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 OPENING BRIEF

ORAL ARGUMENT IS REQUESTED.

(Attachments in scanned PDF format)

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STATEMENT OF PRIOR OR RELATED APPEALS

There have been no prior or related appeals in this case.

JURISDICTIONAL STATEMENT

Defendant-Appellant Douglas D. Smith appeals from the judgment and sentence and the order denying his motion to dismiss for lack of federal jurisdiction by the United States District Court for the District of New Mexico, the Honorable Judith C. Herrera presiding. The district court entered its judgment and sentence on December 8, 2021. Attachment ("Att.")[1] A. The judgment was a final order that disposed of all claims with respect to all parties. Mr. Smith timely filed a notice of appeal on December 14, 2021. I ROA 979.

Mr. Smith argues in this appeal that the district court lacked jurisdiction of the cause below under 18 U.S.C. § 3231 because this case does not involve an offense "against the laws of the United States." This

[1] Mr. Smith cites to the district court judgment, attached to this brief, as Att. A, to the district court's order denying his motion to dismiss as Att. B, to the district court's order granting the government's motion for pre-trial determination of Indian Country Land Status as Att. C, and to the district court's ruling that he was not entitled to a reduction for acceptance of responsibility at Att. D. He cites to the record on appeal ("ROA") volume and page numbers of documents included in the appellate record. The trial transcripts are included in Volume VIII of the record on appeal. The cited page number of the appellate record corresponds to the pdf page number of the digital record. Mr. Smith is filing a motion to supplement the record on appeal with the audio recordings he presented at the sentencing hearing

court has jurisdiction of this appeal under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Whether the district court lacked jurisdiction because the offense in this case did not take place in Indian country and is not an offense described in chapter 53 of title 18 of the United States Code.

II. Whether Congress had constitutional authority to enact the 2005 Amendment to the Pueblo Lands Act.

III. Whether Mr. Smith was entitled to a reduction of two offense levels for acceptance of responsibility.

STATEMENT OF THE CASE

Defendant-Appellant Douglas D. Smith was charged by indictment, filed in the United States District Court for the District of New Mexico, with killing Jane Doe, an Indian, with malice aforethought, in violation of 18 U.S.C. §§ 1152 and 1111. I ROA 50.

Mr. Smith filed a motion to dismiss, arguing that the district court lacked jurisdiction because the land where the offense took place was patented to non-Indians pursuant to the 1924 Pueblo Lands Act ("PLA"), which extinguished all interest of the United States and the Pueblo of Santa Clara in that land and Congress lacked authority to enact the 2005 PLA Amendment. I ROA 126. The district court denied

his motion to dismiss, ruling that the PLA merely quieted title to the land and did not diminish the pueblo and that "the Executive, not Congress, quieted title to the Property at issue." Att. B at 15-17.

Mr. Smith was acquitted of second-degree murder and convicted of involuntary manslaughter after a five-day trial. VII ROA 925.

At sentencing, the district court ruled that Mr. Smith was not entitled to an offense level reduction for acceptance of responsibility, Att. D, and sentenced him to a term of imprisonment of 27 months, to be followed by a three-year term of supervised release. Att. A. He timely filed a notice of appeal, I ROA 979, and this appeal followed.

STATEMENT OF THE FACTS

There was little dispute in this case about Mr. Smith's actions. He had been the manager of the Western Winds Motel in Espanola, New Mexico, a family business with twelve rooms, and still lived on the property. II ROA 45 (unredacted).[2] He had been renting three rooms for $500 total per month to long term renters whose house had caught on fire. *Id.* at 45-46. He had stopped renting out the remaining rooms in

[2] When there is both a redacted and an unredacted version of a record volume, Mr. Smith cites to the unredacted version.

2014. *Id.*; VIII ROA 663. His mother, Suzy, who had died ten years earlier, had lived in a trailer on the property. II ROA 46, 90. She had previously managed the motel and he had lived there most of his life. *Id.* at 47.

The land on which the offense in this case occurred is within the city limits of Española, which is incorporated under the laws of the State of New Mexico. VIII ROA 660. As directed by Congress in the Pueblo Lands Act of 1924, the Pueblo Lands Board issued a patent on it to three non-Indians. The patent document, I ROA 146, states it was issued "under the provisions of the Act of Congress of June 7, 1924 (43 Stat. 636)." It further states that the patent "shall have the effect only of a relinquishment by the United States of America and the Indians of said Pueblo." *Id.*

Over the years, title to the property changed hands and it was purchased in 1965 by Mr. Smith's family. The land is currently owned by Mr. Smith and his brothers. He pays county taxes on it and is otherwise subject to state law. VIII ROA 660.

In the early morning hours of May 5, 2018, Mr. Smith called 911 and reported he had shot a young woman. II ROA 184. He told Officer

Rael, who quickly responded to the call, that he had come outside to his back porch with his pistol after hearing an alarm connected to motion sensors behind his house. *Id.* at 177. He initially assumed it was caused by raccoons. *Id.* Instead, he saw the shadow of someone trying to break into a trailer behind his house. *Id.* After he fired a warning shot aimed away from the shadow, the person took off running. *Id.* at 178. He fired several more times, aiming away from where he thought the intruder was in order to scare the person. *Id.* at 178, 180.

About 1:40 a.m. on May 5, 2018, about twenty minutes after Officer Rael got to Mr. Smith's house, Detective Abeyta arrived there. VIII ROA 450, 453. Detective Abeyta was the lead detective; he had been briefed about a female who had been shot and killed during an attempted burglary. *Id.* Mr. Smith reiterated and expanded on what he told Officer Rael in his statement that to Detective Abeyta that same morning. Detective Abeyta testified that Mr. Smith was cooperative and forthcoming and answered all his questions. VIII ROA 476-77.

Mr. Smith told Detective Abeyta he had lived in Espanola since he was a child. II ROA 139. He and his brother Dan lived in separate residences on the same family property; Dan lived in a back trailer. *Id.*

at 142. He had formerly managed the motel on their property that he co-owned with his brothers. *Id.* at 140. They had had repeated problems with break-ins on the property during the prior six months and had installed motion sensors with an audible alarm that dinged when motion was detected. *Id.* at 143. Dan had reported two of their recent burglaries to police. *Id.* at 146.

In the early morning hours of May 5, 2018, an alarm sounded when Mr. Smith was in bed and he went outside to investigate. *Id.* at 144. Initially, he assumed raccoons set off the sensors, as had happened before. *Id.* at 152. He heard someone at the door of the trailer his mom had lived in before she died. *Id.* at 144, 148. It looked like the person was trying to break into the trailer, which was locked. *Id.* at 155.

Mr. Smith was "scared witless" when he saw someone on his property trying to break into his trailer. *Id.* at 144; VIII ROA 478. He fired once to the side of the trailer and saw the shadow move behind some bushes where he could no longer see it. II ROA 144. Afraid the person would shoot him, he fired quickly several more times to scare the person. *Id.* at 144, 148-49. He thought the intruder had run off and

wanted to ensure the person did not come back. *Id.* at 149. His intention had been only to make noise, not to shoot anyone. *Id.* at 144-45, 150.

Mr. Smith tried to reload in case the intruder returned and started shooting at him, but was too shaky. *Id.* at 145, 151. He walked behind his house and only then saw that he had shot a woman and that she was dead. *Id.* at 145-46. He thought, "oh, no, no." *Id.* at 157. He walked around to the front to determine if anyone else was there. *Id.* at 158.

The victim was a young woman named Maria Gallegos. VIII ROA 462. She sustained one small gunshot wound to her left temple. *Id.*

Mr. Smith set his gun down and went inside and called 911. II ROA 146. He told Detective Abeyta he had been intensely afraid and admitted, "I wasn't really thinking about being careful, as careful as I should have been under the circumstances." *Id.* at 156-57, 164.

Mr. Smith confided in religious terms to Detective Abeyta, acknowledging the terrible mistake he had made and his horrible fear that what he had done was so serious that "Jesus is not going to let me home, in all likelihood." *Id.* at 164. Detective Abeyta responded, "Jesus

is a forgiving man, right?" *Id.* Mr. Smith replied, "[y]eah. But you got to forgive yourself first, and sometimes that takes forever." *Id.* Detective Abeyta replied, "[y]ou're–you're going to have to forgive yourself first. You're the one that's going to have to live with–with what you did." *Id.* at 165.

Mr. Smith also fully cooperated with the FBI investigation of his conduct. In a May 7, 2018, interview with Special Agents Taylor and Cobb, he repeated his prior accounts of what had occurred. VIII ROA 521. He again related his recent problems with intruders and break-ins on his property, two of which had been reported to police. II ROA at 62-71, 83. In the early morning hours of May 5, 2018, he was in bed when one of the alarms connected to his motion sensors went off. *Id.* at 74. He got out of bed and went out onto his back porch with his pistol to investigate. *Id.* He was able to detect the shadow of a person trying to break into the trailer behind his house that his mother had lived in and fired a warning shot behind the trailer to scare the person. *Id.* at 74. He shot to miss. *Id.* at 84.

Mr. Smith was able to see the person in the shadow bend down to face him on the other side of some bushes and was overcome with fear, in "a total panic." *Id.* at 74, 76. After firing the first shot, he thought he saw the person run toward the street and fired several more warning shots, thinking that the person was no longer in front of him. *Id.* at 77, 84-85, 89. He was terrified he was about to be shot and wanted to make sure the person did not return. *Id.* at 74, 76, 85.

Mr. Smith told the agents, as he had related to Detective Abeyta, that he had tried reloading, but was too nervous and unsteady to do so. *Id.* at 75. When he walked out between his back gate and trailer he discovered a woman's body. *Id.* He thought, "oh no, no, no, please, God, no, no." *Id.* at 93.

After responding to the agents' questions concerning his actions, Mr. Smith told them, "[t]he truth is the truth. I can't change what happened. I let fear take over, and–and, she died as a result of fear." *Id.* at 94. He again admitted his wrongful conduct in a religious context. The agents had asked Mr. Smith if he is a religious man and he told them he was. *Id.* at 45.

Mr. Smith expressed his intense guilt about what he had done. "When I stand in front of God–and I'll probably have to face her, I don't know what I'm going to say. But, uh, quite frankly, I'd rather you guys just took me out back here and shot me. Eye for an eye." *Id.* at 98. The agents clearly recognized that Mr. Smith accepted responsibility for his actions. Special Agent Cobb responded, "[y]ou know, and like I said, people do make mistakes, and taking responsibility is step number one, right, being open and honest, and, I mean, I think that's great." *Id.* at 99. Special Agent Taylor agreed and Special Agent Cobb continued, "[a]nd taking responsibility and taking it as it comes and, you know, just one bad mistake, that's not it. That's not all that was written for us, right? There's a lot more to life than making one bad mistake. Okay?" *Id.*

Immediately after he discovered the woman's body, his tenant, Ercelia Trujillo, heard something and came outside and he told her he had shot someone. *Id.* at 76, 80. She said he should call 911; he told her he was on his way to do that. *Id.* at 76. Special Agent Taylor testified that Ms. Trujillo reported that in the early morning hours of May 5,

2018, she had heard a woman yelling to someone else. VIII ROA 527.

District Court Proceedings on Mr. Smith's Motion to Dismiss.

Mr. Smith argued that the PLA effectuated the relinquishment of federal jurisdiction over lands patented to non-Indians and Congress lacked constitutional authority to enact the 2005 PLA Amendment. He explained that the Indian Commerce Clause did not authorize the 2005 Amendment because it does not pertain to commerce or the Pueblo Tribes. VII ROA 59.

The government argued below that "Congress has the power under the Indian commerce clause to regulate with regards to the tribe, and this is a basic tenet of federal Indian law." *Id.* at 55.

The district court upheld federal jurisdiction, concluding that the PLA did not diminish Pueblo lands, that the Executive, not Congress, quieted title to the lands patented to non-Indians under the PLA, and that Congress had constitutional authority to enact the 2005 Amendment to the PLA. Att. B at 13-18.

The parties agreed that the offense in this case occurred on non-Indian land within the city limits of Española, New Mexico, and within the exterior boundaries of the Pueblo of Santa Clara, which is a

federally recognized Indian Tribe. Att. B at 1. The land was transferred to non-Indians Alfred Lucero, Antonia F. de Lucero, and Pleasant Henry Hill, Jr., by a patent issued March 29, 1937, by the Pueblo Lands Board, pursuant to the 1924 Pueblo Lands Act, 43 Stat. 636. *Id.* Mr. Smith's family eventually purchased the property and he currently shares ownership with his brothers.

Mr. Smith is non-Indian; the victim was Indian. *Id.*

District Court Proceedings on Mr. Smith's Sentence.

The probation officer recommended against an offense level reduction for acceptance of responsibility, stating only that "the defendant has not clearly demonstrated acceptance of responsibility for the offense." VI ROA 11 ¶ 28. In response to Mr. Smith's objection to that conclusion, the probation officer declined to reconsider the recommendation and pointed to Mr. Smith's provision of a statement of acceptance after he was convicted and the PSR was disclosed. V ROA 91.

Mr. Smith argued that he was entitled to a reduction for acceptance of responsibility, pointing out that he had called 911 immediately after the shooting, promptly admitted his conduct and

surrendered to authorities, and had continued to admit his conduct throughout the proceedings. VII ROA 212-216. He explained he acted out of intense fear he was about to be shot and had not intended to inflict any harm. *Id.* at 214-15. He admitted to Detective Abeyta on the morning of the shooting that he had not been as careful as he should have been. *Id.* at 215, 224.

Almost immediately after discovering he had shot someone, Mr. Smith called 911 to report what he had done and provided details to Officer Rael and Detective Abeyta. He fully answered the questions he was asked and cooperated with officers' investigation. *Id.* at 216. Based on the evidence Mr. Smith presented at trial, the jury declined to convict him of second degree murder and convicted him instead of involuntary manslaughter. *Id.* at 217.

Mr. Smith objected to the probation officer's characterization of his offense, pointing out that it was taken from the government's argument supporting the second-degree murder charge of which he was acquitted. *Id.* at 216-17.

The government opposed a reduction for acceptance of responsibility. It cited Mr. Smith's admission at trial that he was not

acting in self-defense and maintained that the probation officer had fairly characterized the offense conduct. I ROA 938.

The district court recognized that the probation officer's description of the offense conduct came from information supplied from the government that supported its argument for second-degree murder, of which Mr. Smith was acquitted. VII ROA 217. It pointed to the jury's acceptance of Mr. Smith's position that he lacked the requisite mens rea for second degree murder. Att. D; VII ROA 224. However, the court declined to reduce his offense level for acceptance of responsibility because it concluded that while he admitted the underlying facts, "I just don't see where he admitted or accepted responsibility for involuntary manslaughter." *Id.*

SUMMARY OF THE ARGUMENT

Mr. Smith's land in Española, New Mexico, is not within "Indian country." It is not within the exterior boundaries of an Indian reservation, does not fall within the definition of a "dependent Indian community," and is not an Indian allotment. The 2005 Amendment to the Pueblo Lands Act does not authorize jurisdiction in this case

because it does not involve an offense "described in chapter 53 of title 18, United States Code . . . "

Congress lacked constitutional authority to enact the 2005 Pueblo Lands Act Amendment. It does not fall within the Indian Commerce Clause because it involves neither Indian Tribes nor commerce. While Congress has plenary authority to legislate with respect to Indian Tribes and Indian affairs, the 2005 Amendment improperly provides for jurisdiction over non-Indian individuals who commit offenses outside Indian country.

Mr. Smith was wrongly denied an offense level reduction for acceptance of responsibility. He called 911 moments after the shooting to report what he had done, was forthcoming in his responses to questions posed during interviews with Officer Rael, Detective Abeyta, and two FBI special agents, and fully cooperated in their investigations. He repeatedly admitted he had failed to exercise reasonable care and had committed a horrible act. His contention at trial that his admitted mental state fell short of the requisite legal standard for second degree murder and involuntary manslaughter should not preclude him from the reduction warranted by his consistent acceptance of responsibility.

ARGUMENT

I. The Government Did Not Meet its Burden to Establish Federal Criminal Jurisdiction.

A. *Standard of Review.*

"A motion that the court lacks jurisdiction may be made at any time while the case is pending." Fed. R. Crim. P. 12(b)(2). A challenge to the court's jurisdiction may be raised for the first time on appeal. *United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994). When jurisdiction has not been proved, courts are without power to proceed and must dismiss the cause. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998). That a court may not adjudicate a criminal prosecution without subject matter jurisdiction is beyond doubt. *United States v. Prentiss*, 256 F.3d 971, 982 (10th Cir. 2001), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625 (2002).

B. *The District Court Is Presumed to Lack Jurisdiction.*

Federal courts must presume they lack subject matter jurisdiction. *Vaden v. Discover Bank*, 556 U.S. 49, 69-70 (2009); *Bustillos*, 31 F.3d at 933. "The requirement that jurisdiction be established as a threshold

matter is 'inflexible and without exception.'" *Steel Co.,* 523 U.S. at 93 (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884)). The need for courts to ensure they have subject matter jurisdiction in a given case "'is not a mere nicety of legal metaphysics,' but essential to the rule of law in 'a free society .... The courts, no less than the political branches of government, must respect the limits of their authority.'" *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1144 (10th Cir. 2010) (quoting *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988)).

C. *Legal Background.*

The Pueblo Indians of New Mexico trace their land title to a 1689 grant by the King of Spain. Under the 1848 Treaty of Guadalupe-Hidalgo, the territory that is now New Mexico became part of the United States and the United States agreed to protect the rights of Indians governed by prior sovereigns. *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006). In an 1858 Act, Congress confirmed Pueblo land claims, providing its confirmation "shall only be construed as a relinquishment of all title and claim of the United States of any of said lands, and shall not affect any adverse valid rights, should such exist."

11 Stat. 374. The United States has "never made pretense that it was the owner of the lands so granted by Mexico" and has consistently recognized "that the rightful ownership had never been in the United States." *United States v. Conway*, 175 U.S. 60, 70 (1899)(quoting *Adam v. Norris*, 103 U.S. 591 (1880)).

Pueblo Indians were not initially considered "Indian tribes" and were presumed able to freely convey title to their lands without congressional approval. Approximately 3000 transfers of Pueblo land were made to non-Indians. *Mountain States Tel. & Tel. Co., v. Pueblo of Santa Ana*, 472 U.S. 237, 241-42 (1985). In response to the resulting uncertainty over land ownership, Congress passed the Pueblo Lands Act of June 7, 1924 (PLA), ch. 331, 43 Stat. 636, and established the Pueblo Lands Board (the Board) to settle conflicting claims to Pueblo lands. *Id.* at §§ 2, 6, 43 Stat. at 633-37; *Arrieta*, 436 F.3d at 1249, *Mountain States*, 472 U.S. at 244.

The PLA instructed the Board to issue a report setting forth the metes and bounds of the lands of each Pueblo that were found not to have been extinguished under the rules established in the Act.

Mountain States, 472 U.S. at 244. "Continuous, open, and notorious adverse possession by non-Indian claimants, coupled with the payment of taxes from 1889 to 1924, or from 1902 to 1924 if possession was under color of title, sufficed to extinguish a Pueblo's title." *Id.* (citing PLA § 4). *See also Arrieta*, 436 F.3d at 1249 ("The 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)). The Pueblos retained title to lands not patented to non-Indians. *Id.*

The PLA provided that upon the filing of the Board's report, the Attorney General of the United States would file quiet title suits to lands of non-Indians holding claims that had been determined valid under the conditions set out in the PLA. PLA §§ 1, 3, 5. The Secretary of the Interior was required under § 13 to file plats and field notes for lands to which Pueblo title had been extinguished, "thereby vesting title in the non-Indian claimants." *United States v. Thompson*, 941 F.2d 1074, 1076 (10th Cir. 1991) (citing PLA § 13, 43 Stat. at 640). The plats and field notes were required to "be accepted in any court as competent

and conclusive evidence of the extinguishment of all the right, title, and interest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same." PLA § 13, 43 Stat. at 640. The Secretary of the Interior was directed to issue a patent or certificate of title for the land" to successful non-Indian claimants. *Id.*

D. *Because Mr. Smith's Offense Did Not Take Place in Indian Country, the 2005 Pueblo Lands Act Amendment Does Not Provide Federal Jurisdiction.*

Mr. Smith's offense took place on a tract of land patented to non-Indians Alfred Lucero, Antonia F. de Lucero, and Pleasant Henry Hill, Jr. pursuant to the provisions of the PLA. The land is within the city limits of Española, New Mexico, and within the exterior boundary of the Pueblo of Santa Clara. I ROA 162.

In *United States v. Gutierrez*, No. CR-M-375 LH (unpublished), I ROA 147-48, the district court granted the defendant's motion to dismiss a case involving an offense that occurred within the exterior boundary of the Pueblo of Santa Clara because it did not take place in Indian Country. The court's conclusion would still be correct today because the 2005 Pueblo Lands Act Amendment did not change the

definition of Indian country. It did not extend Indian Country status to non-Indian lands within the city limits of Española, New Mexico.

As the district court recognized in *Gutierrez*, "[w]hile the land in question may at one time have been Indian Country, the Pueblo Lands Act of 1924 (43 Stat. 636) clearly and intentionally quieted title to the land in question against the Pueblo of Santa Clara." I ROA 147. The land did not satisfy the federal set-aside requirement necessary to find it was a dependent Indian community, the court decided, and consequently it lacked Indian country status. The case was dismissed.

Under 18 U.S.C. § 1151, Indian Country is defined to include:

> (a) all land within the limits of any Indian reservation . . .
> (b) all dependent Indian communities . . .
> (c) all Indian allotments, the Indian titles to which have not been extinguished . . .

Mr. Smith's offense, like Mr. Gutierrez's offense, took place on non-Indian land within the exterior boundary of the Pueblo of Santa Clara and similarly did not occur in Indian Country. It does not fall under § 1151(a) because the Pueblo of Santa Clara, which acquired its land by a grant from the King of Spain, is not an Indian reservation.

This Court has recognized that New Mexico pueblos are legally distinct from Indian reservations. In *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), this Court explained that when Congress confirmed Pueblo land claims in 1858, "[t]he Pueblos received fee simple title to their lands." *Id.* at 1111. "The recognized fee title of the Pueblos is logically inconsistent with the concept of a reserved right." *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 and expressly provided that its action did not affect then existing adverse rights." *Id. See also id.* at 1113 ("The United States had nothing to reserve.").

Subsection (c) of § 1151 is also clearly inapplicable in this case because the offense in this case did not take place on an Indian allotment; Indian title to Mr. Smith's land was extinguished.

Mr. Smith's non-Indian land is not Indian country under subsection (b) because is not a "dependent Indian community," which is "a limited category of Indian lands that are neither reservations nor allotments and that satisfy two requirements–first, they must have been set aside by the Federal Government for the use of the Indians as

Indian land; second, they must be under federal superintendence." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998). The federal set-aside requirement relates to land and "ensures that the land in question is occupied by an 'Indian community.'" *Id.* at 531. The federal superintendence requirement requires the land in question to be "under the superintendence of the Federal Government," *id.* at 530, n.5, and the Indian community to be sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians, rather than the States, exercise primary jurisdiction over that land. *Id.* at 531.

Neither *Venetie* requirement is met with respect to Mr. Smith's land and consequently, this case does not involve a "dependent Indian community." The set-aside requirement is not met because this case involves land patented to non-Indians to which Pueblo title was extinguished. In *Arrieta*, this Court held the land in question met the federal set-aside requirement based on the Pueblo-held title to the land, and unlike in this case, the Pueblo title had not been extinguished under the PLA. 436 F.3d at 1250-51. In *Hydro Resources*, this Court

held that because the land at issue in that case was "neither explicitly set aside for Indian use nor federally superintended, it follows that, as a matter of law, the land does not qualify as Indian country under § 1151(b)." 608 F.3d at 1166.

Even where land is closely tied to Indian tribes, unlike the land at issue here, courts have found the *Venetie* standard unmet. In *Owen v. Weber*, 646 F.3d 1105, 1107 (8th Cir. 2011), the court found there was no federal set-aside of land owned by a town in fee and leased on a 99-year lease to a tribal housing authority and consequently held the land did not meet the *Venetie* dependent Indian community test. *Id.* at 1107. Similarly, in *Blunk v. Az. Dept. of Transp.*, 177 F.3d 879 (9th Cir. 1999), the court found neither *Venetie* prong was met with respect to tribally-owned fee land purchased by the tribe that was not set aside by the Federal Government and was not actively controlled by the Federal Government. *Id.* at 883-84.

There can be no question that Mr. Smith's land is not a dependent Indian community. Pueblo title was extinguished pursuant to the PLA. The land is not occupied by an Indian community or used or controlled in any way by members of the Pueblo of Santa Clara. The federal

government relinquished all claim to lands patented to non-Indians under the PLA. PLA § 13, 43 Stat. at 640. In *United States v. Antonio*, 936 F.3d 1117 (10th Cir. 2019), this Court recognized that tracts of land transferred to non-Indians under the 1924 PLA may not fall within the § 1151 definition of Indian country. *Id.* at 1121.

The district court correctly recognized that "[f]ederal jurisdiction exists in this case if the Property where the alleged crime occurred was Indian Country at the time of the offense." Att. B at 7. However, it incorrectly decided that the alleged crime did occur in Indian country.

The 2005 PLA Amendment did not change the § 1151 definition of Indian country or the *Venetie* requirements that must be met to establish that a tract of land is a "dependent Indian community." Subsection (c) of the 2005 Amendment authorizes federal jurisdiction over offenses "described in chapter 53 of title 18, United States Code, committed by or against an Indian" that take place "within the exterior boundaries of any grant from a prior sovereign." Murder and manslaughter, the offenses at issue in this case, are not described in chapter 53.

Mr. Smith was charged under 18 U.S.C. §§ 1152 and 1111. The Major Crimes Act, 18 U.S.C. § 1152 (2012), provides that "the general laws of the US as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the US, except DC, shall extend to the Indian country." The Indian Country Crimes Act, 18 U.S.C. § 1153, also applies only to crimes that occur in Indian country. Both §§ 1152 and 1153 are inapplicable here because the Indian country definitions do not cover Mr. Smith's private land. None of the remaining statutes in chapter 53 apply in this case.

E. *Although the 1924 Pueblo Lands Act Did Not Provide for Extinguishment of Federal Jurisdiction, Congress Would Clearly Have Understood at the Time of its Enactment that its Extinguishment of all Federal and Tribal Interests in Lands Patented to Non-Indians Would Have the Effect of Extinguishing Federal Jurisdiction.*

"Congressional intent to authorize the extinguishment of Indian title must be 'plain and unambiguous,'—that is, it either 'must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' " *Mountain States*, 472 U.S. at 276 (emphasis added) (quoting *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346 (1941), and *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)). Congress plainly and unambiguously

provided for the extinguishment of Pueblo title to lands patented to non-Indian claimants under the PLA. *Mountain States*, 472 U.S. at 244; *Arrieta*, 436 F.3d at 1249. By its plain terms, the PLA effectuated the extinguishment of "all the right, title and interest" of the Pueblos and the United States to lands once held by the Pueblos that were patented to non-Indians in accordance with the Act. PLA § 13, 43 Stat. at 640. The Pueblos retained title to lands not patented to non-Indians. *Arrieta*, 436 F.3d at 1249.

The 1937 patent for Mr. Smith's land, where his offense took place, states that it was issued "under the provisions of the Act of Congress of June 7, 1924 (43 Stat. 636)" and "in conformity with the provisions of the Act."[3] It also states "that this patent shall have the effect only of a relinquishment by the United States of America and the Indians of said Pueblo." I ROA 162. Although the United States never held title to the land where the offense in this case took place, the PLA

[3] The government argued that the PLA did not specifically extinguish title to Mr. Smith's land because it did not even mention his land. I ROA 234. The PLA clearly provided for extinguishment of Pueblo title and issuance of patents to non-Indian claimants of thousands of land parcels not specifically enumerated in the Act. The government cites no authority for the proposition that Congress was required to separately enumerate the land parcels to which the PLA applied.

expressly provided that the United States relinquished any interest it had in lands patented to non-Indians. PLA § 13, 43 Stat. at 640.

The district court found it unclear that Congress's use of the term "extinguish" in the PLA "meant the present and total surrender of all tribal interest to that land, rather than merely a change of title thereto." Att. B at 12. The district court's conclusion flies in the face of the PLA's provision that non-Indian land claims determined valid would result in "extinguishment of all the right, title, and interest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same." PLA § 13.

It is also clear that the district court erred in determining that the PLA lacked the purpose or effect of diminishing Pueblo and federal authority over the lands patented to non-Indians. Att. B at 15-16. As this Court has explained in the reservation context, "Congress's use of the words 'cede, grant and relinquish' can only indicate one thing—a diminished reservation." *Wyoming v. United States Environmental Protection Agency*, 875 F.3d 505, 515-16 (10th Cir. 2017). The PLA provided for relinquishment of all interest of the United States and the Pueblo to lands patented to non-Indians under the Act. *See, e.g.,* PLA §

13, 43 Stat. 640 ("Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians."); I ROA 162 (the patent pertaining to Mr. Smith's land that was issued under the PLA provides that "this patent shall have the effect only of a relinquishment by the United States of America and the Indians of said Pueblo.").

Although the PLA did not provide for termination of federal jurisdiction, *Antonio,* 936 F.3d at 1123 it was well understood when Congress enacted the PLA in 1924 that the extinguishment of Indian title to land removes that land from federal jurisdiction and control. The Enabling Act of New Mexico of June 20, 1910, 36 Stat. 557, reflects that understanding well before the PLA became law in 1924. It states in Section 2:

> Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that *until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; ...*

Id. at 558-59 (emphasis added).

The New Mexico Constitution, adopted Jan. 21, 2010, similarly provides:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title ... to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that *until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.*

Id. at Art. XXI, § 2 (emphasis added).

Congress would have clearly understood when it enacted the PLA in 1924 that termination of title effected termination of federal jurisdiction. As the district court noted in its opinion, Att. B at 12, prior to the enactment of § 1151 in 1948, land within a reservation's boundaries was no longer Indian country when Indian title was extinguished. *See, e.g.*, *Bates v. Clark*, 95 U.S. 204, 208 (1877)("The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer."); *Clairmont v. United States*, 225 U.S. 551 (1912) (vacating

conviction for selling or giving intoxicating liquor to Indian on ground that railroad right-of-way, where offense occurred, had been conveyed in fee to railroad and thus was no longer Indian country); *Seymour v. Superintendent of Wash. State Penitentiary,* 368 U.S. 351, 357-58 (1962)(Congress's definition of Indian Country in 18 U.S.C. § 1151 in 1948 abrogated the prior understanding that tribal land is diminished by land owned in fee by non-Indians and non-Indian land is not reserved for Indians); *Solem v. Bartlett*, 465 U.S. 463, 468 (1984)("Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.").

This Court has recognized that federal criminal jurisdiction no longer exists after Congress has extinguished Indian rights to land where an offense was committed. In *Hackford v. Utah*, 845 F.3d 1325 (10th Cir.), *cert. denied*, 138 S.Ct. 206 (2017), this Court determined that traffic offenses allegedly committed by an Indian driver did not take place on tribal land. Congress had provided in 1910 that "[a]ll right, title, and interest of the Indians in the said lands are hereby extinguished." *Id.* at 1328 (citing Act of April 4, 1910, ch. 140, 36 Stat.

285). *Id.* at 1329. The land was thereby removed from the reservation and no longer had Indian Country status. *Id.* This Court decided that the State of Utah had proper criminal jurisdiction. *Id.* at 1330. It pointed to *Nebraska v. Parker*, – U.S. –, 136 S.Ct. 1072, 1079 (2016), where the Court explained that Congress's passage of a statute that provides for surrender of tribal land claims, along with compensation, "creates 'an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.'" *Hackford*, 845 F.3d at 1329 (internal quotations omitted).

Strikingly, the PLA used the same extinguishment language used by Congress in the 1910 Act that this Court analyzed in *Hackford*. It extinguished "all the right, title and interest" of the Pueblos and the United States to lands once held by the Pueblos that were patented to non-Indians in accordance with the Act. PLA § 13, 43 Stat. at 640.

In *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013), this Court concluded that the land where the crimes in question occurred was "Indian country" because one step required to extinguish Indian title had not been completed. In a 1945 law, Congress had set forth

provisions for extinguishment of federal restrictions on what had been Indian land. *Id.* at 1172. Congress had required approval of the Secretary of the Interior in order to effectuate a conveyance to the Housing Authority that would have removed its Indian status. *Id.* That requirement was not satisfied with respect to the tract of land where Magnan's crimes occurred. For that reason, it was not conveyed to the Housing Authority and remained "Indian country" at the time of the crimes. *Id.* at 1176 & n. 8. Consequently, the United States retained criminal jurisdiction. *Id.*

F. *The District Court Wrongly Concluded that Issuance of the Patent to Mr. Smith's Land under the PLA was an Executive Act.*

The district court erroneously upheld the exercise of federal jurisdiction in this case based on its mistaken conclusion "that the Executive, not Congress, quieted title to the Property at issue." Att. B at 16. As this Court recognized in *Arrieta*, "[t]he PLA established the Pueblo Lands Board ("Board") to resolve conflicting claims to Pueblos lands (citing PLA §§ "2, 6, 43 Stat. at 633-37). The Board issued patents to quiet title to land in favor of [qualifying] non-Indians . . . " 436 F.3d at 1249.

The Board was created by Congress and acted pursuant to Congress's express direction in the PLA when it issued patents to non-Indians holding qualifying claims to lands within the Pueblo of Santa Clara boundaries. The fact that President Roosevelt signed the patents issued pursuant to Congress's instruction in the PLA does not alter that fact. In its opinion, the district court even quoted from *Arrieta* as follows:

> The Board issued patents to quiet title to land in favor of non-Indians who adversely possessed land and paid taxes on the land from 1889 to 1924 or who had color of title to the land from 1902 to 1924. *Id.* § 4, 43 Stat. at 637; *Mountain States Tel. & Tel.*, 472 U.S. at 244-45; 105 S.Ct. 2587. **The Pueblos' rights to such land were extinguished.** PLA § 4, 43 Stat. at 637; *Mountain States Tel. & Tel.,* 472 U.S. at 244, 105 S.Ct. 2587. The Pueblo retained title to all lands not patented to non-Indians. Consequently, pockets of privately owned, non-Indian land lie amidst Pueblo lands.

Att. B at 5 (emphasis in original)(quoting *Arrieta,* 436 F.3d at 1249-50).

By the PLA's explicit terms, Congress set forth the conditions that non-Indian claimants were required to meet to establish the validity of their land claims. It was Congress, not the president, that decided that when those conditions were met, "all the right, title and interest" of the Pueblos and the United States would be extinguished. PLA § 13, 43

Stat. at 640. Congress, not the president, determined the procedure for issuing patents to qualifying non-Indian claimants.

The patent issued under the PLA for the land where Mr. Smith's offense took place specifically recites that it was issued "in conformity with the provisions of the Act [of Congress of June 7, 1924 (43 Stat. 636)]." I ROA 162. In the PLA, Congress provided for the conditions and proceedings under which the patent was issued to non-Indians for the land that now belongs to Mr. Smith. *See also Puyallup Tribe, Inc. v. Washington*, 433 U.S. 165, 174 (1977)(Congress altered the legal status of land formerly reserved to the Puyallup Tribe by treaty by expressly approving its sale to non-Indians).

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.

A. *Standard of Review.*

Mr. Smith argued in the district court that there was no federal criminal jurisdiction because Congress lacked constitutional authority to enact the 2005 Amendment to the Pueblo Lands Act, P.L. 109-133, 119 Stat. 2573. This Court reviews constitutional issues *de novo. United*

States v. Muhtorov, 20 F.4th 558, 630 (10th Cir.), *cert. denied*, 143 S.Ct. 246 (2022).

B. *Congress's Constitutional Authority over Indian Tribes and Tribal Affairs Does Not Permit It to Extend Federal Criminal Jurisdiction over Non-Indians Who Commit Offenses Outside Indian Country.*

In response to Mr. Smith's argument that Congress lacked constitutional authority to enact the 2005 Amendment to the PLA, the government asserted that Congress intended the 2005 Amendment only "to make clear what was originally intended by the 1924 PLA." I ROA 237. However, Congress repeatedly used the word "amend" in the 2005 Amendment. Its preamble states, "An Act to amend the Act of June 7, 1924, to provide for the exercise of criminal jurisdiction." P.L. 109-133, 119 Stat. 2573. The Amendment is captioned, "SECTION 1. INDIAN PUEBLO LAND ACT AMENDMENTS." It begins by stating: "The Act of June 7, 1924 (43 Stat. 636, chapter 331), is amended by adding at the end the following . . . "

Congress could provide for federal jurisdiction over lands patented to non-Indians under the PLA in the 2005 Amendment only if the Constitution endowed it with that authority. "The powers of the legislature are defined and limited; and that those limits may not be

mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000).

The only constitutional clauses that mention Indians or Indian tribes are the Indian commerce Clause, *U.S. Const.*, Art. I, § 8 cl.3, and the Apportionments Clause, Art. I, § 2, cl.3 and Amend. XIV § 2 (both "excluding Indians not taxed" for apportionment purposes). The Apportionments Clause does not authorize exercise of congressional power over Indians. The Indian Commerce Clause states: "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Treaty Clause of Article II, § 2 cl.2, "authorizes the President, not Congress, to make treaties." *United States v. Lara*, 541 U.S. 193, 201 (2004). It "does not literally authorize Congress to act legislatively." *Id.*

The Supreme Court has long recognized that the U.S. Constitution empowers Congress to legislate broadly with respect to Indian Tribes and Indian affairs rather than over individual Indians. In *United States*

v. Kagama, 118 U.S. 375 (1886), the Court declared, "it would be a very strained construction of th[e commerce] clause that a system of criminal laws for Indians living peaceably in the reservations ... was authorized by the grant of power to regulate commerce with the Indian tribes". The Indian Commerce Clause provides Congress with "plenary power to legislate in the field of *Indian affairs*." *Lara*, 541 U.S. at 200 (emphasis added).

Congress's extension of federal jurisdiction to criminal offenses by non-Indians on non-Indian lands in the 2005 Amendment involves neither commerce nor Indian Tribes. The exercise of state criminal jurisdiction over offenses committed by non-Indians against Indians–even in Indian country–does not infringe on tribal self-government. *Oklahoma v. Castro-Huerta*, – U.S. –, 142 S.Ct. 2486, 2501 (2022). The only parties to a state prosecution of a non-Indian for an Indian country offense involving an Indian victim are the State and the non-Indian defendant. *Id.* States' interest "in protecting crime victims includes both Indian and non-Indian victims" within their borders. *Id.* at 2502.

The 2005 Amendment's authorization of federal criminal jurisdiction over non-Indian lands is not legislation "in the field of Indian affairs." The district court wrongly concluded that the Indian Commerce Clause empowered Congress to provide in the 2005 PLA Amendment for federal criminal jurisdiction over offenses by or against an Indian on non-Indian land within the exterior boundaries of the pueblo. Att. B at 17.

As explained above, the district court and the government mistakenly assumed that Española, New Mexico, is Indian country because it is within the exterior boundaries of Santa Clara Pueblo. Mr. Smith's land is not within Indian country because it does not fall within any of the three Indian Country definitions in 18 U.S.C. § 1151.

The federal interest in protecting tribal sovereignty and tribal self-government is not furthered by extending federal criminal jurisdiction over offenses committed by non-Indians on private land. Congress exceeded its authority by providing for exclusive federal criminal jurisdiction over offenses by or against Indians outside Indian country.

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

A. *Standard of Review.*

Mr. Smith preserved this issue by arguing in the district court he was entitled to a reduction in his offense level for acceptance of responsibility. VII ROA 212-216.

This Court reviews the district court's legal conclusions regarding the Guidelines *de novo* and factual questions for clear error, affording deference to the district court's application of the guidelines to the facts. *United States v. Muñoz-Nava*, 524 F.3d 1137, 1146 (10th Cir. 2008).

B. *Mr. Smith Consistently Acknowledged the Wrongfulness of his Conduct before Trial and Argued at Trial that his Admitted Failure to Exercise Reasonable Care Did Not Meet the Requisite Mens Rea for Involuntary Manslaughter.*

Under U.S.S.G. § 3E1.1(a), a defendant who "clearly demonstrates acceptance of responsibility for his offense" should receive a downward adjustment of two offense levels. Commentary n.2 to U.S.S.G. § 3E1.1 states that the 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." It goes on to make clear that a defendant's exercise of his right to trial does not preclude a reduction for acceptance of responsibility. In such cases, "a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct."

In *United States v. Gauvin*, 173 F.3d 798 (10th Cir. 1999), the defendant argued at trial that he had been drunk and scared when he caused a vehicle collision and had not intended to injure anyone. *Id.* at 806. This Court upheld an acceptance of responsibility reduction based on the nature of Mr. Gauvin's challenge at trial to whether the factual state of mind he acknowledged met the legally required intent to harm or cause apprehension. *Id.* In *United States v. Tom*, 494 F.3d 1277 (10th Cir. 2007), on the other hand, this Court ruled the district court wrongly reduced the defendant's sentence for acceptance of responsibility because Mr. Tom maintained at trial he lacked the mens rea for first- and second-degree murder and contested the sufficiency of the government's proof of intent. *Id.* at 1281. The adjustment is permitted only when the defendant admitted his conduct at trial and "simply disputed whether his acknowledged factual state of mind met the legal

criteria of intent required by the applicable statute." *Id.* *See also United States v. Herriman*, 739 F.3d 1250 (10th Cir. 2014) (entitlement to acceptance of responsibility reduction turns on whether the dispute between the parties at trial involved the fact of the defendant's mental condition or its legal ramifications. *Id.* at 1257.

From the time of his offense, Mr. Smith consistently admitted the wrongfulness of his conduct. He maintained at trial that he believed he was about to be shot and acted unreasonably because he was consumed with fear. VIII ROA 732, 740. He argued that his acknowledged intent did not meet the statutory mens rea requirement for involuntary manslaughter. *Id.* at 789, 807. Both in his pre-trial statements and at trial, he admitted that he fired one shot away from where he had seen a person's shadow, then had wrongly fired several more times under the mistaken belief that the person had run away and no one was there. The jury acquitted him of second-degree murder and convicted him of the lesser offense of involuntary manslaughter.

Mr. Smith's pretrial statements strongly demonstrate his consistent admission of the wrongfulness of his actions. He called 911 right after the shooting and reported to the dispatcher that he had shot

a young girl who was breaking into a building behind his house. II ROA 184-85. When Officer Rael responded to the call, Mr. Smith admitted what he had done, answered every question he was asked, and willingly surrendered. He provided additional details later that morning in an interview with Detective Abeyta, who testified that Mr. Smith was cooperative and forthcoming and responded to all his questions. VIII ROA 476. Mr. Smith was again forthcoming when interviewed by two FBI special agents two days later.

Mr. Smith told Detective Abeyta he had intended only to make noise, not to shoot anyone. II ROA 144-45, 150. He had been "scared shitless," *id.* at 164, and admitted, "I wasn't really thinking about being careful, as careful as I should have been under the circumstances." *Id.* at 156-57. He told Detective Abeyta he had done something so terrible that "Jesus is not going to let me home, in all likelihood." *Id.* at 164. Recognizing Mr. Smith admission of wrongdoing and the intense guilt he felt about it, Detective Abeyta responded, "Jesus is a forgiving man, right?" *Id.* Mr. Smith replied, "[y]eah. But you got to forgive yourself first, and sometimes that takes forever." *Id.* Detective Abeyta

continued, "[y]ou're–you're going to have to forgive yourself first. You're the one that's going to have to live with–with what you did." *Id.* at 165.

Similarly, in his interview with the two FBI agents, Mr. Smith fully responded to the agents' questions about his actions and told them, "[t]he truth is the truth. I can't change what happened. I let fear take over, and–and, she died as a result of fear." *Id.* at 94. When the agents asked Mr. Smith if he is a religious man, he told them he was. *Id.* at 45. He admitted the wrong he had done in religious terms, telling the agents, "[w]hen I stand in front of God–and I'll probably have to face her, I don't know what I'm going to say. But, uh, quite frankly, I'd rather you guys just took me out back here and shot me. Eye for an eye." *Id.* at 98. As Detective Abeyta had, the agents recognized Mr. Smith's acceptance of responsibility for his actions. Special Agent Cobb responded, "[y]ou know, and like I said, people do make mistakes, and *taking responsibility is step number one, right, being open and honest, and, I mean, I think that's great.*" *Id.* at 99 (emphasis added). Special Agent Taylor agreed and Special Agent Cobb continued, "[a]nd *taking responsibility and taking it as it comes and, you know, just one bad*

mistake, that's not it. That's not all that was written for us, right? There's a lot more to life than making one bad mistake. Okay?" *Id.* (emphasis added).

At the close of the government's evidence, Mr. Smith moved under Rule 29 for a judgment of acquittal of second degree murder, arguing there was no evidence of malice, the required mens rea for second-degree murder. VIII ROA 586-88. He explained that there was no evidence he was attempting to shoot anyone; he wrongly believed no one was there. *Id.* at 592. Although the district judge denied Mr. Smith's motion, she acknowledged it was "a hard case." *Id.* at 593, 594.

Mr. Smith conceded at trial his failure to exercise reasonable care and argued that the facts he admitted fell short of what the law requires. *Id.* at 791-92, 806-07. He maintained he acted due to intense fear and misjudgment. *Id.* at 788-89, 791-92, 806-07. In light of the entire record, the district court erred in concluding Mr. Smith was not entitled to an offense level reduction for acceptance of responsibility.

Mr. Smith's acceptance of responsibility at trial was underscored by the government. When the prosecutor asked during his cross-examination of Mr. Smith whether he was claiming self-defense, Mr.

Smith responded that he was not. VIII ROA 727. In its closing remarks, the government highlighted to the jury Mr. Smith's failure to claim he had done nothing wrong. It stressed to the jury that "[h]e is not claiming self-defense and there is no other excuse for what he did." *Id.* at 812.

CONCLUSION

For all the reasons stated above, this Court should vacate the district court's denial of Mr. Smith's motion to dismiss and remand this case for further proceedings. In addition, this Court should determine that the district court wrongly denied Mr. Smith a reduction in his offense level for acceptance of responsibility and remand for resentencing.

REQUEST FOR ORAL ARGUMENT

Mr. Smith requests oral argument in order to clarify the facts and the parties' positions with respect to the complex and important constitutional and sentencing issues raised in this appeal.

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, statement regarding oral argument, and certificates of counsel, it contains 9557 words.

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