

DOCKET NO. 13-2027

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DHANZASIKAM R. TOLEDO,

Defendant-Appellant.

APPELLANT'S BRIEF IN CHIEF

**ON THE DEFENDANT'S APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**CAUSE NUMBER CR 11-3075 BB
THE HONORABLE BRUCE D. BLACK, DISTRICT JUDGE
FOR THE DISTRICT OF NEW MEXICO**

ATTACHMENTS IN SCANNED PDF FORMAT

Oral Argument is Requested.

MARC H. ROBERT
Assistant Federal Public Defender
111 Lomas Blvd NW, Suite 501
Albuquerque, New Mexico 87102
(575) 527-6930

May 1, 2013

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PRIOR OR RELATED APPEALS

Appellant certifies, pursuant to 10th Cir. R. 28.2(C)(1), that there are no prior or related appeals.

JURISDICTIONAL STATEMENT

Defendant-appellant Dhanzasikam R. Toledo appeals from the judgment and amended judgments entered by the United States District Court for the District of New Mexico, the Honorable Bruce Black presiding. The district court entered a judgment on February 11, 2013, an amended judgment on the same date, a second amended judgment on February 25, 2013 and a third amended judgment on March 6, 2013. (Volume (“Vol.”) I¹ at 97-101) (Attachment A). The judgment was a final order that disposed of all claims with respect to all parties. Mr. Toledo filed his notice of appeal on February 22, 2013. Vol. I at 95.

The district court had jurisdiction of the cause below pursuant to 18 U.S.C. § 3231. This court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. *See also* Fed. R. App. P. 4(b)(1) (requiring the filing of a notice of appeal within 14 days of the entry of the judgment).

¹ Volume I refers to Volume I of the record of appeal before this court. Volume I consists primarily of pleadings filed in district court.

ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in refusing to instruct the jury on the lesser included offense of involuntary manslaughter when evidence presented at trial fairly raised the issue of self defense, and when the jury could have concluded that Mr. Toledo either over-reacted to the threat posed by the deceased, or brought excessive force to bear in responding to that threat?

2. Did the district court abuse its discretion in refusing to instruct the jury on self defense when evidence presented at trial fairly raised the issue of self defense for the jury's consideration?

STATEMENT OF THE CASE

A grand jury returned a one count indictment in the United States District Court in the District of New Mexico charging Dhanzasikam R. Toledo with second degree murder in violation of 18 U.S.C. § 111. Vol. I at 15. Mr. Toledo entered a not guilty plea and proceeded to trial. Trial Transcript², Volumes 1-3. There was no dispute that Mr. Toledo stabbed the victim, his uncle, Arvin Toledo one time, resulting in Arvin Toledo's death. The government presented its argument that Mr. Toledo had acted with "malice aforethought" during the tragic incident. Mr. Toledo testified,

² The trial transcript, consisting of three volumes which are sequentially paginated, will be referred to herein by the initial "T" followed by the page number (e.g., "T. at 231").

telling the jury that he had reacted to actions by Arvin and that he acted in self defense. Mr. Toledo submitted proposed jury instructions on self defense, and also on the lesser included offense of involuntary manslaughter. Vol. I at 16-25, 50-64. The district court rejected Mr. Toledo's requests, refusing to instruct the jury on those issues. Vol. I at 65-89, T at 489. The district court did instruct the jury on second degree murder and voluntary manslaughter. The jury returned a verdict in which Mr. Toledo was acquitted of second degree murder and convicted of voluntary manslaughter. Vol. I at 88.

Following the jury's verdict, a presentence report was prepared and a sentencing hearing conducted. The guideline sentencing range was determined to be 87 months to 108 months in the custody of the Bureau of Prisons. Mr. Toledo filed a sentencing memorandum seeking a variance. Mr. Toledo was sentenced to 76 months in the custody of the Bureau of Prisons, three years of supervised release, \$391.59 in restitution and a \$100 special penalty assessment. Vol. I at 90-95.

The district court entered a judgment on February 11, 2013. An amended judgment was filed on the same date to reflect that Mr. Toledo was convicted at trial rather than having entered a guilty plea. The district court entered a second amended judgment on February 15, 2013 to change the offense of conviction from second degree murder to voluntary manslaughter. Vol. I at 90-94. A third amended

judgment was filed on March 6, 2013 to correctly reflect the name of the person to whom restitution is owed. Vol. I at 97-101.

Mr. Toledo filed his notice of appeal on February 22, 2013. Vol I at 95.

This appeal followed.

STATEMENT OF FACTS

Trial began on September 24, 2012 before the Honorable Bruce D. Black of the United States District Court, District of New Mexico, in Albuquerque, New Mexico.

Mr. Toledo and Curtis Sanders, the only two living percipient participants of the fateful encounter, testified.³

The incident giving rise to the charges in this case occurred at around 9:00 pm on the evening of November 10, 2011⁴. T. at 383. It was dark, and had been for about two hours. *Id.* Investigator Van Osdell testified that it was “really dark” at the rural scene of the incident. T. at 194. There were no street lights, and very little lighting at all. T. at 195. It was about 35 degrees and wintertime. T. at 215. Mr. Toledo and his stepfather, Curtis Sanders, were outside their home on the Navajo reservation near Ramah, New Mexico. Mr. Toledo had been doing chores and work

³ Mr. Sanders was called by the prosecution. Mr. Toledo testified during the defense presentation.

⁴ The parties stipulated that the incident occurred in Indian Country, that Arvin Toledo was an enrolled member of the Navajo Indian Tribe and that and Dhanzasikam R, Toledo is an enrolled member of the the Navajo Indian Tribe. T. 316.

around the property on that day. T. 99-100. Mr. Toledo and Mr. Sanders were spreading sacramental ashes on the property and their horses. T. 156. They had been asked to do this by Mr. Toledo's mother, Irma Sanders, who feared that something bad might happen. T. 103, 106, 108, 150, 383. They were concerned about the possible presence of "skinwalkers", an evil manifestation in the Navajo cosmology. T. 255. They were confronted at the fence line which defined the boundary of the property occupied by Mr. Toledo's family by Arvin Toledo, Mr. Toledo's uncle and Irma Sanders' brother. Arvin and his family lived on land adjoining the property where Mr. Toledo and his family lived. T. 92-93.

Mr. Sanders testified at trial that Arvin could be, as he put it, a "raging bull" at times. T. 113. Mr. Sanders expressed his opinion that Arvin was "very violent" when he drank. T.149. It was apparent to Mr. Sanders that Arvin was intoxicated⁵. T. 114. Arvin Toledo stood almost six feet tall (T. 338) and weighed 263 pounds⁶. T. 340. At the time, Mr. Toledo stood 5'7" tall and weighed 160 pounds. T. 181.

Mr. Toledo testified that he feared that Arvin Toledo was going to violently attack him at the moment that the incident occurred. T. at 403. Mr. Toledo also

⁵ Arvin Toledo's post-mortem blood alcohol level was 0.123. T. 315. Dhanzasikam Toledo had no alcohol in his blood on November 10, 2011. *Id.*

⁶ Appellant Dhanzasikam Toledo will be referred to herein as "Mr. Toledo". The deceased, Arvin Toledo, will either be referred to as "Arvin" or "Arvin Toledo".

feared Arvin Toledo because Mr. Toledo believed that Arvin had the ability to harm him through Arvin's use of black arts which are a part of Navajo culture and spiritual beliefs. T. 357-62, 367-71. Mr. Toledo feared that Arvin would grab his throat or pull him over the fence. T. at 403.

A conversation quickly deteriorated into an argument, with Arvin hurling racial epithets at Mr. Toledo. T. 117-18, 120. Mr. Toledo's father was African-American, as is Curtis Sanders, Mr. Toledo's step-father. T. 356. Arvin had previously directed racial epithets at Mr. Toledo and Mr. Sanders when he was intoxicated. T. 367.

As things developed, Arvin became "very, very angry". T. 118. Mr. Toledo and Mr. Sanders were on one side of a three-strand barbed wire fence, with Arvin on the other. T. 429. Mr. Sanders described the fence as "like a rubber band". T.123. FBI agent Fortunato testified that officers had examined the fence and found that there were places where the fence was looser than at other places. T. at 219, 247. The fence was about 41 and a half inches high. T. at 221. Mr. Toledo saw Arvin turn away from the fence, and Mr. Toledo also began to take a step to follow his step-father with the intention of walking away. T. 398-99. According to Mr. Sanders, Mr. Toledo said "stop calling us names" as they were all turning away. T. at 123. Mr. Toledo saw Arvin suddenly whirl back in a rapid approach to Mr. Toledo and Mr.

Sanders. T. at 399. Mr. Sanders testified that Arvin “almost runs to where Kam [Mr. Toledo] is” and yells “nigger, nigger, nigger”. T. 120, 123, 147. Arvin and Mr. Toledo were both very close to the fence when Arvin lunged at Mr. Toledo. T. at 147, 162. Mr. Sanders testified that the two had been six inches apart before they began to part and Arvin lunged at Mr. Toledo. T. at 124. Mr. Toledo testified that Arvin had his hands up as he made this sudden move. *Id.*

Mr. Toledo testified that he feared that Arvin was going to grab him or choke him or pull him over the fence. T. 403. Mr. Toledo testified that he believed that Arvin was going to harm him during this encounter. T. 404. Arvin’s hands were raised as he made his sudden movement toward Mr. Toledo. T. 399.

Mr. Toledo testified that he had begun to take one step away from the fence when Arvin Toledo lunged toward the fence. T. at 399. Mr. Sanders had turned away from the fence, but perceived Mr. Toledo raising his left hand as if to push Arvin away from him (T. at 162) and then delivering what Mr. Sanders initially thought was an “overhand right” blow to Arvin. T. at 124, 162. Mr. Toledo, in reaction to this sudden, apparently aggressive motion by Arvin, and fearing a genuine and serious threat by Arvin, reached out with his left hand to fend off Arvin and struck at Arvin with the knife that Mr. Toledo held in his right hand. T. 399. The tip of the knife pierced Arvin’s heart, resulting in his death. T at 332-33. Mr. Toledo did

not intend to kill his uncle; he meant only to “disable him from attacking” Mr. Toledo further. T. 408. He testified that he stabbed his uncle because he tried to attack Mr. Toledo, that Arvin had lunged at him. T. 451. Mr. Toledo testified that he pivoted on the one step away from the fence that he had begun to take and turned. T. at 399. Mr. Toledo raised his left hand to block Arvin’s hands ,which were close to Mr. Toledo’s face. T. at 400.

Mr. Toledo testified that, in retrospect, he could have reacted to his uncle’s lunge in a different way. He said that he realized at the time of the trial that he could have stepped back, away from the fence. T. at 402. However, in the moment that the incident occurred, his instinct was to defend himself. T. at 402. He feared his uncle physically, and also because of the metaphysical powers that he believed that his uncle possessed. T. at 404. After the incident, Mr. Toledo could not believe what had happened, that he had stabbed his uncle. T. at 403. Afterward, he was “scared, and confused”. T. at 444. It was never Mr. Toledo’s intention to kill his uncle. T. at 403, 408.

Mr. Toledo’s mother, Irma Sanders, called 911 and requested help. T. 125. Navajo police arrived at around 9:23 pm that evening. T. 59. Emergency medical technicians were unable to revive Arvin Toledo. T. 66-67. Mr. Toledo told the officer who responded to the call that he had stabbed Arvin Toledo. T. 72. He drew

law enforcement officers a map to show them where the knife which had been used in the incident, which he had hidden, could be found. T. 192.

Mr. Toledo was charged with second degree murder, to which he entered a plea of not guilty. Mr. Toledo submitted requested jury instructions prior to trial. Vol. I at 16-25, 50-62 . The request included a proper form of instruction on the question of self defense. Vol. I at 21, 55. The request also included an instruction on involuntary manslaughter, anticipating the possibility that the jury could find that the facts were insufficient to support a complete acquittal on self defense grounds, but might find that an imperfect self defense supported a conviction for involuntary manslaughter. Vol. I at 24-25, 60-61.

During the charge conference following the close of evidence, the parties argued the inclusion of self defense and involuntary manslaughter instructions to the district court. T. at 465-74. The district court initially indicated that he had heard no evidence supporting the instruction of the jury on these issues. T. at 466. As counsel described the evidence supporting those instructions, it became clear that the district court found the evidence unpersuasive; however, counsel argued that the matter was a question for the jury to decide. T. at 466-67. Counsel described for the district court a previous case in which the trial judge made the choice not to instruct the jury on involuntary manslaughter where self defense became an issue, and the subsequent

conviction was overturned on that ground. T. at 468-69. Counsel described the inextricable relationship between the self defense instruction and the involuntary manslaughter instruction. T. at 467-68. The government argued that there was no evidence to support self defense or involuntary manslaughter. T. at 473-74. The district court recognized that the two issues are intertwined. T. at 469. At one point, it seemed clear that the district court had decided not to include the requested instructions. T. at 470-71. At the end of the day, the district judge indicated that he was “having second thoughts about self-defense, and [was] inclined to include it”, although he indicated that he would still refuse to instruct the jury on involuntary manslaughter. T. at 472-73. However, when advised that the prosecution had the burden to prove beyond a reasonable doubt that Mr. Toledo had not acted in self defense, the district judge indicated that he might change his mind again. T. at 476. The judge indicated that he would add the self defense instruction if he decided that it was appropriate after thinking about it overnight. *Id.*

The following day, before the jury was charged and closing arguments made, the issue was once again joined. T. at 479-89, Attachment B. Counsel argued that the law of this Circuit compelled the inclusion of the requested instructions. The district court once again asserted the absence of supporting evidence “[o]ther than [Mr. Toledo’s] testimony in the courtroom”. T. at 481-82. Returning again to the

assertion that there was no evidence presented at trial supporting the defensive theories of self defense and imperfect self defense (involuntary manslaughter), it was clear that the district court did not credit or account for Mr. Toledo's testimony in deciding whether to instruct the jury on these issues. T. at 483. The fact that Mr. Toledo had other options than to act as he did apparently precluded, in the district court's view, the applicability of the requested instructions. T. at 466-67, 481, 486-87. Ultimately, the court concluded that a self defense instruction was not supported by the evidence and the law, and that because the involuntary manslaughter instruction was intertwined with the self defense instruction, that instruction would also not be given. T. at 489.

SUMMARY OF ARGUMENT

The district court abused its discretion in refusing to instruct the jury on the lesser included offense of involuntary manslaughter, where evidence was presented that Mr. Toledo acted in self defense, and where the jury might have concluded that the evidence of self defense did not support a complete acquittal, but did support the "imperfect self defense" cognizable within the offense of involuntary manslaughter.

The district court further abused its discretion in refusing to instruct the jury on the issue of self defense, where there was evidence presented at trial which fairly bore on the issue of self defense.

ARGUMENT

- 1. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER WHERE EVIDENCE WAS PRESENTED AT TRIAL INDICATING THAT MR. TOLEDO ACTED IN SELF DEFENSE, AND WHERE THE JURY COULD HAVE CONCLUDED THAT MR. TOLEDO ACTED IN SELF DEFENSE BUT IN A RECKLESS OR CRIMINALLY NEGLIGENT MANNER. MR. TOLEDO'S CONVICTION MUST BE REVERSED.**

Standard of Review

“[A] trial court’s decision on whether the evidence justifies a lesser included offense instruction is reviewed for an abuse of discretion”. *United States v. Brown*, 287 F.3d 965, 974 (10th Cir. 2002). However, “this is no broad-ranging discretion but is narrowly focused on whether there is any evidence fairly tending to bear on the lesser included offense.” *Id.*, quoting *United States v. Humphrey*, 208 F.3d 1190, 1206 (10th Cir. 2000) (internal quotation marks and ellipses omitted).

Discussion

“ “[A] defendant is always entitled to an instruction giving his theory of defense if supported by the evidence.”” *Brown*, 287 F.3d at 974 (quoting *United States v. Yazzie*, 188 F.3d 1178, 1185 (10th Cir. 1999); *United States v. Moore*, 10 F.3d 270, 273 (10th Cir. 1997). “In conducting this review, we must give full credence to

defendant's testimony". *Id.* "Moreover, the defendant is entitled to the instruction even if the evidence supporting it is weak and 'depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution on the other points in dispute'". *Id.* (quoting *Humphrey*, 208 F.3d at 1207-08).

The jury in this case could have found that Mr. Toledo committed involuntary manslaughter if it found that he acted with a self defensive mens rea but did so in a criminally negligent manner. *Brown*, 287 F.3d at 975; *Yazzie*, 188 F.3d at 1186; *United States v. Benally*, 146 F.3d 1232, 1237 (10th Cir. 1998); *United States v. Begay*, 833 F.2d 900, 901 (10th Cir. 1987).

This Court has held that four criteria must be satisfied before a defendant is entitled to an instruction on a lesser included offense. *See Brown*, 287 F.3d at 974; *Yazzie*, 188 F.3d at 1185; *Humphrey*, 208 F.3d at 1206. "First, the defendant must make a proper request; second, the lesser included offense must contain some but not all of the elements of the charged offense; third, the elements differentiating the two offenses must be in dispute; and fourth, the evidence must allow the jury to rationally acquit the defendant on the greater charge and convict on the lesser charge." *Brown*, 287 F.3d at 974.

All four criteria are satisfied here. Mr. Toledo made proper requests for instructions on involuntary manslaughter and self defense, satisfying the first criterion. As to the second criterion, it is well established that involuntary manslaughter is a lesser included offense of the charged offense of second degree murder. *Brown*, 287 F. 3d at 974; *Begay*, 833 F.2d at 901. The third criterion, requiring that the element differentiating the charged offense from the lesser included offense be in dispute, is clearly present in the instant case. Mr. Toledo testified that he acted in self defense; the prosecution contended that he acted with malice aforethought. It is presumed that it was the fourth criterion that gave the district court pause.

The district court rejected the requested instructions on the basis that there was no evidence to support them. T. 466. As this Court stated in *Brown*, however, in determining whether a rational jury could convict a defendant of manslaughter and acquit him of second degree murder,

we bear in mind that the [involuntary manslaughter] instruction must be given if there is any evidence to support it, even if that evidence is weak and contradicted, that we must give full credence to Mr. Brown's testimony, and that "there may be some evidence of a lesser offense *even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.*" *Humphrey*, 208 F.3d at 1208 (quoting *Belton v. United States*, 382 F.2d 150, 155

(D.C.Cir.1967), and omitting citations and internal quotations, and adding emphasis).

Brown, 27 F.3d at 975. Any evidence of self defense, then, requires that the district court grant a proper request for a self defense instruction and an instruction on involuntary manslaughter. This is so even if the district court believes, as apparently happened here, that that evidence was insufficiently substantial or credible.

The testimony of Curtis Sanders, Mr. Toledo's step-father, and Mr. Toledo himself, placed evidence of Mr. Toledo's self-defensive intent squarely before the jury. The district court should have instructed the jury on the issues of self defense and involuntary manslaughter. The district court's refusal to do that denied the jury the opportunity to evaluate that evidence in the context of all the available legal options. The jury's verdict shows that the jury rejected the prosecution's theory of the case and convicted Mr. Toledo of the only other option (besides outright acquittal) provided to the jury by the district court.

Here, the district court appears to have rejected the submitted instructions because of a perception that the evidence of self defense, and thus the evidence in support of the lesser included offense of involuntary manslaughter, was not "reasonable". T. at 466. The court and defense counsel engaged in a discussion about the circumstances in which the requested instructions are required. T. at 465-

71. Counsel discussed the possibility that the jury might consider the claim of self defense and accept it, or reject it but find that the imperfect self-defensive reaction by Mr. Toledo might justify a verdict concluding that Mr. Toledo was guilty only of involuntary manslaughter. T. at 476-68. Counsel described another, roughly similar case in which those instructions were not given, resulting in a guilty verdict and a reversal and remand on appeal⁷. In spite of counsel's efforts to avoid that eventuality in Mr. Toledo's case, the district court improperly refused to instruct the jury on the lesser included offense of involuntary manslaughter.

The jury could reasonably have found that Mr. Toledo's actions were genuinely in response to his fear for his safety and motivated by self defense. The jury could have considered that it was dark, that Arvin Toledo had a reputation as a man of violence when drinking, that Arvin was in fact intoxicated when the incident occurred, that Arvin Toledo outweighed Mr. Toledo by around 100 pounds and was substantially taller, that Arvin Toledo was furiously angry, and that even though a fence separated the two, that Arvin could have done grave harm to Mr. Toledo. The jury could have concluded, as defense counsel argued, that Mr. Toledo did not have the time to test the integrity of the three-strand barbed wire fence at that highly

⁷ *United States v. Yazzie*, 188 F.3d 1178 (10th Cir. 1999), in which the undersigned counsel represented Raymond Jones.

fraught moment on a very dark night. The jury could also have concluded that even if Mr. Toledo's actions were insufficient to clear the legal definition of self defense, his actions constituted involuntary manslaughter. The district court's refusal to submit the requested instructions deprived Mr. Toledo of the jury's consideration of those issues. Mr. Toledo's conviction must be reversed and the case remanded for a new trial.

2. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON ISSUE OF SELF DEFENSE, WHEN EVIDENCE WAS PRESENTED TO THE JURY THAT MR. TOLEDO ACTED IN SELF DEFENSE. MR. TOLEDO'S CONVICTION MUST BE REVERSED.

Standard of Review

This Court reviews the district court's refusal to give a requested jury instruction for an abuse of discretion. However, the ultimate standard of review is de novo, to determine whether the instructions as a whole accurately informed the jury concerning the issues presented and the relevant law. *United States v. McPhilomy*, 270 F.3d 1302, 1310 (10th Cir. 2001), *cert. denied*, 535 U.S. 966 (2002); *United States v. Migliaccio*, 34 F.3d 1517, 1523 (10th Cir. 1994); *United States v. Russell*, 109 F.3d 1503, 1513 (10th Cir. 1997).

In reviewing the denial of a jury instruction, ‘we must give full credence to defendant’s testimony.’” *Benally*, 146 F.3d at 1236 (quoting *United States v. Smith*, 63 F.3d 956, 965 (10th Cir.1995)) (other citations omitted).

Discussion

A defendant is entitled to an instruction on his theory of the defense if the instruction is supported by the evidence and the law. *United States v. Wolny*, 133 F.3d 758, 765 (10th Cir. 1995). As discussed above, Mr. Toledo’s theory of the case is that he acted in self defense, and if the jury determined that his perception of the threat posed by Arvin Toledo was unreasonable, or if his reaction to that threat was excessive, that he was guilty of involuntary manslaughter and not second degree murder or voluntary manslaughter. In this sense, the issues of self defense and involuntary manslaughter are inextricably intertwined, as the district court recognized. The jury could not make that decision without knowing the law and limits of self defense, and without knowing that the offense of involuntary manslaughter included the possibility of “imperfect self defense”. Denied those instructions, the jury was not provided with the information and the tools to adequately address Mr. Toledo’s theory of the defense. By refusing to instruct the jury on self defense, the district court usurped the jury’s function to apply the facts presented at trial to the law provided by the court. As a whole, then, the jury

instructions wholly failed to provide the jury with the guidance required to properly evaluate Mr. Toledo's theory of defense. The district court abused its discretion in refusing to instruct the jury on self defense. Mr. Toledo's conviction must be reversed.

CONCLUSION

Evidence was presented which fairly raised Mr. Toledo's self defense explanation for the single stab wound which resulted in the death of his uncle, a death he expressly did not intend. Even if the jury had rejected self defense as a complete defense, the jury could have concluded that Mr. Toledo over-reacted to the perceived threat posed by Arvin Toledo, or that his response to that threat was disproportionate to the magnitude of the threat, and convicted him of the lesser included offense of involuntary manslaughter. The jury rejected the government's theory that the death was the result of second degree murder. The jury convicted Mr. Toledo of the only other option presented by the district court short of outright acquittal.

Under the circumstances presented here, the law plainly required the submission of both the self defense and the involuntary manslaughter jury instruction. The district court abused its discretion by refusing to submit both of those instructions. Mr. Toledo's conviction must be reversed, and the case remanded to the district court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Mr. Toledo respectfully requests oral argument to more fully develop the issues raised and to offer this Court the chance to question counsel so as to clarify the facts and issues raised.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas Blvd. NW, Suite 501
Albuquerque, New Mexico 87102
(505) 346-2489

/s/ Marc H. Robert

MARC H. ROBERT
Assistant Federal Public Defender
NM Bar # 3942
Counsel for Defendant Dhanzasikam Toledo

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Times New Roman, a proportionately spaced font, and includes 4,543 words, excluding items enumerated in Rule 32(a)(7)(B)(iii). I relied on my word processor, Corel WordPerfect, to obtain the count.

/s/ Marc H. Robert

MARC H. ROBERT

CERTIFICATE OF COMPLIANCE WITH DIGITAL REQUIREMENTS

Pursuant to Emergency General Order Filed October 20, 2004, and its revisions, I certify that, with respect to the digital documents on the CD-ROM filed with this document:

- (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the document filed with the Clerk, and

- (2) the digital submissions have been scanned for viruses with Norton Antivirus Corporate Edition, Program Version 12.671.4971, updated April 29, 2013, and, according to the program, are free of viruses.

/s/ Marc H. Robert

MARC H. ROBERT

CERTIFICATE OF SERVICE

I, Marc H. Robert, certify that a true copy of the foregoing was sent by first class mail, postage prepaid, and submitted digitally to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, esubmission@ca10.uscourts.gov, and to Assistant United States Attorney James R.W. Braun, james.braun@usdoj.gov, this 1st day of May 2013.

/s/ Marc H. Robert

MARC H. ROBERT