IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 22-cr-00273-REB-JMC

UNITED STATES OF AMERICA,

Plaintiff,

v.

KALEB ENGLISH,

Defendant.

JOINT MEMORANDUM IN SUPPORT OF PLEA AGREEMENT

The United States of America, by and through Cole Finegan, United States Attorney for the District of Colorado, and Lisa Franceware, Special Assistant United States Attorney, and the defendant, Kaleb English, personally and by counsel, Ingrid Alt, Esq., hereby submit this joint memorandum in support of the proposed Plea Agreement, attached as Ex. 1.

I. NATURE OF THE PLEA

The defendant, Kaleb English, and the government have entered a plea agreement, subject to approval by the Court. *See* Ex. 1. The defendant intends to plead guilty to a lesser-included misdemeanor charge of original Count One: Simple Assault in Indian Country under 18 U.S.C. §§113(a)(5) and 1153. The parties intend to jointly recommend two years of supervised probation, including a domestic violence treatment program, substance use treatment program, mental health treatment, a restriction on the possession of firearms and other dangerous weapons, employment or school, community service hours and testing. The parties agree that this proposal is in the

interest of justice. This memorandum describes the party's legal basis for the plea to a misdemeanor for an Indian offender in Indian Country.

II. ANALYSIS IN SUPPORT OF PLEA AGREEMENT

The United States alleges that in June of 2022, the Defendant committed assault by grabbing S.F. by her hair, dragging her from a laundry room where S.F. barricaded herself, and holding her down on the floor while placing a shotgun to her head. Because the Defendant is considered an "Indian," and the alleged offenses occurred in "Indian Country," the United States has jurisdiction over these offenses by operation of the Major Crimes Act, 18 U.S.C. § 1153. In relevant part, the Major Crimes Act permits the United States to prosecute "a felony assault." In September 2022, a grand jury returned an indictment against the Defendant on two counts of felony assault. Indictment [ECF #1].

The parties agree that at a jury trial this factual basis would support a jury instruction on the lesser included offense of simple assault – the proposed offense of conviction under the plea agreement.

The text of the Major Crimes Act is silent on the jurisdiction of the United States to prosecute misdemeanor offenses as lesser-included offenses at trial or as part of a plea agreement. However, case law demonstrates that this Court has jurisdiction of such offenses where exercise of that jurisdiction is required for equal application of the law. In *United States v. Keeble*, the Supreme Court found that equal application of law required that an Indian defendant was entitled to a jury instruction on the lesser included, non-enumerated offense under the Major Crimes Act. 412 U.S. 205, 212-14. The Court held that "Indians charged under [the Major Crimes Act] 'shall be tried in the

same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States'". *Id.* at 212 *citing* 18 U.S.C. § 3242. The Court explained that the Act does not deprive Indians of the "procedural rights guaranteed to other defendants," and that it could not "conclude that Congress intended to disqualify Indians from the benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense." *Id*. at 212. *See also United States v. Pino*, 606 F.2d 908, 915 (10th Cir. 1979) ("The Indian defendant would, under the principles of *Keeble*, be entitled to no less.").

In *United States v. Bowman*, the Ninth Circuit applied *Keeble's* reasoning to uphold a district court's exercise of jurisdiction to *sentence* a defendant on the lesser, non-enumerated offense. 679 F.2d 798, 799–800 (9th Cir. 1982) (emphasis added). Noting the "emphasis on parity of treatment" by the Supreme Court, the *Bowman* court found that the United States does not lose jurisdiction of an Indian defendant after he is found guilty of a lesser included, non-enumerated offense at trial. *Id.* at 799-800; *accord United States v. John*, 587 F.2d 683, 688 (5th Cir. 1979) ("[T]he Supreme Court in *Keeble* implicitly recognized that federal courts have jurisdiction to convict and punish for a lesser offense included within the enumerated crimes of s 1153."); *United States v. Felicia*, 495 F.2d 353, 355 (8th Cir. 1974) cert. denied 419 U.S. 849 (1974).

Similarly, the Fourth Circuit applied *Keeble* and 18 U.S.C. §3242 to hold that a district court had jurisdiction over a lesser offense, as a matter of trial procedure, to determine the sufficiency of evidence and instruct on the lesser included offense. *United States v. Walkingeagle*, 974 F.2d 551, 553–54 (4th Cir. 1992) (recognizing that "*Keeble* settled the threshold question of whether the federal courts can *ever* have

jurisdiction over non-enumerated offenses in prosecutions under the [Major Crimes Act]"). The court may exercise this jurisdiction "'in the same manner' as any other federal criminal trial". *Id.* at 554 *citing* 18 U.S.C. §3242. The Fourth Circuit reasoned that "when Congress granted jurisdiction over major felonies committed by Indians, it granted jurisdiction over all offenses included within those felonies to the extent that federal trial procedure would allow the jury to return a verdict on the lesser offense." Id. at 554.

While the procedure implicated in this case is a plea agreement instead of a lesser included offense at trial, the reasoning in *Keeble* [and] its progeny emphasizing equal treatment applies with equal force: the Court should apply its plea agreement procedures equally to Indian and non-Indian defendants and permit the Defendant to plead to a lesser included offense. *See generally Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court."). This is especially important because most charges in federal court are resolved through plea bargaining. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) (noting that at the time of the decision "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Further, as would be true in this case, plea agreements provide clear benefits to a defendant. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Withholding a benefit taken by the vast majority of federal defendants only to Indian defendants charged under the Major Crimes Act cannot be harmonized with *Keeble*.

Although limited published precedent exists,[1] the available authority supports this logical extension of *Keeble*. In *United States v. Matheson*, Senior District Court Judge Nielsen applied *Keeble* to uphold a plea agreement to simple assault for a defendant originally charged with assaults under the Major Crimes Act. 2015 WL 12866995, at *3 (D. Idaho Sept. 29, 2015), *vacated on other procedural grounds*, 669 F. App'x 895 (9th Cir. 2016). Senior Judge Nielsen observed, under *Keeble*, that a contrary rule would deprive "only Indian defendants the benefits of plea bargains that would otherwise be available to non-Indians…" *Id*. Accordingly, such a rule "violates the spirit of *Keeble* and runs afoul with Equal Protection." *Id*.

Similarly, in *Morgan v. United States*, District Court Judge Lange analyzed the authority for a court to accept a plea to a lesser included offense:

> Although *Keeble* dealt only with the right to a jury instruction on a lesser included offense and not whether jurisdiction existed to convict and sentence on that offense, four circuits, including the Eighth Circuit, have since sustained convictions based on lesser included offenses. Granted, *Keeble* left open the question of whether an Indian defendant is entitled to plead guilty in federal court to a reduced charge over which the court would not originally have jurisdiction under the MCA. But the dictates of *Keeble* and of those federal appellate courts that have interpreted its scope and breadth compel this Court to conclude that such a practice would not be held to be an undue extension of federal authority. Indeed, forbidding the practice may force an Indian defendant like Morgan to trial on MCA charges when he otherwise bargained for convictions of lesser offenses. Moreover, § 3242 explicitly states that a defendant must be "tried ... in the same manner," and fairness to that defendant requires giving him the opportunity to plead to a lesser included crime if that is what he wants to do.

Morgan v. United States, 2014 WL 1871861, at *7 (D.S.D. May 8, 2014).

…

[1] Neither a defendant receiving the benefit of a misdemeanor plea agreement, nor the United States offering such a plea agreement, would have any incentive to challenge the plea.

Further, such pleas are common practice in many federal districts that routinely deal with Indian Country prosecutions. See e.g., Plea Agreement, *United States v. Bettelyoun*, CR 22-30033 [ECF #18] (D.S.D. May 3, 2022), attached as Ex. 2. (plea to 18 U.S.C. 1153 and 113(a)(4)); Plea Agreement, *United States v. Quiver*, CR 20-30141 [ECF #45] (D.S.D. June 22, 2021), attached as Ex. 3. (plea to 18 U.S.C. 1153 and 113(a)(5)); Plea Agreement, *United States v. Grant*, CR 18-30096 [ECF #25] (D.S.D. May 3, 2022), attached as Ex. 4. (plea to 18 U.S.C. 1153 and 113(a)(4)).

Conclusion

The logic of procedural parity in *Keeble* applies with equal force to plea agreements. Accordingly, the parties jointly and respectfully request that the Court accept the proposed plea agreement to a lesser-included offense.

Dated this 7th day of February 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for the defendant at the following e-mail address:

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By: */s/Lisa Franceware*

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