

No.

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In the  
SUPREME COURT OF THE UNITED STATES

GARY M. BRUGMAN,  
Petitioner

versus

UNITED STATES OF AMERICA  
Respondent

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**Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether there can be a criminal violation of 18 U.S.C.A. 242 for the use of excessive force when the only purported injury was the loss of breath and pain?

2. Whether the decision of the Fifth Circuit runs contrary to previous decisions of the Fifth Circuit and other United States Courts of Appeal that *de minimis* injuries do not rise to the use of excessive force. Thus the force used by a police officer was objectively reasonable in the context of the facts of the case at bar or stated in another way whether *de minimis* injury is conclusive evidence that *de minimis* force was used by Petitioner.

3. Whether the decision of the Fifth Circuit has set a dangerous precedent in civil rights litigation by holding that a loss of breath and pain is not a *de minimis* injury thus opening up the flood gates for civil rights litigation.

4. Whether the extent of injuries suffered by the victim which were loss of breath and pain constitutes *de minimis* injuries and thus do not rise to a constitutional injury.

5. Whether the Fifth Circuit's misconstruction of the facts of the case at bar has led to a misinterpretation of the law of the Fifth Circuit regarding excessive force and a violation of due process.

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## **PETITION FOR CERTIORARI**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered March 26, 2004 affirming the judgment of the trial court and review the denial for the petition for en banc hearing dated April 30, 2004. The mandate was issued on May 10, 2004.

### **OPINION BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit is reported, at 364 F.3d 613 and is reproduced as Appendix A. The denial of the petition for an en banc hearing is reproduced as Appendix B.

### **STATEMENT OF JURISDICTION**

The United States Court of Appeals for the Fifth Circuit rendered its published opinion on March 26, 2004 affirming the judgment of the United States District Court for the Western District of Texas (Senior Judge William Wayne Justice presiding) entered on March 10, 2003. The Fifth Circuit denied Petitioner's Petition for Hearing En Banc on April 30, 2004.

The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(c) in that the Fifth Circuit has decided an important question of constitutional and federal law that has not been, but should be, settled by this Court.

This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

## **STATUTORY PROVISION INVOLVED**

The statutory provision involved in this case is 18 U.S.C.A. 242. (A copy of the statute is reproduced in Appendix C)

## **STATEMENT OF THE CASE**

### **A. Proceedings Below**

Petitioner, Gary M. Brugman, a veteran United States Border Patrol Agent, was charged in a one-count indictment with kicking and striking 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.

Petitioner made all appropriate motions for judgment of acquittal pursuant to Fed. R. Crim. P 29(a). Those motions were denied by the district court. Petitioner in writing re-urged his post trial motion for a judgment of acquittal 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.

Petitioner filed his timely appeal which was argued before the Fifth Circuit on March 2, 2004. The panel affirmed the conviction of Petitioner by opinion dated March 26, 2004. The opinion was received by counsel on March 30, 2004. Petitioner timely filed his Petition for Hearing En Banc. The Fifth Circuit denied Petitioner's Petition for Hearing En Banc on April 30, 2004.

Petitioner was sentenced to imprisonment for 27 months and is presently serving his sentence at a Federal Correctional Institution.

B. Statement of the Facts<sup>1</sup>

Petitioner, 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 Petitioner was conducting "Linewatch" activities around the "Rosetta Farms" area of Eagle Pass, Texas. Petitioner came upon a group of aliens that were trying to cross the Mexican/American border and gave chase. He ordered the aliens to stop running several times. However, they actively resisted arrest by not obeying his commands to stop running. (ROA Vol: 3, p. 8)<sup>2</sup> Meanwhile, two other Border Patrol Agents,

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<sup>1</sup>All facts stated herein are fully supported by the record.

<sup>2</sup> ROA makes reference to the Record on Appeal.

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 Petitioner was in need of assistance in apprehending a group of aliens which he was chasing through the pecan orchards at Rosetta Farms. (ROA Vol: 7, pp. 7-8)

Perez and Alegria drove to the area in order to assist Petitioner in apprehending that group of aliens. (*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) Petitioner caught up to Alegria and the aliens 5 to 10 seconds after Alegria. (*Id* at p. 54). While still running Petitioner noticed that Saldana was not sitting as ordered. As a result, Petitioner 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 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 allegation 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>3</sup> (ROA Vol: 6, p. 7). Saldana also stated to Agent Casares that he had been kicked in the back and kicked in the head (ROA Vol: 6, pp. 12-13). Casares then asked Saldana if he needed medical attention, and Saldana responded in the negative. (id) Agent Casares proceeded to take pictures of the areas of the body where Saldana alleged that he had

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<sup>3</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)

been kicked. However, he did not see any marks or evidence of injury. (ROA Vol: 6, pp. 14).

## REASONS FOR GRANTING WRIT

### **I. Whether The Fifth Circuit's Decision Runs Contrary To Other Decisions Of The Fifth Circuit and Other Circuit Courts That De Minimis Injuries Do Not Equal Excessive Force And Thus the Force Used Was Objectively Reasonable In The Context Of The Facts Of This Case At Bar.**

The Fifth Circuit decided that the victim's testimony that he felt pain and lost his breath regarding the extent of his alleged physical injuries was enough to establish that Saldana's alleged injuries exceeded the *de minimis* threshold. *United States v. Brugman*, 364 F.3d 613, (5<sup>th</sup> Cir. 2004). The Fifth Circuit's decision in the case at bar runs contrary to the established law of the 5<sup>th</sup> Circuit and sister circuits<sup>4</sup>. The Fifth Circuit has held that an alleged victim need not show a significant injury, but he must have suffered some injury. *Jackson v. R.E. Culbertson*, 984 F.2d 699, (5<sup>th</sup> Cir. 1993).

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<sup>4</sup>The Court's attention is directed to the following cases from sister circuits. *Taylor v. McDuffie*, 155 F.3d 479 (4<sup>th</sup> Cir. 1998) [de minimis injuries such as temporary swelling and irritation are the types of injuries the court considers de minimis and thus not actionable]; *Norman v. Taylor*, 25 F.3d 1259, 1263 (4<sup>th</sup> Cir.1994) [absent the most extraordinary circumstances, a plaintiff cannot prevail on an 8<sup>th</sup> Amendment excessive force claim if his injuries are de minimis]; *DeWalt v. Carter*, 224 F.3d 607, 620 (7<sup>th</sup> Cir.1999)[while significant injury is not required, a claim ordinarily cannot be predicated upon a de minimis use of physical force] (citing Hudson); *White v. Holmes*, 21 F.3d 277, 281(8<sup>th</sup> Cir.1994) [a Court must also look to the extent of the pain inflicted in order to determine whether a constitutional deprivation occurred].

The injury must be more than *de minimis*. In the case at bar the victim refused medical treatment and there was no physical evidence of the an injury. There was no evidence of injury because there was no injury. “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers violates a prisoner’s constitutional rights.” *Griffin v. Crippen*, 193 F.3d 89, 91(2d Cir. 1999). In the present case Brugman’s use of *de minimis* force in the continuous action of apprehension was necessary appropriate, and benign.

In *Siglar v Hightower*, 112 F.3d 191 (5th Cir. 1997)<sup>5</sup>, the Fifth Circuit 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). The facts regarding the alleged injury in the present case and in *Siglar* are very similar. The Fifth Circuit in *Gomez v. Chandler*, 163 F.3d 921, 924 (5<sup>th</sup> Cir. 1999), recognized that its decision in *Siglar* left open the question whether a *de minimis* injury coupled by a malicious or repugnant application of physical force still does not amount to a constitutional violation. The Fifth Circuit’s

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<sup>5</sup> Throughout this petition counsel has cited both 4<sup>th</sup> Amendment and 8<sup>th</sup> cases in support of the reasons for granting the petition. The Fifth Circuit in *Ikerd v. Blair*, 101 F.3d 430, 434 (footnote 9) has stated that any force exerted by law enforcement officers which would be objectively reasonable under *Graham* would also be *de minimis* under *Hudson*. Thus holding that there is no difference whether the force used is in the 4<sup>th</sup> or 8<sup>th</sup> Amendment context.

decisions in *Bramer*<sup>6</sup> and *Siglar* are in conflict. This Court should resolve this unsettled area of law within the Fifth Circuit and the sister circuits.

*De Minimis* use of force rarely suffices to state a constitutional claim. *Griffin v. Crippen* at 91. There exists at some point at which the injury is so minor that no reasonable person could conclude that an officer used excessive force. A court must look to the extent of the injury inflicted in order to determine whether a constitutional deprivation has occurred. *Ikerd v. Baird*, 101 F.3d at 434, citing *Hudson v. McMillan*, 112 S.Ct. at 999; *Cummings v. Malone*, 995 F.2d 817, 822 (8<sup>th</sup> Cir. 1993). The Fifth Circuit failed to take into account the extent of the injury in affirming the conviction. Petitioner's Writ of Certiorari should be granted so all relevant factors are considered in determining whether as a matter of law there has been a constitutional deprivation.

## **II. Whether The Fifth Circuit's Mis-characterization and Misconstruction Of The Facts In The Case At Bar Has Lead To A Misinterpretation Of The Law Of The Fifth Circuit Regarding Excessive Force And A Due Process Violation.**

The Fifth Circuit misconstrued the facts in deciding that the illegal alien, Jimenez Saldana, suffered a constitutional injury. The Court relied heavily on the

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<sup>6</sup> The court below relied upon *Williams v. Bramer*, 180 F.3d 699 (5<sup>th</sup> Cir. 1999). In *Bramer* the Court held that "although suffering from dizziness, loss of breath, and coughing are not significant injuries, combined they qualify as a cognizable injury when the victim is *maliciously* assaulted by a police officer." at 704.

decision in *Bramer* in which this Court held that the government need only show that the victim suffered “some” injury although this requires proof of more than “*de minimus* injury” and that this injury is “defined entirely by the context in which the injury arises. *Williams v. Bramer*, 180 F.3d 699, 703 (5<sup>th</sup> Cir. 1999). The Court relied upon the *Ikerd* case in which it was stated:

“On the other hand, in the context of *custodial* interrogation, the use of nearly any amount of force may result in a constitutional violation when a suspect “poses no threat to [the officers’] safety or that of others, and [the suspect] does not otherwise initiate action which would indicate to a reasonably prudent police officer that the use of force is justified.” *Ware v. Reed*, 709 F.2d 345, 351 (5<sup>th</sup> Cir. 1983) *Ikerd*, 101 F.3d at 434

The Court is reminded that the case at bar was not a custodial interrogation case, but a continuing chase and attempt to place the illegal aliens in custody.

The Court below mis-applied the facts and holdings in *Bramer* and *Ikerd* to the case at bar. In *Bramer* the Court held that “although suffering from dizziness, loss of breath, and coughing are not significant injuries, combined they qualify as a cognizable injury when the victim is *maliciously* assaulted by a police officer.” *Bramer* at 704. In the present case Brugman did not *maliciously* assault the alleged victim and the victim was not under *custodial* interrogation. As the evidence clearly established, the use of force by Petitioner was reasonable and minimal and was keeping with the situation which confronted him.

The evidence clearly established that Brugman made 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. Contrary to the facts set forth by the panel decision, Saldana testified that he was never hit or kicked in the head by Brugman as alleged in the indictment and as argued by the government, but that his head was merely pushed to the ground.

“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) Saldana testified that he felt pain and lost his breath.

Q. How did you feel when he kicked you?

A. I felt pain and I lost my breath.(ROA Vol.3, p. 13 )

The Fifth Circuit principally relied upon *Bramer* wherein the police officer choked the victim **after** the victim had been searched. In the present case, unlike in *Bramer*, the alleged victim *had not been searched for weapons* and was not under

custodial interrogation. Agent Perez, confirmed that some of the aliens were not sitting down as Agent Alegria testified. (ROA Vol.: 7, p. 13) Therefore, in the judgement of Petitioner it was necessary for him 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 force used by Brugman was not malicious but reasonable in light of the circumstances confronting him on the evening of January 14, 2001.

### **III. The Fifth Circuit Decision Has Set A Dangerous Precedent In Civil Rights Litigation.**

The decision below does not comport with the philosophy of Fifth Circuit wherein it stated:

“We must avoid substituting our personal notions of proper police procedure for the *instantaneous decision* of the officer at the scene. We must never allow theoretical, sanitized world of our imagination to replace the dangerous and complex world that policeman face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” *Stroik v. Ponseti*, 35 F.3d 155, 158-159 (5<sup>th</sup> Cir. 1994), quoting *Smith v. Freland*, 954 F.2d 343, 347 (6<sup>th</sup> Cir. 1992) [emphasis supplied]

In the case at bar the Fifth Circuit has substituted its personal notions of proper police procedure for the instantaneous decision of Brugman on the evening of January 14, 2001. Further, the Court has opened the door to a plethora of civil rights actions

against police officers and federal agents. Criminals, illegal aliens and suspected terrorists can now offer only their testimony that they felt pain or lost their breath, without any other evidence of injury, and claim a constitutional violation.

In light of the recent revelations regarding torture of Iraqi and Afghani prisoners and the current administration's apparent condoning of such tactics and torture with its legal analysis of the Geneva Conventions, it seems hypocritical to sentence Petitioner to 27 months imprisonment for the pushing of an illegal alien to the ground with his foot and where there were no discernable injuries.

### **CONCLUSION**

The Fifth Circuit failed to follow its prior holdings regarding the use of force and the *de minimis* injury when it affirmed the conviction of Petitioner. The decision in the case at bar is in conflict with the decisions of sister circuits in their holdings that *de minimis* injuries cannot result in an actionable claim of excessive force. Thus, for the foregoing reasons, certiorari should be granted.

Dated: June , 2004

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