IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, *Plaintiff,* **v.** **AMANDA IRENE SMITH, et al.** *Defendant(s).*	**Case No. 21-CR-0553-MWM**

DEFENDANT AMANDA IRENE SMITH'S POST-TRIAL
MOTIONS FOR DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION, JUDGMENT OF ACQUITTAL, AND NEW TRIAL

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TABLE OF CONTENTS

OVERVIEW & SUMMARY

COMES NOW the Defendant, **AMANDA IRENE SMITH**, by and through her counsel of record, in accordance with Rules 12(f),[1] 29(c) and 33 of the Federal Rules of Criminal Procedure, does hereby move for the post-trial motions to dismiss for lack of subject matter jurisdiction, judgement of acquittal, and for new trial. In support, the Defendant states as follows:

BACKGROUND AND INTRODUCTION

On Friday, June 23, 2023, Defendant **AMANDA IRENE SMITH**, a non-native, and her husband and co-defendant **JOEL RICHARD SMITH**, a tribal member of a federally recognized tribe were each convicted of (or by means of "aiding and abetting" the other) of separate counts of Child Abuse and Child Neglect in Indian Country and one count of Abusive Sexual Contact in Indian Country by the means of the assimilated crimes act within the Northern District of Oklahoma. [Docs. 85, 188]. More specifically, as charged, **AMANDA IRENE SMITH**, was either convicted in Counts Three and Four of Child

[1] Rule 12 does not appear to be applicable as subject matter jurisdiction can be raised at any time. In the alternative, Rule 12(b)(1), (2) requires any objection based on a supposed defect in the prosecution, or any objection based on alleged defects in the indictment, must be raised prior to trial, although the Court, for good cause shown, may grant relief from the waiver. Fed. R. Crim. P. 12(f). *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) (decision to grant relief from waiver firmly within trial court's discretion); *United States v. Freeling*, 31 F.R.D. 540, 543 (S.D.N.Y. 1962) (same).

Abuse and Child Neglect in Indian Country and one count of Abusive Sexual Contact of a minor Indian Child, H.M. It also appears that she could have been convicted of "aiding and abetting" **JOEL RICHARD SMITH** in his counts (Counts One and Two). [Doc. 85].

Notably, the verdict form did not allow for an option for the jury to select aiding and abetting, even though she was charged in under Counts One and Two as an aider and abettor. The jury was also instructed she could be convicted under that theory. *See generally*, Doc. 185.

IV. AMANDA IRENE SMITH'S MOTION FOR DISMISSAL FOR LACK OF SUJECT MATTER JURISDICTION OVER A NON-INDIAN DEFENDANT IN INDIAN COUNTRY IN AN ASSIMILATED CRIMES CHARGE POST-*CASTRO-HUERTA*

a. This Court now lacks subject matter jurisdiction after the Supreme Court's decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), to hear federal criminal cases in Indian Country of Non-Indians under the Assimilative Crimes Act (18 U.S.C. § 13)

i. Subject Matter Jurisdiction is never waived.

Federal courts only have subject matter jurisdiction to hear cases if the parties under federal law. Just as the Court reviewed *McGirt*, for similar reasons this Court lacks subject matter jurisdiction. The lack of subject matter jurisdiction does not make the judgment conviction (or a future sentence) voidable, it causes the entire prosecution to be *void ab initio*.

"[I]ssues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Murphy v. Royal*, 875 F. 3d 896, 907, n. 5 (10th Cir. 2017) (*quoting Wallace v. State*, 935 P. 2d 366, 372 (Okla. Crim. App. 1997)).[2] Jurisdictional defects cannot be procedurally defaulted or forfeited during the course of litigation. *See*, *e.g.*, *United States v. Broce*, 781 F.2d 792, 797 (10th Cir. 1986). *See also United States v. Sutton*, 961 F.2d 476, 478-79 (4th Cir. 1992) (defendant may challenge sufficiency of indictment at any time in the proceedings). *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) ("Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings."). *see also United States v. Addonizio*, 442 U.S. 178, 185, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979) (relief under § 2255 is available to correct sentencing defects that raise constitutional, jurisdictional, or other fundamental defects). The Supreme Court has held that defects in the process of indictment by grand jury do not present jurisdictional consequences that

[2] "[I]ssues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Wallace v. State*, 1997 OK CR 18, ¶15. "There are, of course, some constitutional rights which are never finally waived. Lack of [subject matter] jurisdiction, for instance, can be raised at any time." *Johnson v. State*, 1980 OK CR 45, ¶15. "Jurisdiction of the subject-matter cannot be conferred by consent, nor can it be waived, and it may be raised at any time before or after trial, and even for the first time in the appellate court." *Armstrong v. State*, 1926 OK CR 259, Pg. 118.

deprive a court of its power to adjudicate a case. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002).

ii. The Supreme Court's *Castro-Huerta* decision and the Tenth Circuit's *Prentiss* decision have created a bar against any federal prosecutions of non-Indians in Indian Country who are charged with crimes under the Assimilative Crimes Act

Under the current law of the Tenth Circuit in *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000)[3] and now the Supreme Court's decision in *Castro-Huerta v. Oklahoma*, 142 S. Ct. 2486 (2022), the federal government can only assimilate state crimes against non-Indian defendants with Indian victims when the state does not have jurisdiction and/or not with an assimilated crime. The Supreme Court's decision in *Castro-Huerta* changed the law as it gave the State of Oklahoma concurrent jurisdiction over non-Natives who commit crimes against Native victims. *Id*. Therefore, under the readings of *Prentiss* and *Castro-Huerta*, the Government can no longer charge non-Natives in "Indian Country" with crimes under the Assimilative Crimes Act. Only the State of Oklahoma can prosecute non-Native defendants with Indian victims in the Tenth Circuit.

[3] The Court is advised that there is a Prentiss "trilogy" of cases with separate citations within the Tenth Circuit: *United States v. Prentiss*, 206 F.3d 960, 962-964 (10th Cir. 2000) (*Prentiss* I); *United States v. Prentiss*, 256 F.3d 971, 972 (10th Cir. 2001) (*Prentiss* II); *United States v. Prentiss*, 273 F.3d 1277, 1278 (10th Cir. 2001) ("*Prentiss* III"). *Prentiss* I, as applied here, is still valid and controlling on the issue before the Court now.

In this matter, counts Three and Four of the Superseding Indictment allege "**AMANDA IRENE SMITH**, as non-Indian, committed "state offenses" in "Indian Country." [Doc. 85]. The statutory vehicle in which a non-Indian is charged in "Indian Country" is by and through the "Indian Country Crimes Act." *See* 18 U.S.C. § 1152.[4] Section 1152 gives the Court jurisdiction as it has "sole and exclusive jurisdiction" over the offense. In other words, by the plain reading of the statute, the federal government can only charge such an offense only where the State of Oklahoma does not have jurisdiction.

This limitation of jurisdiction is further complicated in that the two state statutes used, 21 Okla. Stat. § 843.5(A) in Count Three, and 21 Okla. Stat. § 843.5(C) in Count Four, can only brought into a federal charge by and through the Assimilative Crimes Act (18 U.S.C. § 13). The Assimilative Crimes Act makes state law applicable to conduct occurring on certain lands when the act or omission is not made punishable by an enactment of Congress (i.e. "child abuse" and "child neglect). More specifically, those lands

[4] 18 U.S.C. § 1152 provided: "Except as otherwise expressly provided by law, 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. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

acquired by the Federal government as provided in 18 § 7(3) (e.g. a military installation or other federal enclave such as a federal prison) or within "Indian Country" as defined at 18 U.S.C. § 1151.

As the Tenth Circuit has stated, "Indian country" is not simply a "place within the sole and exclusive jurisdiction of the United States," and unlike how other Circuits have held, the application of 18 U.S.C. § 7[5] does not extend federal jurisdiction to crimes committed in Indian country. *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000) (aka "*Prentiss* I"). *See* Footnote 3, *supra*. As *Prentiss* noted, had Congress wanted to extend federal criminal jurisdiction to "Indian Country," could simply have amended 18 U.S.C. § 7 to include "Indian Country." *Id*. Federal prosecutions were still possible in the Tenth Circuit without the necessity of the use 18 U.S.C. § 7. *Id*. They were, however, until the U.S. Supreme Court's decision last year in *Castro-Huerta v. Oklahoma*, 142 S. Ct. 2486 (2022).

The issue with the federal prosecutions of Non-Indians for Assimilative Act Crimes has now become an issue after the U.S. Supreme Court issued its opinion in 142 S. Ct. 2486 (2022), on June 29, 2022. In *Castro-Huerta*, the

[5] Generally, 18 U.S.C. § 7, which defines the "special maritime and territorial" jurisdiction of the United States, provides the specific jurisdictional element the government must allege and prove in order to establish federal jurisdiction. Notably, under § 7, under its statutory language, albeit inapplicable to Indian Country, applies the Assimilative Crimes Act (§ 13) to both concurrent or exclusive jurisdictions (i.e. military installations).

Supreme Court found that the State had concurrent jurisdiction over non-Indian defendants (such as Ms. Smith in this Indictment) for crimes committed on Indian Country.[6] Because under *Prentiss*, 18 U.S.C. § 7 does not extend federal jurisdiction to crimes committed in Indian country, a court must now look only to the plain language of the Assimilative Crimes Act (18 U.S.C. § 13) alone. The language in 18 U.S.C. § 13 does not allow for assimilation of state criminal statutes where the jurisdiction is concurrent with the State, and *Castro-Huerta* has now created a concurrent jurisdiction which in turn bars prosecution as it can only be applied to exclusive jurisdiction under § 1152 and *Prentiss*.

A reading of 18 U.S.C. § 13 clearly states that the federal government can assimilate state crimes "within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State . . .." In other words, the federal

[6] Prior to *Castro-Huerta*, both federal and state case law had consistently interpreted § 1152 to reserve exclusive federal jurisdiction over crimes committed by non-Indians against the person or property of Indians in Indian Country. *Williams v. United States*, 327 U.S. 711, 714 (1946); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980); *State v. Flint*, 157 Ariz. 227, 756 P.2d 324 (Ariz. App. 1988), cert. denied, 492 U.S. 911 (1989); *State v. Greenwalt*, 204 Mont. 196, 663 P.2d 1178 (1983); *State v. Warner*, 71 N.M. 418, 379 P.2d 66 (1963); *State v. Kuntz*, 66 N.W. 2d 531 (N.D. 1954); *State v. Larson*, 455 N.W.2d 600 (S.D. 1990).

government can only assimilate state crimes against defendants when the state does not have jurisdiction. *Castro-Huerta* changed the jurisdictional analysis over non-Natives when it gave concurrent jurisdiction to the State of Oklahoma, and in turn under the analysis of *Prentiss*, has barred federal prosecutions of non-Indians for Assimilative Act Crimes in the Tenth Circuit.

b. Amanda Irene Smith, a non-Indian, cannot "aid and abet" an Indian Defendant in "Indian Country" under a statute that has no jurisdiction over non-Indians

The defendant, **AMANDA IRENE SMITH** is, as charged in count three of the indictment, a "non-Indian." *id*. at Doc. 85. She is also listed in both Counts One and Two of the indictment in 18 U.S.C. § 1153 offenses ("Major Crimes Act") as an aider and abettor to her co-defendant **RICHARD JOEL SMITH** pursuant to 18 U.S.C. § 2. *Id*. Notably, section 1153 offenses are reserved only for Indian defendants who commit crimes within "Indian Country." More importantly, section 2 does not extend federal jurisdiction to an alleged accomplice under § 1153. *See United States v. Graham*, 572 F.3d 954 (8th Cir. 2009); *United States v. Norquay*, 905 F.2d 1157, 1159-63 (8th Cir. 1990); *accord United States v. Torres*, 733 F.2d 449, 453 n.1 (7th Cir. 1984)(noting that a non-Indian, who allegedly conspired to murder a non-Indian, was not prosecuted under §§ 1153 or 2).

c. Because each Defendant was charged as an "aider and abettor" to the other in the non-jurisdictional substantive offenses, and the verdict form did not provide an option for a jury to decide whether they were each guilty of the substantive offense or as an "aider and abettor," there is no way to determine which Count each Defendant was actually convicted of at trial.

Under Fed. R. Crim. P. 30, an objection to the jury instruction must be entered before a jury retires to deliberate. However, a defendant who fails to preserve an error is entitled to relief if he or she can establish plain error. Plain error occurs when (1) a district court commits error, (2) the error is plain, (3) the error affects the defendant's substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Teague*, 443 F.3d 1310, 1318-19 (10th Cir. 2006). An error that affects the defendant's substantial rights involves "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004) (citations omitted). Plain error analysis is conducted "less rigidly" when reviewing a constitutional error. Fed. R. Crim. P. 52(b), *United States v. Dazey*, 403 F.3d 1147, 1174 (10th Cir. 2005). For example, plain error review is an appropriate standard when the jury instruction omits an element of an

offense and the defendant fails to object to the instruction at trial. *See Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *see also United States v. Clifton*, 127 F.3d 969, 970 (10th Cir. 1997).

The Government chose to indict each Defendant in separate counts of abuse and neglect, but then chose to add each Defendant to the other's substantive offense by means of aiding and abetting. The verdict form provided the jury only the options of determining guilt of each Defendant as to the substantive Counts, but the jury was provided both the charges and instructed on "aiding and abetting." If the jury believed that either Defendant was guilty of "aiding and abetting," rather than the substantive offense, their only option to reflect their decision was to select the substantive offense to indicate their findings.

V. JUDGMENT OF ACQUITTAL

Rule 29(c)(2) permits a court to set aside a guilty verdict and enter a judgment of acquittal when the evidence presented at trial is insufficient to sustain a conviction. "Sufficiency of evidence is a question of law." *United States v. Rahseparian*, 231 F.3d 1257, 1261 (10th Cir. 2000); *United States v. Carter*, 130 F.3d 1432, 1439 (10th Cir. 1997). The law and the facts, and the lack of evidence, demand for dismissal.

STANDARD OF REVIEW

The standard for evaluating a Rule 29 motion for judgment of acquittal is the same as the due process standard used in evaluating whether the evidence is sufficient to sustain the verdict: whether viewing all the evidence in the light most favorable to the government,[7] any rational juror could find the defendant guilty beyond a reasonable doubt. *United States v. Hale*, 762 F.3d 1214, 1222 (10th Cir. 2014); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Although the evidence is to be viewed in the light most favorable to the prosecution, a conviction can only be sustained where "there is substantial evidence." *United States v. Harris*, 441 F.2d 1333, 1336 (10th Cir. 1971). Substantial evidence "must clearly do more than raise a suspicion of the existence of the facts sought to be established, or a suspicion of guilt." *Cartwright v. United States*, 335 F.2d 919, 921 (10th Cir. 1964) (emphasis added0. Notably, even if evidence of guilt and evidence of innocence are in

[7] "Although *Jackson* requires the reviewing court initially to construe all evidence in favor of the government, the evidence so construed may still be so supportive of innocence that no rational juror could conclude that the government proved its case beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." *Id.* (emphasis added).

equipoise, a conviction cannot stand. *See United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009).[8]

a. Evidence supporting judgment of acquittal as to "child abuse" as to Amanda Irene Smith

The Government did not produce any evidence that **AMANDA IRENE SMITH** committed the offense of child abuse. More specifically, there was no evidence that she "willfully or maliciously" or "injured or tortured" H.M. See Doc. 184, Instruction 12 ("Child Abuse in Indian Country – Non-Indian Defendant (Amanda Smith)"). First, the only evidence regarding any physical contact came only from H.M., who testified that Defendant **AMANDA IRENE SMITH** had spanked her a single time. No evidence was presented that it was done "maliciously," or more notably, that H.M. was either "injured" or "tortured" by this otherwise lawful means of corporal punishment (spanking). *See* Doc. 184, Instruction 16 (Defense to Child Abuse – Use of Ordinary Force for Discipline).

VI. RULE 33 MOTION FOR NEW TRIAL

The standards for granting a new trial are not as strict as the standards for granting judgment of acquittal, as Rule 33 provides that a court

[8] *See also United States v. Flores- Rivera*, 56 F.3d 319, 323 (1st Cir. 1995); *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002); *United States v. Caseer*, 399 F.3d 828, 840 (6th Cir. 2005); *United States v. Wright*, 835 F.2d 1245, 1249 n.1 (8th Cir. 1987); *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).

may grant a new trial "if the interest of justice so requires." A new trial is warranted if, "after weighing the evidence and the credibility of the witnesses, the court determines that 'the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred.'" *United States v. Gabaldon*, 91 F.3d 91, 93–94 (10th Cir. 1996) (*quoting United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994).

a. The Government committed prosecutorial error when it failed to disclose until after its witness Robert Sanger testified that he was able to recall more of his prior statements made to the FBI and State authorities (Department of Human Services) during his pre-trial preparations with the Government

Throughout the defense cross-examination of government witness Robert Sanger, the estranged biological son of **AMANDA IRENE SMITH**, provided an answer that he could not remember due to a Traumatic Brain Injury ("TBI"). The Defendant was unaware of this issue until this witness took the stand.[9] Despite prior statements to the FBI and the Oklahoma state agency workers from the Department of Human Services (DHS), he maintained he could not recall ever making any statements. Even when asked if his memory and recollection could be "refreshed" if he were to review

[9] Prior disclosure of this could have allowed the Court to give the parties an opportunity to use the deposition process of Mr. Sanger. *See* Rule 15, FRCrP.

his prior impeaching and contradictory statements made, Robert Sanger oddly maintained that even reading his own prior statements would not help him remember. As a last resort, when the Defense moved to admit the statements under FRE 806, the Court denied its introduction and the jury was kept from hearing any of Robert Sanger's contradictory and impeaching statements. In addition, Fed. R. Evid. 613(b), which establishes that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon . . .." Further, when counsel for Amanda Smith moved to have his testimony stricken as he was not a "competent witness" under FRE Rule 601, the Court denied that request as well.

Secondly, after Mr. Sanger left the witness stand, the Government disclosed on the record that just a few days prior during their pre-trial interviews of Mr. Sanger, he was able to recall "much more" of his prior statements. This failure by the Government to timely disclose Mr. Sanger's prior statements that he could not remember is a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), possibly *Giglio v. United States*, 405 U.S. 150, 154 (1972), and the *Due Process Protections Act*.[10] Doc. 63. It is the

[10] *The Due Process Protections Act*, PL 116-182, [S 1380], effective October 21, 2020, requires that the parties be informed regarding an amendment to Federal

obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "To establish a *Brady* violation, the defendant must establish: 1) that the prosecution suppressed evidence; 2) that the evidence was favorable to the accused; and 3) that the evidence was material." *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994).

Federal courts have explicitly recognized that dismissal of charges with prejudice may be an appropriate remedy for a discovery violation. *See United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) ("Nonetheless, our circuit has recognized that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a court's supervisory powers where prejudice to the defendant results and the government misconduct is flagrant. *United States v. Miranda*, 526 F.2d 1319, 1325 n.4 (2d Cir. 1975) (sanctions which may be imposed against the Government for failure to disclose material available to the defense include "the exclusion or

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Rule of Criminal Procedure 5. By this legislation, subsection (f) of the Rule has been redesignated as subsection (g), with new subsection (f) hereinafter designated as "REMINDER OF PROSECUTORIAL OBLIGATION."

suppression of other evidence concerning the subject matter of the undisclosed material, the grant of a new trial, or, in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal.") (citations omitted); *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008) (although the appropriate remedy for a *Brady* violation will usually be a new trial, "a district court may dismiss the indictment when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct.").

b. The Government committed prosecutorial error when it failed to disclose that it had in fact promised Government witness Allison Smith that she would not be prosecuted for child abuse or neglect

During the cross-examination of the Government's "star witness" Allison Smith (and estranged biological daughter of **AMANDA IRENE SMITH**), it was disclosed through her testimony that she had in fact was promised that she would not be prosecuted for the handcuffing, slapping, and choking of the minor victim. Allison Smith, along with mother **AMANDA IRENE SMITH** and her step-father **JOEL RICHARD SMITH**, were all initially charged in Mayes County (Okla.) District Court for the abuse and neglect. *See State v. Allison Elizabeth Ann Smith*, CF-2019-107.[11] The

[11] Available online at the Oklahoma State Courts Network (OSCN) at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=mayes&number=CF-2019-00107&cmid=9735 (last visited August 1, 2023).

charges were dismissed in accordance with *McGirt*, but prior to the U.S. Supreme Court's opinion in *Castro-Huerta* giving the State jurisdiction over non-Natives for crimes against Indian victims (H.M. is a member of a federally recognized tribe). This had never been disclosed to either Defendant.

This promise of non-prosecution is even more telling when Allison Smith disclosed on the witness stand that she had made "false official statements"[12] when she knowingly lied on U.S. Army enlistment documents when she joined the Oklahoma National Guard. Allison Smith's willingness to not only perjure herself, but extended to encouraging others to do the same when defense witness John Clark testified that Allison Smith directed him to lie on his own National Guard enlistment forms when he lied about having asthma. Unlike Allison Smith, Mr. Clark rectified his false statement during an "amnesty period" while in "basic training" at Fort Jackson, South Carolina. Unlike Allison Smith, John Clark is no longer in the Oklahoma National Guard.

[12] *See* Article 107, Uniform Code of Military Justice (UCMJ); 18 U.S.C. § 1001.

c. The Government committed Brady and Rule 16 violations in the middle of trial when it asked its expert witness Dr. Lauren Conway to testify to other medical records and reports that were never disclosed to the Defense and deprived both Defendants the right to cross-examine the witness regarding these unknown reports

During the Government's re-direct of Dr. Lauren Conway, and in an effort to provide an improper bolstering of her own testimony with otherwise hearsay evidence, the Government specifically asked her of statements of others contained in undisclosed reports she reviewed prior to trial. This was very problematic as that the statements that Dr. Conway testified to do not appear in the discovery provided to the Defendants. This was brought to the Court's attention at trial, and was not only a violation of the Defendant's right to both discovery, but denied both defendants the right to effective confrontation under the Sixth Amendment. Again, as with the Government's failure to disclose Mr. Sanger's statements to them in which he could recall much more, this is a violation of *Brady*, Rule 16, and the DPPA. "To establish a *Brady* violation, the defendant must establish: 1) that the prosecution suppressed evidence; 2) that the evidence was favorable to the accused; and 3) that the evidence was material." *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994). Here, without an evidentiary hearing on the Government's failure to disclose, the favorability is unknown, but it

remains a violation of Rule 16, the DPPA, and the Defendants' right to effectively confront witnesses.

The Government's withholding of apparent exculpatory evidence from a witness, as well as favorable promises to another witness, was, standing alone, so destructive of Defendants' right to a fair trial that reversal is mandated. As the Supreme Court noted in *Berger v. United States*, the average jury has confidence that a prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." 295 U.S. 78, 88 (1935).

d. The Court erred when it would not allow the defendant Amanda Irene Smith to fully impeach witnesses or present her "theory of the defense"

At multiple times throughout the trial, the Court denied the defense in presenting evidence (impeachment or otherwise) through government witnesses supporting the defense theory. Government witness Allison Smith had made several prior statements in both journals and on social media ("TikTok")[13] that demonstrated that she is very likely the abuser of H.M. due to her own mental health and clear resentment of this special needs child. They also demonstrated and contradicted her testimony as to any claims of

[13] The Court has advised the undersigned to file copies of the items that were denied use to ensure they are made a part of the record for appeal. The undersigned will file those items (journal pages, TikTok "screenshots," etc.) so that the record is complete.

abuse by either Defendant, and would have shown the jury she has a pattern of dishonesty and manipulation. A criminal defendant's right to present a defense is essential to a fair trial. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 875 (1982) (O'Connor, J., concurring); *see also United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005). The Fifth and Sixth Amendments concomitantly provide a criminal defendant the right to present a defense by compelling the attendance, and presenting the testimony, of his own witnesses. *Washington v. Texas*, 388 U.S. 14, 18-19 (1967). The Supreme Court's has "established, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Likewise, "[t]he necessary ingredients of the [Fifth] Amendment[s'] guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony[.]" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987).

CONCLUSION

Before this Court lies a convoluted problem that begins with the lack of subject matter jurisdiction over a non-Indian defendant in Indian Country due to case law by both the Supreme Court in *Castro-Huerta* and the Tenth Circuit's *Prentiss* I case. Combined with the fact the verdict form failed to

provide an option for conviction under aiding and abetting, there is no way to know whether **AMANDA IRENE SMITH** was convicted under her principal charges or under her **RICHARD JOEL SMITH's** in Counts One and Two as an aider and abettor in which there is no jurisdiction over her in Counts One and Two. When you then move into the issues of prosecutorial error in discovery violations, this verdict cannot stand.

Dated: August 8, 2023

Respectfully submitted,

/S/ Robert Don Gifford

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Certificate of Service

This is to certify that on August 8, 2023, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a notice of electronic filing to all counsel of record.

/s/ Robert "Bobby Don" Gifford
ROBERT D. GIFFORD