No. 18-2118

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JEFFREY ANTONIO,

Defendant-Appellant.

Appeal from the United States District Court for the District
of New Mexico, the Honorable James O. Browning
USDC NM CR No. 16-1106 JMC

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT IS REQUESTED.

(Attachments in scanned PDF format)

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TABLE OF CONTENTS

LIST OF ATTACHMENTS

TABLE OF AUTHORITIES

Statutory and Constitutional Authority

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.

JURISDICTIONAL STATEMENT

Defendant-Appellant Jeffrey Antonio appeals from the judgment and sentence imposed by the United States District Court for the District of New Mexico. The Honorable James O. Browning presided over Mr. Antonio's trial; the Honorable Joel M. Carson III imposed his sentence. The district court entered its Judgment in a Criminal Case on August 1, 2018. Att.[1]A. The order was a final order that disposed of all claims with respect to all parties. Mr. Antonio timely filed his notice of appeal on August 13, 2018. Doc. 109.

The District Court had jurisdiction of the cause below under 18 U.S.C. § 3231. This Court has jurisdiction of this appeal pursuant to 18 U.S.C. § 3742(a), 28 U.S.C. § 1291, and Fed. R. App. P. 4(b)(1) (requiring the filing of a notice of appeal within 14 days of the entry of judgment).

ISSUES PRESENTED FOR REVIEW

I. Whether, in the absence of a Jurisdictional Ruling, there was Sufficient Evidence that Mr. Antonio's Offense was committed within the Territorial Jurisdiction of the United States.

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[1] Mr. Antonio cites here to the attachment ("Att.") letter of the district court documents ("Doc.") attached to this brief. He cites to the volume ("ROA Vol.") and page numbers of documents included in the record on appeal that are not attached to this brief. He cites to hearing and trial transcripts ("Tr.") by date and page numbers. The record does not currently include the notice of appeal and some exhibits introduced by the parties during hearings pertaining to the jurisdiction issue. Mr. Antonio will file a motion to supplement the record with these documents.

II Whether the District Court Violated Fed. R. Crim. P. 12(d) by Failing to Rule on Mr. Antonio's Pretrial Motion to Dismiss for Lack of Jurisdiction until well after Trial without a Finding of Good Cause.

III. Whether the Government Met its Burden to Prove that the District Court Had Subject Matter Jurisdiction.

IV. Whether Mr. Antonio Was Erroneously Deprived of his Right to have the Jury Consider his Theory of Defense that He Committed Involuntary Manslaughter, not Second Degree Murder.

STATEMENT OF THE CASE

Defendant-Appellant Jeffrey Antonio was charged by indictment, filed in the United States District Court for the District of New Mexico, with one count of second degree murder in violation of 18 U.S.C. §§ 1153 and 1111. 1 ROA, p. 56. He was convicted after a three-day jury trial.

Antonio filed a pretrial motion to dismiss for lack of subject matter jurisdiction. The district court heard evidence pertaining to the motion at two pretrial hearings. More than six weeks after Antonio was convicted, the court ruled that it had subject matter jurisdiction.

Antonio was sentenced by then United States District Judge Joel M. Carson III to a term of imprisonment of 240 months, to be followed by a three-year term of supervised release. Att. A. He timely filed a notice of appeal, Doc. 109, and this appeal followed.

STATEMENT OF THE FACTS

Antonio was driving his Ford F-150 north of Albuquerque on State Road 313, which runs through Sandia Pueblo, at about 6:20 p.m. on July 31, 2015, when he collided head-on with a Hyundai Sonata occupied by sisters Jane Doe and Felicia Avery. Felicia Avery, the driver, sustained injuries to her foot and ankle. Jane Doe was fatally injured in the collision and died shortly thereafter.

The government charged Antonio with second degree murder. 1ROA, p.56. His blood alcohol content two hours after the accident was .19. 4/19/17 Tr., p. 492. He acknowledged at trial that he negligently caused the accident when he was intoxicated. Antonio contended that he was guilty of involuntary manslaughter rather than second degree murder. He argued that he acted negligently at the time of his offense without rational thought or awareness of the risk of his actions.

Antonio is a Native American. He filed a pretrial motion to dismiss in which he argued that the district court lacked subject matter jurisdiction. 1ROA, p. 195. The court heard evidence pertaining to jurisdiction during two pretrial hearings. More than six weeks after Antonio was convicted, the district court ruled that it had jurisdiction. Att. C.

Felicia Avery testified at trial that she had traveled to Santa Fe with her sister the day of the accident; they were on their way home when Antonio hit her car. 4/17/17 Tr., p. 39-41. She saw him drive into her lane, but had no way to avoid him. *Id.* at 42. Her sister died at the scene. *Id.* at 43.

Gail Scott, who was driving the same direction as Antonio before the accident, testified Antonio passed her vehicle a short distance before he collided with Avery's car. *Id.* at 52. After Antonio passed her, Scott saw his truck move off the right side of the road and almost hit a guard rail. He then over-corrected and drifted across the road into the oncoming lane of traffic. She saw his truck crash head-on into Avery's car. *Id.* at 53-54.

Bernalillo County Sheriff's officers responded to calls reporting the accident. *Id.* at 97. The Bureau of Indian Affairs was notified about four days later that a Native American had been involved in the accident; their personnel subsequently participated in the investigation. *Id.* Bureau of Indian Affairs Special Agent James Jojola testified about records of Antonio's prior convictions for driving under the influence of alcohol in 2008 and 2015. *Id.* at 102-06. As a result of those convictions, Antonio was required to attend classes emphasizing the dangers and consequences of drunk driving. *Id.* at 106-07.

David Torres, who performs accident reconstruction, concluded that Antonio was traveling about 54 miles per hour just prior to the accident and that Avery was traveling about 29 miles per hour. 4/18/17 Tr., p. 313-14.

Chemist Nancy Dres testified that Antonio's blood, withdrawn about two-and-a-half hours after the accident, had a blood alcohol content of .19. 4/19/17 Tr., p. 492. She estimated that his blood alcohol content at the time of the accident would have been between .15 and .24. *Id.* at 493.

Antonio testified that he had a wife and three children and about his employment history as a construction laborer. *Id.* at 544-45. On the day of the accident, he went to Sandia Casino to gamble. *Id.* at 547. He drank beer in his truck in the parking lot and drank beer and tequila at the casino bar. *Id.* He testified that he did not remember getting into his vehicle. *Id.* He did not consider the possibility that he might hurt someone. *Id.* He acknowledged that he is an alcoholic. *Id.* at 546.

The Jury Instructions.

At Antonio's request, 1ROA, p. 138, the district court instructed the jury that Antonio contended that he was guilty of involuntary manslaughter rather than second degree murder and that he admitted drunk driving. 1ROA, p. 464. The court declined to give the instruction requested by Antonio that explained the

distinction between the required mental states for second degree murder and involuntary manslaughter. *Id.* at 139. The district court gave separate instructions for the two offenses. *Id.* at 461, 465. Only the involuntary manslaughter instruction addressed the distinction between the required mental states for the two offenses. The court directed the jury to consider involuntary manslaughter only if it found Antonio not guilty of second degree murder or was unable to agree on a verdict on second degree murder. *Id.* at 465.

Mr. Antonio's Motion to Dismiss for Lack of Jurisdiction.

Prior to trial, Antonio filed a Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction. 1ROA, p. 195. The accident giving rise to this case occurred on non-Indian owned land east of the Rio Grande River near the intersection of Wilda Dr. and State Road 313, which traverses the length of Sandia Pueblo between its northern and southern boundaries. Att. C at 4, ¶ 4, 5. The property had been patented in the 1930s to Pedro C. Garcia and his heirs ("the Garcia tract"). Patent Number 1069186, dated April 26, 1934, and Patent Number 1067360, dated December 20, 1933, relinquished to Garcia, respectively, one hundred eleven acres and nine hundred twenty-six thousandths of an acre and fifty-one acres and six hundred sixty-five thousandths of an acre "within the Pueblo of

Sandia." *Id.* The patents stated that they were "a relinquishment by the United States of America and the Indians of said Pueblo." *Id.* at 205-06.

Antonio argued that the accident site was not within the exterior boundary of Sandia Pueblo. *Id.* The accident occurred on the portion of the Garcia tract called Private Claim 364 ("P.C. 364"). Att. C at 4 ¶6. As the district court found, the Rio Grande was the west boundary of P.C. 364. *Id.* at 5-6, ¶ 10 & at 49, n.10. *See also* 4/11/17 hearing Tr., p. 31 (the west boundary of the Garcia tract was the Rio Grande).

The government conceded the authenticity and relevance of the patent documents. 1ROA, p. 259. It acknowledged that the land on both sides of State Road 313, where the accident took place, is privately owned. *Id.* at 257. The government contended that Sandia Pueblo owns land between the west boundary of P.C. 264 and the Rio Grande and that the accident therefore occurred within the exterior boundaries of Sandia Pueblo and within "Indian Country." *Id.* at 258. Antonio maintained that the accident site was non-Indian land that extends west to the Rio Grande and that because that land is not within the exterior boundary of Sandia Pueblo, the court lacked subject matter jurisdiction. *Id.* at 199-200.

In 1930, Garcia and his wife conveyed in fee simple a right-of-way along the Rio Grande to the Middle Rio Grande Conservancy District ("MRGCD tract").

4/11/17 hearing Tr., p. 26; defendant's 4/11/17 hearing Ex. C at 1. The MRGCD is a political subdivision of the State of New Mexico which manages flood control, drainage, and irrigation. 4/11/17 hearing Tr., p. 23. The west boundary of the MRGCD tract is the Rio Grande, as the district court recognized, Att. C at 5 ¶¶ 8-9 & at 51, and as shown by defendant's 4/11/17 hearing Ex. C at 1 and the testimony of Douglas Stretch, a mapping supervisor for the MRGCD, 4/11/17 Tr., p. 31. In other words, the MRGCD owns property that runs west from the west boundary of the Garcia tract–where the accident occurred–to the Rio Grande.

A number of landowners on the west side of the Rio Grande, directly across the river from Sandia Pueblo, conveyed land bordering the west bank of the Rio Grande to the MRGCD. 1ROA, p. 208-231. Stretch verified that those conveyances granted MRGCD title and easements to land on the west side of the Rio Grande directly west of the Garcia tract. 4/11/17 Tr., p. 26.

Antonio contended that the land included in the Garcia and MRGCD tracts forms a peninsula outside the Pueblo boundary that is bordered on the west by the Rio Grande. 1ROA, p. 199-200. That land is bordered on its north, east, and south sides by Sandia Pueblo. Its west boundary–the Rio Grande–was also the west boundary of Sandia Pueblo before the conveyance to Garcia. *Id.* at 200. The Garcia tract can be entered through the Rio Grande without setting foot on Sandia

Pueblo land. *Id.* The Rio Grande still forms the west boundary of Sandia Pueblo north and south of the peninsula formed by the Garcia and MRGCD tracts. 4/11/17 hearing, defendant's Ex. A.

At the 4/3/17 motions hearing, the government requested a pretrial jurisdictional ruling. 4/3/17 Tr., p. 55. At both that hearing and a hearing held April 11, 2017, the government presented the testimony of Earl Ortiz, a Bureau of Indian Affairs land surveyor. He testified that he visited the land at issue in this case, 4/3/17 Tr., p. 65, and that the accident site is within the exterior boundaries of Sandia Pueblo. *Id.* The southern boundary of Sandia Pueblo is about six-tenths of a mile south of the accident site. *Id.* at 65-66. Referring to the map admitted as Defendant's Exhibit E at the 4/11/17 hearing, Ortiz testified that Sandia Pueblo has fenced and posted an area between the Alameda Riverside Drain and the Rio Grande north of the flood control channel shown on the lower left corner of that map. 4/11/17 Tr., p. 57. The Pueblo owns the land directly north of that flood control channel that is south of the non-Indian owned peninsula at issue here. 4/11/17 hearing, defendant's Ex. A.

Ortiz did not testify that Sandia Pueblo has fenced and posted the land along the river that is part of the non-Indian owned peninsula at issue here. The government acknowledged that Ortiz's testimony concerning the Pueblo's fencing

and posting of land referred to Pueblo land south of the Garcia and MRGCD holdings. *See* 1ROA, p. 261: "[Ortiz] testified at the April 11, 2017, hearing that Sandia Pueblo has fenced and posted the portion of its land cut by a flood control channel running from east to west *that lies south of the Pedro Garcia patent*." (Emphasis added).

The government disputed evidence that the west boundary of both the original Garcia tract and the 1930 Garcia MRGCD conveyance was the Rio Grande. It maintained that Sandia Pueblo holds land between the Garcia and MRGCD tracts and the Rio Grande that forms the west boundary of the Pueblo. *Id.* at 257-59. The government pointed to language in the patents granted to Pedro Garcia describing the tracts of land as "within" Sandia Pueblo. *Id.* at 262.

The government also argued that even if the accident site was not enclosed by the exterior boundaries of Sandia Pueblo, the district court should nonetheless rule that there is federal jurisdiction because of the difficulties posed by checkerboard jurisdiction. *Id.* at 262-63.

<u>More than Six Weeks after Antonio Was Convicted, the District Court Ruled It Had Jurisdiction.</u>

The district court found that the Rio Grande River was the west boundary of (1) the tract of land granted to Sandia Pueblo in 1748 ("1748 Grant"); (2) the P.C. 364 portion of the Garcia tract; and (3) the 1930 conveyance by Garcia to the

MRGCD. *See*, respectively, Att. C at 48-49; *id.* at 5-6, ¶ 10, at 49, n.10, and at 51-52; *id.* at 5 ¶¶8-9, 51.

The district court recognized that the applicability of the Indian Pueblo Land Act Amendments of 2005, 119 Stat. 2573 (2005), *codified at* 25 U.S.C § 331 Note. Att. C at 1. That statute provides for federal criminal jurisdiction as follows:

> (a) IN GENERAL.—Except as otherwise provided by Congress, jurisdiction over offenses committed 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. . . .
>
> (c) JURISDICTION OF THE UNITED STATES.—The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian as defined in title 25, sections 1301(2) and 1301(4) or any Indian-owned entity, or that involves any Indian property or interest.

The district court rested its decision on a ground not argued by the parties. It determined that the non-Indian land on which the accident occurred is within the exterior boundaries of the 1748 Spanish Grant to Sandia Pueblo. The district court did not analyze whether Congress confirmed the Rio Grande as the exterior boundary of the tract of land later patented to Pedro Garcia. It did not consider whether Congress "otherwise provided" with respect to jurisdiction over offenses committed on that land by extinguishing Pueblo title and relinquishing all federal interest.

The district court also ruled that the accident site is within the current exterior boundaries of Sandia Pueblo. It rejected Antonio's argument that the non-Indian land on which the accident occurred extends to the Rio Grande and forms a peninsula that has a west boundary outside Sandia Pueblo. Att. C at 51. The district court found that "[s]ince 1914, the Rio Grande has moved west, leaving a strip of land between the Rio Grande's current east bank and the original Garcia Parcel, Private Claim 364, which includes that tract that Garcia conveyed to the MRGCD." Att. C at 51. *See also id.* at 5 ¶ 10 (same).

The court thus concluded that "Sandia Pueblo owns the land located between the current easterly bank of the Rio Grande and the original Pedro Garcia Parcel, Private Claim 364, which includes that land which Garcia conveyed to the MRGCD." Att. C at 52. The district court did not cite any legal authority supporting its ruling that Sandia Pueblo acquired land west of the Garcia tract because of the meandering of the Rio Grande. It did not explain why it interpreted the designation of the Rio Grande as the west boundary of Sandia Pueblo in the 1748 Grant by its plain language–that the boundary was the river, while interpreting the designation of the Rio Grande as the west boundary of the Garcia and MRGCD tracts to mean the land that constituted the east bank of the river at the time of the conveyance.

Mr. Antonio's Motion for Judgment of Acquittal.

At the conclusion of the government's case, Antonio moved for a judgment of acquittal under Fed. R. Crim. P. 29. Att. C; 4/19/17 Tr., p. 536. He argued that there was insufficient proof that the accident occurred within Indian country and thus insufficient proof of federal jurisdiction. *Id.* He also argued that there was insufficient evidence that he acted with malice aforethought as required for a second degree murder conviction. *Id.*

The government responded that it had proved that Antonio is an enrolled member of a federally recognized tribe. *Id.* at 538. It pointed out that the district court had indicated its intent to instruct the jury that the accident site is within the territorial jurisdiction of the United States. *Id.* The government argued that it had presented sufficient evidence of implied malice to require denial of Antonio's motion, citing evidence of his high blood alcohol level and his prior convictions for driving under the influence of alcohol. *Id.* at 538-39.

The district court denied the motion. Att. B at 539. It stated 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." *Id.* The court stated that it would instruct the jury "that the land is Indian Country, so that they will have – they will make their decision based on my instruction that the

court has jurisdiction." *Id.* at 540. The court found that the government had presented evidence of callous disregard of human life by showing that Antonio had been made aware of the risk of driving while intoxicated, but did so nonetheless. *Id.*

The Sentencing Hearing.

Antonio had no criminal history in addition to his two prior drunk driving convictions. 4ROA, p. 7, ¶¶ 36-37.

The probation officer considered all the pertinent sentencing factors and recommended a downward variance from the guideline range of 292-365 months, *id.* at 12, ¶ 68, to a sentence of 180 months. *Id.* at 15 ¶ 85. The probation officer noted Antonio's difficult childhood, his family responsibilities and efforts to maintain employment, as well as his admission that he was driving while intoxicated and caused the death of Jane Doe. *Id.* at 14-15 ¶ 84.

Antonio pointed out to the court prior to sentencing the extreme disparity between the sentence he was confronting and those imposed on offenders in similar cases. 2ROA, p, 5-29. He reiterated those arguments at the sentencing hearing. 6/20/18 Tr., p. 44-47, 55.

The government asked for an upward variance to a sentence of 405 months. *Id.* at 54. It argued to the district court that the difficult childhood Antonio experienced was "the standard sad story." *Id*. at 52.

The district court declined to impose the obstruction enhancement the government had sought. *Id.* at 60-61. It ruled that Antonio was not entitled to a reduction for acceptance of responsibility. *Id.* at 62. The resulting guideline range was 235-293 months. *Id.* The court imposed a 240-month sentence. *Id.* at 63.

SUMMARY OF THE ARGUMENT

The third element of the second degree murder offense of which Mr. Antonio was convicted was that "the killing took place within the territorial jurisdiction of the United States." Att. D. This Court ruled in *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), that the district court may decide the jurisdictional status of the property or area where the offense occurred and leave to the jury the factual determination of whether the alleged crime occurred at that site. *Id.* at 1139. The jury was instructed here 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." While the location of the offense was undisputed, the jurisdictional status of that property was very much

disputed. Because the district court did not issue a jurisdictional ruling until after the jury returned its verdict, Antonio was convicted without sufficient evidence.

Fed. R. Crim. P. 12(d) requires the district court to decide every pretrial motion before trial unless it rules there is good cause to defer its ruling. The court violated that rule by ruling on Antonio's motion to dismiss for lack of jurisdiction more than six weeks after trial with no finding of good cause.

The government did not meet its burden to establish facts proving that the district court had jurisdiction. Under the Indian Pueblo Land Act Amendments of 2005, federal criminal jurisdiction exists over offenses committed within the exterior boundaries of a grant from a prior sovereign so long as those boundaries were "confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico" and "except as otherwise provided by Congress." The government did not prove that Congress confirmed the Rio Grande as the west boundary of Sandia Pueblo with respect to the tract of land where Antonio's offense took place. The 1858 Act in which Congress confirmed Pueblo land claims only relinquished claims of the United States and did "not affect any adverse valid rights, should such exist." This Court has recognized that some adverse claimants had claims existing before 1858. If Pedro Garcia or his predecessors in interest had an adverse claim to the land at issue in this case before

1858, Congress would not have confirmed a west boundary of Sandia Pueblo at the Rio Grande with respect to that tract.

The district court erred by failing to recognize that Congress "otherwise provided" with respect to jurisdiction over the Garcia tract by extinguishing Pueblo title and relinquishing all federal interest. This Court has previously recognized that extinguishment of Indian title to land removes its Indian Country status. The 1924 Pueblo Land Claims Act and the patents issued to Pedro Garcia pursuant to that act extinguished all claim of Sandia Pueblo to the property he acquired. Consequently, there was no longer a basis for federal criminal jurisdiction.

The government contended that there is federal criminal jurisdiction over the tract of land patented to Pedro Garcia because it is within the current exterior boundaries of the Pueblo. That conclusion, however, required disregard of the plain language of the documents conveying land to Pedro Garcia and from Garcia to the Middle Rio Grande Conservancy (MRGCD) district. As the district court recognized, the Rio Grande was the west boundary of the land conveyed to Sandia Pueblo in 1748, the land patented to Pedro Garcia, and the land conveyed by Garcia to the MRGCD. Because the Garcia and MRGCD tracts extend west to the Rio Grande, Sandia Pueblo has a west boundary on the river north and south of them, but not west of those tracts.

The government argued without legal support that the designation of the Rio Grande as the west boundary of the Garcia and MRGCD tracts actually meant the land on the east bank of the river at the time of the conveyance. However, it maintained that the designation of the Rio Grande as the west boundary of Sandia Pueblo meant the river itself. The government concluded from its inconsistent interpretations of the meaning of the Rio Grande that the Pueblo acquired land west of the Garcia and MRGCD tracts because the course of the river moved west. The government provided no documentation or legal support for its claim that the Pueblo acquired that land. It presented no evidence concerning the course of the Rio Grande between the time of the 1748 Grant and the Garcia and MRGCD conveyances. Under the government's theory, if the Rio Grande moved west between the time of the 1748 Grant and the conveyance to Garcia, he would have owned land west of the Pueblo boundary.

The district court deprived Antonio of the benefit of an instruction on his theory of defense. Although the district court instructed the jury that Mr. Antonio's defense was that he was guilty of involuntary manslaughter, but not second degree murder, it instructed the jury in the next breath that it must attempt to reach a verdict on second degree murder before considering involuntary manslaughter. The verdict form and the government's closing argument reiterated

that instruction. The district court essentially instructed the jury to disregard Antonio's theory of defense unless it was unable to agree that he was guilty of second degree murder.

The jury was afforded no guidance on how to analyze whether Antonio committed second degree murder if it believed his argument that he lacked rational thought at the time of his offense and lacked awareness of the possible consequences of his actions. Because the jury reached a verdict on second degree murder, it apparently never considered the portion of the involuntary manslaughter instruction that explained the difference between the required mental states for the two offenses. The outcome of Antonio's trial may well have been different if the jury had been properly instructed to decide whether Antonio's mental state at the time of his crime showed that he committed involuntary manslaughter rather than second degree murder. This Court should reverse.

ARGUMENT

I. Because there had been no Jurisdictional Ruling, there was Insufficient Proof that Mr. Antonio Committed his Offense within the Territorial Jurisdiction of the United States.

A. *Standard of Review.*

Antonio preserved this issue by moving for a judgment of acquittal at the conclusion of the government's case. 4/19/17 Tr., p. 536. He argued there was insufficient evidence to support his conviction because there was insufficient proof of federal jurisdiction. The district court denied the motion. Att. C at 539-40.

This Court reviews sufficiency of evidence claims and denials of motions for judgment of acquittal *de novo*. *United States v. Porter*, 745 F.3d 1035, 1050 (10th Cir. 2014). It draws all reasonable inferences in support of the government. *United States v. Washington*, 783 F.3d 1198, 1199 (10th Cir. 2015). This Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

B. *Mr. Antonio Was Convicted without Sufficient Evidence that he Committed Second Degree Murder "within the Territorial Jurisdiction of the United States."*

The jury returned a verdict on April 19, 2017. On June 5, 2017, the district court issued its Memorandum Opinion and Order denying Mr. Antonio's Motion to Dismiss for Lack of Federal Subject Matter Jurisdiction. Att. C.

"The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law' . . . " *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995). The Due Process Clause requires that each element of a crime be proved beyond a reasonable doubt. *Hurst v. Florida*, – U.S.–, 136 S.Ct. 616, 621 (2016); *Rivera v. Minnish*, 483 U.S. 574, 578 (1987). "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged . . . " *Gaudin*, 515 U.S. at 511. *See also Patterson v. New York*, 432 U.S. 197, 204 (1977)(same). "[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

This Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319. The prosecution bears the burden of proving all elements of the

charged offense. *Patterson*, 432 U.S. at 210. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278 (emphasis in original).

In *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), this Court held that "[a]s a general matter, the 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.* at 1139. The district court determines whether "a particular tract of land or geographic area is Indian Country, and then instructs the jury to determine whether the alleged offense occurred there." *Id.* In *Roberts*, as in this case, "[e]ach count requires proof of the commission of the offense within the territorial jurisdiction of the United States." *Id.* at 1138.

After hearing pretrial evidence concerning jurisdiction, the district court stated that it would be "inclined to find [the accident site is] within the [Pueblo] exterior boundaries." 4/3/17 Tr., p. 66. The court later stated: "So I'm inclined to deny the motion [to dismiss for lack of jurisdiction]. But I do want to do a little bit more work on this." 4/11/17 Tr., p. 98.

At the conclusion of the government's case, the court explained that it was not yet ready to issue its jurisdiction ruling. In denying Antonio's motion for judgment of acquittal, the district court stated, "I'm still working on the jurisdiction" and "I'll continue to work on that." Att. B at 539. The court stated that it would instruct the jury that "the land is Indian Country" and "that the court has jurisdiction." *Id.* at 540. Defense counsel objected to that instruction. 4/18/17 Tr., p. 393. He repeatedly reminded the court that jurisdiction is an element of the charged offense. *See, e.g.*, 4/3/17 Tr., p. 57, 67; 4/12/17 Tr., p. 203.

The third element of the second degree murder instruction stated that in order for the jury to find Mr. Antonio guilty of second degree murder, it "must be convinced that the government has proved beyond a reasonable doubt . . . *Third*, the killing took place within the territorial jurisdiction of the United States. 1ROA, p. 461; Att. D. The instruction further stated:

> 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.

Id.

The jury's finding that the offense occurred "at the intersection of Highway 313 and Wilda Drive" was obviously insufficient to prove that "the killing took

place within the territorial jurisdiction of the United States." Att. D. The court's instruction to the jury did not constitute proof of that element. The district court had not ruled that the land at issue in this case had Indian status that rendered Antonio's offense subject to federal jurisdiction.

The required jurisdiction ruling came more than six weeks after Antonio was convicted. In its decision, the court enumerated fourteen facts and numerous legal findings in support of its ruling that it had jurisdiction. *See, e.g.*, Att. C at 2 ("The following facts, which the Court finds by a preponderance of the evidence, are relevant to the Court's jurisdictional determination."). Those findings had yet to be made at the time of the jury verdict.

This Court must rule that Antonio was convicted on insufficient evidence. He vigorously contested the issue of the court's jurisdiction. In the absence of a jurisdictional ruling, there was insufficient proof to establish the third element of second degree murder. This Court must reverse and order dismissal of the indictment against him with prejudice.

II. The District Court Violated Fed. R. Crim. P. 12(d) by Failing to Rule on Mr. Antonio's Motion to Dismiss for Lack of Jurisdiction until after Trial without a Finding of Good Cause.

A. *Standard of Review.*

This Court reviews *de novo* questions involving compliance with the requirements of the Federal Rules of Criminal Procedure. *United States v. Rodriguez-Delma*, 456 F.3d 1246, 1253 (10th Cir. 2006).

B. *The District Court Violated Fed. R. Crim. P. 12(d) by Failing to Rule on Antonio's Pretrial Motion to Dismiss until more than Six Weeks after Trial.*

Fed. R. Crim. P. 12(d) states, in pertinent part:

> The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling.

The district court held hearings addressing the jurisdictional issue and other pretrial issues on April 3, 2017, and April 11-12, 2017. Trial began Monday, April 17, 2017. The jury returned its verdict April 19, 2017. 1ROA, p. 477. The court issued its Memorandum Opinion and Order denying the motion and ruling that it had subject matter jurisdiction on June 5, 2017. Att. C.

The district court did not address the requirements of Rule 12(d) or make a finding of "good cause" to defer ruling on the subject matter jurisdiction issue in this case. "Good cause" for deferring decision of a pretrial motion may exist if facts will be presented at trial that will be relevant to the court's decision. *United*

States v. Adkinson, 135 F.3d 1363, 1369 n.11 (11th Cir. 1998); *United States v. Avarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987). The district could not have reasonably believed that trial proceedings in this case would shed light on the jurisdiction question; no such evidence was presented at trial. Even if there had been good cause for the court to defer its ruling, the district court violated Rule 12(d) by failing to make a finding of "good cause."

Because the district court had not ruled that it had jurisdiction, there was insufficient evidence to establish the third element of second degree murder, that the offense took place "within the territorial jurisdiction of the United States." The court's failure to issue a jurisdictional ruling until well after Antonio was convicted also raised a troubling appearance of a lack of impartiality. The court's jurisdiction in this case was a closely contested issue. The issuance of a ruling well after the jury returned a guilty verdict created the appearance that the court fashioned its ruling to uphold the jury's verdict.

Even if this Court rejects Antonio's argument that there was insufficient evidence for the jury to find that he committed second degree murder "within the territorial jurisdiction of the United States," it should order that he is entitled to a new trial.

III. The Government Failed to Meet Its Burden to Prove that the District Court Had Subject Matter Jurisdiction.

A. *Standard of Review*.

Challenges to the district court's jurisdiction are subject to this Court's *de novo* review. *Roberts*, 185 F.3d at 1129.

B. *This Court Must Presume that the District Court Lacked Jurisdiction.*

Federal courts have power to hear only cases within the judicial power of the United States—as set forth in the Constitution or laws passed by Congress. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). "The requirement that jurisdiction be established as a threshold matter is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884)). The necessity that courts ensure that 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)).

A federal court must presume that it does not have subject matter jurisdiction; where jurisdiction has been challenged, the party seeking to invoke it

must demonstrate that jurisdiction is proper by a preponderance of the evidence. *Vaden v. Discover Bank*, 556 U.S. 49, 69-70 (2009); *United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994)). That party must affirmatively allege the facts supporting jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Bustillos*, 31 F.3d at 933. A challenge to the court's jurisdiction may be raised at any time, even for the first time on appeal. *Bustillos*, 31 F.3d at 933; Fed. R. Crim. P. 12(b)(2) ("A motion that the court lacks jurisdiction may be made at any time while the case is pending."). When jurisdiction has not been proved, courts are without power to proceed and must dismiss the cause. *Steel Co.*, 523 U.S. at 94.

C. *The Government Did Not Prove that Congress Confirmed the Rio Grande as the West Boundary of Sandia Pueblo with respect to the Tract of Land Conveyed to Pedro Garcia.*

The Indian Pueblo Land Act Amendments of 2005, provide for federal criminal jurisdiction over offenses committed within the exterior boundaries of a grant from a prior sovereign so long as those boundaries were "confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico" and "except as otherwise provided by Congress." As the district court found, the King of Spain granted land to Sandia Pueblo in 1748. Att. C at 2-4. Under the terms of that grant, the west boundary of Sandia Pueblo was the Rio

Grande River, which was referred to as the Rio del Norte. *See id.* at 3, 4. The east boundary was "the sierra madre called Sandia." *Id*. at 3. There was no proof in this case that Congress or the Court of Private Land Claims confirmed to Sandia Pueblo the grant of the tract of land that was later conveyed to Pedro Garcia with a west boundary at the Rio Grande.

In 1848, in the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), Mexico ceded to the United States a large land mass which included the lands in the territory of New Mexico on which the Pueblo Indians resided. *Id.* at 929. The treaty "provided that Mexican property rights in the lands ceded 'shall be inviolably respected.'" *Sanchez v. Taylor*, 377 F.2d 733, 735 (10th Cir. 1967) (quoting 9 Stat. 922, 929).

Congress gave effect to the 1848 Treaty by confirming the grants to seventeen Pueblos, including Sandia Pueblo. 11 Stat. 374 (1858). The 1858 confirmation by Congress was to be construed "only as a relinquishment of all title and claim of the United States to any of said lands . . ." *Id.* It did not confirm the exterior boundaries of Sandia Pueblo with respect to lands claimed by third parties and stated that it "shall not affect any adverse valid rights, should such exist." *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." *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976). As this Court has recognized, "the Supreme Court has consistently held that the confirmatory Act of Congress is final and conclusive as to the nature and validity of such a grant and is therefore not subject to judicial review." *Sanchez*, 377 F.2d at 737.

In *Aamodt*, a water rights case, this Court reviewed the history of the New Mexico Pueblos and concluded that non-Indian claimants–such as Pedro Garcia–fall in three categories:

> (1) Those who held adversely to the Pueblos before the 1858 Act.
>
> (2) Those who held lands within the Pueblos as the result of some circumstance occurring after 1858, other than the failure of the United States seasonably to protect the rights of the Pueblos.
>
> (3) Those whose rights depend on the limitation periods recognized by the 1924 Act.

Id. at 1112.

If, prior to the 1858 Act, Pedro Garcia or his predecessors in interest held adverse valid rights to the land later conveyed to them, that Act by its terms would not have confirmed that the Rio Grande formed the west boundary of Sandia Pueblo with respect to the land that became the Garcia tract. The government presented no evidence to the district court concerning the nature or history of Pedro

Garcia's adverse rights in the tract of land that was formally conveyed to him in the 1933 and 1934 patents. No evidence was presented concerning the application of Congress's 1858 confirmation to the tract of land where the accident in this case took place.

There is no dispute that the offense in this case took place "within the exterior boundaries of [a] grant from a prior sovereign." That alone, however, was insufficient to establish federal jurisdiction. Under the 2005 amendments to the Indian Pueblo Land Act, the district court had jurisdiction only if the offense took place with exterior boundaries "confirmed by Congress." Congress did not confirm boundaries insofar as they were subject to claims by non-Indians holding "adverse valid rights." Because the government did not show that Congress confirmed a west exterior boundary of Sandia Pueblo that encompasses the accident site, this Court must presume that the district court lacked subject matter jurisdiction.

D. *Even if Congress Had Confirmed an Exterior Boundary of Sandia Pueblo that Encompassed the Garcia Tract where Antonio's Offense Occurred, the Government Did Not Prove that Federal Jurisdiction Exists despite the Extinguishment of all Right, Title, and Interest of Sandia Pueblo to that tract and the Relinquishment of all Claims of the United States.*

As the district court found, P.C. 364, the part of the Garcia tract on which the accident in this case occurred, officially came into Garcia's ownership under

the provisions of the Pueblo Land Act ("PLA"), 43 Stat. 636 (1924). Att. C at 4 ¶ 6. The PLA established the Pueblo Lands Board and authorized it to determine the exterior boundaries of Pueblo lands and to settle conflicts involving title to lands claimed by New Mexico Pueblos and non-Indian citizens. *Id.* at 36; § 2, 43 Stat. 636; *Mountain States Tel. & Tel.Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240, 244 (1985). The Board was instructed to award compensation to Pueblos for losses suffered due to failure of the United States to protect their rights, § 6, 43 Stat. at 638, and to report on possible purchases for the Pueblos of some lands validly held by non-Indians. § 8, 43 Stat. at 639. The PLA provided for judicial determination of the area and value of lands where non-Indian claims based on Spanish or Mexican grants were superior to Indian claims. § 14, 43 Stat. at 641. If non-Indian claims to land that had been occupied and improved in good faith were not upheld, the court was to make findings as to the value of the improvements and the Secretary of the Interior was to submit a report to Congress with recommendations concerning compensation. § 15, 43 Stat. at 641.

The Board issued patents to non-Indians whose adverse claims were found valid. Att. C at 36. "The Pueblos' rights to such land were extinguished." *Id.* (quoting *United States v. Arrieta*, 436 F.3d 1246, 1249-50 (10th Cir. 2006) (citing PLA, § 4; 43 Stat. at 637, *Mountain States Tel. & Tel.*, 472 U.S. at 244)). The

United States relinquished all claim to those lands. § 13, 43 Stat. at 640. The Pueblos retained title to lands not patented to non-Indians. Att. C at 36.

As a result of the Pueblo Lands Board determination, Pedro Garcia was found entitled to two patents to the tract of land on which the accident in this case took place. *Id.* at 4 ¶ 6. The patents issued to Pedro Garcia state that they effect "a relinquishment by the United States of America and the Indians of said Pueblo." 1 ROA, p. 205-206. The supplemental plat containing the tract of land conveyed to Pedro Garcia states that it "represents the survey of certain tracts of land within the Sandia Pueblo Grant to which the Indian title has been extinguished . . . " *Id.* at 207. The extinguishment of Indian title removed the Garcia tract from within the boundaries provided in the 1748 Grant.

As the district court found, the patents Congress issued to Pedro Garcia conveyed land that extended west to the east bank of the Rio Grande. Att. C at 5-6, ¶ 10, at 49, n.10, and at 51-52. The west boundary of the tract conveyed by Pedro Garcia to MRGCD was also the Rio Grande. *Id.* at 5, ¶ 8 & 9; 51. *See also* Stretch testimony, 4/11/17 Tr., p. 29 (the west boundary of the tract conveyed by Garcia to MRGCD is the Rio Grande).

By extinguishing Pueblo title to the Garcia tract and relinquishing all federal interest, Congress removed the land from federal jurisdiction and thereby

"otherwise provided" within the meaning of the Indian Pueblo Land Act Amendments of 2005, 25 U.S.C. § 331(a) Note. The government did not prove that any other provision authorized federal jurisdiction over Antonio's offense.

It has long been established that it is up to Congress to determine "what land is Indian country subject to federal jurisdiction." *Hydro Resources*, 608 F.3d at 1151 (citing *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998)). " . . . [T]he questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865)).

Congressional intent to extinguish Indian title must be "plain and unambiguous." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941). 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. Congress clearly extinguished all rights of the Pueblo to the Garcia tract, relinquished all federal claims, and removed that tract from federal trust responsibility and protection.

The Enabling Act of New Mexico of June 20, 1910, 36 Stat. 557, supports the conclusion that the extinguishment of Pueblo rights to land effected removal of that land from federal jurisdiction and control. 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).

This Court has recognized that federal criminal jurisdiction no longer exists once 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. In 1910, Congress had expressly provided for extinguishment of Indian interest in the land where the offenses occurred and had set it aside for use as a reservoir. *Id.* at 1329. The land was thereby removed from the reservation and no longer had Indian Country status. *Id.* This Court 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). Because the traffic offenses in *Hackford* did not occur on tribal land, the State of Utah properly had criminal jurisdiction. *Id.* at 1330.

In *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013), this Court reached the opposite conclusion, *i.e.*, 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 had exclusive criminal jurisdiction. *Id.*

There can be no question that Pueblo title to the Garcia tract was extinguished and all federal claims were relinquished. As explained above, Congress explicitly and comprehensively so provided in the PLA and thereby

removed the Garcia tract from federal jurisdiction and protection. Because the government did not prove that Antonio's offense was committed at a location that remained subject to federal jurisdiction after the extinguishment of the Pueblo's interest and the relinquishment of all federal claims, this Court must presume that the district court lacked jurisdiction.

E. *The Government Failed to Prove that the Collision Site is within the Current Exterior Boundaries of Sandia Pueblo.*

The district court found that the Rio Grande River was the west boundary of the land granted to Sandia Pueblo in 1748; the P.C. 364 portion of the tract conveyed to Pedro Garcia; and the 1930 Garcia MRGCD conveyance. *See*, respectively, Att. C at 48-49; *id.* at 5-6, ¶ 10, at 49, n.10, and at 51-52; *id.* at 5 ¶¶8-9, 51. It nonetheless agreed with the government's argument that the Garcia and MRGCD tracts are within the current exterior boundaries of Sandia Pueblo because the Rio Grande has moved west since 1914, exposing "a strip of land strip of land between the Rio Grande's east bank and the original Garcia Parcel, Private Claim 364, which includes that tract that Garcia conveyed to the MRGCD." *Id.* at 51. *See also id.* at 5 ¶ 10 (same). The court concluded that "Sandia Pueblo owns the land located between the current easterly bank of the Rio Grande and the original Pedro Garcia Parcel, Private Claim 364, which includes that land which Garcia conveyed to the MRGCD." *Id.* at 52.

The district court's ruling is wrong for the numerous reasons discussed herein. The court wrongly interpreted the designation of the Rio Grande as the west boundary of the tract patented to Garcia, as well as Garcia's conveyance to the MRGCD, to mean the location of the east bank of the Rio Grande at the time of those conveyances, contrary to what the designation of the river as the boundary plainly means. However, without explaining why, it interpreted the designation of the river as the west boundary of the Pueblo in the 1748 Grant to mean the river itself.

The government presented no legal authority for the proposition that Sandia Pueblo somehow acquired land on the east bank of the Rio Grande as the river meandered west after the patents were issued to Pedro Garcia. The government also did not prove how the river moved between the time of the 1748 Grant and when the conveyance was made to Garcia.

The government had the burden to establish facts proving that the district court had jurisdiction. The determination of subject matter jurisdiction may not rest on obfuscation or contortion. While the establishment of the court's jurisdiction to hear a given case may be complicated, it is a determination essential to the rule of law in "'a free society'" and is not "a mere nicety of legal

metaphysics." *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d at 1144 (quoting *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. at 77).

1. The government did not prove that the designation of the Rio Grande as the west boundary of the Garcia and MRGCD tracts does not have its plain meaning.

When applying federal law, courts must always begin with the language of a statute. If the language is plain, "that is also where the inquiry should end." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. –, –, 136 S.Ct. 1938 (2016). "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira*, – S.Ct. –, 2019 WL 189342 (2019) (quotations omitted). "After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). Where statutory language is unambiguous, it is presumed to reflect Congress's intent and is controlling. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 71 (1982).

If the district court had interpreted the Rio Grande according to its plain meaning, the natural feature that is the river, it could not have arrived at the conclusion that the Pueblo acquired land west of the boundary of the Garcia tract.

Had the district court had been faithful to the designation of the Rio Grande as the boundary of the tract patented to Pedro Garcia, it would have found that the Rio Grande remains the west boundary of the Garcia/ MRGCD tracts. It was not the district court's prerogative to substitute another meaning for the clear designation of the Rio Grande as the west boundary of the conveyances pertinent to this case. There was no indication that any Act of Congress changed the west boundary of the Garcia and MRGCD tracts to something other than the Rio Grande or that the legal interpretation of the meaning of the river has changed over time.

The government argued that even if Antonio was correct that the west boundary of the Garcia tract and the portion of that tract later conveyed to MRGCD was not within the exterior boundaries of Sandia Pueblo, the district court should nonetheless rule that the accident site is "Indian country" because of the difficulties posed by checkerboard jurisdiction. 1ROA, p. 262-63. At Congress's direction, the Rio Grande was designated as the west boundary of the Garcia tract. The district court lacked authority to conduct its own policy assessment and decline to adhere to what Congress unambiguously provided. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978); *Hydro Resources, Inc.*, 608 F.3d at 1151.

The Rio Grande is the west boundary of the non-Indian land where Antonio's offense took place. The land directly west of the Garcia tract on the other side of the river is non-Indian owned. While Sandia Pueblo lies north and south of the Garcia and MRGCD tracts, the Pueblo owns no land west of them.

The government attempted to support its position by pointing to language in the patents issued to Garcia that described the tracts as "within" the Pueblo of Sandia. 1ROA, p. 262. The land conveyed to Pedro Garcia had been within the area conveyed to Sandia Pueblo by the 1748 Grant. After the conveyance to Garcia, the tract patented to him was no longer within the west boundary of the Pueblo. The Garcia tract extended to the Rio Grande on its west side, as the Pueblo land had prior to the conveyance to Garcia. And because Sandia Pueblo's title to the land where the accident occurred has been extinguished, that land is no longer within the exterior boundaries of Sandia Pueblo.

2. The government did not prove and the district court did not address why the designation of the Rio Grande as the west boundary meant one thing in the 1748 Grant and another in the documents conveying land to Pedro Garcia and the MRGCD.

As explained above, the district court wrongly interpreted the designation of the Rio Grande as the west boundary of the land conveyed to Pedro Garcia to mean not the river, but the land on the east bank of the river at the time of the conveyance. Inexplicably, however, the government and the district court

interpreted the designation of the Rio Grande as the west boundary of Sandia Pueblo in 1748 to mean the river itself. Neither the government nor the district court pointed to any rule of statutory construction that justified the conflicting interpretations. There was no evidence of a changed understanding of what was meant by the designation of the river as the boundary between 1748 and the time of the Garcia and MRGCD conveyances. There was no justification for the district court's failure to interpret the designation of the Rio Grande as the west boundary of the Garcia and MRGCD tracts consistently with what it concluded the language meant in the 1748 Grant–that is, the river forms the west boundary.

3. The government presented no evidence concerning the course of the Rio Grande between the time of the 1748 Grant and the conveyances to Garcia and MRGCD.

The government presented evidence, and the district court found, that "[s]ince 1914, the Rio Grande has moved west, leaving a strip of land between the Rio Grande's current east bank and the original Garcia parcel, which includes that tract that Garcia conveyed to MRGCD." Att. C at 5 ¶ 10. The government presented no evidence, however, of the Rio Grande's course between 1748 and 1914. Under the government's theory, if the river meandered west between 1748 and the time of the Garcia conveyance, Garcia would have owned land west of the land granted to the Pueblo in 1748.

4. The government did not prove that Sandia Pueblo acquired ownership of land exposed by the meandering of the Rio Grande after the conveyance to Pedro Garcia.

The government maintained that Sandia Pueblo acquired a strip of land between the Rio Grande and the west boundary of the Garcia tract when the path of the Rio Grande moved westward. However, the government proved, and the district court cited, no legal support or documentation for the proposition that land exposed by the meandering of the Rio Grande was acquired by Sandia Pueblo. The government provided no documents supporting its claim that Sandia Pueblo owns land between the west boundary of the Garcia tract and the east bank of the Rio Grande.

The district court relied on evidence that Sandia Pueblo fenced and posted land west of the Albuquerque Riverside drain and east of the Rio Grande, Att. C at 6, ¶ 12; *id.* at 52, failing to recognize that the evidence showed merely that the Pueblo fenced and posted land south of the Garcia/ MRGCD tracts. As the government characterized Ortiz's testimony, "[Ortiz] testified at the April 11, 2017, hearing that Sandia Pueblo has fenced and posted the portion of its land cut by a flood control channel running from east to west *that lies south of the Pedro Garcia patent*." 1ROA, p. 261 (emphasis added). The Pueblo's fencing and posting of that land has no bearing on the jurisdiction issue in this case.

IV. The District Court Deprived Mr. Antonio of the Benefit of the Instruction on his Theory of Defense by Instructing the Jury Not to Consider his Defense that He Was Guilty of Involuntary Manslaughter unless It Could Not Agree on a Guilty Verdict based on the Government's Theory of the Case.

A. *Standard of Review*.

This Court reviews jury instructions *de novo* to determine whether, as a whole, they provide the jury with an accurate understanding of the relevant legal standards and factual issues. *United States v. Crockett*, 435 F.3d 1306, 1314 (10th Cir. 2006).

Antonio requested, and the district court gave, a jury instruction on the lesser included offense of involuntary manslaughter. 1ROA, p. 274-80; Att. E. He requested, and the district court gave, an instruction to the jury that he contended he was guilty of involuntary manslaughter and not guilty of second degree murder. *Id.* at 138; 464. Antonio also requested, and the court did not give, a separate instruction specifically explaining the difference between second degree murder and involuntary manslaughter. *Id.* at 139.

Antonio did not object to the court's instruction to the jury that it must not consider whether he was guilty of involuntary manslaughter unless it found him not guilty of second degree murder or was unable to agree on a second degree murder verdict. Att. E. He did not argue that the instruction deprived him of his constitutional rights to due process and a fair trial.

This Court should find that Antonio preserved this issue by requesting a separate instruction explaining the difference between second degree murder and involuntary manslaughter. 1ROA, p. 139. Should this Court conclude that Antonio inadequately preserved his objection to the court's direction to the jury not to consider his guilt of involuntary manslaughter unless it was unable to agree that he committed second degree murder, this Court should review this issue under the less rigid plain error standard that applies "when reviewing a potential constitutional error." *United States v. Benford*, 875 F.3d 1007, 1016 (10th Cir. 2017) (quoting *United States v. James*, 257 F.3d 1173, 1182 (10th Cir. 2001)). Under the plain error standard, this Court will reverse if it determines that (1) the district court erred; (2) the error was plain; (3) the error affected a defendant's substantial rights; and (4) the error seriously affected the fairness integrity, or public reputation of a judicial proceeding. *United States v. Olano*, 507 U.S. 725, 732 (1993).

B. *The Jury should have been, but was not, Instructed that it Must Consider Antonio's Mental State at the time of his Offense and Decide whether it Showed He Committed Involuntary Manslaughter or Second Degree Murder.*

Antonio was charged in this case with second degree murder. The jury was instructed on second degree murder and the lesser included offense of involuntary

manslaughter. Att. D, E. The court's involuntary manslaughter instruction began 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.

Att. E. The jury was similarly instructed by the verdict form, which first required the jury to state whether it found Antonio guilty or not guilty of second degree murder. It went on to state:

> If you unanimously find the Defendant, Jeffrey Antonio, not guilty of the offense charged in **Count 1**, 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 guilty of involuntary manslaughter.

1ROA, p. 477 (emphasis in original). In its closing argument, the government emphasized these instructions. It stated: "You're not to even consider involuntary manslaughter until, first, you deliberate and decide the charge of second degree murder." 4/19/17 Tr., p. 559.

If the jury followed the court's instruction, it likely never considered the involuntary manslaughter instruction beyond its first sentence. "Absent evidence to the contrary, it is presumed that juries follow the trial court's instructions." *United States v. Santiago*, 977 F.2d 517, 520 (10th Cir. 1992). The jury would thus not have analyzed the portion of the manslaughter instruction that explained that

"[s]econd degree murder involves reckless and wanton disregard for human life that is extreme in nature, while involuntary manslaughter involves reckless and wanton disregard that is not extreme in nature." Att. E. The jury would also reasonably not have considered the portion of the manslaughter instruction that stated that involuntary manslaughter entails "gross negligence amounting to wanton and reckless disregard for human life." *Id.*

The second degree murder instruction the jury received did not explain the distinction between the required mental states for second degree murder and involuntary manslaughter. The jury was informed by the court's second degree murder instruction that conviction of that offense required a finding of malice aforethought. Att. D. It further stated that malice aforethought means "either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life." *Id.*

The district court informed the jury that Antonio "contends that he is guilty of involuntary manslaughter, a lesser included offense, rather than second degree murder. Mr. Antonio concedes that he was drinking and driving, and committed the offense of DWI." 1ROA, p. 464. The very next sentence of the instructions told the jury that it should consider Antonio's guilt of involuntary manslaughter

only if it was unable to unanimously agree that Antonio was guilty of second degree murder.

"The jury should be advised of the defendant's position so as to put the issues raised by the theory of defense squarely before it." *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985). "[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). *See also United States v. Yazzie*, 188 F.3d 1178, 1185 (10th Cir. 1999) (A defendant is always entitled to an instruction on his theory of defense if the evidence supports it); *United States v. Alcorn*, 329 F.3d 759, 767 (10th Cir.2003) (same).

By 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 unless it was unable to agree on a guilty verdict on the government's second degree murder theory. Pursuant to the court's instructions, the jury would have deliberated Antonio's 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. The jury may well have reached its second degree

murder verdict without considering the substance of either the involuntary manslaughter instruction or Antonio's defense. The right to a theory of defense instruction is an empty formalism if the jury is merely told what that theory is and then instructed not to consider it.

In *Stevenson v. United States*, 162 U.S. 313 (1896), the Court reversed a murder conviction stemming from a gunfight "in the Indian Territory," *id.* at 314, and determined that the defendant had been wrongly denied a manslaughter instruction.

> So long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder.

Id.

The definitions of second degree murder and involuntary manslaughter both refer to "reckless and wanton" behavior. *United States v. Wood*, 207 F.3d 1222, 1229 (10th Cir. 2000). The "substantive distinction" between second degree murder and involuntary manslaughter "is the severity of the reckless and wanton behavior." *Brown v. United States*, 287 F.3d 965, 975 (10th Cir. 2002). The difference between murder and manslaughter is "one of degree rather than kind." *Wood*, 207 F.3d at 1229 (quoting *United States v. Fleming*, 739 F.2d 945, 948 (4th

Cir. 1984)). The jury could only fairly determine whether Antonio's behavior was of a severity warranting a second degree murder conviction or an involuntary manslaughter conviction by comparing the definitions of the two offenses and grappling with the competing evidence and arguments presented by the prosecution and defense about Antonio's state of mind. Instead, the jury was told to attempt to reach a verdict on second degree murder without taking into account the manslaughter instruction's explanation of the difference between murder and manslaughter.

Antonio was denied his right to have the jury consider "the boundary which separates the two crimes of murder and manslaughter," *Stevenson*, 162 U.S. at 320, and determine whether his mental state fell closer to one side of that boundary or the other. By instructing the jury to deliberate only about whether Antonio's mental state amounted to "callous and wanton disregard for human life," Att. D, before considering the definition of manslaughter or the issues raised by Antonio's defense, the district court denied him his right to have the jury weigh his theory of defense. The jury was relieved of its obligation to weigh Antonio's mens rea and decide whether it "showed that the crime was manslaughter instead of murder." *Id.* at 314.

As Antonio's counsel explained to the jury during closing argument, his sole defense was that while he was grossly negligent and reasonably should have known of the risk of his behavior, he was too drunk at the time of his offense to remember what he had learned during classes subsequent to his DUI convictions or to recognize the extreme risk of his behavior. 4/19/17 Tr., p. 575. His addiction took over and "rational thought was virtually impossible for him." *Id.* at 576. It was not that he was indifferent to the consequences of his behavior; rather, he was oblivious to the risks. *Id.* at 577.

The jury was afforded no guidance in its deliberation of second degree murder as to how to proceed if it found Antonio's version of events credible. The second degree murder instruction provided no advice concerning how to analyze evidence that Antonio acted without conscious thought or awareness of risk.

This Court must weigh the adequacy of the jury instructions as a whole. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). In analyzing the effect of the jury instructions on the validity of Antonio's conviction, no single instruction may "be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyd v. United States*, 271 U.S. 104, 107 (1926).

Under the circumstances of this case, the jury reasonably would have understood the court's instruction to require that it decide whether the

government's evidence supported a finding of guilt of second degree murder before considering evidence Antonio presented that the offense he committed was involuntary manslaughter. Because the jury did reach a verdict on second degree murder, it would not have debated whether his actions were more reflective of gross negligence than malice. By instructing the jury only to consider Antonio's defense if it was unpersuaded by, or could not agree on, the government's argument that he committed second degree murder, the district court plainly erred.

Considered as a whole in light of Antonio's defense, the jury instructions were constitutionally infirm. This Court can only conclude that if the jury had been required to consider the difference between second degree murder and involuntary manslaughter and the issues raised by Antonio's defense, it might have had a reasonable doubt about whether he was guilty of involuntary manslaughter rather than second degree murder and acquitted him of second degree murder. The jury's return of a second degree murder verdict without adequate consideration of his theory of defense "so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147.

This Court should determine that the jury instructions infringed his rights to due process and a fair trial and that Antonio's conviction must be reversed. "In view of the place of importance that trial by jury has in our Bill of Rights, it is not

to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach v. United States*, 326 U.S. 607, 615 (1946).

C. *Even under the Plain Error Standard, Mr. Antonio is Entitled to Relief.*

The first two prongs of the plain error standard are easily met in this case. The right to a theory of defense instruction, when supported by sufficient evidence, is well established. The district court found that Antonio was entitled to an instruction that he contended he committed involuntary manslaughter rather than second degree murder. Obviously, a theory of defense instruction is only meaningful if the jury considers it. By immediately following the instruction on Antonio's theory of defense with an instruction not to consider that defense until after deliberating the government's second degree murder theory of the case, the district court plainly erred.

The third prong of the plain-error analysis requires a showing that the instructional error affected the defendant's substantial rights. "A plainly erroneous jury instruction affects a defendant's 'substantial rights' if the instruction concerns a principal element of the defense or an element of the crime, thus suggesting that

the error affected the outcome of the case." *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998). *See also United States v. Simpson*, 845 F.3d 1039, 1061 (10th Cir. 2017) (same). The defendant must show a "'reasonable probability that, but for the error,' the outcome of the proceedings would have been different." *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1343 (2016) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 82 (2002)).

A "reasonable probability" of a different outcome is less than proof by a preponderance of the evidence that, but for the error, the outcome would have been different. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). It requires a showing of a probability that "undermines confidence in the outcome of the trial." *Id.* *See also United States v. Wolfname*, 835 F.3d 1214, 1222 (10th Cir. 2016) (same); *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (same).

Because the jury decided that Antonio was guilty of second degree murder, there is every reason to believe that it never deliberated on whether he had a mental state at the time of his offense that warranted a conviction of involuntary manslaughter rather than second degree murder. As argued above, if the jury had considered Antonio's defense and the differences between the required mental states for second degree murder and involuntary manslaughter, it might well have acquitted him of second degree murder and convicted him of involuntary

manslaughter. The instructional error clearly implicated Antonio's substantial rights. "When an error affects substantial and fundamental rights, [ ], we may remedy the defect under the plain error rule." *Lofton*, 776 F.2d at 920.

While courts of appeals have discretion in applying the fourth prong of the plain error standard, the Supreme Court has instructed that courts " 'should' correct a forfeited plain error that affects substantial rights 'if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.' " *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1906 (2018) (quoting *Olano*, 507 U.S. at 736). *See also id.* at 1907 ("The possibility of additional jail time ... warrants serious consideration in a determination whether to [reverse under plain error review]. It is crucial in maintaining public perception of fairness and integrity in the judicial system that courts exhibit regard for fundamental rights and respect for prisoners as people.") (internal quotations omitted).

Because Antonio may well have been convicted of a less serious offense if the jury had been properly instructed, the district court's error "seriously affects the fairness, integrity or public reputation of judicial proceedings." This Court should apply the less rigid plain error standard that applies in cases involving constitutional violations and rule that Antonio is entitled to reversal of his conviction.

CONCLUSION

For the reasons stated, this Court should determine that there was insufficient evidence to support Antonio's conviction and that the government failed to prove that the district court had subject matter jurisdiction. For both reasons, this Court should reverse Antonio's conviction and remand with instructions for dismissal with prejudice. This Court should also rule that Mr. Antonio's conviction must be reversed due to the district court's errors in failing to comply with Fed. R. Crim. P. 12(d) and in instructing the jury not to consider Antonio's theory of defense unless it was unable to agree on a guilty verdict based on the government's theory of the case.

REQUEST FOR ORAL ARGUMENT

Mr. Antonio requests oral argument in order to clarify his position with respect to the important issues before this Court in this appeal and respond to any questions of the panel that the parties have not adequately covered in their briefs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I, Irma Rivas, counsel for Appellant Jeffrey Antonio, 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 12,921 words.

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CERTIFICATE OF PRIVACY REDACTIONS AND VIRUS SCANNING

I, Irma Rivas, counsel for Defendant-Appellant JeffreyAntonio, certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk and that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning

program, i.e., Symantec AntiVirus Corporate Edition, Version 12.1, updated February 19, 2019, and according to the program, are free of viruses.

/s/ Irma Rivas
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CERTIFICATE OF SERVICE

I, Irma Rivas, certify that an original and seven copies of the foregoing was sent by Federal Express, 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. The electronic filing of the foregoing caused United States Attorney John C. Anderson to be served electronically this 19th day of February 2019.

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