

No. 03-50294

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

**UNITED STATES OF AMERICA
Plaintiff-Appellee**

v.

GARY M. BRUGMAN

Defendant-Appellant

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

PETITION OF APPELLANT FOR HEARING EN BANC

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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

STATEMENT OF COUNSEL

I, Ronald H. Tonkin, court appointed attorney for the appellant, Gary M. Brugman, express a belief based upon a reasoned and studied professional judgement, that this appeal involves serious constitutional implications and questions of exceptional importance¹:

1. Whether the panel decision runs contrary to the decisions of the 5th Circuit and other United States Courts of Appeal that *de minimis* injuries do not rise to the use of excessive force and 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 Defendant.

2. Whether the panel decision has set a dangerous precedent in civil rights litigation by holding that a momentary loss of breathe and residual pain for three days is not a *de minimis* injury thus opening up the flood gates for civil rights litigation.

3. Whether the extent of injuries suffered by the victim which were momentary

¹ Throughout this petition counsel has cited both 4th Amendment and 8th Amendment cases in support of the reasons for granting the petition. This Court 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 4th or 8th Amendment context.

loss of breath and residual pain for three days constitutes *de minimis* injuries and thus does not rise to a constitutional injury.

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

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PETITION FOR HEARING *EN BANC*
(FRAP 35)

Gary M. Brugman Petitions the Court for an *en banc* hearing and for his reasons sets forth the following.

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 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.

Defendant made all appropriate 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 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.

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. Defendant was sentence to 27 months confinement on March 10, 2003.

Defendant filed his timely appeal which was argued on March 2, 2004. The panel affirmed the conviction of defendant by opinion dated March 26, 2004. The opinion was received by counsel on March 30, 2004.

B. Statement of Facts

Defendant, Gary M. Brugman, 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, Brugman was conducting "Linewatch" activities around the "Rosetta Farms" area of Eagle Pass, Texas. Brugman 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. Meanwhile, two other Border Patrol Agents, Remberto Perez, a journeyman Border Patrol 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 Brugman was in need of assistance in apprehending a group of aliens he was chasing through the pecan orchards at Rosetta Farms.

Perez and Alegria drove to the area in order to assist Brugman in apprehending that group of aliens. 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. Alegria chased the aliens on foot before they finally stopped running. At that point Alegria ordered the aliens to sit on the ground. Brugman while still running caught up to Alegria and the aliens. While still running Brugman noticed that Saldana was not sitting as ordered. As a result, Brugman 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. Neither

Saldana nor any of the other aliens had been searched for weapons at that time.²

Shortly thereafter, Perez who witnessed Brugman's actions arrived at the scene.

Perez and Alegria then walked the aliens to Perez's vehicle. 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 Saldana said they were okay.

Agent Aponte drove the aliens to the Border Patrol station, at which point he began to process them. 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.

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 and that he had been "kicked"³ in the back and "kicked" in the head⁴. Casares then

²The evidence established that the Rosetta Farm areas was a dangerous area where Border Patrol Agents had been shot at and where a Border Patrol Agent had been killed.

³The actions of Brugman have been characterized in testimony as "kick" and "push". The panel has chosen to characterize Brugman's actions as "kicked".

⁴At the trial Saldana testified that he had not been "kicked" in the head.

"Q. So is it your testimony that this third agent (Defendant) did not kick you

asked Saldana if he needed medical attention, and Saldana responded in the negative. Agent Casares proceeded to take pictures of the areas of the body (head and back) where Saldana alleged that he had been kicked. However, he did not see any marks or evidence of injury and the pictures which were introduced into evidence did not reflect any injuries.

ARGUMENT

I. The Panel’s Decision Runs Contrary To The Decisions Of The 5th Circuit and Sister Circuits That *De Minimis* Injuries Do Not Equal Excessive Force And Are Thus Objectively Reasonable In The Context Of The Facts Of This Case At Bar.

The panel’s decision 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*, 2004 WL 596124 (5th Cir. 2004). The panel’s decision runs contrary to the established law of the 5th Circuit and sister circuits⁵. This court held

in the head? A. No, it was on the side.” (Record on Appeal Vol. 3, page 44)
“Q. Did the third border patrol agent (Defendant) hit you in the head or merely push your head to the ground? A. He just pushed my head to the ground?” (Record on Appeal Vol. 3, page 45)

⁵The Court’s attention is directed to the following cases from sister circuits. *Taylor v. McDuffie*, 155 F.3d 479 (4th 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 (4th Cir.1994)-absent the most extraordinary circumstances, a plaintiff cannot prevail

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, (5th Cir. 1993).

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 alleged 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), 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). The facts regarding the alleged injury in the present case and in *Siglar* are very similar. This Court in *Gomez v. Chandler*, 163

on an 8th Amendment excessive force claim if his injuries are *de minimis*; *DeWalt v. Carter*, 224 F.3d 60, 620 (7th 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 (8th Cir. 1994)-“a Court must also look to the extent of the pain inflicted in order to determine whether a constitutional deprivation occurred”. *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000)-*de-minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment even if the force used was unnecessary.

F.3d 921, 924(5th Cir. 1999), recognized that this Court 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. This Court's decisions in *Bramer*⁶ and *Siglar* are in conflict. A rehearing *en banc* is required to resolve this unsettled area of law within the 5th Circuit.

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. Blair*, 101 F.3d at 434, citing *Hudson v. McMillan*, 112 S.Ct. 945, 999; *Cummings v. Malone*, 995 F.2d 817, 822 (8th Cir. 1993). The panel failed to take into account the extent of the injury in the present case. *En Banc* review should be granted so all relevant factors are considered in determining whether as a matter of law there has been a constitutional deprivation.

II. The Panel's Mis-characterization and Misconstruction Of The Facts In The Case At Bar Has Led To A Misinterpretation Of The Law Of The 5th Circuit Regarding Excessive Force And A Due Process Violation.

The panel misconstrued the facts of the case in deciding that Jimenez

⁶ *Williams v. Bramer*, 180 F.3d 699 (5th Cir. 1999)

Saldana, suffered a Constitutional injury. The panel relied heavily on the decision in *Bramer* in which this Court ruled 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 (5th Cir. 1999). The panel relied on this Courts decision in *Ikerd* in which this Court 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 (5th 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 panel mis-applied the facts and holdings in *Bramer* and *Ikerd* to the case at bar. In *Bramer* this Court ruled “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 Saldana while he was under *custodial* interrogation.

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 by Brugman, but that his head was merely pushed the ground⁷. The panel principally relied upon *Bramer* wherein the police officer choked the victim **after** the victim had been searched. In the present case, unlike in *Bramer*, Saldana as well as the other detained aliens *had not been searched for weapons* and were not under custodial interrogation. Agent Perez confirmed that some of the aliens were not sitting down as Agent Alegria testified. Therefore, it was necessary for Brugman to use his foot to push Saldana to the ground to prevent a further escape or assault upon a fellow agent. Brugman was of the belief that it was necessary to keep Saldana from running or attacking Agent Alegria. The Ninth Circuit Court of Appeal ruled in *Saman v. Robbins*, 173 F.3d 1150, 1156 (9th Cir. 1999) :

“He noticed an individual who matched the description given of the the suspect and he had no way of knowing whether the individual was armed. That individual began to comply with his commands to get down on the ground , but then suddenly jumped to his feet as Kimball approached him. Kimbal’‘s split-second judgment to administer a single kick to subdue Alofar in this tense, uncertain and dangerous situation in which one officer had already been shot was

⁷See footnote 4 for the actual testimony as an example of the erroneous mis-characterization of the facts which were stated in the panel decision wherein it was stated “Brugman began to punch Jiminez-Saldana in the ribs with his hands”.

certainly objectively reasonable as a matter of law.”

The force used by Brugman was not malicious, sadistical, and against contemporary standards of decency, but was objectively reasonable as a matter of law in light of the circumstances confronting him on the evening of January 14, 2001.

III. The Panel Has Set A Dangerous Precedent By Its Decision In Civil Rights Litigation.

The panel’s decision does not comport with the philosophy of this Court.

This Court has 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 (5th Cir. 1994), quoting *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992)

In the case at bar the panel has substituted its personal notions of proper police procedure for the instantaneous decision of Brugman on the evening of January 14, 2001. Further, the panel 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 there testimony that they felt pain or lost

their breath, without any other evidence of injury, and claim a constitutional violation.⁸

CONCLUSION

This case should be heard *en banc* because of the exceptional importance of the issues raised above.

Respectfully submitted,

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⁸ As a plaintiff's civil rights attorney, counsel applauds the panel's decision since it will make it easier to present Section 1983 cases.

As a criminal defense attorney, counsel deplores the decision for it permits legitimate police practice to result in criminal convictions of police officers.

CERTIFICATE OF SERVICE

I hereby certify that on April , 2004 the original and 20 copies of the foregoing together with one computer disk was sent to the Court. I further certify that on April , 2004 two copies of the foregoing was sent to Tovah R. Calderon.

Ronald H. Tonkin

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing satisfies the requirements of the Federal Rules of Appellate Procedure 32 (a)(7). The brief was prepared under Corel Word Perfect 11, in 14 point Times New Roman font and the word count is 3600 and line count is 479.

Ronald H. Tonkin