Case No. 06-51489

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

IGNACIO RAMOS & JOSE ALONSO COMPEAN,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas, El Paso Division

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS RAMOS AND COMPEAN URGING REVERSAL

Daniel J. Popeo
Paul D. Kamenar
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302 (Tel)
(202) 588-0386 (Fax)

Counsel for Amicus Curiae
Washington Legal Foundation

Date: May 31, 2007

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Ignacio Ramos and Jose Alonso Compean, Appellants

David L. Botsford, Appellant Ramos' counsel on appeal

Robert T. Baskett, Appellant Compean's counsel on appeal

United States of America, Appellee

Joseph H. Gay Jr., Appellee's counsel on appeal

Congressman Walter B. Jones, Congressman Virgil H. Goode, Jr., Congressman Ted Poe, Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund, Amici Curiae

Mark Brewer, William J. Olson, Herbert W. Titus, John S. Miles, and Jeremiah L. Morgan, counsel for Amici Curiae

Daniel J. Popeo, Paul D. Kamenar, and Richard A. Samp, counsel for Washington Legal Foundation, Amicus Curiae

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that the Washington Legal Foundation

is a non-stock, nonprofit corporation, has no parent companies, and no person or entity owns them or any part of them.

Richard A. Samp

Richard A. Samp
Attorney of Record for Amicus Curiae

Date: May 31, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide, including many in Texas. Founded in 1977, WLF devotes substantial resources to litigating cases and filing amicus curiae briefs in the U.S. Supreme Court and lower federal courts, including this one. WLF advocates for a limited and accountable government, a strong national security and defense, vigorous enforcement of our immigration laws, and opposes abusive civil and criminal enforcement actions by regulatory agencies and the Department of Justice. In particular, WLF has filed amicus briefs in important criminal cases (*e.g., United States v. Booker*, 543 U.S. 220 (2005); *Arthur Andersen v. United States*, 544 U.S. 696 (2005)); national security cases (*e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)); and immigration cases (*e.g., Clark v. Martinez*, 543 U.S. 371 (2005); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005)).

In addition, WLF filed an amicus sentencing memorandum in federal district court on March 16, 2007, in *United States v. Hernandez*, Crim. No. DR-06-CR-568 (RD) (D. Tex. Del Rio Div.). In that case, WLF urged the district court to reject the government's request for a harsh prison sentence and instead to impose probation on a young Texas deputy sheriff convicted of one count of

violating the civil rights of an illegal alien under 18 U.S.C. § 242, after shooting at the tires of a van loaded with illegal aliens, the driver of which had tried to run him over after being stopped for a traffic offense. The court imposed a prison sentence on Deputy Hernandez of one year and a day on March 21, 2007.

Unless the convictions and sentences of 11 years and 12 years for the two U.S. Border Agents in this case are reversed in this high-profile case[1], WLF is deeply concerned that they will have a chilling effect on the ability of other agents (and other law enforcement personnel) to carry out their difficult duties to protect our borders against drug smugglers, possible terrorists, and other violent illegal aliens who resist arrest, and thereby expose themselves (and the rest of the country) to more danger than they already face. WLF believes that its amicus brief will assist the Court in resolving the issues in this appeal. In particular, WLF's brief presents additional legal authorities and public policy

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[1] The criminal prosecution of these two Border Agents, including the grant of immunity to the drug smuggler, and the draconian sentences imposed on them have generated widespread public attention and well-deserved criticism. *See, e.g.,* Jerry Seper, *Lawmakers Seek Review of Border Agent Case,* Wash. Times, Aug. 23, 2006, *available at* http://www.washingtontimes.com/national/20060823-122228-3575r_page2.htm. U.S. Senator Dianne Feinstein was particularly troubled by the immunity agreement afforded the drug smuggler in this case, and demanded that the Attorney General provide her with information regarding the granting of immunity. See Letter from Senator Feinstein to Attorney General Gonzales, Feb. 8, 2007, *available at*, http://feinstein.senate.gov/public/index.cfm (Follow "View More Headlines" hyperlink; then follow "February" hyperlink; then follow "Senator Feinstein Calls for Answers Regarding Prosecution and Imprisonment of Border Patrol Agents" hyperlink).

arguments to supplement those presented by the defendants, particularly with regard to the following points of error: (1) the misapplication of 18 U.S.C. § 924(c)(1)(A) to law enforcement officers who use and carry their weapons during and in relation to their duties to enforce the law, rather than to commit violent crimes and traffic in drugs, and (2) the denial of the right of the defendants to have the jury be properly instructed regarding a law enforcement officer's use of force, thereby preventing the jury from considering the totality of the circumstances that faced the defendants as they encountered the drug smuggler on the day in question.

INTRODUCTION AND SUMMARY

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the Briefs of Appellant Ignacio Ramos ("Ramos Br.") and Appellant Jose Alonso Compean ("Compean Br."). To summarize briefly, on the afternoon of February 17, 2005, U.S. Border Patrol Agents Compean and Ramos (and two other agents) attempted to capture an illegal alien who was smuggling over 750 pounds of marijuana in a van along the Mexican/U.S. river border near Fabens, Texas, an area notorious for drug and alien smuggling. Over a 15-20 minute period, a high-speed vehicle chase by the border agents ensued until the smuggler, Osvaldo Aldrete-Davila ("Davila")

managed to stop at the edge of a canal. Davila ran from the van, brazenly ignored Agent Compean's warnings to stop (even though Compean had his shotgun pointing at Davila), got in a scuffle with Compean who dropped his shotgun, resisted arrest, and then began to flee. Compean testified that he saw something shiny in Davila's left hand as he turned towards Compean, and fearing that he was in danger, Compean fired several shots at Davila with his revolver without hitting him. Meanwhile, Agent Ramos, who heard only the shots as he was approaching the scene through the muddy canal, finally saw Davila with what he believed was a gun in his left hand, and then fired one shot at Davila, which was later learned to have struck Davila in the left buttock. Davila continued his flight across the river and ultimately got into another vehicle and left the area.

The smuggler was later located in Mexico by federal authorities and given immunity to testify against the two Border Agents who were charged by overzealous prosecutors with a dozen felony charges collectively, including attempted murder, and were convicted on all counts except the attempted murder charge. However, the single shooting episode (and the single shot by Ramos that struck Davila) gave rise to *four* other serious felony charges and convictions: Assault with a dangerous weapon 18 U.S.C. §§ 7(3), 113(a)(3) (Count 2-Ramos

& Compean); Assault with serious bodily injury, 18 U.S.C. §§ 7(3), 113(a)(6) (Count 3-Ramos & Compean); Discharge of a firearm in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A), (Count 4-Ramos; Count 5-Compean); and Deprivation of rights under color of law, 18 U.S.C. § 242 (Count 11-Compean; Count 12-Ramos). Thus, a single *actus reus,* the shooting, resulted in four felony convictions.

As if this weren't enough, prosecutors also charged the agents with four counts of tampering with an official proceeding (Counts 6-9) for conduct *after* the shooting, including the *failure* to act; namely, the failure to make an oral report within an hour after the shooting, which was required by Border Patrol internal administrative policies. In short, administrative regulations, violations of which may result in a disciplinary action such as a short suspension, were suddenly bootstrapped into major felony charges, and allowed to infect the jury's deliberations on the other counts.

Due to the harsh mandatory 10-year sentencing feature of § 924(c)(1)(A) -- a provision intended to be used against gun-wielding drug traffickers and violent criminals -- Ramos received 11 years, and Compean received 12 years (all the other sentences ran concurrently to the 10-year sentence as required by statute). While WLF agrees with the appellants that the convictions on *all* the

counts should be reversed and/or a new trial ordered, a reversal of the conviction on the § 924(c)(1)(a) charge would result in a drastically reduced sentence, even if the convictions for all the other counts are affirmed.

ARGUMENT

I. APPLICATION OF 18 U.S.C. § 924(c)(1)(A) TO THE APPELLANTS VIOLATED THEIR RIGHTS TO DUE PROCESS

Both Compean and Ramos attack the application of 18 U.S.C. § 924(c)(1)(A) in this case, a conviction of which requires a mandatory 10-year sentence stacked on top of the underlying or predicate crime. *See* Issues Nos. 2, 3, and 11 (Compean Br. at 8, 20, 36); Issues Nos. 3, 4, 12 (Ramos Br. at 2, 46, 89.

In the first place, WLF agrees with the appellants that Counts Four and Five of the indictment were fatally defective for not charging an offense. Section 924(c)(1)(A) states in pertinent part, that "any person who, *during and relation to any crime of violence or drug trafficking crime . . . uses or carries* a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" receive a minimum of five years under § 924(c)(1)(A)(i); seven years "if the firearm is brandished" under § 924(c)(1)(A)(ii); and 10 years

"if the firearm is discharged" under § 924(c)(1)(A)(iii). Counts Four and Five of the indictment allege that the defendants "knowingly discharged a firearm . . . during and in relation to a crime of violence." However, the *discharge* of a firearm is a sentencing enhancing factor and not a substantive offense. *United States v. Harris*, 536 U.S. 545 (2002). The substantive offense is where one "uses" or "carries" a firearm "during and in relation to a crime of violence, or "possesses" a firearm "in furtherance of any such crime." The agents were not charged with "us[ing]" a firearm "during and in relation to a crime of violence." Accordingly, Counts Four and Five fail to charge any criminal offense, the omission was plain error, the resultant jury instructions were flawed, and the convictions on those counts must be reversed because the defendants rights to due process were thereby violated. *See United States v. McGilberry*, 480 F.3d 326 (5th Cir. 2007).

Any attempt by the government to argue that the "discharge" of a firearm is a subset of the "use" of that firearm ignores the important qualifier that an offense occurs only if the person "uses" or "carries" the firearm "during and in relation to any crime of violence or drug trafficking." § 924(c)(1)(A). Here, the defendants were carrying and using their firearms "during and in relation to" their duties as U.S. Border Patrol Agents when they suddenly confronted the

evasive and dangerous drug smuggler.

Congress simply did not intend that § 924(c)(1)(A) would be applicable to law enforcement agents such as appellants, who are required to possess and carry their weapons, and to use them to protect themselves and others in situations that reasonably appear to them at the moment in tense situations to be life-threatening, even if after-the-fact they are found to have been mistaken about the apparent threat. Rather, it is clear that § 924(c)(1)(A) was directed at punishing and deterring criminals who set out to commit a crime of violence or drug trafficking and use, carry, or possess a firearm to do so.

As originally enacted, § 924(c)(1)(A) was part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). As the title of this legislation indicates, Congress was concerned with the widespread gun violence caused by criminals, and the use of guns in drug trafficking. The floor debates of the measure illuminate the purpose of § 924(c). *See* 145 Cong. Rec. H22231-48 (1968).

Speaking of the general climate and public concern over crime at the time, Representative Cellar provided the following statistics: "[In 1967] there were over 71,000 armed robberies with a gun and 55,0000 aggravated assaults with a gun and 7,700 murders and nonnegligent manslaughter cases with a gun . . . ."

Id. at 22235. Representative Casey stated, "[t]he so-called experts want . . . to try to remove guns from the hands . . . of citizens. Let us say one word, ladies and gentlemen, about the crook." *Id.* at 22230. Representative Edmonson, a co-sponsor of the bill, stated: "I have joined . . . in sponsorship of this legislation, and I think there is a need for *stronger law enforcement* . . . ." *Id.* at 22231 (emphasis added).

Representative Harsha stated: "It is high time we deal with the criminal rather than blame society for the disrespect for law and order that is now prevalent." *Id*. Congressman Hunt commented that "various Supreme court decisions have hamstrung the police officers to the point where we have bought society to chaos." *Id*. Representative Cramer spoke with concern about "guns used in an attempt to commit murder or rape or burglary or kidnapping or homicide . . . ." *Id.* at 22233. As Representative Rogers observed, "What we are trying to get at is the flood of crimes where there is a gun used by placing an additional penalty on it." *Id.* at 22237.

> [M]any people throughout the Nation have been led or misled into believing that some gun control law would prevent crime or cause a return of law and order. I do not think there is any question but that most people can see that law enforcement and law and order have broken down. They want something done. *Something must be done to return to law enforcement, where the criminal can be sure of being arrested, tried, convicted and punished, for that is the real deterrent to crime*.

Id. at 22238 (emphasis added).

Representative Poff noted that his substitute amendment, which became the provision that passed later that day as § 924(c), "retains its central thrust and targets upon the criminal rather than the gun." *Id.* at 22231. There was some discussion that the enhanced penalty provision might inadvertently cover police officers who may lawfully carry guns:

> It has been suggested in the general debate that a policeman, having a perfect right to have a gun, might come under the provisions of the Casey amendment, or a person who has a license to carry a gun with him, and though he did not use it, if he got involved in a fracas, might come under the burden of this bill because he had been carrying a gun, though it would not have anything to do with the commission of an offense he might commit. I believe my amendment would improve the Casey amendment. It certainly would remove the objections along the line I have mentioned and which I feel are valid.

Id. at 22235 (Rep. Dowdy). As noted, Representative Poff's substitute amendment to the Casey amendment was enacted which apparently reflected those concerns by adding the qualifier "unlawfully" to § 924(c)(2) ("carries a firearm *unlawfully* during the commission of any felony which may be prosecuted in a court of the United States") (emphasis added).

Because Congress adopted § 924(c) so swiftly, the committee reports and congressional hearings are absent. Therefore, statements made during the floor debate remain the sole indication of Congressional intent. Representative Poff,

the legislation's chief sponsor, stated that § 924(c) was intended to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." 145 Cong. Rec. H22231 (1968), cited in *Muscarello v. United States*, 524 U.S. 125, 132 (1998). Clearly, law enforcement agents should not leave their guns at home; rather, they are required to carry them and use them when warranted.

Because Representative Poff was the chief sponsor of the provision, his views are entitled to great weight. *See Busic v. United States*, 446 U.S. 398, 405 (1980) (discussing the authoratative nature of Rep. Poff's statements as the bills chief legislative sponsor); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (when the meaning of language is unclear, "[w]e search the words of the sponsors for a clear indication" of legislative intent). Other lawmakers echoed Rep. Poff's views: "We are concerned . . . with having the criminal leave his gun at home." 145 Cong. Rec. H22236 (1968) (Rep. Meskill); "[T]he man who goes out taking a gun to commit a crime" is the main concern. *Id.* at 22243-44 (Rep. Hunt).

Given that Congress's effort to curb gun violence centered on persuading the would-be criminal to "leave his gun at home," it strains credulity to imagine § 924(c) was ever intended to apply to law enforcement officers (such as appellants) acting in the line of duty. *See Smith v. United States*, 508 U.S. 223,

240 (1993) (discussing Congressional intent to reduce the use of firearms in violent and drug-related crime). Moreover, applying 18 U.S.C. § 924(c) to the conduct of law enforcement acting in the line of duty produces results that are patently absurd.

To be sure, § 924(c) was subsequently amended in 1984 as part of the Comprehensive Crime Control Act of 1984, and the modifier "unlawfully" preceding "carries" was deleted so that those who are lawfully allowed to carry weapons, including police officers, can be subject to § 924(c) "as in *the extremely rare case* of the armed police officer who commits a [violent or drug trafficking] crime." *United States v. Rivera*, 889 F.2d 1029, 1031 (1989) (citing S. Rep. No. 225, 98th Cong., 2d Sess., 314 n. 10 (1983) (emphasis added). These few "extremely rare cases" of a rogue officer are cited and properly distinguished by Compean in his brief at page 16 where, for example, an officer committed rape, *United States v. Contreras*, 950 F.2d 232 (5th Cir. 1991), engaged in drug trafficking, *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001), or gratuitously assaulted surrendering suspects or hand-cuffed prisoners, conduct that was patently unlawful. *United States v. Williams*, 343 F.3d 423 (5th Cir. 2003). Here, on the other hand, both Compean and Ramos were not rogue officers who used their guns in a patently unlawful way to commit a crime of

violence or drug trafficking offense. Rather, they were carrying the guns "during and in relation to" their duties as border patrol agents to secure our borders and chase and apprehend drug smugglers like Davila.

In his State of the Union address earlier this year, President Bush was greeted with applause when he urged Congress to pass immigration reform that will "leave Border Agents free to chase down drug smugglers and criminals and terrorists." Presumably, the President meant that the Border Agents should chase down *and capture* drug smugglers, criminals, and terrorists. Yet, when Agents Compean and Ramos tried to do just that, and made a split-second decision to use their weapons to protect themselves from perceived harm in a dangerous and tense situation, their quick response is second-guessed, and they find themselves thrown behind bars for 11 and 12 years. This is clearly a miscarriage of justice.

If the application of § 924(c) in this situation is sanctioned, then not only Border Agents, but all law enforcement officers will be hesitant to vigorously enforce the laws and apprehend criminals. Section 924(c) forces officers to walk a narrow line between upholding their duty to keep the peace by using reasonable force, and risking a mandatory 5 to 10 year prison sentence if a jury determines long after-the-fact that the force used was unreasonable. Clearly

such an interpretation has a chilling effect on an officer's willingness to arrest criminals or protect him or herself or others.

Moreover, in light of the legislative history of this provision, namely, that Congress attempted to strengthen law enforcement rather than place officers in fear of incarceration for activities directed toward upholding the peace or preventing crime, law enforcement officers would certainly not be on notice that the provision can be so easily invoked against them. "Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989) (rejecting literal meaning of the statutory term "utilize"). "It is a fundamental principle of statutory construction that the meaning of a word may not be determined in isolation, but must be drawn from the context in which it is used." *Smith v. United States*, 508 U.S. 223, 241 (1993). Furthermore, if there is ambiguity concerning the ambit of the law, the rule of lenity provides that the reach of the law be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 226 (1971). However, the rule of lenity need not be invoked in this case because, as previously demonstrated, a "resort to the language and structure, legislative history, and motivating policies," *United States v. Reedy*, 304 F.3d 358, 367, n.13

(5th Cir. 2002), leaves no reasonable doubt that the scope of § 924(c) was not meant to encompass the kind of conduct at issue here.

Here, § 924(c) proscribes using or carrying a firearm "during and relation to" commission of a "crime of violence" or "drug-trafficking crime." In this case, the defendants were charged and convicted under 18 U.S.C. § 242 for violating the constitutional rights of the drug smuggler in effecting his seizure. Furthermore, this Court has ruled that a civil rights violation is a "crime of violence" if committed with, or while carrying a gun. *United States v. Williams*, 343 F.3d 423, 434 (5th Cir. 2003). Therefore, if the government's application of § 924(c) is upheld, then all state and federal law enforcement officers run a risk of violating 18 U.S.C. § 242 each time they attempt to capture or hold a fleeing criminal, even if they do not draw or discharge their firearm. At the whim of the prosecutor, they can be charged under the harsh provision of § 924(c) requiring a mandatory minimum prison term of five years, or a 10-year sentence if the weapon is used to protect themselves or others, if they are second-guessed about the reasonableness of their actions. This is particularly prejudicial to a law enforcement officer's due process rights where, as discussed in the following section, the Border Agents were not permitted to fully present their defense and the jury instructions on use of force were defective.

II. THE APPELLANTS' DUE PROCESS RIGHTS WERE VIOLATED WITH REGARD TO THE JURY INSTRUCTIONS ON THE LAWFUL USE OF FORCE AND THE BURDEN OF PROOF

Amicus agrees with appellants that the Court committed plain and reversible error by omitting essential defensive instructions to the jury regarding the circumstances under which a law enforcement officer may use force and how the jury must examine the issues. Compean Br. 26 (Issue No. 5); Ramos Br. 88 (Issue No. 12). In addition, amicus agrees with the appellants' related arguments that it was error to limit their cross-examination of Davila about his experience in handling drugs and drug smuggling and to preclude evidence about the weight of the marijuana involved, as well as other evidence showing the totality of the circumstances they faced in those tense and dangerous moments.

The fundamental flaw in this case was the failure of the jury instructions to properly explain the law governing the use of reasonable force by a law enforcement officer. The leading case that explicates the defense is *Graham v. Connor*, 490 U.S. 386 (1989). In *Graham*, the Supreme Court outlined the scope of the defense as follows:

> Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper

> application requires *careful attention to the facts and circumstances of each particular case*, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396 (case citations omitted) (emphasis added). *See Tennessee v. Garner,* 471 U.S. 1, 8-9 (1985) (the question is "whether *the totality of the circumstances* justifie[s] a particular sort of ... seizure") (emphasis added). In addition, the "reasonableness" of a particular use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. It is also crucial for the jury as the factfinder to understand that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id*. at 397-98.

The jury instructions that were given for the assault counts in Counts Two and Three regarding self-defense were sparse and unilluminating; for Counts Four and Five, they omitted any mention of defensive theories; and for Counts Eleven and Twelve (the 18 U.S.C. § 242 civil rights counts), they refer only generally to the use of force permitted by an officer to be used against persons once in custody (and not at all with respect to effectuating a seizure of the criminal as in this case), and to defend himself or another from bodily harm. *See*

Compean Br. 29-30.

Indeed, as the appellants correctly point out, even an accused officer sued in a civil case for using excessive force has the right to the instructions regarding the defensive theories as specified in *Graham*. *See* Compean Br. at 31 (citing Fifth Circuit Pattern Jury Instruction 10.2 (civil cases)). All the more so are these instructions required where, as here, the officer's substantial liberty interests are at stake.

As noted earlier, in *United States v. Hernandez*, Crim. No. DR-06-CR-568 (RD) (D. Tex. Del Rio Div.), a deputy sheriff was convicted of one count of violating 18 U.S.C. § 242 for deprivation of civil rights when an illegal alien was injured by a bullet fragment when the officer shot at the rear of a van carrying a load of illegal aliens as the driver attempted to run him over following a traffic stop. The jury instructions in that case, while defective in some respects, at least provided the jury with certain provisions of the law from *Graham* with respect to the use of force. In particular, the last paragraph of Instruction No. 16 (attached hereto) provides as follows:

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight. You should consider the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation. Whether the force used by a law enforcement officer

> was reasonable is an issue to be determined by you in light of all the surrounding circumstances on the basis of the degree of force a reasonable and prudent officer would have applied under the circumstances of the case.

Id. These jury instructions in the *Hernandez* case at least satisfy most of the *Graham* factors that Compean argued in Sub-Issue 5-B and 5-C of his brief that should have been given here. Comp. Br. at 26-27; Ramos Br. 88. But it was plain error to omit these important aspects of the *Graham* factors from the jury instructions in the instant case.

Moreover, the instructions in this case were further flawed with respect to Counts 11 and 12, by failing to instruct the jury that the government has the burden of proof to disprove the defense beyond a reasonable doubt. Compean Br. at 30; Ramos Br. at 56-57. The court erred by instructing the jury with respect to these two counts that it had to find the truth as to whether reasonable force was used or not, thereby misleading the jury into believing that the defendants bore the burden of proving beyond a reasonable doubt (or some other level of proof) that their use of force was justified. "The test . . . of course, [is] not which side is more believable, but whether . . . guilt as to every essential element of the charge has been proven [by the government] beyond a reasonable doubt." *United States v. Stanfield*, 521 F.2d 1122 (9th Cir. 1975).

As the court made clear in *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim.

App. 2003):

> [W]e are dealing with self-defense, which is classified as a defense, as opposed to an affirmative defense. With a defense, the burdens at trial alternate between the defense and the State.
>
> * * * *
>
> We said a defendant bears the burden of production, which requires the production of some evidence that supports the particular defense. Once the defendant produces such evidence, the State then bears the burden of persuasion to disprove the raised defense [beyond a reasonable doubt].

Id. at 594.[2]

Amicus also agrees with the appellants' argument that the jury instructions with respect to Count 12 constituted plain error by defining "willfully" to mean that the person acted "with a bad purpose or evil motive." Ramos Br. 48 (Issue No. 5). As *Graham* made clear, a "willful" violation of 42 U.S.C. § 1983 (the civil analogy to 18 U.S.C. § 242) is determined "without regard to their underlying intent or motivation." Ramos Br. at 55. Accordingly, the jury instruction in this regard was defective.[3]

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[2] Amicus notes that the jury instructions in the *Hernandez* case were similarly defective in this respect for not instructing the jury that the government had the burden of disproving the defense beyond a reasonable doubt.

[3] Amicus notes that the Jury Instruction No. 15 in the *Hernandez* case (attached hereto) does not mention "evil motive" in the definition of "willfully"; rather, "willfully" is defined as meaning that "the act was committed voluntarily and purposely, with the specific intent to

As *Graham* makes clear, the reasonableness of the defendant's use of force requires *"careful attention to the facts and circumstances of each particular case*, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (emphasis added). Here, the defendants were prevented from introducing evidence about the large quantity of marijuana involved, approximately 750 pounds, and from cross-examining Davila about his drug smuggling experience, despite his immunity and in violation of their Sixth Amendment right to confront their accuser. Those who transport large quantities of drugs are likely to carry weapons to protect their cargo, and can be expected to pose a serious threat to law enforcement officers who confront them.

Indeed, a recent congressional staff report and congressional hearings chillingly demonstrate just how dangerous the conditions are that Compean and Ramos faced, as well as other Border Patrol agents. A section of that report describes the situation thusly:

F. Border Violence Against Law Enforcement and U.S. Citizens

The violence on the Southwest border encountered by U.S. Border

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disobey or disregard the law." *Id*.

> Patrol and local law enforcement is increasing at an alarming rate. From 2004 to 2005, violent incidents against Border Patrol agents on the Southwest border have increased 108%. During FY 2006, there have been 746 violent incidents against Border Patrol agents, including 435 incidents of rock assaults, 173 physical assaults, 46 vehicle assaults, and 43 firearm assaults. In January 2006, the Department of Homeland Security sent a confidential memo to Border Patrol agents warning that they could be the targets of assassins hired by alien smugglers.

STAFF OF SUBCOMM. ON INVESTIGATION OF H. COMM. ON HOMELAND SEC., 109TH CONG., A LINE IN THE SAND: CONFRONTING THE THREAT AT THE SOUTHWEST BORDER 18 (Comm. Print 2006), *available at* http://www.house.gov/mccaul/pdf/Investigaions-Border-Report.pdf.

The staff report further found as follows:

> This new generation of sophisticated and violent cartels, along the Southwest border, is presenting significant challenges to U.S. law enforcement. These criminal syndicates have unlimited money to buy the most advanced weapons and technology available. The cartels monitor the movements and communications of law enforcement and use that intelligence to enable the criminals to transport their cargo accordingly.
>
> In addition to the criminal activities and violence of the cartels on our Southwest border, there is an ever-present threat of terrorist infiltration over the Southwest border. Data indicates that there are hundreds of illegal aliens apprehended entering the United States each year who are from countries known to support and sponsor terrorism.

Id. at 4.

The report further describes how sophisticated the drug smuggling operations can be:

> Mexican drug cartels operating along the Southwest border are *more sophisticated and dangerous than any other organized criminal enterprise.* The Mexican cartels, and the smuggling rings and gangs they leverage, wield

> substantial control over the routes into the United States and pose substantial challenges to U.S. law enforcement to secure the Southwest border. The cartels operate along the border with military grade weapons, technology and intelligence and their own respective paramilitary enforcers.

Id. at 4 (emphasis added).

> In today's climate, U.S. Border Patrol agents are fired upon from across the river and troopers and sheriff's deputies are subject to attacks with automatic weapons while the cartels retrieve their contraband. In May 2006, the Zapata County Sheriff's Office received information that the cartels immediately across the border plan to threaten or kill as many police officers as possible on the United States' side.

Id. at 19.

A few years ago, a Senate Judiciary's Subcommittee heard similar evidence regarding the dangers that law enforcement encounter at our Southwest border. According to Zapata County Sheriff Gonzalez:

> We recently received information that the cartels immediately across our border are planning on killing as many police officers as possible on the United States side. This is being planned for the purpose of attempting to "scare us" away from the border. They have the money, equipment, and stamina to do it. They are determined to save their "load."

Outgunned and Outmanned: Local Law Enforcement Confronts Violence Along the Southern Border: Hearing Before the H. Subcomm. On Immigration, Border Sec., and Claims, & Subcomm. On Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 109th Cong. (2003) (Statement of Sigifredo Gonzalez, Jr., Zapata County Sheriff at 4).

Amicus submits that the appellants' constitutional rights were plainly violated by (1) being denied the right to fully cross-examine Davila and present all the evidence showing the "totality of the circumstances," such as the amount of drugs involved; (2) the failure of the court to properly instruct the jury, particularly with regard to the permissible use of force during the tense situation they faced, rather than in 20/20 hindsight; and (3) the failure of the court to instruct the jury that the government bears the burden to disprove self-defense beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons and those provided by the appellants, the judgments and convictions should be reversed.

Respectfully submitted,

Daniel J. Popeo
Daniel J. Popeo

Paul D. Kamenar
Paul D. Kamenar

Richard A. Samp
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302 (Tel)
(202) 588-0386 (Fax)

Counsel for Amicus Curiae
Washington Legal Foundation*

Date: May 31, 2007

* Counsel wish to acknowledge the assistance of Gabriel Brake and Selina A. Alaniz, law students at Texas Tech University School of Law, in the preparation of this brief.

ADDENDUM

Final + 7*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA — PLAINTIFF

v. CASE NO. DR-06-CR-568(1) RTD

GUILLERMO FALCON HERNANDEZ — DEFENDANT

FINAL JURY INSTRUCTIONS

1. INTRODUCTION TO FINAL INSTRUCTIONS (5th Cir. 1.03)
2. DUTY TO FOLLOW INSTRUCTIONS (5th Cir. 1.04)
3. PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, REASONABLE DOUBT (5th Cir. 1.05)
4. EVIDENCE-EXCLUDING WHAT IS NOT EVIDENCE (5th Cir. 1.06)
5. EVIDENCE-INFERENCES-DIRECT AND CIRCUMSTANTIAL (5th Cir. 1.07)
6. CREDIBILITY OF WITNESSES (5th Cir. 1.08)
7. CHARACTER EVIDENCE (5th Cir. 1.09)
8. IMPEACHMENT BY PRIOR INCONSISTENCIES (5th Cir. 1.10)
9. EXPERT WITNESS (5th Cir. 1.17)
10. ON OR ABOUT (5th Cir. 1.18)
11. CAUTION-CONSIDER ONLY CRIME CHARGED (5th Cir. 1.19)
12. CAUTION-PUNISHMENT (5th Cir. 1.20)
13. APPLICABLE STATUTE (18 U.S.C. 242)
14. SINGLE DEFENDANT-MULTIPLE COUNTS (5th Cir. 1.21)
15. DEPRIVATION OF CIVIL RIGHTS (5th Cir. 2.18)
16. PROHIBITION AGAINST THE USE OF UNREASONABLE FORCE
17. BODILY INJURY
18. DUTY TO DELIBERATE-VERDICT FORM (5th Cir. 1.24)

INSTRUCTION NO. 15

DEPRIVATION OF CIVIL RIGHTS

TITLE 18, UNITED STATES CODE, SECTION 242, MAKES IT A CRIME FOR ANYONE, ACTING UNDER COLOR OF LAW, WILLFULLY TO DEPRIVE SOMEONE OF A RIGHT SECURED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

FOR YOU TO FIND THE DEFENDANT GUILTY OF THIS CRIME, YOU MUST BY CONVINCED THAT THE GOVERNMENT HAS PROVED EACH OF THE FOLLOWING BEYOND A REASONABLE DOUBT:

FIRST: THAT THE DEFENDANT DEPRIVED THE VICTIM OF A RIGHT SECURED BY THE CONSTITUTION OR LAW OF THE UNITED STATES BY COMMITTING ONE OR MORE OF THE ACTS CHARGED IN THE INDICTMENT;

SECOND: THAT THE DEFENDANT ACTED WILLFULLY; AND

THIRD: THAT THE DEFENDANT ACTED UNDER COLOR OF LAW; AND

FOURTH: THAT BODILY INJURY DID OCCUR AS A RESULT OF THE DEFENDANT'S CONDUCT.

THE INDICTMENT CHARGES THAT THE DEFENDANT DEPRIVED THE VICTIM OF THE FOLLOWING RIGHT: THE RIGHT TO BE FREE FROM UNREASONABLE SEIZURE. YOU ARE INSTRUCTED THAT THIS RIGHT IS ONE SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES.

ACTING "WILLFULLY" MEANS THAT THE ACT WAS COMMITTED VOLUNTARILY AND PURPOSELY, WITH THE SPECIFIC INTENT TO DISOBEY OR DISREGARD THE LAW.

ACTING "UNDER COLOR OF LAW" MEANS ACTS DONE UNDER ANY STATE LAW, COUNTY OR CITY ORDINANCE, OR OTHER GOVERNMENTAL REGULATION,

AND INCLUDES ACTS DONE ACCORDING TO A CUSTOM OF SOME GOVERNMENTAL AGENCY. IT MEANS THAT THE DEFENDANT ACTED IN HIS OFFICIAL CAPACITY OR ELSE CLAIMED TO DO SO, BUT ABUSED OR MISUSED HIS POWER BY GOING BEYOND THE BOUNDS OF LAWFUL AUTHORITY.

INSTRUCTION NO. 16

PROHIBITION AGAINST UNREASONABLE SEIZURE

AS TO THE FIRST ELEMENT OF THE CRIMES CHARGED IN COUNTS ONE AND TWO OF THE INDICTMENT, THE GOVERNMENT MUST PROVE THAT THE CONDUCT OF THE DEFENDANT DEPRIVED **MARICELA RODRIGUEZ-GARCIA** AND **CANDIDO GARCIA-PEREZ** OF A RIGHT SECURED OR PROTECTED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES. IN THIS CASE, THE INDICTMENT CHARGES THAT THE DEFENDANT DEPRIVED **MARICELA RODRIGUEZ-GARCIA** OF HER RIGHT AND **CANDIDO GARCIA-PEREZ** OF HIS RIGHT TO BE SECURE IN THEIR PERSON AND TO BE FREE FROM UNREASONABLE SEIZURE BY ONE ACTING UNDER COLOR OF LAW.

COUNT ONE OF THE INDICTMENT CHARGES GUILLERMO FALCON HERNANDEZ WITH VIOLATING **MARICELA RODRIGUEZ-GARCIA'S** RIGHT UNDER THE FOURTH AMENDMENT TO BE FREE FROM UNREASONABLE SEIZURE BY ONE ACTING UNDER COLOR OF LAW. SPECIFICALLY, COUNT ONE CHARGES THAT DEFENDANT HERNANDEZ VIOLATED THIS RIGHT BY SHOOTING **MARICELA RODRIGUEZ-GARCIA** WITH A DANGEROUS WEAPON, TO-WIT: A FIREARM, CAUSING BODILY INJURY TO **MARICELA RODRIGUEZ-GARCIA.**

COUNT TWO OF THE INDICTMENT CHARGES GUILLERMO FALCON HERNANDEZ WITH VIOLATING **CANDIDO GARCIA-PEREZ'S** RIGHT UNDER THE FOURTH AMENDMENT TO BE FREE FROM UNREASONABLE SEIZURE BY ONE ACTING UNDER COLOR OF LAW. SPECIFICALLY, COUNT TWO CHARGES THAT DEFENDANT HERNANDEZ VIOLATED THIS RIGHT BY SHOOTING **CANDIDO GARCIA-PEREZ** WITH A DANGEROUS WEAPON, TO-WIT: A FIREARM, CAUSING BODILY INJURY TO **CANDIDO GARCIA-PEREZ.**

IT HAS ALWAYS BEEN THE POLICY OF THE LAW TO PROTECT EVERY PERSON FROM AN UNREASONABLE SEIZURE BY THE USE OF UNREASONABLE FORCE OR DEADLY FORCE. NO ONE, NOT EVEN A PERSON BEING PLACED UNDER ARREST, MAY BE PHYSICALLY ASSAULTED, INTIMIDATED, OR OTHERWISE ABUSED INTENTIONALLY AND UNREASONABLY BY SOMEONE ACTING UNDER COLOR OF LAW OR IN AN OFFICIAL CAPACITY. ACCORDINGLY, EVERY PERSON HAS A CONSTITUTIONAL RIGHT TO BE SECURE IN HIS PERSON AND FREE FROM UNWARRANTED PHYSICAL MISTREATMENT BY LAW ENFORCEMENT OFFICERS.

UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ALL PERSONS ARE ENTITLED TO THE PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES WHICH REQUIRES THAT OFFICERS REFRAIN FROM USING EXCESSIVE FORCE, THAT IS, MORE FORCE THAN IS REASONABLY NECESSARY, WHEN EFFECTUATING AN ARREST.

UNREASONABLE FORCE IS PHYSICAL FORCE THAT HAS NO LEGITIMATE LAW ENFORCEMENT PURPOSE WHICH IS UNREASONABLE IN LIGHT OF THE NEED FOR THE FORCE. DEADLY FORCE IS FORCE THAT CREATES A SUBSTANTIAL RISK OF CAUSING DEATH OR SEROUS BODILY INJURY. DEADLY FORCE MAY BE USED ONLY WHEN THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT A FLEEING SUSPECT POSES A SIGNIFICANT THREAT OF DEATH OR SERIOUS PHYSICAL INJURY TO THE OFFICER OR OTHERS AND IT IS NECESSARY TO PREVENT ESCAPE.

THE REASONABLENESS OF A PARTICULAR USE OF FORCE MUST BE JUDGED FROM THE PERSPECTIVE OF A REASONABLE OFFICER ON THE SCENE, RATHER THAN WITH 20/20 VISION OF HINDSIGHT. YOU SHOULD CONSIDER THE FACT

THAT POLICE OFFICERS ARE OFTEN FORCED TO MAKE SPLIT-SECOND JUDGMENTS - IN CIRCUMSTANCES THAT ARE TENSE, UNCERTAIN, AND RAPIDLY EVOLVING - ABOUT THE AMOUNT OF FORCE THAT IS NECESSARY IN A PARTICULAR SITUATION. WHETHER THE FORCE USED BY A LAW ENFORCEMENT OFFICER WAS REASONABLE IS AN ISSUE TO BE DETERMINED BY YOU IN LIGHT OF ALL THE SURROUNDING CIRCUMSTANCES ON THE BASIS OF THE DEGREE OF FORCE A REASONABLE AND PRUDENT OFFICER WOULD HAVE APPLIED UNDER THE CIRCUMSTANCES OF THE CASE.

CERTIFICATE OF SERVICE

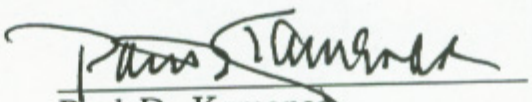
I hereby certify that an electronic copy and two hard copies of the foregoing brief of Amicus Curiae the Washington Legal Foundation were served this 31st day of May, 2007, by depositing a copy thereof in the United States Mail, First-Class, postage prepaid, addressed to the following:

David L. Botsford, Esquire
1307 West Avenue
Austin, TX 78701
Counsel for Defendant-Appellant Ramos

Robert T. Baskett, Esquire
2612 Boll Street
Dallas, TX 75204-1002
Counsel for Defendant-Appellant Compean

and

Joseph H. Gay, Jr., Esquire
Assistant United States Attorney
601 NW Loop 410, Suite 600
San Antonio, TX 78216-5597
Counsel for Plaintiff-Appellee

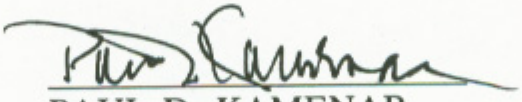


Paul D. Kamenar

CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Wordperfect 6.0 in CG Times 14.



PAUL D. KAMENAR

Dated: May 31, 2007