UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 18-2118

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

JEFFREY ANTONIO,

Defendant/Appellant.

Appeal from the United States District Court
For the District of New Mexico
District Court No. 16-CR-1106 JMC
Hon. James O. Browning, United States District Judge (Trial)
Hon. Joel M. Carson III, United States Circuit Judge (Sentencing)

APPELLEE'S ANSWER BRIEF
ATTACHMENTS IN SCANNED PDF FORMAT

ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

ISSUES PRESENTED FOR REVIEW

Facing federal charges for a death he caused while driving drunk, Defendant-Appellant Jeffrey Antonio moved to dismiss the indictment against him on the grounds that the crime had not occurred in Indian Country. Over Antonio's objection, the district court instructed the jury that the place where the accident was alleged to have occurred was within the territorial jurisdiction of the United States. After the jury convicted Antonio of second-degree murder, the district court memorialized its jurisdictional ruling in a memorandum opinion and order. This appeal presents four issues:

I. Whether the district court properly determined that it had subject matter jurisdiction over this case where the accident occurred within the exterior boundaries of a Spanish land grant to Sandia Pueblo, an area over which Congress confirmed federal criminal jurisdiction in the 2005 Amendments to the Pueblo Lands Act.

II. Whether the district court erred by denying Antonio's motion for judgment of acquittal under Rule 29, when the district court had previously ruled that the situs of the accident was within the territorial jurisdiction of the United States.

III. Whether the district court plainly erred under Rule 12(d) by not issuing an order denying Antonio's motion to dismiss before trial, despite having ruled before trial that the situs of the accident was within the territorial jurisdiction of the United States.

IV. Whether the district court plainly erred in its instructions to the jury to consider the charged offense of second-degree murder before the lesser included offense of involuntary manslaughter.

STATEMENT OF THE CASE AND THE FACTS

I. Factual Background

On the evening of July 31, 2015, Felicia Avery and her older sister, Carolyn Chappell, were returning home to Albuquerque, New Mexico following a day trip to Santa Fe. 5R.383.[1] Avery was driving her 2015 Hyundai Sonata, in which Chappell was a passenger. 5R.384. Because of rain, Avery had exited I-25 and chose instead to take Highway 313, driving through the Town of Bernalillo and from there heading south into Albuquerque. 5R.385-86.

The section of Highway 313 onto which Avery exited runs in a north-south direction, roughly parallel to the Rio Grande, just a few miles north of Albuquerque. 5R.386; 1R.250, 264. Although the land on both sides of Highway 313 is privately held, that private land is surrounded by Sandia Pueblo. 5R.172; 1R.483.

At approximately 6:00 pm, as the two women drove south on Highway 313, Defendant Jeffrey Antonio, an enrolled member of Laguna Pueblo, was driving his gray Ford F-150 pickup truck northbound on that same road. 5R.758; 5R.402; 5R.516-17. Earlier that day, Antonio had gone to the Sandia Casino, where he sat in his car in the parking lot and drank two beers.

[1] Citations to the record in this brief take the following forms. Citations to the Record on Appeal are cited as [Volume]R.[page].

5R.893. After gambling at the casino, Antonio went to the bar and drank at least four more beers and at least three shots of tequila. *Id*. Although he does not remember doing so, Antonio then got in his car and proceeded to drive. *Id.* As he drove north on Highway 313, near the intersection with Wilda Drive, Antonio cut in front of another driver who was also headed north on Highway 313. 5R.396; 5R.399. As he did so, Antonio's vehicle swerved off the right-hand side of the road, and then drifted back across the center and into the southbound lane. 5R.397-98.

This occurred just as Avery and her sister were arriving at the same point on the road. 5R.386. Avery saw Antonio's vehicle swerve onto the right shoulder of the road. *Id*. Before she could take any evasive action, Antonio's vehicle crossed into her lane and collided head-on with her car. 5R.386-87.

Upon impact, Avery recalls looking to the passenger seat and instantly recognizing that her sister was dead. 5R.388. She then immediately passed out. *Id.* The next thing she remembers is being pulled from the car by first responders. *Id*.

Upon arriving at the scene just prior to 7:00 pm, Bernalillo County Sheriff's Deputy Jeffrey Bartram found Antonio in the driver's seat of his vehicle, apparently trapped there. 5R.531. Upon encountering Antonio, Deputy Bartram immediately smelled an odor of alcohol on Antonio and noticed that Antonio's eyes were watery and bloodshot. 5R.532. Bartram also

noticed two unopened beer cans on the floorboard of the vehicle. 5R.533. Bartram asked Antonio whether he had consumed any alcoholic beverages. 5R.534. Antonio denied having done so. *Id.*

Based on his observations, Bartram conducted a horizontal gaze nystagmus test in an effort to determine whether Antonio was under the influence of alcohol. *Id.* The results of this test led Deputy Bartram to believe that Antonio was under the influence. 5R.536-37. Deputy Bartram then obtained a warrant from a state court judge to test Antonio's blood for the presence of alcohol. 5R.538. This test ultimately revealed that, two hours after the accident, Antonio's blood alcohol level was 0.19, more than twice the legal limit. 5R.803.

This fatal accident was hardly Antonio's first documented episode of driving under the influence. Prior to this incident, Antonio had twice been convicted of driving under the influence, once in 2008 and again in 2011. 5R.450-52. As part of his sentences for these convictions, Antonio was required to, and did, attend classes stressing the dangers of driving under the influence. *Id.*; 5R.604; 5R.665-66; 5R.763.

On March 23, 2016, a federal grand jury returned an indictment charging Antonio with one count of second degree murder, in violation of 18 U.S.C. §§ 1111 and 1153, for the death of Carolyn Chappell. 1R.14. Federal jurisdiction was premised on the allegation that Antonio was a member of a

federally recognized Indian tribe and that the accident occurred in Indian Country. *Id.*

II. Pre-Trial Proceedings

After several continuances and other pre-trial proceedings not relevant to this appeal, the district court set trial of this matter to begin on April 17, 2017. 1R.5. Prior to trial, the United States filed a motion *in limine* seeking a legal ruling from the district court that the location at which the accident occurred was Indian Country. 5R.55. At a pre-trial hearing on April 3, 2017, Antonio informed the district court of his own ongoing investigation into the question of land status. Antonio explained that

> I want to let the Court and the Government know that we're doing this. Because I don't think it would be fair to anybody if we just raised this as a Rule 29 motion at trial. . . . If we come up with information that suggests we have an issue on jurisdiction, I'm going to let the Court know, so you can make the decision before trial.

5R.56.

At the same April 3 hearing, the Government presented testimony from Earl Ortiz, a land surveyor with the Bureau of Indian Affairs, on the legal question of land status. 5R.63. Although Antonio reserved his cross-examination of Mr. Ortiz, at the conclusion of the testimony the district court noted that it would be "inclined to find" that the situs of the alleged accident was Indian Country. 5R.66.

One week later — a week before the start of trial — Antonio filed a motion to dismiss the indictment for lack of subject matter jurisdiction pursuant to Federal Rule of Criminal Procedure 12(b)(2). 1R.195. Antonio argued that the district court lacked subject matter jurisdiction over the offense because, as a matter of law, the land on which the accident was alleged to have occurred was not within Indian Country. 1R.197. Specifically, Antonio argued that the situs of the accident was not Indian Country because it was privately owned land. 1R.199.

At a hearing the following day, Antonio presented testimony from Doug Stretch, a mapping supervisor at the Middle Rio Grande Conservancy District ("MRGCD"). 5R.137. Following this testimony and legal argument, the district court noted that it remained "inclined to deny the motion" but stated its desire to "do a little bit more work on this." 5R.213.

The district court and the parties revisited the land status issue at a motions hearing on April 12, 2017. At that time, the Government objected to certain exhibits listed by Antonio, which were intended to show that the situs of the accident was not Indian Country. 5R.318. In response to this objection, the district court stated

> Right at the moment, I'm inclined to put it in the instruction that it is within Indian Country. And with that, since I'm making a determination pretrial, I'm putting it in the jury instructions and instructing, then[,] those exhibits will not be

> allowed for the purpose of contesting that this is Indian Country.

Id.

The United States filed a written response to the motion on April 14, 2017. 1R.257. In this response, the United States' principal argument rested on 18 U.S.C. § 1151, which provides a statutory definition of Indian Country, to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a); 1R.258. The United States argued that the accident site is surrounded by lands owned by Sandia Pueblo, such that the accident occurred within the exterior boundaries of the Sandia Pueblo, and therefore in Indian Country as that term is defined in 18 U.S.C. §1151(a). 1R.261.

III. Trial Proceedings

Trial began on April 17, 2017. 5R.346. During a conference with counsel to discuss proposed jury instructions on April 18, Antonio objected to Proposed Instruction No. 12, which reflected this ruling, and advised the jury that, as a matter of law, the situs of the accident was within the territorial jurisdiction of the United States. 1R.323; 5R.736. In response to Antonio's objection, the district court noted that it was "working on that opinion to try to make sure I'm comfortable with the ruling I gave." 5R.736. The district

court again affirmed its ruling on the land status issue, acknowledging that Antonio objected "to the Court finding it" but explaining that it was going to include that finding in one jury instruction or another. 5R.737. Antonio recognized the district court's decision. 5R.738 ("I understand the Court is going to rule that it is within Indian Country. We respectfully disagree. And to that extent, we object to the instruction that includes the consequence of that decision.").

At the close of the Government's case on April 19, Antonio moved for a judgment of acquittal under Rule 29. 5R.882. Antonio argued that there had been "insufficient proof that the site of the accident actually occurred within Indian Country." *Id.* Antonio acknowledged that "[t]he Court's made a decision, about which you'll write, and we'll address it down the line." *Id.* Denying the motion, the district court explained that it was "still working on the jurisdiction. That was an issue that kind of popped up right toward the end here, and materials were still being submitted as of Monday. So I'll continue to work on that." 5R.885. But in so doing, the district court reaffirmed its earlier decision, noting that "I'm going to tell the jury that the land is Indian Country, so that . . . they will make their decision based upon my instruction that the Court has jurisdiction." 5R.886.

Antonio proceeded to present his case. At the close of evidence, Antonio renewed his motion for judgment of acquittal, which the district court denied. 5R.900.

The district court proceeded to instruct the jury in accordance with its earlier ruling on jurisdiction: "You are instructed that the alleged murder occurred within the territorial jurisdiction of the United States, if you find beyond a reasonable doubt that such offense occurred at the intersection of Highway 313 and Wilda Drive, in Bernalillo County, in the District of New Mexico." 1R.434. The district court also gave an instruction concerning the lesser included offense of involuntary manslaughter, to which Antonio raised no objection. 1R.437-38.

The matter was submitted to the jury on April 19, 2017. Later that day, the jury returned a verdict finding Antonio guilty of second degree murder. 1R.477.

On June 5, 2017, the district court issued a 56-page Memorandum Opinion and Order denying Antonio's Motion to Dismiss for Lack of Subject Matter Jurisdiction. 1R.478. In the opinion, described more fully below, the district court concluded that it had jurisdiction because the site of the accident was within the exterior boundaries of the Spanish land grant to Sandia Pueblo. Congress provided for federal criminal jurisdiction of such

areas in the 2005 Amendments to the Pueblo Lands Act, Pub. L. No. 109–133, 119 Stat. 2573 (2005) (Att. 1).[2]

At a sentencing hearing on June 20, 2018, the Honorable Joel M. Carson, III, United States Circuit Judge, sentenced Antonio to a term of imprisonment of 240 months.[3] 5R.1008. Judge Carson entered a judgment reflecting this sentence on August 1, 2018. Supp.R.3-9. Antonio timely filed a notice of appeal in the district court on August 13, 2018. Supp.R.1-2. This appeal followed.

SUMMARY OF THE ARGUMENT

1. The district court correctly ruled that it had subject matter jurisdiction over this case. The 2005 Amendments to the Pueblo Lands Act provide for federal criminal jurisdiction "over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress . . ." 119 Stat. 2573. Antonio concedes that the collision at issue took place within the exterior boundaries of the 1748 grant

[2] The 2005 Amendments were passed as a note to 25 U.S.C. § 331, a section of code that was repealed in 2000. For purposes of clarity, that provision is cited herein as 119 Stat. 2573.

[3] This case was originally assigned to the Honorable James O. Browning, United States District Judge. Judge Browning conducted all pre-trial proceedings in this matter, and presided over trial. This case was reassigned to Judge Carson for purposes of sentencing only, and as such, Judge Carson entered judgment in this matter.

by the King of Spain to the Pueblo of Sandia. In 1858, Congress confirmed the boundaries of Sandia Pueblo as set forth in the original 1748 grant. Under the Pueblo Lands Act, the fact that title to certain lands within those boundaries later came to be held privately by non-Indians does not remove federal criminal jurisdiction over those lands. Accepting Antonio's argument that federal jurisdiction does not exist over such parcels would create lawless enclaves within the boundaries of the Spanish land grants, the very outcome the 2005 Amendments were designed to avoid.

2. The district court properly denied Antonio's motion for judgment of acquittal. Prior to trial, the district court ruled that the collision occurred in Indian Country. The district court's instructions to the jury reflected this jurisdictional ruling. The instruction provided a sufficient factual and legal basis on which a reasonable jury could find Antonio guilty of the charged offense. The fact that the district court did not issue a formal opinion on the jurisdictional question until after trial is of no moment.

3. The district court did not plainly err under Rule 12(d) by issuing its written opinion on Antonio's motion to dismiss after the trial. The district court made a proper ruling on this motion before trial, and even if it did not, Antonio cannot show that such oversight disturbed the outcome of proceedings in the district court and thereby affected his substantial rights. Had the district court, after trial, decided in favor of Antonio on the

jurisdictional question, it would have been well within its rights to enter a judgment of acquittal at that time. That it did not do so dispels any suggestion of prejudice to Antonio.

4. Nor did the district court plainly err in its instructions to the jury. Antonio requested, and the district court gave, an instruction on the lesser included offense of involuntary manslaughter, which reflected Antonio's theory of defense. The district court read the instruction to the jury, and Antonio highlighted this instruction in his closing argument. Moreover, this Court has expressly approved of jury instructions requiring the jury to decide the greater offense before deliberating on the lesser included.

ARGUMENT

I. The District Court Did Not Err in Denying Antonio's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Antonio argues that the district court erroneously concluded that it had subject matter jurisdiction over the crime. Federal jurisdiction existed, however, because the accident site was within the boundaries of the original Spanish land grant, boundaries that were confirmed by Congress, and no other act of Congress exempted that land from federal criminal jurisdiction over crimes by or against an Indian.

A. Standard of Review

This Court reviews de novo a district court's decision and legal conclusion concerning its exercise of subject matter jurisdiction. *Price v.*

Wolford, 608 F.3d 698, 702 (10th Cir. 2010). Any facts found by the district court in support of such decision, however, are reviewed only for clear error. *Id*. ("In general, our review of a question of subject-matter jurisdiction is de novo, although we review for clear error any district-court findings of fact relevant to the question.").

B. The District Court Opinion

On June 5, 2017, after return of the jury's verdict, the district court entered a Memorandum Opinion and Order explaining its reasoning behind its denial of the motion to dismiss. 1R.478.

It its Memorandum Opinion and Order, the district court found that the collision occurred at the intersection of Highway 313 and Wilda Drive in Bernalillo, New Mexico. 1R.481. This location lies within a larger parcel of land that was granted to Sandia Pueblo in 1748 under authority of the King of Spain (the "Sandia Pueblo Grant"). *Id*. As originally bestowed under authority of the Spanish crown, the Sandia Pueblo Grant was bounded by the Rio Grande on the west, and the Sandia Mountains on the east. *Id*.

In 1858, to discharge its obligations under the Treaty of Guadalupe-Hidalgo, Congress passed an Act confirming the boundaries of the Pueblo of Sandia as set forth in the original 1748 Sandia Pueblo Grant. *See* 11 Stat. 374, 374 (1859); 1R.525 ("In the Act of December 22, 1858, Congress confirmed the 1748 Spanish grant to the Sandia Pueblo, which w[as]

memorialized in documents provided to Congress by the Secretary of the Interior."); 96 Interior Dec. 331, 1988 WL 410394 (Dep't of Interior, Dec. 9, 1988) ("Pursuant to the direction of Congress, the Surveyor-General appears to have accepted Spanish documents relevant to the claim of the Pueblo of Sandia and transmitted these . . . to the Commissioner.").

Thereafter, in 1924, Congress passed the Pueblo Lands Act, 43 Stat. 636 (1924) (the "1924 PLA"). *See* 1R.512-13. The 1924 PLA was intended to quiet title to certain lands within the exterior boundaries of the various Pueblos that were subject to competing claims by the Pueblos and non-Indians. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 243-44 (1985) (discussing history of 1924 PLA); *United States v. Arrieta*, 436 F.3d 1246, 1249-50 (10th Cir. 2006) (same). To that end, the 1924 PLA set forth a process by which title to such disputed lands would be quieted, either in favor of the Pueblo or non-Indian claimants. *Mountain States Tel. & Tel. Co.*, 472 U.S. at 244-45.

In 1933 and 1934, through the process set forth in the 1924 PLA, a portion of the Sandia Pueblo Grant known as Private Claim (P.C.) 364, which included the situs of the accident, came into private ownership. 1R.481. This

transfer of ownership occurred through issuance of two land patents by the United States Government to an individual named Pedro C. Garcia. *Id.*[4]

On the basis of these facts, the district court concluded that it had subject matter jurisdiction over the case. In reaching this conclusion, the district court found that the United States' reliance on 18 U.S.C. § 1151(a) was misplaced because Sandia Pueblo is not a "reservation" within the meaning of that statute.[5] 1R.526-28. Instead, the district court's conclusion rested on its reading of the 2005 Amendments to the Pueblo Lands Act, Pub. L. No. 109–133, 119 Stat. 2573 (2005) (the "2005 PLA"), which neither party had raised.[6] The 2005 PLA provides, in pertinent part, that "[e]xcept as otherwise provided by Congress, jurisdiction over offenses committed

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[4] The district court also found that several years earlier, in 1930, Garcia had transferred a fee simple interest in a parcel of land within the exterior boundaries of the Sandia Pueblo Grant to the MRGCD. 1R.482 at ¶ 7. The Rio Grande formed the western boundary of this parcel of land. *Id.* at 5, ¶9. This fact, however, is irrelevant to the district court's resolution of the jurisdictional question.

[5] The district court recognized that land held by the Pueblos generally qualifies as "Indian country" under § 1151(b)'s option for "dependent Indian communities," 1R.513, but it did not undertake an analysis under that subsection because the parcel in question was not owned by Sandia Pueblo.

[6] Although Antonio did not raise below any arguments regarding the Pueblo Lands Act, this Court may nevertheless consider his arguments on appeal. *See United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003) ("[W]hen the district court sua sponte raises and explicitly resolves an issue of law on the merits, the appellant may challenge that ruling on appeal on the ground addressed by the district court even if he failed to raise the issue in district court.").

anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section." 119 Stat. 2573. That section proceeds to explain that "[t]he United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code . . . committed by or against an Indian…" *Id*. Thus, according to the district court "the jurisdictional inquiry is whether the collision site is located anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian Tribe of New Mexico." 1R.521.

The district court answered this inquiry in the affirmative. The district court first reviewed the terms of the 1748 Sandia Pueblo Grant and concluded that the location of the accident fell within the exterior boundaries of such grant. 1R.522-24.

The district court then turned to the question of whether such boundaries had been "confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian Tribe of New Mexico." 119 Stat. 2573. The district court explained that in 1854, Congress created the office of Surveyor General of New Mexico. 1R.524. Congress tasked that office with surveying the land claims of the Pueblos in New Mexico and with "mak[ing] a report in regard to all pueblos existing in the Territory, showing the extent and locality of each .

. . which report shall be laid before Congress . . . with a view to confirm bona fide grants . . .” *Id.* (citing 10 Stat. 308 at 309).

Upon receipt of the resulting report in 1858, Congress passed an Act “confirm[ing] the Land Claim of Certain Pueblos . . . in the Territory of New Mexico. 11 Stat. 374 (1859). Among the claims confirmed in this Act were those of the Pueblo of Sandia. *Id.*; 1R.524-25. On this basis, the district court concluded that the boundaries of the original Sandia Pueblo Grant had been confirmed by Congress and that the district court therefore had jurisdiction over this matter under the 2005 PLA.

Having concluded that federal criminal jurisdiction attached because the accident site was within the exterior boundaries of the original Spanish land grant, the district court turned back to the question briefed by the parties—whether the accident was within Indian Country as that term is defined in 18 U.S.C. § 1151(a). 1R.527. Although the district court’s conclusion that Sandia Pueblo was not a “reservation” under § 1151(a) rendered it irrelevant whether the accident had occurred within the Pueblo’s present-day exterior boundaries, the court nevertheless addressed the issue “out of respect for the parties.” 1R.528. On this point, the district court found that the land on which the collision occurred was in fact surrounded by land owned by Sandia Pueblo. The district court therefore concluded that “the collision site is located within Sandia Pueblo’s exterior boundaries.” 1R.529.

On appeal Antonio raises two arguments as to why the district court's ruling under the 2005 PLA was error, and he also attacks the court's conclusion regarding the present-day exterior boundaries of the Sandia Pueblo. Because the court's conclusion was correct under the 2005 PLA, the United States addresses only his two arguments regarding the 2005 PLA.

C. An 1858 Act of Congress Confirmed the Boundaries of the Original 1748 Sandia Pueblo Grant.

First, Antonio concedes that the accident occurred within the exterior boundaries of a grant from a prior sovereign. Op. Br. at 28-29; 31. But, Antonio argues, those boundaries were not "confirmed by Congress" as required for the exercise of jurisdiction under the 2005 PLA, 119 Stat. 2573. *See* Op. Br. at 29. He suggests that because a non-Indian claim to P.C. 364 could have arisen before the 1858 confirmation, Op. Br. at 28, Congress might have "confirmed" boundaries narrower than the original Spanish land grant, which extended to the Rio Grande on the west.

Antonio's argument is belied by the historical record that the district court relied upon. The 1858 Act confirmed the land claim of the Pueblo of Sandia "reported on favorably by the said surveyor-general, on the thirtieth of November, eighteen hundred and fifty-six." 11 Stat. 374. That November 30, 1856 report of the surveyor general, which was transmitted to Congress and recorded as H.R. Exec. Doc. No. 36 (34th Cong.), described the western

boundary of the Pueblo as the "Del Norte river." *See* Att. 2 at 10. Congress therefore specifically confirmed the Rio Grande as the western boundary of Sandia Pueblo and did not exempt any parcels from that confirmation.

Further, if Congress had accepted a determination in 1858 that the land later known as P.C. 364 was privately held by a non-Indian and should not be "confirmed" as a Sandia Pueblo claim, then there would have been no need in 1933 and 1934 for that land to be put through the quiet-title procedure provided in the 1924 PLA.

The provision from the 1858 confirmation statute about adverse rights does not support Antonio's position. Antonio points to language providing that "this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist." 11 Stat. 374, 374 (1859); from which Antonio argues that Congress "did not confirm the exterior boundaries of Sandia Pueblo with respect to lands claimed by third parties." Op. Br. at 29.

The central flaw in this argument is that it fails to distinguish between fact of confirmation on the one hand and effect and construction of that confirmation on the other. By its plain terms, the 1858 statute confirmed the boundaries of Sandia Pueblo as originally granted through the 1748 Sandia Pueblo Grant. *See* 11 Stat. 374, 374 (1859) (providing that the boundaries of Sandia Pueblo, as reported by the surveyor general "are hereby, confirmed").

The qualifying proviso at the end of that statute does not exempt any lands from such confirmation. Rather, that proviso serves only to limit the legal effect of such confirmation insofar as it does not "affect any adverse valid rights, should any exist." *Id*. Indeed, because this clause makes clear that confirmation has no effect on any adverse rights, there would have been no reason to exclude any disputed parcels from the confirmation. This language therefore supports the district court's conclusion that the 1858 Act confirmed the original boundaries of the Spanish grant. Indeed, the plain language of the proviso addresses how the confirmation is to be "construed" with respect to such claims, not whether such lands are subject to the confirmation in the first instance. *Id*. Had Congress intended to exempt from the confirmation any lands subject to valid adverse rights, it was surely capable of doing so.

D. The 1924 PLA Did Not Extinguish Federal Jurisdiction Over P.C. 364, and the 2005 PLA Was Expressly Intended to Ensure Such Jurisdiction.

As a second assignment of error to the district court, Antonio argues that even if the 1858 Act of Congress effectively confirmed the original boundaries of the 1748 Sandia Pueblo Grant, federal jurisdiction over P.C. 364 was extinguished when the United States quieted title in favor of Pedro Garcia in 1933 and 1934 pursuant to the 1924 PLA. *See* Op. Br. at 34. ("The 1924 Pueblo Lands Act unambiguously removed the Garcia tract from the exterior boundary of the land set aside for Sandia Pueblo and thereby

removed it from federal control."). In providing for federal criminal jurisdiction in the 2005 PLA, Congress qualified its jurisdictional grant with the phrase "except as otherwise provided by Congress." 119 Stat. 2573. According to Antonio, this phrase was intended to exclude from the grant of federal jurisdiction those lands formerly belonging to the Pueblos that were transferred to private ownership pursuant to the 1924 PLA, including P.C. 364. Op. Br. at 33-34.

This argument is without merit. The phrase "except as otherwise provided by Congress" in the 2005 PLA does not operate to exclude privately held lands, such as P.C. 364, from its assignment of federal criminal jurisdiction. First, because the 1924 PLA contains no mention of P.C. 364, or the termination of federal jurisdiction, the 1924 PLA cannot be read to evince a congressional intent to extinguish federal jurisdiction over this land. Rather, the 1924 PLA addresses the limited issue of quieting title to lands lying within the exterior boundaries of Pueblo lands.

In a related vein, the 2005 PLA's use of the phrase "except as otherwise provided *by Congress*" makes clear that an act of the Pueblo Lands Board or, indeed, any individual or body other than Congress, cannot form the basis for a proper exception. 119 Stat. 2573 (emphasis added). "It is a general rule of statutory construction that if a statute specifies exceptions to its general application, other exceptions not explicitly mentioned are excluded." *St.*

Charles Inv. Co. v. Comm'r, 232 F.3d 773, 776 (10th Cir. 2000). By way of example, in *St. Charles*, this Court noted that the phrase "except as otherwise provided in this subtitle" precluded a party's reliance on an exception "not specifically appearing in the subtitle." *Id.* (quoting *O'Gilvie v. United States*, 66 F.3d 1550, 1555 (10th Cir. 1995)).

Contrary to Antonio's argument, the 1924 PLA did not extinguish Pueblo title to P.C. 364. As noted above, the 1924 PLA never mentions P.C. 364 or Pedro Garcia. Rather, the 1924 PLA merely established a Pueblo Lands Board to "investigate, determine and report" the ownership status of lands lying within the exterior boundaries of the Pueblo. 43 Stat. 636. And it was the Executive, not Congress, that subsequently issued the land patents quieting title to P.C. 364 in favor of Pedro Garcia. 1R.205. Under the rule of statutory construction described in *St. Charles*, Antonio cannot rely on an act of the Executive or the Pueblo Lands Board as creating an exception to the general grant of federal criminal jurisdiction in the 2005 PLA.

The cases Antonio cites in support of his position, *Hackford v. Utah*, 845 F.3d 1325 (10th Cir. 2017) and *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013), are inapposite. These are fact-bound decisions addressing the question of whether particular land retained its Indian Country status. Neither case speaks to the 1924 PLA, or to a Pueblo, as opposed to a reservation or an Indian allotment. Moreover, even if the 1924 PLA could be

read as divesting particular tracts of their Indian Country status, the 2005 Amendments to the PLA were intended to change that status, and establish federal jurisdiction over the totality of lands within the original exterior boundaries of a Pueblo.

Perhaps more importantly, Antonio's argument asks this Court to create the exact problem that the 2005 Amendments to the Pueblo Lands Act were intended to prevent. The legislative history underlying the 2005 PLA reveals that the provision for extending criminal jurisdiction "to the exterior boundaries of the grant from a prior sovereign" was motivated by Congressional concerns about potential gaps in criminal jurisdiction. Specifically, Congress was concerned that questions about federal jurisdiction over certain Pueblo lands would create lawless enclaves, over which neither state nor federal government could exercise criminal jurisdiction. 119 Stat. 2573.

The Senate committee report discussing the 2005 Amendments to the PLA explains that they were motivated by concerns over "the potential for a void in criminal jurisdiction on Pueblo lands" that resulted from a federal district court decision in the District of New Mexico. S. Rep. No. 108-406 (2004); *see* 1R.515 (district court opinion discussing legislative history of 2005 Amendments). That decision, issued by the United States District Court for the District of New Mexico in *United States v. Gutierrez*, No. Cr. 00-M-375

LH, involved jurisdictional facts similar to those here. In *Gutierrez*, an offense occurred on privately held land which, prior to the 1924 PLA, had been owned by the Pueblo of Santa Clara. On a motion to dismiss for lack of subject matter jurisdiction, defendant argued that because the land in question was privately held, it could not be Indian Country under the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The district court agreed, finding that

> [w]hile the land in question may at one time have been Indian Country, the [1924 PLA] clearly and intentionally quieted title to the land in question against the Pueblo of Santa Clara. Consequently, the land in question no longer satisfies the federal set-aside requirement necessary for a finding of 'Indian Country' and this Court cannot exercise subject matter jurisdiction.

Att. 3 at 1.

Concerned that this interpretation of the law would result in a jurisdictional gap, Congress amended the PLA to clarify the fact of federal criminal jurisdiction over the full extent of Pueblo lands as they existed prior to any divestment occasioned by the 1924 PLA. Thus, while the 2005 Amendments to the PLA were intended to ensure that no gaps existed in criminal jurisdiction, Antonio's argument asks the Court to create exactly such a gap. The State of New Mexico has already determined that it does not have criminal jurisdiction over lands like that on which the collision occurred. *See State v. Romero*, 142 P.3d 887, 896 (N.M. 2006) (holding that federal

government retains criminal jurisdiction over Indian defendants on all lands within original exterior boundaries of Pueblo grants, including lands now privately held). Thus, if accepted, Antonio's argument would create a category of land over which neither state nor federal government may exercise criminal jurisdiction. This is precisely the scenario that the 2005 Amendments to the PLA were intended to avoid. This Court should not interpret a statute in a manner that thwarts clearly expressed Congressional intent. *United States v. White*, 782 F.3d 1118, 1132 (10th Cir. 2015) ("[W]hen interpreting a statute, we attempt to give effect to Congressional intent.").

II. The District Court Properly Denied Antonio's Motion for Judgment of Aquittal.

In addition to his challenge to federal subject matter jurisdiction, Antonio complains on appeal about the timing of the district court's ruling on that matter. At the close of the Government's case in chief, and again at the close of all evidence, Antonio moved the district court for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. 5R.882; 5R.900. The district court denied this motion. 5R.885; 5R.900. On appeal, Antonio contends that this decision was error. Antonio argues that, at the time of the jury's verdict, the district court "had not ruled that the land at issue in this case had Indian status" and that accordingly "there was insufficient proof to establish the third element of second degree murder." Op. Br. at 24. A review

of the pre-trial and trial transcripts, however, reveals that the district court *had* issued a ruling, prior to the close of the Government's case, finding that federal jurisdiction existed over the situs of the alleged accident. And further, even if the district court had not resolved the question until it instructed the jury, that instruction itself provided the jury with a sufficient basis on which to conclude that the United States had carried its jurisdictional burden.

A. Standard of Review

This Court reviews *de novo* a district court's decision denying a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. *United States v. Wells*, 843 F.3d 1251, 1253 (10th Cir. 2016). In so doing, this Court "view[s] the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government." *Id.* Reversal is appropriate only "if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Rodebaugh*, 798 F.3d 1281, 1296 (10th Cir. 2015).

B. The District Court Ruled on the Jurisdictional Issue Prior to the Close of the Government's Case, and the Instruction Was Sufficient to Support a Conviction.

To meet its burden of proof on the charge of second degree murder, the Government was required to prove beyond a reasonable doubt, *inter alia*, that the offense occurred within the territorial jurisdiction of the United States. 1R.434. This Court has recognized that this element has both factual and

legal components. The factual component is whether the crime occurred at the location alleged by the Government. The legal question is whether that location is within the territorial jurisdiction of the United States. *See United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999). In *Roberts*, this Court recognized that while the factual question is reserved to the jury, the legal question is properly resolved by the district court as a matter of law. "[T]he trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site." *Id.*

Here, in accordance with *Roberts*, the district court properly issued a legal ruling on the jurisdictional question of land status prior to the return of the jury's verdict. This ruling is reflected in both the trial and pre-trial proceedings:

- "[S]ince I'm making a determination pretrial, I'm putting it in the jury instructions and instructing, then[,] those exhibits will not be allowed for the purpose of contesting that this is Indian Country." 5R.318.
- "I know you have your objection to the Court finding it, but understanding that I'm going to find it [in one numbered instruction] or another." 5R.737.

Of similar importance, at several points during both pre-trial and trial proceedings, Antonio recognized that the district court had properly ruled on

the land status issue prior to the close of the Government's case, as demonstrated by the following statements from Antonio's counsel:

- "I understand the Court is going to rule that it is within Indian Country. We respectfully disagree. And to that extent, we object to the instruction that includes the consequence of that decision." 5R.738;
- "There has been insufficient proof that the site of the accident actually occurred within Indian Country. That issue has been factually developed. *The Court's made a decision*, about which you'll write, and we'll address it down the line." 5R.882 (emphasis added).

But even if the district court had not decided the jurisdictional issue before instructing the jury, the jury instruction itself was a definitive resolution of that issue. The district court instructed the jury that, as a matter of law, the collision occurred in the territorial jurisdiction of the United States if it found beyond a reasonable doubt that the collision occurred at the intersection of Highway 313 and Wilda Dr. 1R.434. It is therefore clear that any "rational trier of fact" could have found that element beyond a reasonable doubt. *Rodebaugh*, 798 F.3d at 1296.

On appeal, Antonio seeks to sow confusion by pointing to the district court's issuance of a written opinion on June 5, 2017, after the trial was completed. Antonio suggests that the district court's issuance of a formal opinion after trial means that the land status issue had not been decided earlier. *See* Op. Br. at 24. But the fact that, after trial, the district court

issued a written opinion explaining and memorializing its ruling is irrelevant to the timing of the actual ruling. *Cf. Sierra Applied Scis. Inc. v. Adv. Energy Indus.*, 363 F.3d 1361, 1370, n.1 (Fed. Cir. 2004) ("It is not unusual for a district court to issue an opinion after orally informing the parties of a ruling; the opinion provides a more formal and thorough explanation of the earlier oral ruling."). The district court's instruction to the jury that the intersection of Highway 313 and Wilda Dr. was under federal territorial jurisdiction was sufficient to support the jury's verdict.

III. The District Court Did Not Violate Rule 12(d), and Any Violation of That Rule Does Not Amount to Plain Error.

Antonio argues that the district court violated Rule 12(d) by failing to rule on his Motion to Dismiss for Lack of Subject Matter Jurisdiction prior to trial without good cause to defer such ruling. Op. Br. at 25-26. But the district court did resolve the substance of Antonio's issue before trial, and further, Antonio cannot show that any technical violation of Rule 12(d) meets the plain-error standard.

A. Standard of Review

This Court ordinarily reviews de novo the district court's compliance with the Rules of Criminal Procedure. *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006). In this case, however, Antonio failed to preserve this argument for appellate review, as he raised no objection to the

alleged violation of Rule 12(d) in the district court. Antonio never suggested to the district court that it had not properly ruled on his motion to dismiss prior to trial. *See United States v. Tena-Arana*, 738 F. App'x 954, 960 (10th Cir. 2018) ("[C]ontemporaneous objection to procedural errors is required to adequately preserve a procedural challenge for appeal."); *United States v. Winder*, 557 F.3d 1129, 1136 (10th Cir. 2009) ("[A]n objection must be definite enough to indicate to the district court the precise ground for a party's complaint. . . . Absent a specific objection, the district court is deprived of the opportunity to correct its action in the first instance.").

Accordingly, this argument may be reviewed only for plain error. *United States v. Lacy*, 904 F.3d 889, 893 (10th Cir. 2018) ("Because Defendant did not raise this argument below, we review it only for plain error."). Under a plain error standard of review, this Court will grant relief only when "(1) an error occurred; (2) the error is plain or obvious; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

B. The District Court's Treatment of the Motion to Dismiss Was Not Plain Error.

In pertinent part, Rule 12(d) provides that "[t]he court must decide every pretrial motion before trial unless it finds good cause to defer a ruling." Fed. R. Crim. P. 12(d).

As discussed above, the district court did make a legal ruling, prior to trial, that the situs of the alleged accident is within the territorial jurisdiction of the United States. *See supra* at 26-28. This ruling determined the jurisdictional question raised by Antonio's motion to dismiss and operated as a denial of his motion. Accordingly, there was no violation of Rule 12(d) and no error, plain or otherwise.[7]

Even if the district court had not resolved Antonio's motion to dismiss before trial, any resulting violation of Rule 12(d) did not affect Antonio's substantial rights. To establish that an error affected substantial rights, a defendant must show "that the error disturbed 'the outcome of the district court proceedings.'" *United States v. Taylor*, 413 F.3d 1146, 1154 (10th Cir. 2005) (quoting *United States v. Cotton*, 535 U.S. 625, 632 (2002)); *see United States v. Olano*, 507 U.S. 725, 734 (1993) (noting that to affect substantial rights "the error must have been prejudicial: It must have affected the outcome of the district court proceedings."); *see also United States v. Sing*, 736 F. App'x 184 (9th Cir. 2018) (finding that "any error under Rule 12(d)

[7] The district court also articulated grounds establishing good cause for any delay in issuing its jurisdictional ruling. As the district court noted during a pretrial conference "[t]hat was an issue that kind of popped up right toward the end here, and materials were still being submitted as of Monday." 5R.885. Courts have recognized that the filing of such motions shortly before trial may constitute "good cause" under Rule 12(d). *See United States v. Hardison*, 859 F.3d 585, 589 (8th Cir. 2017).

would have been harmless" because defendant failed to show that his "trial strategy was materially impaired").

Here, Antonio fails to demonstrate how the alleged violation of Rule 12(d) affected the outcome of his trial. Antonio offers no reason to believe that, if forced to issue a more complete statement of its decision prior to trial, the district court would have changed course and granted Antonio's motion to dismiss. And if, in drafting its Memorandum Opinion and Order after trial, the district court had become convinced of the correctness of Antonio's position on the jurisdictional issue, it could have entered a judgment of acquittal at that time. C*f. United States v. Vilar*, 530 F. Supp. 2d 616, 643 (S.D.N.Y. 2008) (holding that Rule 12(d) did not require a pretrial ruling because if "the Court issued a post-trial suppression order, [it] would either order a new trial . . . or enter a judgment of acquittal based on the insufficiency of the evidence").[8]

Nor can Antonio show that any alleged error by the district court seriously affects the fairness, integrity, or public reputation of judicial

[8] Antonio's suggestion of a "lack of impartiality" on the part of the district court finds no basis in the record. Op. Br. at 26. The district court's ruling, as expressed in its Memorandum Opinion and Order, is consistent with its pre-trial rulings, and there is no reason to believe that the district court reached this conclusion in an effort "to uphold the jury's verdict." *Id.*

proceedings. This Court should, therefore, reject Antonio's allegation that the district court committed reversible error by violating Rule 12(d).

IV. The District Court Did Not Plainly Err in Its Instructions to the Jury.

Antonio contends for the first time on appeal that the district court deprived him of his theory of defense by instructing the jury that it was to consider the lesser offense of involuntary manslaughter only if it found him not guilty of second degree murder, or was unable to reach a verdict on that charge. Op. Br. at 46. But because the instructions as a whole did inform the jury of Antonio's theory of defense, and because this Court has previously approved the sequence used here, Antonio cannot establish any error, much less a plain one.

A. Standard of Review

This Court ordinarily reviews the district court's instructions to the jury de novo. In so doing, "[t]his court considers the instructions as a whole in determining whether the jury was provided with sufficient understanding of the applicable standards." *United States v. Frias*, 893 F.3d 1268, 1275 (10th Cir. 2018). Where, as here, a defendant failed to object in the district court to the particular jury instruction he seeks to challenge on appeal, this Court reviews such instruction only for plain error. *United States v. Jereb*, 882 F.3d 1325, 1335 (10th Cir. 2018) ("Where a particular objection to a jury

instruction was not raised below, we review only for plain error."). Under a plain error standard of review, this Court will grant relief only when "(1) an error occurred; (2) the error is plain or obvious; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lacy*, 904 F.3d 889, 893 (10th Cir. 2018).

B. Antonio Did Not Properly Preserve the Argument He Advances on Appeal.

Antonio concedes that he did not object to the lesser included offense instruction at trial. Op. Br. at 44. Nonetheless, Antonio argues that this Court should deem this issue preserved for appellate review because he "request[ed] a separate instruction explaining the difference between second degree murder and involuntary manslaughter." *Id.* at 45.

The submission of an instruction explaining the difference between second degree murder and involuntary manslaughter is insufficient to preserve the distinct argument Antonio urges on appeal. Federal Rule of Criminal Procedure 30(d) provides that "[a] party who objects to any portion of the instructions . . . must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. . . . Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)." Fed. R. Crim. P. 30(d); *see United States v.*

Faust, 795 F.3d 1243, 1251 (10th Cir. 2015) ("Nor does a request for an instruction before the jury retires preserve an objection to the instruction actually given by the court.") (quoting *Jones v. United States*, 527 U.S. 373, 388 (1999)). Accordingly, this Court may review the challenged jury instruction only for plain error.

C. The District Court Did Not Plainly Err in Instructing the Jury to Consider Antonio's Theory of Involuntary Manslaughter Only If It Found Antonio Not Guilty of Second Degree Murder or Failed to Reach a Verdict on That Charge.

As relevant to Antonio's argument, the district court instructed the jury as follows:

> If you unanimously find Mr. Antonio not guilty of the offense charged, or if, after all reasonable efforts, you are unable to agree on a verdict as to that offense, then you must determine whether Mr. Antonio is guilty or not of involuntary manslaughter.
>
> The difference between these two offenses is that, to convict Mr. Antonio of involuntary manslaughter, the government does not have to prove malice aforethought. This is an element of the greater offense, but not of the lesser included offense. Second degree murder involves reckless and wanton disregard for human life that is extreme in nature, while involuntary manslaughter involves reckless and wanton conduct that is not extreme in nature.

1R.437.

Antonio contends that this instruction ("Instruction No. 14") denied him his theory of defense. According to Antonio, Instruction No. 14 dictates that "the jury would have deliberated on [his] guilt of second degree murder

without even reaching the portion of the involuntary manslaughter instruction that explained the difference between the required mental states for the two offenses." Op. Br. at 48. Thus, "[b]y instructing the jury to deliberate on a second degree murder verdict before considering involuntary manslaughter, the district court essentially instructed the jury to disregard Antonio's theory of defense…" *Id.* This argument is factually and legally infirm.

1. *Antonio Cannot Show That the Jury Failed to Consider His Theory of Defense.*

As a factual matter, there is little chance that the jury reached its verdict without having considered the mental state necessary to find Antonio guilty of involuntary manslaughter. The district court read the instructions in their entirety to the jury before it retired to deliberate. 5R.901. In his closing argument, Antonio called the jury's attention to Instruction No. 14 and discussed that instruction at length. 5R.926-29. In so doing, Antonio stressed the mental state required for involuntary manslaughter. 5R.928

Moreover, the jury instructions themselves provide that the jury has "no right to disregard, or to give special attention to any one instruction." 1R.424. The instructions further direct that after selecting a foreperson, the jury should "review the instructions" as such review will help the jury to "understand the legal principles on which your verdict must be based." 1R.

443. As Antonio correctly points out, the law presumes that a jury follows the instructions given to it by the district court. *See United States v. Poole*, 545 F.3d 916, 921 (10th Cir. 2008) ("[J]urors are presumed to understand and follow instructions given to them."). Thus, the instructions themselves, district court's reading of those instructions to the jury, and Antonio's closing argument dispel any suggestion that the jury did not, before reaching its verdict, consider the difference in the required mental states for the two offenses.

2. *This Court Has Approved of the Very Type of Step-Down Jury Instruction the District Court Used Here.*

As a legal matter, Antonio's argument is contrary to longstanding guidance from this Court on the issue of jury instructions. First, this Court has repeatedly held that jury instructions must be "considered as a whole" in ascertaining whether they provide the jury with "an accurate understanding of the relevant legal standards and factual issues." *United States v. Kamahele*, 748 F.3d 984, 1011 (10th Cir. 2014) (internal quotation marks and citation omitted). But Antonio's argument asks this Court to focus on the first paragraph of the challenged instruction, to the exclusion of the second paragraph, which explains the required mental state for involuntary manslaughter. *See United States v. Petty*, 856 F.3d 1306, 1310-11 (10th Cir.

2017) ("We do not read selected portions of a jury instruction in isolation, removed from their context.")

Moreover, this Court and its sister circuits have long approved of step-down jury instructions which, like Instruction 14, direct a jury to deliberate on a greater offense before considering a lesser included. In *United States v. Visinaiz*, 428 F.3d 1300, 1309 (10th Cir. 2005), this Court rejected a challenge almost identical to that raised by Antonio here. In *Visinaiz*, defendant argued that "the district court's instructions and verdict form constituted structural error because they precluded the jury from considering lesser included offenses until the greater offense of second degree murder was considered." *Visinaiz*, 428 F.3d at 1309. Unpersuaded, this Court explained that "[g]iven proper instructions, it was entirely proper to have the jury consider the second degree murder charge first." *Id.*; *see also United States v. Carter*, 172 F. App'x 883, 887 (10th Cir. 2006) (affirming jury instruction requiring jury to find defendant not guilty of greater offense before considering lesser included).

Other circuits have similarly accepted "the traditional instruction that [juries] should consider first the greater offense and that a verdict of guilty precludes their consideration of the lesser included offense." *United States v. Roland*, 748 F.2d 1321, 1324 (2d Cir. 1984); *see United States v. Jackson*, 726

F.2d 1466 (9th Cir. 1984).[9] For these reasons, the district court did not err, let alone plainly so, in its instructions to the jury.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

For the foregoing reasons, Antonio's conviction should be affirmed. Because the issues presented in Antonio's brief are the subject of settled law within this Circuit, oral argument would not assist the Court in resolving the questions presented. Oral argument is therefore not requested.

Respectfully submitted,

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[9] Although there has been little debate among courts about the correctness of instructing a jury to consider the greater offense before the lesser, there has been substantial debate about the scope of such instruction. The Second and Ninth Circuits have held that a court must give a defendant the option of instructing the jury to consider the lesser included offense when the jury (1) has found defendant not guilty or (2) found the defendant not guilty *or* is unable to reach a verdict on the greater offense. *See Roland*, 748 F.2d at 1324; *Jackson*, 726 F.2d at 1469. Other courts, including this Court, have affirmed jury instructions permitting consideration of the lesser included only upon a finding of not guilty on the greater offense. *See United States v. Carter*, 172 F. App'x 883, 887 (10th Cir. 2006); *see also Spierings v. Alaska*, 479 U.S. 1021 (1986) (White, J., dissenting from denial of cert).

TYPE-VOLUME CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 9,339 words. I relied on my word processor to obtain the count. My word processing software is Word 2016.

s/ John C. Anderson
JOHN C. ANDERSON
United States Attorney

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on April 22, 2019, and that the original and six photocopies of the foregoing brief will be sent by Federal Express to the United States Court of Appeals for the Tenth Circuit, Office of the Clerk, located at the Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, 80257, within two business days of the electronic filing.

I ALSO CERTIFY that Irma Rivas, attorney for Defendant-Appellant Jeffrey Antonio, is a registered CM/ECF user, and that service will be accomplished by the appellate CM/ECF system.

I ALSO CERTIFY that any required privacy redactions have been made, and the copy of this document filed using the CM/ECF system is an exact copy of the hard copies filed with the Clerk.

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JOHN C. ANDERSON
United States Attorney