

NO. 06-51489

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

**UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE**

VS.

**IGNACIO RAMOS and
JOSE ALONSO COMPEAN,
DEFENDANT-APPELLANTS**

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF TEXAS (EL PASO DIVISION)**

**REPLY BRIEF OF APPELLANT
JOSE ALONSO COMPEAN**

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COMES NOW, JOSE ALONSO COMPEAN, respectfully submitting this
Reply Brief and would show as follows:

GENERAL RESPONSE

Compean focuses only on selected points in this Reply Brief. His decision
not to respond to all the Government's assertions and arguments is not meant to
reflect acquiescence in the Government's position or evidence a waiver of the

issues raised in his principal brief.

REPLY POINT NUMBER ONE

(Germane to Compean's Issue Number Two and
Government's Reply Point III)

**IS IT A VIOLATION OF FIFTH AMENDMENT DUE
PROCESS PROTECTIONS TO APPLY 18 USC 924(c)
TO A PEACE OFFICER WHO FIRES HIS SERVICE
WEAPON IN THE LINE OF DUTY?**

The legislative history of the statute includes the statement that the law was aimed at those “who chose to carry a firearm as an offensive weapon for a specific criminal act. . . .” See, *United States v. Rivera*, 889 F2d 1029 (11th Cir. 1989).

The Government seizes upon this language as support for its position that 924(c) was meant to be applied in cases like this one. In fact, the opposite is more likely.

In every case found by counsel, involving a peace officer, there was a clear “specific criminal act” that was the underlying offense. In *Rivera*, it was narcotics, as was the case in *United States v. Radcliff*, 331 F3d 1153 (10th Cir. 2003), *United States v. Novaton*, 271 F3d 968 (11th Cir. 2001), and *United States v. Vasquez-Guadalupe*, 407 F3d 492 (1st Cir. 2005). The “specific criminal act” was forcible rape in *United States v. Contreras*, 950 F2d 232 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992) and *United States v. Guidry*, 456 F3d 493 (5th Cir. 2006), cert. denied, ___ U.S. ___; 127 S.Ct. 996 (2007).

In both *United States v. Winters*, 174 F3d 478 (5th Cir. 1999), cert. denied, 528 U.S. 969 (1999) and *United States v. Williams*,¹ 343 F3d 423 (5th Cir. 2003), cert. denied, 540 U.S. 1093 (2003), officers abused persons who were already in custody. These cases are different in kind, rather than degree, from the cases now before the Court.

The Government repeats over and over the mantra “the jury rejected their self-defense claims.” However, that is irrelevant to the issue here. Even disbelieving the Appellants’ version of the reasonableness of shooting, this is a case where the undisputed facts are that officers were trying to apprehend a person they had every reason to believe had committed serious offenses, who had led them on a dangerous chase, who disregarded verbal commands and show of authority, and who according to medical testimony, had turned his body back towards them at some point. Unlike cases such as *Winters* and *Williams*,² here the discharge of firearms was, without question, in the midst of a “tense, uncertain, and rapidly-evolving”³ situation, no matter who is to be believed.

“Split-second judgments” were involved here. *Id.* No one “chose to carry a

¹ No due process argument was raised in *Williams*.

² Where the person was already in custody and could have posed no threat.

³ *Graham v. Connor*, 490 U.S. 386, 397 (1989).

firearm as an offensive weapon for a specific criminal act.” In fact, there is no underlying offense at all- -the discharge is the alleged crime. No officer would believe that firing during a critical police incident would “flaunt the clear dictates of the law,” *Rivera, supra*, and therefore subject him to a mandatory ten year minimum sentence.

The Government’s reliance on “the jury found against them” is not a relevant inquiry. Such contention disregards the mandate of *Graham v. Connor*, that reasonableness, in this context, cannot be judged “with the 20/20 vision of hindsight.” A jury verdict is, perforce, “hindsight,” especially after a lengthy trial. But, the issue is a legal, not factual one: whether the agents can be subjected to the harsh 924 (c) application at all in a case where there is no specific, underlying criminal act that flaunts “the clear dictates of the law.”

The issue raised here has not been decided before, because the case at bar is so different from those cited, or was not urged there. What is at issue is, in truth, fairly simple. A person will never be put in the situation of having to decide, in a split-second and during a tense situation, whether an armed robbery, a forcible rape, or narcotics dealing would be considered legal or illegal. The law would not allow that person to claim any justification or excuse for such conduct. He would know such conduct falls withing the coverage of the statute.

A police officer abusing a non-resisting and in-custody suspect would not have been faced with a split-second decision whether to whip up on him or not or be concerned that hindsight would judge him guilty. Like *Winters* and *Williams*, he would know he was using a firearm “as an offensive weapon for a specific criminal act.” He, too, would know such conduct falls within 924(c).

As the legislative history notes, situations where armed officers commit crimes are “extremely rare.” On the other hand, instances where officers have to use force, even deadly force, are all too common these days. Surely Congress knew that. Surely there is at least some uncertainty whether Congress intended police use-of-force cases all to be swept up within 924(c)’s reach. Does this Court really think the executive branch should, or even wants to, examine each police shooting to see whether, after the fact, an officer was unreasonable or mistaken in his decision to use force?

The words in the statute may be simple and plain, but the intended reach is hardly certain.⁴ There are reasonable doubts about the intended scope of 924(c), especially considering the legislative history. The rule of lenity requires that these doubts be resolved in favor of the Appellants.

⁴ Note the “widely shared view that the statute’s text is ambiguous. . . .” *United States v. Phillips*, 319 F3d 177 (5th Cir. 2003).

REPLY POINT TWO

(Germane to Compean's Issue Number Four and
Government's Reply Point V)

THE JURY INSTRUCTION IN THE CIVIL RIGHTS COUNT (18 U.S.C. 242) MISPLACED THE BURDEN OF PROOF. WAS THIS PLAIN ERROR?

The Government asserts that the charge misplacing the burden of proof was not harmful because, “read as a whole,” the instructions would not have misdirected or confused the jury. In fashioning this contention, the Government takes some ten pages of its brief to formulate a circuitously-reasoned argument that the jury would have known that (1) it had to find “wilful” conduct, (2) that Appellants had to intend to deprive the complainant of his right to be free of unreasonable force and (3) that reasonableness is an issue to be determined by them in light of the degree of force a reasonable officer would have used. (Gov. Brief 102-103). Therefore, says the Government, and in spite of the now-challenged instruction,⁵ the jury would have known it was really required to find, beyond a reasonable doubt, that no reasonable officer could have acted as Appellants did. The Government's conclusion does not follow logically from its predicate assumptions, and is wrong.

⁵ Which required the jury to choose between two versions rather than find Government's version beyond a reasonable doubt.

First of all, the Government relies on an irrational belief that the jury could have reasoned out, in the midst of its deliberations, the winding path of the Government now takes many pages of brief to map. Even if they could have done so, the last stop on that tortured journey was the offending charge, which flatly took away the burden on the Government to prove unreasonableness.

The “record as a whole” does not cure the harmful misplacing of the burden of proof. The civil rights counts were hardly even mentioned in jury argument, and certainly no explication was made of the burden of proof and how it should be applied there. The last instruction in the subject was very clear: “You must determine whether the force used was reasonable or unreasonable.” This does not require for conviction that the Government establish unreasonableness, but tells them to choose between alternatives depending on who they believe. This gross and plain misdirection is not rendered harmless by general references elsewhere to the burden of proof, since no matter how often such general reference appears, the specific reference in the civil rights count instruction is what would hold the attention of the jury. Conviction on Count 11 (and Count 12 for Ramos) cannot stand.

REPLY POINT NUMBER THREE

(Germane to Compean's Issue Number Five)

WAS IT PLAIN ERROR THAT THE JURY INSTRUCTIONS OMITTED KEY DEFENSE ELEMENTS REGARDING THE CIRCUMSTANCES UNDER WHICH A PEACE OFFICER MAY USE FORCE AND HOW THE JURY MUST EXAMINE SUCH ISSUE?

Compean replies here only to point out that the Government's response to his original point of error consists merely of a footnote on page 133 of its Brief, which is but a summary denial with no supporting argument or authorities.

For the reasons stated in his principal brief, Compean believes that had the missing and vital instructions been requested by trial counsel, it would have been error to refuse them. That would, at least, have transferred to the Government the burden to show the error was harmless. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). And, it is probably premature to assert harm from the ineffective assistance of counsel in failing to request such instructions. *United States v. Gibson*, 55 F3d 173 (5th Cir. 1995). Nevertheless, the instructions that are so conspicuous by their absence impact directly on the very core of the defense in this case. The jury was not properly equipped to examine or resolve the central issues.

The bottom line is that this jury was not properly instructed as to the

principles of law governing when police officers⁶ may use force, under what circumstances, and how that use is to be judged. This plain error seriously affected the fairness and integrity of those proceedings. Under no stretch of the imagination can such deficiencies be dismissed as insignificant or harmless.

REPLY POINT NUMBER FOUR

(Germane to Compean's Issue Number One and Government's Reply Point I)

THE TRIAL COURT ERRED IN RESTRICTING CROSS EXAMINATION WITH REGARD TO ALDRETE-DAVILA'S DRUG DEALINGS IMPAIRING APPELLANT'S RIGHT TO PRESENT A DEFENSE.

Compean adopts the Reply Brief of Ramos on Point Number One by reference.

Compean further urges that the Government is wrong when it urges that the Court's construction of the immunity agreement between Aldrete-Davila and the Government should be reviewed under the "Clear Error" standard, since it was contractual in nature, citing *United States v. Wilson*, 392 F3d 1055, 1059 (9th Cir. 2004):

Because this is a claimed immunity agreement, ordinary contract principles apply. *United States v. Plummer*, 941 F2d 799, 802-03

⁶ As opposed to the general public.

(9th Cir. 1991). Therefore, we review the trial court's factual determinations for clear error. *Id.* at 803. We review determinations relating to formation of an enforceable agreement also for clear error. See *Collins v. Thompson*, 679 F2d 168, 170 (9th Cir. 1982) (“[d]eterminations of contract matters regarding offer, rejection, and revocation utilizing the objective standard are factual” and are upheld unless clearly erroneous).

Wilson urged that he had an oral immunity agreement with the case agents which the United States Attorney failed to honor. The trial court, using the guidance of contract law principles, found otherwise. However, that agreement was a “non statutory” agreement. That is not the case here.

Appellants urged that the agreement was a written, statutory agreement, where the specific language of the written agreement provided specific protections which negated Aldrete-Davila's need to assert his Fifth Amendment claims.

United States v. Plummer, 941 F2d 799 (9th Cir. 1991) (contract principles apply to non-statutory immunity agreements). This agreement left no ambiguity to be construed. *United States v. Carrillo*, 709 F2d 735, 738 (9th Cir. 1983) (where no written agreement agreed to, no meeting of the minds, the court's finding on scope not clearly erroneous). Here the agreement was written, agreed to by the parties, and, by its terms, granted Aldrete-Davila immunity from the use of his testimony against him in the prosecution of the October transaction. For agreements such as this, clear error is not the standard for review.

With these additional observations, Compean adopts the argument and authority in the Reply Brief of Co-Appellant, Ignacio Ramos.

CONCLUSION

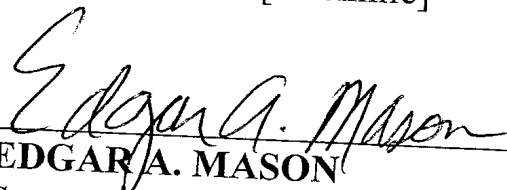
Compean urges reversal of all counts, and remand for appropriate action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It certify that a true copy hereof was served on the following parties by transmitting said Reply Brief by United Parcel Service for delivery within three calendar days this 22 day of August, 2007.

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CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,344 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Wordperfect 10 in Times New Roman 14.



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Dated: August 21, 2007