

**No. 03-50294**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**UNITED STATES OF AMERICA**

**v.**

**GARY M. BRUGMAN**

**Defendant-Appellant**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS**

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**BRIEF FOR THE APPELLANT**

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**RONALD H. TONKIN  
Appointed Attorney  
for Appellant  
1080 Riviana Building  
2777 Allen Parkway-Suite 1080  
Houston, Texas 77019  
(713) 942 9111-Telephone  
(713) 942-0102-Facsimile**

## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies, pursuant to Fed. R. App. P. 26.1 and Rule 28.2.1 of the Rules of the Fifth Circuit, that the persons listed below are the only persons who have an interest in the outcome of this case:

1. Ronald H. Tonkin-Court appointed attorney for plaintiff.
2. Bill Baumann-Assistant United States Attorney-attorney for the United States of America.
3. Brent Alan Gray-Trial Attorney, U.S. Department of Justice.
4. Tovah R. Calderon, Attorney, Appellate Section, U.S. Department of Justice.

\_\_\_\_\_  
Ronald H. Tonkin  
Appointed Attorney of Record  
for Appellant

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## **Statement Regarding Oral Argument**

Appellant requests oral argument in this case to materially assist the Court in understanding the factual evidence and the applicable law pertaining thereto. The serious questions of law are complex and the issues raised rise to constitutional magnitude. The implications of this case are far reaching in that an adverse decision by this Court will hamper the effectiveness of law enforcement not only in the Fifth Circuit but nationally. The law enforcement community has expressed much interest in the outcome of this case.

## **Statement of Jurisdiction**

This is an appeal from a final judgment of conviction for violation of civil rights (18 U.S.C. 242). Defendant was found guilty of a one count indictment on October 31, 2002 after a four day jury trial. Defendant was sentenced on March 10, 2003 to a term of 27 months imprisonment by Senior United States District Judge William Wayne Justice. Notice of Appeal was filed on March 10, 2003 and Ronald H. Tonkin was appointed by Judge Justice to be Brugman's counsel for the appeal.

This Court has jurisdiction pursuant 28 U.S.C.A. 1291.

## **Statement of the Issues**

1. Whether the trial court erred in not granting Defendant's Motions for Judgment of Acquittal because there was insufficient evidence to support the jury's verdict.
2. Whether the trial court committed reversible error in permitting the government to introduce, over defendant's objection, other alleged bad acts of the defendant, in violation of Rules 403 and 404(b), F.R.E.,
3. Whether the trial court committed plain error in failing to charge the trial jury *sua sponte* with a limiting cautionary instruction prior to and/or subsequent to the introduction of the evidence concerning the admission of evidence regarding extraneous conduct and how to treat such evidence.
4. Whether the trial court erred in assessing Brugman's sentence because of erroneous interpretations of the Federal Sentencing Guidelines.

## **Statement of the Case**

### **A. Nature of the Case, Course of Proceedings and Disposition Below**

Defendant, Gary M. Brugman, a veteran United States Border Patrol Agent, was charged in a one-count indictment with kicking and striking illegal alien Miguel Angel Jimenez on or about January 14, 2001 resulting in bodily injury to Jimenez-Saldana and thereby depriving Jimenez-Saldana (an illegal alien) of his rights secured

by the Constitution and laws of the United States to be free from the use of unreasonable force by one acting under color of law, in violation of 18 U.S.C. Sec. 242 during the course of an arrest.

At the close of the government's case in chief (ROA Vol: 6, p. 74) and at the conclusion of all the evidence (ROA Vol: 9, p. 107), Defendant made motions for judgment of acquittal pursuant to Fed. R. Crim. P 29(a). Those motions were denied by the district court. Defendant in writing re-urged his post trial motion for a judgment of acquittal (ROA Vol: 1, p. 00132) on the grounds that the government, (1) failed to prove beyond a reasonable doubt that Brugman acted willfully and with the intent to deprive Miguel Angel Jimenez-Saldana of his Constitutional rights and (2) that Brugman's conduct did not result in bodily injury to Saldana. The motion for a judgment of acquittal was denied by Senior U.S. District Judge William Wayne Justice by order dated February 18, 2003. (Record Excerpts No. 6 and ROA Vol: 1 p. 00156)

In conjunction with the post trial motion for judgment of acquittal, Defendant filed a written motion for a new trial upon the ground that the trial court abused its discretion in admitting evidence of the Defendant's use of force in apprehending a drug smuggler on February 22, 2001. The motion for a new trial was denied by Senior

U.S. District Judge William Wayne Justice by the same Order dated February 18, 2003 (Record Excerpts No. 6 and ROA Vol: 1 p. 00156).

### **B. Statement of Facts**

Defendant, Gary M. Brugman (Hispanic Male) was charged with kicking and striking during the course of an arrest, Jimenez- Saldana, an illegal alien who had crossed into the United States from the Republic of Mexico. On January 14, 2001, Defendant was conducting “Linewatch” activities around the “Rosetta Farms” area of Eagle Pass, Texas. Defendant came upon a group of aliens that were trying to cross the Mexican/American border and gave chases. He ordered the aliens to stop running several time. However, they actively resisted arrest by not obeying his commands to stop running. (ROA Vol: three, p. 8) Meanwhile, two other Border Patrol Agents, Remberto Perez, a journeyman Agent in Eagle Pass, Texas and Marcelino Alegria, a rookie agent who had recently entered into duty in Eagle Pass, heard a call for help go out over the Eagle Pass Border Patrol Repeater Station, indicating that Defendant was in need if assistance in apprehending a group of aliens which he was chasing through the pecan orchards at Rosetta Farms. (ROA Vol: seven, pp. 7-8)

Perez and Alegria drove to the area in order to assist Defendant in apprehending that group of aliens. (*An id* at p. 9). The aliens spotted Perez and Alegria, and attempted to flee from them as well. At that point Perez, told Alegria to

exit the Border Patrol vehicle and pursue the aliens on foot. (*Id* at p. 10). Alegria chased the aliens on foot, before they finally stopped running. At that point, Alegria ordered the aliens to sit on the ground. (ROA Vol: 4, pg. 23) Defendant caught up to Alegria and the aliens 5 to 10 seconds after Alegria. (*Id* at p. 54). At that point Defendant noticed that Saldana, the alleged victim, was not sitting as ordered. As a result, Defendant believed it was necessary to use his foot to push Saldana to the ground in order to keep Saldana from running or attacking Agent Alegria. (ROA Vol: 8, p. 79) Neither Saldana nor any of the other aliens had not been searched for weapons at that time. Shortly thereafter, Perez who witnessed Brugman's actions from a distance of 80 to 100 feet arrived at the scene. (ROA Vol: 7, p. 14). Perez and Alegria walked the aliens to Perez's vehicle and then to a transport unit. (ROA Vol: 7, p. 16, ROA Vol: 4, p. 36 and ROA Vol: 9, p. 50). The aliens were transferred to the transport vehicle, driven by Agent Hector Aponte. Agent Aponte asked the aliens if they were in good health or if they had been injured, all the aliens including the alleged victim said they were okay. (ROA Vol: 9, p. 45 and p. 50).

Agent Aponte drove the aliens back to the Border Patrol station, at which point he began to process them. (ROA Vol: 9, pp. 45-46). It was brought to Aponte's attention that Saldana was making allegations. Aponte went back and checked up on Saldana but did not see any injuries to the alleged victim. (ROA Vol: 9, pp. 48-49).

Saldana's allegations of excessive force was then brought to the attention of Supervisory Border Patrol Agent Eduardo Casares. Saldana informed Agent Casares That he attempted to come into United States illegally three times before.<sup>1</sup> (ROA Vol: 6, p. 7). Saldana also stated to Agent Casares that he had been kicked in the back and in the head (ROA Vol: 6, pp. 12-13). Casares then asked Saldana if he needed medical attention, and Saldana responded in the negative. (*An id*) Agent Casares proceeded to take pictures of the areas of the body where Saldana alleged that he had been kicked. However, he did not see any marks or evidence of injury. (ROA Vol: 6, pp. 14).

### **SUMMARY OF ARGUMENT**

The government failed to produce evidence to establish all the elements of the criminal civil rights offense. 18 U.S.C.242. The spontaneous pushing of a detained alien to the ground by the Defendant with is foot in the belief that the detained alien was about to escape or possibly attack a fellow Border Patrol Agent did not rise to a constitutional violation. The government failed to prove beyond a reasonable doubt that Defendant acted with willfulness and had the specific intent to deprive the

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<sup>1</sup> Saldana was arrested on three separate occasions between January 9, 2001 and January 14, 2001. On each occasion he gave the processing officer different birth dates and addresses. (Defense Exhibits 4, 5, and 7). Agent Casares testified in the government's case in chief that Saldana had given false information to border patrol agents and that would be indicative of Saldana being an alien smuggler. (ROA Vol 6:p.20)

detained alien of his constitutional right to be free from the use of unreasonable force. The complaint by the alleged victim that he had residual pain for three days is characterized as a *de minimus* injury which does not rise to a constitutional injury where the only evidence was the testimony of the alleged victim and where all evidence clearly established no injury.

The trial court erred in permitting the introduction of highly prejudicial Rule 404 (b) alleged spontaneous acts which occurred in the arrest and fight with a drug smuggler five weeks after the indictment made the subject of the indictment.

The trial court committed errors in the sentencing of the Defendant where he misinterpreted the Federal Sentencing Guidelines.

## **ARGUMENT**

### **I. The Trial Court Should Have Granted Defendant's Motions For Judgment Of Acquittal because There Was Insufficient Evidence To Support the Jury's Verdict**

#### **STANDARD OF REVIEW**

The standard of review for sufficiency of evidence is whether any reasonable trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt. *U.S. v. Washington*, 340 F.3d 222 (5th Cir. 2003), (citing *U.S. v. Jones*, 133 F.3d 358, 362 (5<sup>th</sup> Cir. 1998)). This Court can review an insufficiency claim to determine whether there was a manifest miscarriage of

justice [*United States v. Galvan*, 949 F.2d 777,783 (5<sup>th</sup> Cir.1991)] that occurs where the record is devoid of evidence pointing to guilt or contains evidence on a key element of the offense that is so tenuous that a conviction would be shocking [*United States v. McIntosh*, 259 F.3d 365, 368 (5<sup>th</sup> Cir. 2002)]

**A. The Government Failed To Prove Beyond A Reasonable Doubt That The Defendant Acted Willfully And With The Intent To Deprive Miguel Angel Jimenez-Saldana Of His Constitutional Rights Through The Use Of Excessive Force.**

The Government failed to prove beyond a reasonable doubt that Brugman acted willfully and with the intent to deprive Miguel Angel Jimenez-Saldana of his constitutional rights and that Brugman's conduct resulted in bodily injury to Saldana. This Court has determined that if the evidence gives equal or nearly equal support to the theory of innocence and to a theory of guilt, this Court must reverse the conviction. Under these circumstances "a reasonable jury *must necessarily entertain* a reasonable doubt."(emphasis in original) *United States v. Reveles*, 190 F.3d 678, 686-687(5<sup>th</sup> Cir. 1999) quoting *United States v. Lopez*, 74 F.3d 575, 577 (5<sup>th</sup> Cir. 1996). In the case at bar the evidence more than supported a theory of innocence. Therefore, taking all of the evidence as a whole, this Court as a matter of law should direct that a judgment of acquittal be entered because a *reasonable jury* should have had a reasonable doubt.

The jury was instructed that in order to convict Brugman, he must have acted willfully, that is, that the defendant committed such acts with a bad purpose or evil motive, intending to deprive the person of that right beyond a reasonable doubt. The meaning of “willfulness” and “specific intent” is critical in determining the culpability of Brugman’s conduct. In *Screws*, the Supreme Court made clear that “it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for (the jury) to find that petitioners had the purpose to deprive the prisoner of a constitutional right...” *Screws v. United States*, 325 U.S. 91, 107 (1945). The Court in *Screws* explained that to “act willfully in the sense in which we use the word [is to] act in open defiance or reckless disregard of a constitutional requirement that has been made specific and definite.” *Id at 105*.

The Government presented three witnesses in its attempt to prove that Brugman willfully and intentionally used excessive force under color of law through a kick to the back and strike to the head of Miguel Angel Jimenez-Saldana. However, all three witness’ testimonies were inconsistent.

The Governments first witness, Agent Marcelino Alegria, was an inexperienced rookie agent in the service for only one week. Alegria testified that 10 aliens were sitting down on their butts and he saw Brugman push three aliens down to the ground. When Alegria was asked:

“Q. But at no time did you see Mr. Brugman kick either Alien 1, Alien 2 or Alien 3 is that correct?

A. A soccer kick to the first guy. I mean, **not a soccer kick**, I mean, **a push**.

Q. A push, I’m saying, you did not see him kick; you saw him push.

A. **Push.**” [Emphasis supplied] (ROA Vol: 4, p. 66).

Alegria also testified that Brugman punched two of the three aliens. However, Alegria testified that he did not know if Saldana was one of the two aliens that Brugman allegedly punched (ROA Vol: 4, pp. 45-46) and that he did not see any physical evidence of injury on any of three aliens (ROA Vol: 4, p . 46). Alegria further testified:

Q. When you used your terms in discussion with Mr. Moore, did you use the term “pushing him to the ground with his feet,” or did you use the term “kicking the person to the ground,” whether it be Alien Number 1, Alien Number 2, or Alien Number 3.

A. I don’t recall what I said. I know – I mean, I know for a fact that it was *not* a **kick** (ROA Vol: 4, pg. 46).

Alegria testified that he did not have much experience being alarmed for his personal safety in the field and that a more experienced agent, like Brugman, could perceive the situation as being more dangerous because the aliens might have been able to get up and run (*Id* p . 68). Alegria further testified that he did not know if the aliens were armed or not (*Id* p. 69). Before Agent Brugman arrived, Alegria was the

only Agent on the scene attempting to secure 10 illegal aliens who might have been armed. Brugman testified that he used reasonable force to subdue the aliens because he believed they were going to get up and run or attack Agent Alegria (ROA Vol: eight p .172).

The government's second witness, Miguel Angel Jimenez- Saldana, the alleged victim, testified that Brugman *never* punched him but that Brugman kicked him on his *left* side of his back (as he demonstrated to the jury) and that he was **never struck in the head**. The complaint to Border Patrol Agent Edward Casares the night of the alleged kick was that Saldana was kicked on the right side of his back. Defendant's Exhibit 1. When Saldana was asked:

Q. Well, show the ladies and gentlemen of the jury, as best as you can recall, the kind of kick you say this border patrol agent gave you.

A. I couldn't specify the exact type of kick that I received. I know that it hurt me.

Q. So is it your testimony that this third agent did not kick you in the head?

A. No, it was on the side. (ROA Vol: 3, p. 44)

Q. Did the third border patrol agent (Defendant) hit you in your head or merely push your head to the ground?

A. He just **pushed** my head to the ground with force. (ROA Vol: 3, p. 45)

The indictment in the case at bar charged Brugman with kicking and striking Saldana. Saldana only testified to being kicked once (in the back), but not to any other type of striking by Brugman. The government's other witness, Agent Alegria, testified that Brugman only pushed Saldana down with his foot, that it was not a kick. Alegria further testified that Brugman punched Saldana, but Saldana, testified he was never punched. The testimonies of the government's two eye witnesses were highly inconsistent.

Saldana's own testimony was inconsistent with his initial report to Supervisory Border Patrol Agent Casares, witness for the government, who took the complaint of Saldana immediately after the incident on January 14, 2001. Casares stated in the report:

“Jimenez-Saldana alleged that an Agent walked up to him and kicked him in the back and also in the back of his head. **I asked Jimenez-Saldana if he required medical attention to which he responded negatively.** I asked Jimenez-Saldana if I could photograph the areas struck by the agent and he agreed. SBPA Willingham and I were **not able to see any type of bruise or mark on his back.** We then asked to inspect his head and again **there was no evidence of being kicked.**” (Defendant's Exhibit 1). [Emphasis supplied]

Pictures taken on January 14, 2002, immediately after the alleged assault, show no marks or abrasions on Saldana's back (right side) or head. (Defendant's Exhibit No. 2). The only evidence of injury was the inconsistent testimony of Saldana. Casares' testimony, report and the contemporaneous pictures which were taken of

Saldana, showed the right side of Saldana's back as the area in which he was struck by Brugman. However, Saldana in demonstrating where he was struck by Brugman showed the jury that he was struck on the left side of his back. Saldana also testified that he was never punched but was grabbed from the back of the head and his head was pushed into the ground and the Border Patrol Agent put his knee on him.<sup>2</sup>(ROA Vol: 3, pp.11-12).

The government's third witness, Agent Remberto Perez, testified that he did not see Brugman punch anyone, but only saw Brugman deliver one kick and that **not all the aliens were sitting down as ordered**. When Perez was asked:

Q. Were they (the 10 aliens) standing or sitting?

A. A couple of them looked like they were **kneeling**. One of them-- some of them looked like they were sitting down.

Q. And what, if anything did you see him (Brugman) doing?

A. I saw Gary kick one of the aliens.

Q. Can you tell us how he kicked him?

A. I really don't remember if it was like a kick, like a swinging kick or like a pushing kick. I don't know, sir. ( ROA Vol: 7, p. 13)

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<sup>2</sup> This is a classic technique used by police officers in order to keep a suspect under control.

Agent Perez also testified that he never saw Brugman punch Saldana. When asked:

Q. And from a distance of 80 to 100 yards, you say you could see clearly Agent Brugman kicking or pushing with his foot?

A. Yes, sir.

Q. Did you see him strike any blows with his hands?

A. No, sir (ROA Vol: 7, p. 38)

From his vantage point, Perez was unsure if Saldana was kicked or pushed by Brugman's foot, but he testified that he *did not see* Brugman *punch* Saldana. Government witnesses Saldana (the alleged victim), and Agent Perez both agree that Brugman *did not punch* Saldana with his hands. Government Witness Alegria testified that he saw Brugman punch Saldana. This is contrary to the testimony of both Agent Perez and the victim. All three of the Government's witnesses testimonies are inconsistent.

Agent Perez testified that a rookie agent may not perceive things the same as a veteran agent in the field. (ROA Vol: 7, pg. 25); that the area in which the alleged assault had taken place was a dangerous area in which an agent had been shot and killed; and that Brugman had been shot at. (ROA Vol: 7, pp. 24-25). Agent Perez, confirmed that some of the aliens were not sitting down as Agent Alegria testified.

(ROA Vol.: 7, p. 13) Therefore, it was necessary for Brugman to use his foot to push Saldana to the ground. Saldana had not been searched for weapons at the time, and Brugman was of the belief that it was necessary to keep Saldana from running or attacking Agent Alegria. The pushing of Saldana to the ground with use of a foot was not the use of excessive force. Agent Perez' testimony did not prove that Agent Brugman acted with a bad purpose or the required showing that Brugman acted with the purpose to deprive Saldana of a constitutional right.

The inconsistent testimonial evidence from the Government's three witnesses gives more than equal circumstantial support to a theory of innocence as well as a theory of guilt. Therefore, under *Revelles* the court must reverse the conviction since under these circumstances "a reasonable jury *must necessarily entertain* a reasonable doubt."

Brugman testified that he used his foot to push Saldana to the ground as a result of Saldana's non-compliance with Agent Alegria's commands to sit down. Brugman testified that he used this technique or type of force because he felt the alien was going to flee<sup>3</sup> or attack Alegria. (ROA Vol: 8, p. 79) Brugman had to make a split second decision in an attempt gain control of the situation as he saw it. The force used

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<sup>3</sup> Brugman had been chasing the illegal aliens on foot for a good ten minutes through the orchards, had twisted his foot a couple of times, and was exhausted before he pushed Saldana to the ground with his foot. (ROA Vol 8: p.76)

by Brugman was reasonable in light of the circumstances confronting him on the evening of January 14, 2001.

Defense witness, Agent Pitts, was originally subpoenaed to testify on the Government's behalf as an expert witness. (ROA Vol: 8 p. 172) He was a combat trainer and qualified to testify on the technique used by Brugman on the illegal alien Saldana. Agent Pitts testified that Brugman's use of his foot to push Saldana down was a legitimate technique in order to prevent a suspect from fleeing. (ROA Vol: 8 p. 182) and that in the field an officer must protect their side arm and in order to keep distance an agent may push a suspect down with his foot. (ROA Vol: 8, pp. 183-184)

The amount of force that is constitutionally permissible must be judged in the context by which the force is deployed. In *Ikerd v. Blair*, 101 F.3rd 430, 434 (5<sup>th</sup> Cir. 1996) this Court stated:

“The *Hudson* Court recognized that a constitutional violations does not occur every time an officer touches someone. In just about every conceivable situation, some amount of force or contact would be too nominal to constitute a constitutional violation. *When the force is insufficient to satisfy the legal standard necessary for recovery, the amount of force is de minimis for constitutional purposes.*” [Emphasis supplied]

In the instant case Brugman used reasonable force by pushing Saldana to the ground with his foot in his belief that Saldana, who was kneeling and not sitting, might escape from custody or attack Alegria.

The jury was required to determine whether Brugman acted willfully and with the intent to deprive Miguel Angel Jimenez-Saldana of his constitutional rights from the circumstantial evidence presented by the government witnesses. Thus, the mere intention to use force -general criminal intent-(which the jury appears to have found to have been unreasonable)- would be insufficient to sustain a conviction under 18 U.S.C. Section 242. *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993). In order to have found Brugman guilty, the jury would have had to make a determination that he intended to use unreasonable force, that is, he must have intended to deprive Saldana of his constitutionally protected right to be free from the use of unreasonable force. The government presented no evidence that Agent Brugman acted with defiance or reckless disregard for Saldana's constitutional rights. In fact all the evidence established that Brugman used reasonable force. Under the criminal civil rights statute in this case, Brugman's conduct must do more than merely transgress the objective boundary of another person's legal rights. Instead, **the conduct must transgress sufficiently far beyond the objective permissible boundary** that the Brugman is put on clear notice that he is unlawfully effectuating a deprivation of civil rights. *United States v. Bradfield*, 225 F.3d 660, (6th Cir. 2000) quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (to prove a willful violation, which requires specific intent, the government had to "prove that the defendant acted with

knowledge that his conduct was unlawful”). The government’s evidence wholly failed to establish this essential element of 18 U.S.C. 242.

“The Court’s calculus of reasonableness must include allowances for the fact that police officers are often forced to make split second judgements in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 396-397 (1989).

The evidence established that Brugman had to make a split second judgement in order to gain control of the situation in circumstances that demanded great caution on the part of a Border Patrol Agent. Saldana testified that while Brugman was chasing him and the other aliens, Brugman yelled at them to stop (ROA Vol: 3, p. 8). However, Saldana and the other aliens did not obey Brugman at any moment (*Id* at p. 8). The fact that Saldana did not obey Brugman’s orders to stop running gives credence to Brugman’s contention that not all the aliens were sitting down, as they were ordered to do by Agent Alegria when Brugman arrived at the scene.

Brugman used his foot to push Saldana to the ground because Saldana did not comply with verbal orders to sit. Saldana testified that Brugman never punched him and there is no evidence that Brugman punched Saldana (to the contrary Saldana testified that he was not punched) or that he suffered an injury by punching. Moreover, “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.”

*Graham* at 396. Factors to consider when determining whether the force used was objectively reasonable include whether the suspect posed a threat to the safety of officers or others, and whether the arrestee actively resisted arrest or attempted to avoid arrest. *Nowell v. Acadian Ambulance Service*, 147 F.Supp.2d 495, 508 (WDLA, 2001), citing *Graham*, 109 S.Ct. 1865, 1872. In the case at bar Saldana testified that he and the other aliens actively resisted and attempted to avoid arrest (ROA Vol : 3, p. 8). Brugman only used force that was reasonably necessary to prevent Saldana from fleeing or causing harm to Agent Alegria

In *Kellough v. Bertrand*, 22 F.Supp.2d 602, 608 (S.D. Tex. 1998)- ( a 42 U.S.C. 1983 civil rights action)- a police officer ordered plaintiff to lie face down on the ground. Instead of complying immediately, plaintiff asked the officers what he had done. At that point an officer employed a leg sweep technique to knock him to the ground. The Court holding in the defendant police officer's favor stated "[e]ven accepting as true Plaintiff's allegation that he exited his vehicle in a nonthreatening manner, his refusal to follow Defendant's instruction to go to the ground would probably justify a reasonable officer's decision, in light of the circumstances, to employ some force to take him to the ground" . Brugman's actions were very similar to the actions of the police officer in *Bertrand* where such actions were held as a matter of law as not so excessive as to constitute a constitutional violation.

In the case at bar the Government presented contradictory evidence from its three witnesses. In the light of such contradictory evidence the Government did not prove guilt beyond a reasonable doubt. The Government presented no evidence that Brugman acted with *knowledge* that his conduct was unlawful. Brugman's use of *de minimis* physical force in this situation did not rise to the level of a constitutional violation as a matter of law since its use is not of a sort 'repugnant to the conscience of mankind'. *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992)

**B. The Government Failed To Establish That Saldana Suffered A Constitutional Injury.**

Although the cases Brugman cites in support of his case are taken in the context of a federal civil rights (42 U.S.C. 1983), they are used in interpreting a constitutional violation in the case at bar.

"Whether a case is brought on the civil or criminal side of the docket, the actionable conduct is deprivation of rights secured by the Constitution or laws of the United States. The culpable intent will vary from willfulness of a criminal charge to something less in a civil complaint, and it may vary according to the particular Constitutional right infringed... Otherwise between the criminal and civil statutes the courts recognize the intent of Congress to cover the same cases, though providing different remedies." *United States v. Bigham*, 812 F.2d 943, 948 (5<sup>th</sup> Cir. 1987) (discussing a federal civil rights actions 42 U.S.C. 1983 and 18 U.S.C. 242).

Regarding the fourth element of the charged offense, 'bodily injury', Brugman was charged with inflicting bodily injury to Miguel Angel Jiminez-Saldana. The government claimed that 'bodily injury' is defined to include physical pain. However,

the government cited only one case from the 5<sup>th</sup> Circuit and one case from the 11<sup>th</sup> Circuit to support this contention.<sup>4</sup> The only evidence the government provided to support this element that Saldana suffered a ‘bodily injury’ was the testimony of Saldana who testified that *he felt some residual pain for around three days*. (ROA Vol: 6, p.18) This Court should bear in mind that Saldana refused medical treatment. (ROA Vol: 6, pp. 12-13 and Defendant’s Exhibit No.1) and that no marks appeared on his body (head or back) immediately after he registered his complaint to Agent Casares and when his body was photographed by Agent Casares.

“Although a showing of ‘significant injury’ is no longer required in the context of an excessive force claim, ‘we do require a plaintiff asserting an excessive force claim to have ‘suffered at least some form of injury.’” *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5<sup>th</sup> Cir.2001)(quoting *Williams v. Bramer*, 180 F.3d 699, 703 (5<sup>th</sup> Cir. 1999) (quoting *Jackson v. R.E. Culbertson*, 984 F.2d 699, 700 (5<sup>th</sup> Cr. 1993).

In *Glenn* Judge Edith Jones stated (reiterating the holding in *Williams* )that “[t]he injury must be more than a *de minimis* injury and must be evaluated in the context in which the force was employed”. *Glenn* at 314. In *Williams* the 5<sup>th</sup> Circuit

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<sup>4</sup> *U.S. v. Harris*, 293 F.3d 863, 871 (5<sup>th</sup> Cir. 2002); *U.S. v. Meyers*, 972 F.2d 1566 (10<sup>th</sup> Cir.1992). These cases are easily distinguishable from the case at bar.

held that the loss of breath and dizziness suffered when the suspect was allegedly choked while an officer searched his mouth did not amount to a cognizable injury.

However, the burden of proof is higher in a criminal complaint. Yet, the Government in the case at bar contended that a *de minimis* injury- alleged “residual pain for around three days”- rises to the level of a constitutional violation. In *Siglar v Hightower*, 112 F.3d 191 (5th Cir. 1997), this Court found that plaintiff’s alleged injury, a bruised ear lasting for three days and requiring no medical treatment suffered as a result of an *unprovoked* twisting of plaintiff’s ear, was *de minimis*. (*Id* at 193-194). Further in *Nowell*, the district court held, “[f]inally, accepting the injuries as noted in the medical records, abrasions inside Nowell’s mouth and a bruise in the area of the right eye, in the context employed, fail to rise to the level of constitutional significance. To the contrary, such injuries, even if sustained as a result of force applied by Clay, more appropriately fall into the *de minimis* range of imposition.” *Nowell* at 510. The facts regarding the alleged injury in the present case and in *Hightower* are very similar and this court should hold that unsubstantiated allegations of physical pain which are *de minimis*, do not result in a constitutional violation.

In *Crow v. Comal County, TX*, 2001 WL 1910555, 5 (W.D.Tex. 2001), the court stated, “the fact that Crow declined Mathews’ offer to obtain medical assistance (which Mathews obtained anyway) and the fact that EMS technicians found Crow did

not need attention, shows Crow was not injured, or if he was injured, that his injuries were no more than *de minimis* and not a basis for a federal action.” In the case at bar, the government’s own witness, Agent Eduardo Casares, testified that Saldana refused medical treatment. Agent Casares, who took pictures of Saldana following the alleged incident, was unable to see any type of bruise or mark on Saldana’s back or head. (ROA Vol: 8, pp. 13-14). Thus, Saldana’s refusal of medical treatment and lack of physical bruising is evidence that there was no injury and if he was injured, that his injuries were no more than *de minimis* and not a basis for a criminal federal civil rights action under *Hightower* and *Comal County*.

A dangerous precedent would be created if this conviction is sustained. Suspects will be able to retaliate against police officers, claiming excessive force, but only offering their word that they felt “residual pain”.

## ARGUMENT

**II. The Trial Court Committed Reversible Error By Permitting The Government, Over Defendant’s Objection, To Introduce Evidence Of Other Alleged Bad Acts Of The Defendant In Violation Of Rules 403 And 404(b), F.R.E.**

### STANDARD OF REVIEW

The standard of review for the denial of Defendant’s motion for new trial based on the admission of extrinsic offense evidence over a 404(b) objection is a “heightened:” abuse of discretion standard. *United States v. Wisenbaker*, 14 F.3d 1022,

1028 (5th Cir. 1993). “[E]vidence in criminal trials must be ‘strictly relevant to the particular offense charged.’” *United States v. Jackson*, 339 F.3d 249 (5th Cir. 2003), citing *United States v. Hays*, 872 F.2d 582, 587 (5<sup>th</sup> Cir. 1989) (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949)).

Brugman filed his Motion in Limine regarding *uncharged* alleged misconduct or wrongful acts. The trial court granted the motion. The government offered evidence of a subsequent episode involving Brugman and a dope smuggler on February 22, 2001. The Court held a hearing outside the presence of the jury and then permitted the government to introduce the February 22, 2001 episode over the objection of Brugman that the testimony was highly prejudicial. (ROA Vol: 6, p. 37).

The district court abused its discretion in admitting evidence of an instance when Brugman was required to use force in order to apprehend a drug smuggler on February 22, 2001-five weeks after the indicted offense. It is a cardinal principle of the common law that the prosecution may not use evidence of prior or subsequent criminal acts in its case-in-chief to prove that the defendant committed the crime with which he is presently charged. *United States v. San Martin*, 505 F.2d 918, 921 (5<sup>th</sup> Cir. 1974), citing *Michelson v. United States*, 335 U.S. 469, 475-476 (1948). The general rule is that evidence of another crime unconnected with the one on trial is inadmissible. This rule is subject to a number of exceptions, one of which is that

evidence of other crimes by the accused is admissible to show the criminal intent to the offense charged. Where the other offense[s] are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged, such evidence could be permitted. *Id.* citing *Weiss v. United States*, 122 F.2d 675, 682 (5<sup>th</sup> Cir. 1941).

Further, this court, sitting *en banc* provided two conditions that must be met before evidence of prior offenses, or other misconduct, can be introduced. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1979) (en banc). “First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant’s character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403.” *Id.* In the present case, the testimony of convicted felon Rodriguez Silva<sup>5</sup> fails to meet the requirements of the *Beechum* test.

Applying this test to the case at bar, the evidence of Brugman’s *uncharged* extraneous incident-not a crime- fails to meet the prerequisites of Rule 404 (b).

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<sup>5</sup>Rodriguez Silva smuggled close to 100 pounds of marijuana across the border when he was arrested by Brugman after a lengthy chase. He was convicted of conspiracy to possess with intent to distribute marijuana, and possession with intent to distribute.(ROA Vol: 6, pp. 50-53). He was sentenced to federal prison and was writted out to attend the trial.

Evidence of this extraneous incident confused the issues, misled the jury, wasted time, and resulted in cumulative evidence and therefore should not have been admitted.<sup>6</sup>

Highly prejudicial evidence that Brugman punched a drug smuggler, who was evading an arrest and who was fighting him to escape, was admitted over defense counsel's objection. The probative value of this act, which was neither a crime nor a wrongful act, did not outweigh the prejudicial effect of its admittance into evidence. This event took place on February 22, 2001, five weeks after the indicted offense. A narcotics smuggler, Rodriguez Silva, after being chased by Brugman, resisted arrest and grabbed for Brugman's handcuff's while they were wrestling each other on the ground. Brugman punched him in the face to subdue him. Silva testified that Brugman used excessive force. In all likelihood, Silva, offered perjured testimony against Brugman. However, no charges were ever brought against Brugman for this incident on February 22, 2001. Over the objection of defense counsel (ROA Vol:6,p 47), the government, on *three* separate occasions, displayed highly prejudicial photographs to the jury (Government Exhibit 16) of Silva's bloodied face after his encounter with Brugman. (ROA Vol: 6, pp. 47-48, ROA Vol: 8, p. 17, and ROA Vol: 9, p. 98). The photograph was projected on a large screen (The image was at least 3 ft. by 3 ft. in

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<sup>6</sup> A great amount of the testimony, at the trial, was devoted to the February 22, 2001 incident. Of 585 pages of testimony, 210 pages (Approximately 36%) were devoted to the extraneous February 22, 2001 incident.

size). Counsel for the government would ask that the lights be turned down and the only thing visible in the court room was the large projected image of Silva's face covered with blood.<sup>7</sup> Moreover, this image was allowed to be displayed while the government questioned its witnesses. The image was highly prejudicial and should not have been introduced over defense counsel's objection. (ROA Vol: 6, p. 47)

The government offered testimonial evidence from three individuals who were present during the incident between Brugman and Saldana. There was no need to introduce the testimony of Silva who was arrested for his felonious conduct. In the present case, the government had eyewitness testimony and thus it was error for the Court to permit the government to introduce extremely prejudicial evidence of the incident that took place on February 21, 2002.

In order to satisfy the first step of the *Beechum* test, the government had to establish that the extrinsic offense requires the same *intent* as the charged offense. *Beechum* at 911. However, evidence of other acts or events involving "*intent of the moment are hardly ever probative of earlier or later acts involving similarly split-second actions.*" *U.S. v. San Martin*, 505 F.2d at 923. The Saldana incident for which Brugman was charged involved a split second decision. The highly prejudicial incident with convicted felon Silva involved a split-second decision. The introduction of this

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<sup>7</sup>Silva refused medical attention.

subsequent act had nothing to do with the type of specific intent required for the crime alleged. It was really an attack on the Defendant's overall disposition or character. If there is one clear category that is not an exception to the general rule against allowing evidence of prior acts, it is that which includes 'character, disposition, and reputation.' *Id* at 923, (citing *Michelson v. United States*, 335 U.S. at 475, 69 S.Ct. 213; See also *Railton v. United States*, 127 F.2d 691, 692 (5th Cir. 1942); *Hurst v. United States*, 337 F.2d 678, 680 (5th Cir. 1964)). In *Sieber v. Wigdahl*, 704 F.Supp.1519 (N.D.Ill 1989) the Court citing this Court's opinion in *San Martin* held:

1.

The reason for plaintiff's inability to satisfy the requirements for Rule 404 (b) admissibility stem in part from the very nature of the act in question. Because this case involves *spontaneous* conduct, it is difficult to rely on other specific instances to establish defendant's *state of mind* on this particular occasion. It is for that reason that the *Fifth Circuit* and *Ninth Circuit* have held, and this Court agrees, that *evidence of other acts is often lacking in probative value as to be admissible on issues of state of mind where such spontaneous acts are involved.* (Citing *Bettencourt* and *San Martin* at 923) [Emphasis supplied]

Moreover, in order to be relevant, the extraneous incident must be substantially similar to the conduct underlying the offense with which the defendant was charged. Under the circumstances of this case, the force employed by Brugman in the extraneous incident on February 22, 2001 must be shown to have been excessive. The

government failed to establish that the force used in the extraneous incident was in fact excessive. The later extraneous incident proved nothing about specific intent which is required for a defendant to be convicted under 18 U.S.C. 242. As this Court said in *San Martin*, at 923,

“Under this test, prior crimes involving deliberate and carefully premeditated intent-- such as fraud and forgery-- are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent- such as assault in the case before us.”

Because intent on the later occasion was never proved, there is no basis for inferring that Brugman intended to willfully deprive Silva of his constitutional rights on February 22, 2001 or with Saldana on January 14, 2001. *United States v. Bettencourt*, 614 F.2d 214, 218 (9<sup>th</sup> Cir. 1980). Therefore, proof of the prior or subsequent similar conduct must be ‘plain, clear and convincing.’ This was never established by the government.

The second prong of the *Beechum* test requires the extrinsic evidence to possess probative value that is not substantially outweighed by the danger of unfair prejudice. The extrinsic evidence was a critical part of the government’s case and the government placed undue emphasis on it. In addition, to the already mentioned cumulative use of

the extraneous evidence<sup>8</sup>, the government placed great emphasis on the extraneous incident in their closing argument. (ROA Vol: 9, pp. 120-121). The extraneous evidence was so unfairly prejudicial that it is no wonder the jury rendered a guilty verdict. Admitting this evidence ultimately confused the issues and inflamed the jury. The uncharged extrinsic incident made it impossible for a lay jury to logically discern which alien (Saldana or Silva) Brugman was on trial for assaulting. This Court recognized in *Beechum* that, “[t]he likelihood that the jury will convict the defendant because he is the kind of person who commits this particular type of crime or because he was not punished for the extrinsic offense increases with the increasing likeness of the offenses.” *Beechum* at 915.

**A. The Trial Court Committed Plain Error By Not Charging *Sua Sponte* That The February 22, 2001 Incident Was To Be Considered For A Limited Purpose. This Failure Resulted in Reversible Error.**

In the present case, the extraneous testimony was so extremely damaging that the need for an instruction limiting the use of the evidence was obvious. The failure to give the instruction immediately before and/or after the evidence was introduced was so prejudicial that it affected Brugman’s substantive rights. This Court recognized

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<sup>8</sup> Another tactic of the government over the objection of the defense counsel was to bring in an unsubstantiated and highly prejudicial allegations against Brugman that he had punched a 14 year old in the face.(ROA Vol: 8, pp. 114-116) This incident never occurred and the Government presented no evidence to support that accusation. *Id.*

in *Diaz*, that the trial judge must act, *sua sponte*, whether or not a request for instruction is made. *United States v. Diaz*, 585 F.2d 116, 118 (5th Cir. 1978), *see also* *Coleman v. United States*, 779 A.2d 297, 305 (D.C. Ct. App. 2001), *citing* *United States v. McClain*, 440 F.2d 241, 245 (D.C. Cir. 1971). It was reversible error for the trial judge to fail to give an instruction, *sua sponte*, cautioning the jury that the evidence of the prior alleged bad act to come in only on the issue of intent.

For the reasons cited above, the trial court erred in not granting Brugman's motion for a new trial. This Court should order a new trial in the event it should find that the trial court did not err in granting the motions for judgment of acquittal.

## **ARGUMENT**

### **III. The Trial Court Erred in Assessing Brugman's Sentence based upon a Misinterpretation of the Federal Sentencing Guidelines**

#### **STANDARD OF REVIEW**

The sentencing court's decision to depart downward from the Guidelines is reviewed under a deferential abuse of discretion standard. *Koon v. United States*, 518 U.S. 81, S.Ct. 2035, 2046, (1996). The district court's interpretation of the Guidelines is question of law that this court reviews, *de novo*. *United states v. Clayton*, 172 F.3d

347, 353 (5th Cir. 1999). The sentencing court's factual findings are reviewed for clear error and due deference is given to the sentencing court's application of the Guidelines to the facts. 18 U.S.C. Sec. 3742(e)(4).

## **ARGUMENT**

Gary M. Brugman, through his attorney, filed objections to the Presentence Investigation Report.

1. Defendant objected to the characterization of evidence in the Presentence Investigative Report because the facts were contrary to the evidence at trial. (ROA Vol 10: p.2 ff). The trial court overruled the objections stating that he adopted the factual findings in the PSR (id p.16).<sup>9</sup>

2. Brugman objected to Para. 28 of the PSR (Victim Related Adjustments of +2 in that it was subsumed in the base level offense. The government admitted that the conduct of Brugman amounted to a minor assault. It was submitted that Brugman's conduct did not rise to a vulnerable victim status and thus should not have been considered by the Court. The objection was overruled.(id p.4)

3. Brugman objected to the failure to give credit for the acceptance of responsibility (Para.23 &24 of the PSR) Brugman submitted that Guideline 3E1.1

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<sup>9</sup>This Court can review the facts noted in the statement of facts and those as stated in he sealed PSR in order to fully understand Brugman's objections.

(Commentary 1-A) permitted this since Brugman admitted to the conduct but challenged that the conduct constituted a criminal offense. The government argued that putting it through a trial was sufficient to deny credit for acceptance of responsibility. The sentencing court overruled the objection (*id.* p.10). This Court in *United States v. Washington*, 340 F.3d 222, 228-229 (5<sup>th</sup> Cir.2003) has held that there is a distinction between denial of factual guilt and denial of legal guilt (which in the case at bar Brugman argued). This Court reversed the trial court and remanded the case for re-sentencing on the issue of acceptance of responsibility (*at 230*).

4. Brugman requested that the sentencing judge give a downward departure because the conduct of Brugman constituted a minor assault resulting in three days of residual pain. It was argued that the totality of the evidence warranted a downward departure bringing the offense level down to a Base Level of 8. Brugman cited *U.S. v. Harris*, 293 F.3d 863 (5<sup>th</sup> Cir.2002) in support of his request. In *Harris* the sentencing court reduced the Base Level of 29 down to either a level 8 or 12. This Court said that the sentencing judge should have given a better explanation for his downward departure.

*Harris* recognized that the court could give a downward departure if the reasoning was valid. Brugman further argued that the definition in 1B1.1 of the Guidelines defines “bodily injury” as any significant injury which is painful and obvious (which was not

the case in the case at bar) or is of the type of which medical attention is ordinarily sought (which was not the case in the case at bar). This also should have been considered a minor assault under 2A2.3 of the Guidelines. These objections and observations were overruled. (Id. p.16)

The sentencing court adopted all the findings of the PSR and offense level of 18 and sentenced Brugman to 27 months imprisonment. The court should have granted Brugman probation.

Brugman submits to this Court as it did to the sentencing court that the offense level at the most should be 10 (Zone B) or 7 (Zone B) according to the 2002 Federal Sentencing Table Guidelines and not offense level the Report states. The offense level should be as follows:

Base Offense Level	+6	or	+3
Specific Offense Characteristic	+6		+6
Acceptance of Responsibility	-2		-2
Offense Level	10 (Zone B)	or	7 (Zone B)

The trial court erred in not granting probation to Brugman.

## **CONCLUSION**

This case is a classic example of a manifest miscarriage of justice which should be so shocking to this Court that this Court should reverse and remand this case to the district court with directions to order a judgment of acquittal.

Dated: October , 2003

Respectfully submitted,

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Ronald H. Tonkin  
Attorney at Law  
TBA# 20104500; Fed ID# 3964  
1080 Riviana Building  
2777 Allen Parkway  
Houston, Texas 77019  
Tel: (713) 942-9111  
Fax: (713)942-0102

ATTORNEY FOR APPELLANT

## **CERTIFICATE OF SERVICE**

I hereby certify that on October , 2003 the original and six copies of the foregoing Brief for Appellant, together with one computer disk was sent to the Court. I further certify that on October , 2003 two copies and one computer disk of the foregoing Brief for Appellant was sent to Tovah R. Calderon.

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Ronald H. Tonkin

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Brief for Appellant satisfies the requirements of the Federal Rules of Appellate Procedure 32 (a)(7). The brief was prepared under Corel Word Perfect 10, in 14 point Times New Roman font and the word count is 8348 and line count is 696.

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Ronald H. Tonkin