial to assert and preserve issues that do not relate to factual guilt." *Id.* Examples of these rare situations include where the defendant goes to trial to challenge the constitutionality of a statute or the applicability of a statute to the defendant's conduct. *Id.*

The district court's determination of whether a defendant accepted responsibility is reviewed for clear error. *United States v. Nevarez*, 55 F.4th 1261, 1266 (10th Cir. 2022). This determination is "entitled to great deference on review" because the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." USSG § 3E1.1 cmt. n.5. Due to the combination of the application notes to § 3E1.1 and the deferential standard

of review, reversal of the district court's denial of an acceptance-of-responsibility adjustment for a defendant who went to trial is "rarer than hen's teeth." *Nevarez*, 55 F.4th at 1266.

Applying these principles, this Court has affirmed the district court's denial of an acceptance-of-responsibility reduction on facts almost identical to Smith's. In *United States v. Tom*, the defendant went to trial on charges of first- and second-degree murder. 494 F.3d 1277, 1281 (10th Cir. 2007). While Tom admitted responsibility for the death of the victim, he nonetheless sought acquittal on grounds that he lacked the requisite mens rea for each charge. *Id.* At sentencing, the district court granted a two-level reduction for acceptance of responsibility. *Id.* at 1279, 1282. On appeal, this Court reversed, even under its deferential standard of review. *Id.* It held that Tom did not sufficiently accept responsibility because he "challeng[ed] the government on the issue of intent." *Id.* at 1282. This is precisely what Smith did at trial.

The only case Smith identifies in which this Court affirmed a downward adjustment for a defendant who went to trial turned on the deference owed to the district court. *See* Op. Br. 41 (discussing *United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999)). *Gauvin* approved of the downward adjustment, finding that Gauvin "admitted to all the conduct with which he was charged" and only "disputed whether the acknowledged factual state of

mind met the legal criteria of intent to harm or cause apprehension." *Id.* at 806. While this Court noted that it "might not have reached the same decision" as the district court, it affirmed "in light of the deference afforded the sentencing judge." *Id.*

Subsequently, this Court has clarified that *Gauvin* "merely accorded the district court the requisite deference in upholding its decision to *grant* the two-level reduction" and "did not indicate that other sentencing courts would be obliged to reach the same conclusion on similar facts." *United States v. Herriman*, 739 F.3d 1250, 1256 (10th Cir. 2014) (internal quotations omitted) (emphasis in original). This Court has recognized that it "might well uphold" district court decisions denying the adjustment on similar facts to those in *Gauvin*. *Id.* After *Gauvin*, this Court has explained that an adjustment is appropriate only where "a defendant admitted to all the conduct with which he was charged but simply disputed whether his acknowledged factual state of mind met the legal criteria of intent required by the applicable statute." *Tom*, 494 F.3d at 1281 (internal quotation omitted). The adjustment is not available "where defendants have challenged the *factual* element of intent." *Id.* (emphasis added); *see also United States v. Melot*, 732 F.3d 1234, 1244–45 (10th Cir. 2013) (affirming denial of downward adjustment where defendant maintained at trial that he "did not commit the crimes charged because he did not act willfully).

Smith does not fall within the rare exception recognized in *Gauvin* because Smith challenged the factual element of intent. The government's theory was that Smith "was tracking [the victim] with his gunfire" as "she was running for her life." 8R.776. Smith contested this version of events. He testified that when he saw the victim, he "fired behind the trailer . . . where it wouldn't hit [her] and it wouldn't hit anybody else." *Id.* at 696. After the victim took off running, he fired more shots "pointing toward the woodpile." *Id.* Smith was questioned regarding his intent:

> Q. Were you aiming at the person?
>
> A. No.
>
> Q. Were you trying to hit the person?
>
> A. No.
>
> . . .
>
> Q. When you shot the second time, did you think the person was still on your property?
>
> A. No. If they were they were way out toward the street.
>
> Q. Did you think that there was any chance you could hit somebody?
>
> A. No.

8R. 703, 705. At closing, Smith's counsel directly countered the government's theory that Smith tracked the victim with his gunfire:

> He didn't fire at the person, he fired to miss the person. . . . He thought that person was gone. He was scared and terrified and he wanted to make sure that that person was scared, so he

> fired three more rounds. He fired those three rounds at the woodpile. He never, he certainly never tracked somebody.

8R.782. Unlike *Gauvin*, Smith and the government disputed his factual state of mind, not just whether it met the legal criteria for murder or involuntary manslaughter.

Moreover, Smith did not stipulate to any other element of voluntary manslaughter. Instead, he held the government to its burden, arguing that the government's investigation was inadequate to prove its case beyond a reasonable doubt. 8R.798–99 (arguing that the government failed to try to get fingerprints and footprints, take measurements, and look for surveillance video). Because of these alleged shortcomings, defense counsel argued that "we don't know how many people were on that property, we don't even know if Maria Gallegos was the person standing next to this trailer. We don't know where she was." *Id.* at 800. Smith never admitted his factual guilt.

Instead, Smith repeatedly disclaimed responsibility for involuntary manslaughter, the charge on which the jury convicted him. His counsel argued:

- "Mr. Smith is not a criminal. He did not commit a crime." 8R.781–82.
- "He is an innocent man." 8R.293.
- "We are not here because he did something wrong." 8R.783.
- "Doug Smith is not the one to blame." 8R.784.

- "We do not have reckless and wanton disregard for human life." 8R.786.

At no point at trial did Smith accept responsibility for his actions. The district court did not clearly err in denying Smith a downward adjustment for acceptance of responsibility.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

The district court properly exercised federal jurisdiction because Smith committed involuntary manslaughter in Indian country. Likewise, the district court did not clearly err in denying Smith a reduction in his Guideline offense level for acceptance of responsibility where Smith challenged the factual element of intent at trial. Accordingly, the Court should affirm Smith's conviction and sentence.

Oral argument is not requested.

Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 7,231 words. I relied on my word processor to obtain the count. My word processing software is Word 2016.

s/ Tiffany L. Walters
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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 5, 2023, and that seven photocopies of the foregoing brief will be sent by Federal Express to the United States Court of Appeals for the Tenth Circuit, Office of the Clerk, located at the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, 80257, following notification that the electronic brief is compliant.

I ALSO CERTIFY that Aric G. Elsenheimer, attorney for Defendant-Appellant Douglas D. Smith, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

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