

No. 06-51489

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

**IGNACIO RAMOS and
JOSE ALONSO COMPEAN,**

Defendants-Appellants.

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

CONSOLIDATED BRIEF FOR THE UNITED STATES OF AMERICA

TRIAL ATTORNEYS

**Debra Kanoff and
Jose Luis Gonzalez
Assistant United States Attys.**

**JOHNNY SUTTON
United States Attorney**

**Mark R. Stelmach
Assistant United States Attorney
Appellate Section
Western District of Texas
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
(210) 384-7090
ATTORNEYS FOR APPELLEE**

RECOMMENDATION ON ORAL ARGUMENT

The United States of America suggests oral argument may aid the decisional process in this case. The record is large. Multiple issues (although largely plain-error issues) have been raised.

TABLE OF CONTENTS

	<u>Pages</u>
RECOMMENDATION ON ORAL ARGUMENT	ii
LIST OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE	4
A. Course of Proceedings and Disposition in the Court Below	2
B. Statement of Facts.	6
SUMMARY OF THE ARGUMENTS	40
ARGUMENTS AND AUTHORITIES	43
CONCLUSION	157
CERTIFICATE OF SERVICE	158
CERTIFICATE OF NON-COMPLIANCE	159

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Arthur Andersen LLP v. United States</i> , 544 U.S. 696 (2005)	142
<i>Bailey v. United States</i> , 516 U.S. 137 143 (1995)	156
<i>Bd. of Trustees of Univ. of Alabama v. Garrett</i> 531 U.S. 356 (2001)	99
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964)	84
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	44
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	106
<i>Heller v. Doe by Doe</i> , 509 U.S. 312 (1993)	99
<i>Henderson v. Kibbe</i> , 431 U.S. 145 (1977)	101
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	117
<i>Hoffman v. United States</i> , 341 U.S. 479 (1951)	69
<i>Jackson v. Virginia</i> , 443 U.S. 307, 319 (1979)	116

<i>Kastigar v. United States</i> , 406 U.S. 441 (1972)	62
<i>Lefkowitz v. Turley</i> , 414 U.S. 70 (1973)	69
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968)	66
<i>McGinnis v. Royster</i> , 410 U.S. 263 (1973)	99
<i>Resident Counsel of Allen Parkway Village v. HUD</i> , 980 F.2d 1043 (5 th Cir. 1993)	150
<i>Rewis v. United States</i> , 401 U.S. 808 (1971)	95-96
<i>Scott v. Harris</i> , 127 S. Ct. 1769, 1777 (2007)	135
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	106, 109
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985)	95, 134
<i>United States v. Freed</i> , 401 U.S. 601 (1971)	65
<i>United States v. Harris</i> , 347 U.S. 612 (1954)	87
<i>United States v. Harris</i> , 536 U.S. 545 (2002)	150, 155
<i>United States v. Lanier</i> , 520 U.S. 259 (1997)	84, 133, 134

<i>United States v. Murdock</i> , 290 U.S. 389 (1933)	108
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	77, 84, 100
<i>United States v. Ragen</i> , 314 U.S. 513 (1942)	97
<i>Becker v. Federal Election Commission</i> , 112 F.Supp2d 172, 185 n.6 (D. Mass. 2000)	150
<i>Rowe v. Griffin</i> , 676 F.2d 524 (11 th Cir. 1982)	64
<i>Rule v. United States</i> , 362 F.2d 215 (5 th Cir. 1966)	66
<i>Trevino v. Johnson</i> , 168 F.3d 173 (5 th Cir. 1999)	150
<i>United States v. Abod</i> , 770 F.2d 1293 (5 th Cir. 1985)	94
<i>United States v. Baptiste</i> , 264 F.3d 578 n.6 (5 th Cir. 2001)	131
<i>United States v. Ballenger</i> , 894 F.2d 402 (4 th Cir. 1990)(unpublished)	91
<i>United States v. Barksdale-Conteras</i> , 972 F.2d 111 (5 th Cir. 1992)	153
<i>United States v. Black</i> , 776 F.2d 1321 (6 th Cir. 1985)	64, 68, 70
<i>United States v. Blackburn</i> , 9 F.3d 353 (5 th Cir. 1993)	153, 157

<i>United States v. Bourgeois</i> , 423 F.3d 501 (5th Cir. 2005)	83, 99
<i>United States v. Bower</i> , 575 F.2d 499 (5th Cir. 1978)	86
<i>United States v. Branch</i> , 91 F.3d 699 (5th Cir. 1996)	135
<i>United States v. Brechtel</i> , 997 F.2d 1108 (5th Cir. 1993)	78
<i>United States v. Brenson</i> , 104 F.3d 1267 (11 th Cir. 1997)	142
<i>United States v. Brewer</i> , 835 F.2d 550 (5 th Cir. 1987)	97
<i>United States v. Brimberry</i> , 779 F.2d 1339 (8 th Cir. 1985)	67, 70
<i>United States v. Brugman</i> , 364 F.3d 613 (5th Cir. 2004)	108, 135
<i>United States v. Butler</i> , 429 F.3d 140 (5th Cir. 2005)	78-79, 85
<i>United States v. Caron</i> , 551 F.Supp. 662 (E.D.Va. 1982)	67-68
<i>United States v. Christo</i> , 614 F.2d 486 (5th Cir. 1980)	78-81
<i>United States v. Cooks</i> , 52 F.3d 101 (5 th Cir. 1995)	44, 71
<i>United States v. Cover</i> , 199 F.3d 1270 (11 th Cir. 2000)	142

<i>United States v. Garcia</i> , 531 F.2d 1303 (5 th Cir. 1976)	54
<i>United States v. Gonzalez</i> , 922 F.2d 1044 (2d Cir. 1991)	140
<i>United States v. Gonzalez-Balderas</i> , 11 F.3d 1218 (5 th Cir. 1994)	114-115
<i>United States v. Griffin</i> , 589 F.2d 200 (5 th Cir. 1979)	97
<i>United States v. Hernandez</i> , 891 F.2d 521 (5 th Cir. 1989)	154, 157
<i>United States v. Hoch</i> , 837 F. Supp. 542 (W.D.N.Y. 1993)	97
<i>United States v. Hollis</i> , 208 F.3d 227 (10 th Cir. 1999) (unpublished) 2000 WL 235250	53
<i>United States v. Hook</i> , 781 F.2d 1166 (6 th Cir. 1986)	100
<i>United States v. Hutcherson</i> , 2006 WL 1875955, at * 3 (W.D. Va. July 6, 2006)	139
<i>United States v. Hutcherson</i> , 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006)	139, 143, 147
<i>United States v. Jaramillo</i> , 42 F.3d 920 (5 th Cir. 1995)	116-117
<i>United States v. Jimenez</i> , 464 F.3d 555, 558-65 (5 th Cir. 2006)	71
<i>United States v. Kelley</i> , 36 F.3d 1118 (D.C. Cir. 1994)	140-141

<i>United States v. Landes</i> , 704 F.2d 152 (5 th Cir. 1983)	54
<i>United States v. Martin</i> , 332 F.3d 827 (5 th Cir. 2003)	101
<i>United States v. McGilberry</i> , 480 F.3d 326 (5 th Cir. 2007)	154-155
<i>United States v. Musa</i> , 45 F.3d 922 (5 th Cir. 1995)	81
<i>United States v. Peel</i> , No. 06-30049-WDS, 2006 WL 2864106 at *2 (S.D. Ill. Oct. 2, 2006) ..	138
<i>United States v. Pennington</i> , 168 F.3d 1060 (8 th Cir. 1999)	153, 157
<i>United States v. Quatermain</i> 613 F.2d 38 (3 rd Cir. 1980)	66, 70
<i>United States v. Radcliff</i> , 331 F.3d 1153 (10 th Cir. 2003)	90
<i>United States v. Reasor</i> , 418 F.3d 466 (5 th Cir. 2005)	110
<i>United States v. Riddle</i> , 103 F.3d 423 (5 th Cir. 1997)	81
<i>United States v. Rivera</i> , 889 F.2d 1029 (11 th Cir. 1989)	86-87, 89
<i>United States v. Rodriguez</i> , 360 F.2d 949 (9 th Cir. 2004)	151-153, 157
<i>United States v. Rogers</i> , 101 F.3d 247 (2 nd Cir. 1996)	65

<i>United States v. Romero</i> , 166 Fed.Appx. 34 (4 th Cir. 2006), 2006 WL 250720 (unpublished)	69
<i>United States v. Ruiz</i> , 213 Fed.Appx. 345 (5 th Cir. 2007) (unpublished)	105
<i>United States v. Serrano</i> , 406 F.3d 1208 (10 th Cir. 2005)	69
<i>United States v. Schnitzer</i> , 145 F.3d 721 (5 th Cir. 1998)	81
<i>United States v. Singleton</i> , Crim. No. H-06-080, 2006 WL 1984467 *3 (S.D. Tex. Aug. 13, 1984)	139, 143, 147
<i>United States v. Sipe</i> , 388 F.3d 471 (5 th Cir. 2004)	105, 110, 135
<i>United States v. Shelton</i> , 937 F.2d 140, 142 (5 th Cir. 1991)	152
<i>United States v. Skinner</i> , 2005 WL 782811 (W.D.N.Y. 2005) (unpublished)	90
<i>United States v. Solis</i> , 299 F.3d 420, 452 (5 th Cir. 2002)	79, 131
<i>United States v. Stewart</i> , 93 F.3d 189 (5 th Cir. 1996)	44
<i>United States v. Tansley</i> , 986 F.2d 880 (5 th Cir. 1993)	44, 53
<i>United States v. Thomas</i> , 768 F.2d 611 (5 th Cir. 1985)	112

<i>United States v. Tomblin</i> , 46 F.3d 1369 n.16 (5 th Cir. 1995)	105
<i>United States v. Weaver</i> , 905 F.2d 1466 (11 th Cir. 1990)	64
<i>United States v. Williams</i> , 343 F.3d 423 (5 th Cir. 2003)	88-89, 98, 106, 135
<i>United States v. Wilson</i> , 884 F.2d 174 (5 th Cir. 1989)	152
<i>United States v. Wilson</i> , 392 F.3d 1055 (9 th Cir. 2004)	68
<i>United States v. Winn</i> , 948 F.2d 145 (5 th Cir. 1991)	113, 115
<i>United States v. Winters</i> , 174 F.3d 478 (5 th Cir. 1999)	89, 135
<i>United States v. Zaia</i> , 35 F.3d 567 (6 th Cir. 1994)(unpublished), 1994WL478707	105

Statutes

18 U.S.C. § 113(a)(1)	3
18 U.S.C. § 113(a)(3) & 2)	3
18 U.S.C. § 242	4-5, 104-105, 107
18 U.S.C. § 924(c)(1)(A)	4, 85, 151
18 U.S.C. § 1512(c)(1)	4, 138-146-147
18 U.S.C. § 1515(a)(1)(C)	139

Other Authorities

S.Rep. No. 98-225, 2d Sess., 314 n.10 (1983),
reprinted in 1984 U.S.Code Cong. & Admin. News, 3182, n. 10) . 87-88, 91

No. 06-51280

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

**IGNACIO RAMOS and
JOSE ALONSO COMPEAN,**

Defendants-Appellants.

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

CONSOLIDATED BRIEF FOR THE UNITED STATES OF AMERICA

JURISDICTION

This is an appeal from a final judgment of the district court in a criminal case. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether limitation of cross-examination of witness Aldrete-Davila was erroneous; whether Aldrete-Davila's March 16, 2005 immunity agreement covered an offense he is alleged to have committed in October of 2005, seven months after the agreement; whether the district court's finding as to the scope of the immunity agreement was clearly erroneous; whether the district court erred in allowing Aldrete-Davila to assert his Fifth Amendment rights regarding questioning about the alleged October offense; and whether collateral evidence could be used for impeachment.

II. Whether the district court committed plain error in allowing evidence of Border Patrol regulations and policies.

III. Whether application of section 924(c) was a due process "fair warning" plain error.

IV. Whether application of section 924(c) was an equal protection "fair warning" plain error.

V. Whether the failure to give certain instructions constituted plain error; whether the instructions as given constituted plain error.

VI. Whether the evidence for the assault and civil rights convictions was constitutionally sufficient.

VII. Whether application of section 242 to Defendants-Appellants was a “fair warning” plain error.

VIII. Whether the evidence was sufficient to support the section 1512(c)(2) obstruction of justice conviction.

IX. & X. Whether the evidence was sufficient to support the section 1512(c)(1) obstruction of justice conviction. Whether the denial of an instruction was error.

XI. Whether there was plain error as to the sufficiency of the indictment regarding the section 924(c) offense, where it charged “discharge” of a firearm instead of the statutory “use” of a firearm.

XII. Whether there was significant cumulative error.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

A third superseding indictment contained the following charged, all committed on or about February 17, 2005: Ignacio Ramos (Ramos”) and Jose Alonso Compean (“Compean”) were charged in **Count One** with Assault With Intent To Commit Murder, in violation of 18 U.S.C. § 113(a)(1); Ramos and Compean were charged in **Count Two** with Assault With A Dangerous Weapon, and aiding and abetting, in violation of 18 U.S.C. § 113(a)(3) & 2; Ramos and Compean were charged in **Count**

Three with Assault With Serious Bodily Injury, and aiding and abetting, in violation of 18 U.S.C. §§ 7(3), 113(a)(6) & 2; Ramos was charged in **Count Four** with Discharge Of A Firearm In Relation To A Crime Of Violence (as charged in Counts One through Three), in violation of 18 U.S.C. § 924(c)(1)(A); Compean was charged in **Count Five** with Discharge Of A Firearm In Relation To A Crime Of Violence (as charged in Counts One through Three), in violation of § 924(c)(1)(A); Compean was charged in **Count Six** with Tampering With An Official Proceeding, by collecting and disposing of his shell casings expelled from his firearm, in violation of 18 U.S.C. § 1512(c)(1); Compean was charged in **Count Seven** with Tampering With An Official Proceeding, by altering the integrity of the crime scene, in violation of 18 U.S.C. § 1512(c)(2); Ramos and Compean were charged in **Count Eight** with Tampering With An Official Proceeding, by obstructing and impeding a contemporaneous investigation surrounding the shooting, in violation of § 1512(c)(2); Ramos was charged in **Count Nine** with Tampering With An Official Proceeding, by failing to report the discharge of his firearm, in violation of § 1512(c)(1); Compean was charged in **Count Ten** with Tampering With An Official Proceeding, by failing to report the discharge of his firearm, in violation of § 1512(c)(1); Compean was charged in **Count Eleven** with Deprivation Of Rights Under Color Of Law, in violation of 18 U.S.C. § 242; and

Ramos was charged in **Count Twelve** with Deprivation Of Rights Under Color Of Law, in violation of 18 U.S.C. § 242 (1 R. 13).¹

After a lengthy jury trial, in which both Ramos and Compean testified in their own defense, Ramos and Compean were found guilty of all of the charged offenses except Count One.

Ramos was sentenced to: imprisonment for 12 months and 1 day on each of Counts Two, Three, Eight, Nine, and Twelve, all to be served concurrently, and 120 months as to Count Four, to be served consecutively to the above counts; terms of supervised release for three years, all to be served concurrently, a fine of \$2,000, and the special assessment of \$600 (4 R. 653-58). He filed a timely notice of appeal (4 R. 659).

Compean was sentenced to: imprisonment for 24 months on each of Counts Two, Three, Six, Seven, Eight, and Eleven, all to be served concurrently, and 120 months as to Count Five, to be served consecutively to the above counts; terms of supervised release for three years, all to be served concurrently, a fine of \$2,000, and the special assessment of \$600 (3 S.R. 571-76). He filed a timely appeal (4 R. 659).

¹ References to the Record on Appeal and Supplemental Record are designated by the number of the record volume or supplemental record volume followed by "R." or "S.R." and the pertinent page number(s). References to the a Government Exhibit are "G.Ex" followed by the number(s).

B. Statement of Facts From The Jury Trial.

A Woman Complained That Her Friend's Son, Oswaldo Aldrete-Davila, Had Been "Shot In The Back" By A Border Patrol Agent While He "Was Running Back To Mexico"

Border Patrol Agent Rene Sanchez, raised for part of his childhood in San Isidro, Chihuahua, Mexico, had then become acquainted with Oswaldo Aldrete-Davila (22 R. 226, 230-33, 238). The agent's his mother-in-law, Gregoria Toquinto, is "friends with" Oswaldo Aldrete-Davila's mother, Macaria (22 R. 229, 232-33). On February 28, 2005, Agent Rene Sanchez, then stationed in Wilcox, Arizona, received a telephone call from his mother-in-law, who related that "her friend's son had been shot by a Border Patrol agent" (22 R. 227, 229, 239). The agent's mother-in-law had been contacted by Macaria Aldrete-Davila with the news that her son, Oswaldo, "had been shot while he was trying to evade apprehension" (22 R. 229-30). Specifically, she claimed that as Oswaldo "was running back to Mexico," he had been "shot in the back" (22 R. 230). The call to the agent was for the purpose of "report[ing] this incident" (*id.*).

Agent Rene Sanchez Found No Record Of The Shooting

Agent Rene Sanchez told his mother-in-law that he needed more information to investigate this matter; he suggested that she take a cell phone to Mexico so that he

could speak directly to Oswaldo Aldrete-Davila (22 R. 231). In a telephone conversation, Aldrete-Davila did report to Agent Rene Sanchez that while trying to “evade apprehension” he “took of that running, and he got shot in the back area” (22 R. 231). Aldrete-Davila said that the shooting had occurred on February 17, 2005, and he provided a location (22 R. 234).

Agent Rene Sanchez made a report to his supervisor, who instructed him to investigate the matter further (“to find out more facts”) (22 R. 234-35, 248-49). The agent utilized the “BPETS,” the Border Patrol’s “national computer,” which should have contained a record of a shooting by an agent, if it had been reported (22 R. 235-36). Agent Sanchez found no record of a shooting in February of 2005 (*id.*).

Agent Rene Sanchez spoke with Aldrete-Davila on March 3, 2005 (22 R. 244). Aldrete-Davila said that he still had the bullet in his body (22 R. 249). Agent Rene Sanchez filed a memorandum of his investigation on the same date (22 R. 236, 239).

Special Agent Christopher Sanchez
Opened His Investigation; He Found
No Record Of A Shooting On February 17, 2005;
He Met With Aldrete-Davila

Special Agent Christopher Sanchez, of the Department of Homeland Security’s Inspector General’s Office, in March of 2005 received two memoranda, one from Agent Rene Sanchez and one from that agent’s supervisor, regarding a shooting incident on February 17, 2005 (22 R. 263, 265-67). Agent Christopher Sanchez

contacted the Border Patrol, “[a]nd they stated that there was no report of a shooting on February 17, 2005 (22 R. 279). The agent explained that according to Border Patrol policy, “any shooting, any discharge of [a] weapon must be reported . . . within one hour” (22 R. 280, 307). After any shooting, a “significant incident report [] would be written” (22 R. 280). Even an accidental discharge should be reported (*id.*).

Agent Christopher Sanchez obtained the recorded “radio traffic” from that day for the Fabens area and found nothing to indicate that a shooting had occurred (22 R. 268-70). The agent compiled a list of the agents from the Fabens station present on that day (22 R. 267-70, 287).

On March 11, 2005, Agent Christopher Sanchez spoke with Aldrete-Davila (22 R. 270, 291). The agent then spoke with the truck driver that had towed a van that had been seized near Fabens on the February 17 date of the reported shooting (22 R. 271). On March 15, the driver took him to the exact spot where the van had been found (22 R. 271). Agent Sanchez could still see the tire tracks where the van had gotten stuck in the front part of the drainage ditch (22 R. 271-72).

On March 16, Agent Christopher Sanchez traveled back to the site with a metal detector in an unsuccessful attempt to find shell casings (22 R. 273-74, 295).

Two days later, the “sector evidence team,” agents trained and certified to find evidence at a scene and who are called out after all shootings, examined the area (22

R. 274-75). They looked by the levee, drainage ditch, and the vega, but they too did not find any shell casings that would have come from a service handgun (*id.*).

Aldrete-Davila was reluctant to speak to Agent Christopher Sanchez (22 R. 276). The prosecutor who initially handled the case made the decision to give Aldrete-Davila what was first expressed in a written letter as “limited use immunity,” but had been expanded by oral assurances from Agent Christopher Sanchez to be a promise that “he would not be prosecuted” for “the incidents that occurred that day” (22 R. 276-77).

Agent Christopher Sanchez spoke to Aldrete-Davila at the American consulate in Juarez (22 R. 276-77; 23 R. 11). Agent Sanchez testified that when Aldrete-Davila walked into the consulate, he was “limping,” he had “crutches,” and “he had a catheter coming out . . . a red hose [that] was attached to a large urine bag” (22 R. 277).

The Bullet Was Removed From Aldrete-Davila;
It Had Been Fired From The Service-Issued
Handgun Of Border Patrol Agent Ignacio Ramos

Agent Christopher Sanchez arranged for the bullet lodged in Aldrete-Davila’s body to be surgically removed at the William Beaumont Army Medical Center in the United States (22 R. 278). The agent was in the operating room, right behind the surgeon, when the bullet was removed, and the agent took custody of it “so we could run ballistics” (22 R. 279). The Border-Patrol issued service firearms - Baretta .40

caliber semi-automatic pistols - were collected from the agents of the Fabens station on duty that day (22 R. 275, 279, 281). The bullet removed from Aldrete-Davila “matched” the service firearm of Agent Ignacio Ramos, tested on March 18 (22 R. 281-82). This was when Agent Sanchez learned who had shot Aldrete-Davila (*id.*).

On February 17, Aldrete-Davila
Was Driving A Van Loaded With Drugs
Into The Border Town Of Fabens

Aldrete-Davila testified that on February 17, 2005, he had been recruited to deliver a van full of drugs within the United States for a fee of between \$1,000 and \$1,500 (23 R. 152, 159, 165). Aldrete-Davila admitted that “they had told me it was drugs” (23 R. 159). He knew that what he was doing was illegal, and a “serious offense” (23 R. 165, 175-76).

The van was already on the United States side of the Rio Grande River; Aldrete-Davila could see the van from his vantage point on the Mexican side of the river (23 R. 158-60). Aldrete-Davila waded across the river and went to the van; the keys were in the ignition (*id.*). There was a cell phone in the van (23 R. 193, 198).

From the driver’s seat, Aldrete-Davila could see the van was loaded with large bundles (23 R. 161, 164). He drove to Fabens in about five minutes (23 R. 153).

Aldrete-Davila Saw He Was Being Followed
By A Border Patrol Unit; He Turned Around
And Fled In The Van Back Towards Mexico

Aldrete-Davila testified that on February 17, at approximately 1:00 p.m., he was proceeding north on Fabens Road, the street coming into the town of Fabens from the border to the south, when he arrived at a traffic signal at the intersection with Alameda (or Texas Highway 20) (23 R. 69-72, 75, 170-71; G.Ex.s 40-43). It was a little overcast; a “gray day” (23 R. 94). Aldrete-Davila saw that a marked Border Patrol vehicle began to follow him (23 R. 72, 171).

Aldrete-Davila explained that once the Border Patrol vehicle began to follow him, “his intent” was to “[g]et to the edge of the river” so he could cross back into Mexico (23 R. 75, 173). Aldrete-Davila’s focus was on saving himself, by getting back into Mexico; it was not on trying to save the van (23 R. 174-75).

Aldrete-Davila related that the Border Patrol vehicle behind him “caused” him to make a left turn on to Alameda (23 R. 71-72). The Border Patrol unit followed him (23 R. 72). After one more block, Aldrete-Davila made a second left turn, onto First Street, then another left turn, and the patrol vehicle continued to follow him (23 R. 73-75; 25 R. 66).

When Aldrete-Davila got back to Fabens Road, he turned right, going back toward the river and Mexico (23 R. 75-76, 84). The patrol vehicle continued to follow

about ten meters behind the van (23 R. 76, 79). Aldrete-Davila later noticed a second Border Patrol vehicle following him (23 R. 76).

While proceeding south on Fabens, “racing back towards Mexico,” Aldrete-Davila saw that another patrol vehicle was also following him (23 R. 76-77). Fabens Road has an “S-curve,” and posted speed limits of 10 and 15 miles per hour (23 R. 77-78, 82, 84-85). Aldrete-Davila was driving much faster, and he ignored traffic control signs (23 R. 78, 82).

After the two curves, Fabens Road turns into Jess Harris Road, which becomes a dirt road and then continues to the irrigation or drainage ditch (sometimes referred to as “the ditch” or “the canal”) (23 R. 84-86, 92, 95; G.Ex. 84). South of the irrigation ditch was the levee and elevated levee road, then the vega (a strip of relatively flat land), and finally the Rio Grande River (*id.*). The distance from the levee road to the river, on the American side, is approximately 230 feet (26 R. 145).

After a chase of about five minutes, Aldrete-Davila skidded to a stop at the south rim of the ditch, leaving deep tire tracks, and getting stuck in the dirt (23 R. 83, 86-88; G.Ex.s 9, 15, 28 & 51A). Aldrete-Davila exited the van; he testified his intent was to “[g]et to the river and cross to Mexico walking” (23 R. 86, 97). Aldrete-Davila looked south across the ditch and saw a Border Patrol vehicle (23 R. 95, 97).

Agent Compean Blocked Aldrete-Davila's Path;
Agent Compean Swung The Butt Of His Shotgun
At Aldrete-Davila, But He Missed And Fell;
Aldrete-Davila Ran Around Him South Into The Vega

Aldrete-Davila testified that after exiting the van, he “crossed the water in the ditch” (23 R. 97). As he ran up the south face of the ditch Aldrete-Davila saw that he was being followed by “[a]t least two” agents who were north of the ditch (23 R. 98-99). He believed that they had their weapons drawn (23 R. 99).

As he was “running upwards,” when Aldrete-Davila was blocked by an agent on the south rim of the ditch (later identified as Agent Compean) (23 R. 101). He testified that “I put my hands up” (*id.*). Aldrete-Davila explained that an agent, later identified as Agent Compean, was pointing the shotgun at him (although he calls it a “rifle”) (23 R. 105). When he raised his hands, he had stopped, and he remained stopped (23 R. 189).

The agent said to Aldrete-Davila: “Stop, you shit Mexican” (23 R. 106). Aldrete-Davila twice said to Agent Compean: “Take it easy man. Don’t hit me” (*id.*). Aldrete-Davila had stopped and had his hands up (*id.*). Aldrete-Davila, showing his palms, had nothing in his hands (23 R. 106-07).

Aldrete-Davila described what happened next: “He [the agent] gets closer to me. He turns the rifle over. He tries to hit me with the butt of the rifle” (23 R. 107). The agent took a full swing (23 R. 110). Aldrete-Davila next demonstrated for the

jury how he was able to avoid the swinging shotgun, without making contact with the weapon or the agent (23 R. 107, 110). Aldrete-Davila ran away to the right, over the levy road and into the vega (23 R. 110-12). He did not see what happened to the agent once he got past him (23 R. 132). He never slowed down (23 R. 112).

As Aldrete-Davila Ran Through The Vega,
South Towards The River, Shots Were Fired At Him;
He Saw Dirt Being Kicked Up By Bullets

Aldrete-Davila testified that as he was running, about one-half way through the vega, heading for the river, he realized he was being shot at, based on “puffs” of dust, “bullets that were picking up dust” (23 R. 113). He indicated the location of the shooting as between points 4 and 3 on Government’s Exhibit 54 (23 R. 113, 115). Aldrete-Davila explained to the jury that when he “began to see the bullets in the sand” as he was running, he was “just covering my head” (23 R. 115-16). He was looking for a place to “cross to Mexico” (23 R. 116-17).

Aldrete-Davila Was Shot Near the Edge Of The River;
The Agents Did Not Arrest Him; Wounded,
He Crossed Back Over The Rio Grande To Mexico

Aldrete-Davila related that he fell, and felt as if he had been shot, in his “left buttock,” perhaps by “another type of bullet” (23 R. 115, 122). He noticed a “burning sensation”; he touched the wound with his hand, and “saw the blood” (23 R. 122).

At this point, Aldrete-Davila was on the ground, near the edge of the river and he testified that “I just waited for them to come and arrest me” (23 R. 115, 122). He saw that the agents, however, had lowered their weapons; they turned around (23 R. 123-24). He pointed to the location of the agents on Government’s Exhibit 54 when they turned around (23 R. 124).

Aldrete-Davila got up and crossed the Rio Grande back into Mexico (23 R. 125, 133). He testified that he believed the people who entrusted him with the drugs would be watching him (23 R. 196). He was picked up in Mexico by a vehicle on a street near the river, and taken to a medical facility (23 R. 137, 187).

A Bullet Fragment Severed Aldrete-Davila’s Urethra; He Now Uses A Catheter; Evidence Of Trajectories

Urologist Todd Miller testified that an examination of Aldrete-Davila revealed that a catheter had been inserted to drain his bladder through the abdominal wall (24 R. 185, 187). The physician found: that Aldrete-Davila’s body contained a number of bullet fragments; that Aldrete-Davila’s urethra was no longer intact; and that “he could not have surgery to put his urethra back into working condition” at that time (24 R. 187-89, 201, 202).

Another doctor, Winston Warne, an orthopedic surgeon, testified that Aldrete-Davila’s injuries were caused by bullet fragments (25 R. 187-88). The bullet entered

the victim's body through "[h]is left buttocks," there it "deflected" (25 R. 189). The doctor was asked whether Aldrete-Davila's body was turned somewhat back towards the shooter, and he responded: "I really don't know exactly how it was turned. But, like you say, the bullet went in on an angle" (25 R. 195). The bullet went in on an angle to the shooter (25 R. 197-98). Based on the bullet's trajectory inside the patient, he believed the person shooting would have been "straight behind" Aldrete-Davila (25 R. 199), or behind him at some angle (25 R. 200). The doctor was asked twice whether the bullet path within Aldrete-Davila's body was consistent with a person turning and being shot (25 R. 198, 201). His first response was: "It's possible" (25 R. 198). The second response was "that's possible . . . I can't rule it out" (25 R. 210).

Agent Oscar Juarez Started The Pursuit
Of Aldrete-Davila's Van

After receiving a proffer letter, Border Patrol Agent Oscar Juarez testified that, at the time of the trial, he was on administrative duty based on "the investigation of the shooting at Fabens, Texas" because he "was a witness of the shooting" and he "failed to report it" (24 R. 136-38).

On February 17, 2005, at 1:11 p.m., Agent Juarez was in his patrol unit, driving by himself on the levee, when he heard a radio transmission from Agent Compean to "be on the lookout" for a "blue minivan" (24 R. 139, 142-43, 151). Agent Juarez

exited the levee to try to locate the minivan, went through the “CC Bills gate,” and he proceeded north on Fabens Road (24 R. 149-50).

Agent Juarez then spotted a “gray van” that he believed could have been the vehicle that was the subject of the alert because it was the only vehicle that emerged from the area where the alert originated (24 R. 151-52; 25 R. 51). Agent Juarez got on the radio and advised Agent Compean that a full-size gray van was “traveling northbound away from the levee” (24 R. 152). Agent Compean answered “that could be it” (24 R. 155).

The agent did not catch up to the van until an intersection in Fabens, where the van turned left on Alameda (24 R. 155-59). When he was almost at the intersection, Agent Juarez activated his emergency lights, located both overhead and in front of his vehicle, and followed the van, intending to make a stop for an “immigration check” (24 R. 158-60; 25 R. 54, 62). The van did not stop (24 R. 160). The van made a series of left turns, and then a right turn, proceeding back to the south on Fabens Road (24 R. 160, 162-63; 25 R. 66).

Agent Ramos “Took The Eye”;
An Unreported High-Speed Chase Ensued

Prior to Agent Juarez turning south on Fabens Road to follow the van, Agent Ramos started follow the van and “took over” the pursuit; Agent Ramos’ vehicle was just behind the van, with Agent Juarez’ vehicle following these two vehicles (24 R.

163-64; 25 R. 61). Agent Juarez explained that he almost ran into Agent Ramos' vehicle as Agent Juarez turned onto Fabens; Agent Ramos taking charge was unexpected for Agent Juarez "[b]ecause I was leading the pursuit" (25 R. 149-50). Agent Ramos "took the eye"; he gave instructions concerning the pursuit (24 R. 163).

Agent Juarez testified that Agent Ramos gave him a signal to turn off the overhead lights (24 R. 163-64; 25 R. 7-9). Agent Ramos tapped the top of the door-roof area with his left hand; this was the signal to turn off the overhead lights (25 R. 8). Agent Juarez turned off his emergency lights about one mile south of Fabens (24 R. 161). Agent Juarez believed that Agent Ramos never activated his overhead emergency lights (25 R. 10-11, 61, 63).

According to Agent Juarez, when involved in a high-speed chase, agents are required to notify their supervisor and obtain approval (24 R. 165; 25 R. 65). Agent Juarez testified that they did not ask for authorization for a pursuit (25 R. 10).

The chase continued on Fabens Road as it changed into Jess Harris Road, and Agent Juarez fell behind both the van and Agent Ramos' vehicle, which was following the van at "[l]ess than a car [length] back" (24 R. 166). Agent Juarez said that although it was unsafe to drive fast, in this case he did not see anyone endangered by the chase (24 R. 165; 25 R. 72).

Agent Juarez hit his brakes, and he slid up to the top of the canal or irrigation ditch at the end of the road (24 R. 169-70). Ramos had parked next to the van (24 R. 166). He had left his door open (25 R. 29). Agent Juarez parked to the left of Ramos' vehicle (24 R. 166). Before Agent Juarez exited his vehicle, he saw Agent Compean's vehicle on the other side, the north side, of the canal, on the levee road (24 R. 170-72; 25 R. 12). He saw Agent Compean standing holding his shotgun at "port arms" (*id.*).

At The South Rim Of The Irrigation Ditch, Agent Juarez
Observed Agent Compean Blocking Aldrete-Davila's Path;
Agent Compean Swung The Butt Of His Shotgun
At Aldrete-Davila, But He Missed And Fell Into The Ditch

Agent Juarez testified that he exited his vehicle, and as he walked toward the ditch, he noticed "the driver of the van" was on in the ditch, on the north side, almost across from the van (24 R. 172-73). When the driver, Aldrete-Davila, saw Agent Juarez, Aldrete-Davila "went like a bullet across the water" that was in the ditch (24 R. 173, 175; 25 R. 12-13). Agent Juarez described Aldrete-Davila as "very fast" (25 R. 12-13). Agent Juarez testified that he did not "pull" his weapon because "I felt it was no threat" (24 R. 173).

Agent Juarez observed Agent Compean, on the south side of the ditch, move in front of Aldrete-Davila's path and raise the butt of his weapon (24 R. 174; 25 R. 137). According to Agent Juarez, Agent Compean took a "full swing" with the shotgun at the driver of the van (24 R. 175).

Agent Juarez explained that Aldrete-Davila's hands were raised in the air (24 R. 175; 25 R. 120). Agent Juarez testified in response to a number of questions that he thought the driver was going to "surrender" when he met Agent Compean, but that then Agent Compean "picked up the butt of the shotgun" (25 R. 87). Aldrete-Davila put his hands above his head when he was almost at the north lip of the ditch or canal, when he got close to Agent Compean (25 R. 120, 155).

Agent Juarez saw nothing in Aldrete-Davila's hands (*id.*). No agent yelled "cover" or otherwise indicated that the subject had a weapon, as required by their training (24 R. 176).

Agent Juarez described Aldrete-Davila's encounter with Agent Compean on the bank of the ditch (24 R. 175):

When he got over there, I noticed the driver when Agent Compean attempted to block him or hit him, the driver of the van went like this. But he was fast. I mean, that driver was fast. He went like that. And went, boom, he took off right away.

At another point in his testimony, Agent Juarez stated that the driver "was quick, he dodged the shotgun" (25 R. 13, 86). Agent Compean fell forward (25 R. 131-32). Then, Aldrete-Davila fled around Agent Compean, toward and over the levee (24 R. 176; 25 R. 15).

Agent Juarez indicated that after Agent Compean swung the shotgun at Aldrete-Davila, attempting to strike him, Agent Compean “fell down” (24 R. 176-77). He explained that when Agent Compean “attempted to hit” Aldrete-Davila, Agent Compean was on the edge of the ditch, and “that’s when he lost [his] balance,” he hit the ground and dropped the shotgun (24 R. 177). Agent Juarez demonstrated for the jury “how he fell” (*id.*).

After Agent Compean fell, Agent Juarez observed him get up and run after Aldrete-Davila over the levee (24 R. 177-78; 25 R. 94).

Agent Juarez testified that at no time did he see Aldrete-Davila throw any dust or dirt at Agent Compean (24 R. 178). He never saw Aldrete-Davila “touch” Agent Compean (24 R. 178).

Agent Juarez Saw Agent Compean Fire
His Service Handgun Toward The South,
In The Direction Of The Fleeing Aldrete-Davila;
Agent Compean Changed Magazines, Firing More Rounds

Agent Juarez further testified that after Aldrete-Davila fled around Agent Compean, he walked back toward his unit, and “that’s when I hear the shots” (25 R. 15, 123). From Agent Juarez’ vantage point, which was on the road on the north side of, and adjacent to, the ditch or canal, he saw Compean to the south of the canal and the levee road, about “halfway down from the levee” (25 R. 15-18). Agent Juarez

could see Compean's body from the "waist up" (25 R. 18, 25). Agent Compean was shooting south "towards Mexico" (25 R. 25).

Agent Juarez explained that when he turned around upon hearing the shots, he saw Compean in a "fire stance position," which he demonstrated for the jury (25 R. 18-19). Agent Juarez described what he saw (25 R. 19):

He was like this. And, of course, boom, boom, boom, boom. And that's when I noticed he dropped – something black dropped. And I noticed there was a pause. Then he reached over to do a magazine exchange. And after that, it was boom – two. And after that he disappeared.

After Agent Compean finished discharging his weapon, after reloading, he proceeded south, into the vega, where Agent Juarez could no longer see him (25 R. 19, 23, 111). Agent Compean fired at least eleven rounds before the magazine exchange (25 R. 19-20). Agent Compean was out in the open; he was not standing behind his nearby vehicle (25 R. 25-26).

Agent Juarez testified that when he heard the shots, "I just stood there" (25 R. 21). Agent Juarez did not draw his own weapon "[b]ecause I didn't feel there was a threat" as the driver was "almost in Mexico" (25 R. 22). Agent Juarez never heard Agent Compean or anyone else say "stop" as that person was fleeing (25 R. 22).

Agent Juarez Saw Agents Ramos
And Compean Return From The Vega;
The Returning Agents Did Not Mention
Any Belief That The Driver Had A Gun;
Agent Juarez Did Not Report The Shooting

Agent Juarez later observed Agents Compean and Ramos return from the direction of the vega (25 R. 23). Agent Compean asked “where’s my shotgun,” and Agent Juarez pointed to it, inside the ditch (25 R. 24). When Agents Ramos and Compean returned there was no mention of the fleeing individual having a gun or the agents seeing a shiny object (25 R. 24-25).

When Agent Juarez debriefed to investigating officers, he did not tell the truth or tell everything he knew (25 R. 27-30). The agent testified he did not want to be labeled as a “whistle blower” or someone who “snitches on people” (25 R. 28). His “Field Training Officer” as a rookie agent had been Agent Compean (25 R. 26-27).

Agent Juarez initially reported that he heard shooting, but thought it could be hunters or the Mexican military (25 R. 112). He acknowledged that this was a lie (*id.*).

Agent Compean Exhibited “Spent Shell Casings”
To Agent Vasquez And He Asked Agent Vasquez
To Pick Up Other Evidence Of The Shooting
More Of Compean’s Ejected Shell Casings,
And Agent Vasquez Complied, Throwing The Brass
He Found Near The Levee Into The Water Of The Ditch

Border Patrol Agent Arturo Vasquez testified that on February 17 he heard radio traffic from Agent Compean that “a van was traveling north close to the Stubbs

compound” (2nd S.R. 185). Later, from his vantage point facing north on Jess Harris Road, Agent Vasquez saw a gray van drive by at “easily over 50 [miles per hour]” followed by two patrol units (2nd S.R. 185, 190-93). The agent made a U-turn and followed behind, testifying that “I tried to go fast, but, once they hit the dirt road, I couldn’t see anything, so I had to slow down” (2nd S.R. 194).

When Agent Vasquez arrived at the scene he saw Agent Juarez “standing at the edge of the ditch” within a few feet of van “looking south” (2nd S.R. 194-95). Although the windows of his vehicle were rolled up he “heard multiple gunshots” (*id.*). Agent Vasquez exited his vehicle and asked Agent Juarez “Hey, what happened?” but he received no answer (2nd S.R. 196). When Agent Vasquez asked about the location of the agents, Agent Juarez indicated that they were in the vega (2nd S.R. 197-98). Agent Vasquez saw a shotgun on the ground “[o]n the slope between the drainage canal and the levee” (2nd S.R. 199). Agent Vasquez picked up the cell phone that he had recovered from the van and he was looking for information regarding contacts for the marijuana load (2nd S.R. 199, 203-04).

As Agent Vasquez left the scene to go back to his “assigned area,” he stopped facing south at the locked gate to the levee, the “C.C. Bills gate,” and he saw Agent Compean’s vehicle approaching the gate from the north (2nd S.R. 208-10, 232). Agent

Compean stopped and exited his vehicle, and he went to the driver's side of Agent Vasquez' vehicle (2nd S.R. 210).

Agent Vasquez asked if Agent Compean was "okay," and Agent Compean exhibited "a little cut on this part of the hand" (2nd S.R. 211). Agent Vasquez asked Agent Compean "What happened?" and Agent Compean replied: "Well, that little bitch took me to the ground and threw dirt on my face" (2nd S.R. 211). After Compean said he was "okay," Agent Vasquez said "I thought I heard some gunshots" (2nd S.R. 211). Agent Compean responded: "Well, I had to fire some rounds. I went through a magazine exchange, and then I fired some additional rounds" (2nd S.R. 211, 272).

Agent Vasquez testified that he asked "How many rounds did you fire?" and Agent Compean said: "I don't know" (2nd S.R. 213). Agent Compean then exhibited to Agent Vasquez "used shells from the gun," "spent casings," in Agent Compean's hand (2nd S.R. 213-14, 280). Agent Vasquez asked Agent Compean "How many do you have?" (2nd S.R. 214). Agent Compean counted the ejected shell casings and replied: "There's nine" (*id.*). Again, Agent Vasquez asked Agent Compean: "and how many did you fire?" (*Id.*). Agent Compean said he did not know, and he proceeded to examine one magazine he retrieved from a pouch and a second magazine that he removed from his service weapon (*id.*). After finishing his examination of the

magazines in Agent Vasquez' presence, Agent Compean said: "I'm probably missing five, about five rounds" (2nd S.R. 213-15).

At this point, there was a radio message to the effect that Agent Vasquez should return to "baby-sit, or take care of, the van" (2nd S.R. 213, 215). Agent Compean then said that he was going back to the station "to do the report," but he asked Agent Vasquez "can you find those casings for me?" (2nd S.R. 215, 279). Agent Compean also asked Agent Vasquez: "Let me know if you find them" (2nd S.R. 217, 280). Agent Vasquez replied: "Okay" (2nd S.R. 215).

Although Agent Vasquez agreed to pick up the casings of the fired rounds, he knew he was not supposed to engage in that activity (2nd S.R. 216). A shooting incident is to be reported within one hour, and Agent Vasquez knew he was required to leave the casings there as "evidence" for the evidence team (2nd S.R. 216, 284). On cross-examination, he acknowledged that he believed it was a "crime" to "destroy evidence" (2nd S.R. 275).

Agent Vasquez explained that he returned to the levee, near where the van was parked and that: "When I got there, I just sat in my vehicle [and] made sure nobody was there" (2nd S.R. 217). Agent Vasquez walked around the area, and he explained:

I found four casings in the levee, [and] one between the levee and the drain canal on the slope. I got them all and threw them into the drainage canal.

He also testified that he watched the casings sink in the water (2nd S.R. 221, 223). Agent Vasquez testified that these five shell casings were “.40 caliber casings,” they were not old, and “they were the only ones there,” so that Agent Vasquez “assumed they were his casings” (2nd S.R. 217-18). About one month later, Agent Vasquez went with Agent Christopher Sanchez and showed him where he had found the casings, the “expended bullet cartridges”; and on Government’s Exhibit 21 he marked where he had found them (2nd S.R. 218-20).

Agent Vasquez further testified that on February 17, at 2:17 p.m., he used his personal cell phone, called the station, and asked for Agent Compean (2nd S.R. 223-24). He called Agent Compean “to let him know that I had found the casings and I threw them away” (*id.*). Agent Compean replied: “Okay” (*id.*). Agent Vasquez’ cell phone records confirmed this call (*id.*).

Agent Compean did not say why he had to fire the rounds (2nd S.R. 211). He did not assert that he had been shot at nor did he say that he thought he saw an object in the driver’s hand (2nd S.R. 212).

Agent Richards Received The Statements
From Agents Ramos And Compean;

Agent Jonathan Richards, the Border Patrol’s field operations supervisor for the Fabens Station, testified that on February 17 at approximately 1:11 p.m., while at his office in the station, he “heard Agent Compean call out that he had a vehicle leaving

an area at a high rate of speed” (26 R. 184, 191). He ordered Supervisor Arnold “to respond to that area” (26 R. 191). Because he did not hear much radio traffic on the repeater, he attempted to contact some of the agents to try to find out what was going on (26 R. 188, 192-93). Agent Richards called Agent Ramos on the radio and asked his location but he received no response (26 R. 194). He proceeded to the field when he understood that there had been a seizure (26 R. 195). There had been no request to conduct a “hot pursuit,” to violate traffic laws in the pursuit (26 R. 197).

Agent Richards asked Agent Ramos “if everything was okay,” and Ramos said that it was (26 R. 210). Agent Ramos reported that the van driver fled through the canal, and “Agent Compean tried to grab him, or did some type of side to side movement to grab him, and fell down to the ground and got dirt in his eyes” (26 R. 211). Agent Richards called out to Agent Compean, asking if he was okay, and Compean “said he was” (26 R. 212). Ramos “seemed a little hyped up” (26 R. 213). Agent Richards said that the agents “needed to put this stuff over the radio and the repeater, and let us know what’s going on” (26 R. 214-15).

Back at the station, Agent Richards asked Agent Compean, on two occasions, “if he had been assaulted,” and Compean responded, “no” (26 R. 217).

Agent Compean Confessed To Agent Jacquez:
That He Swung His Shotgun At The Van's Driver
But Missed And Slipped Into The Drainage Ditch;
And That "He Shot At" The Driver;

After receiving a proffer letter, Border Patrol Agent David Jacquez testified that on February 17, he was patrolling east of the Fabens Port of Entry when he heard Agent Compean's call of a "van leaving the 76 area" (26 R. 67-68, 81). After about five minutes, he proceeded to the end of Jess Harris Road where he saw Agents Ramos and Compean walking on top of the levee, where Agent Compean's vehicle was located (26 R. 69, 71).

Agent Ramos reported to the supervisor and the other agents that the driver of the van had gotten into a "physical altercation" with Agent Compean, and that Ramos had gone after the driver (26 R. 73). At the scene, however, no one spoke about seeing a gun or of a shooting (26 R. 69-70).

Agent Jacquez testified that after he had returned to the station, Agent Vasquez related that there had been "shots at the scene" and that Agent Compean had fired the shots (26 R. 75). Agent Jacquez then asked Agent Compean what had happened (*id.*).

Agent Jacquez related Agent Compean's explanation:

He saw a van leaving the 76 area, [and] lost sight of it. And then, when it started going southbound, he stayed on the levee to stop the driver from making it back to Mexico . . .

Agent Compean further related that: “when the driver got down into the drainage ditch, that he told the driver to stop and the driver never stopped. And that he tried to hit him with the shotgun” (26 R. 76). Agent Jacquez understood from Agent Compean’s account that he had “missed” when he was swinging the shotgun and “had slipped” into the drainage ditch (26 R. 76-77). Agent Compean admitted to Agent Jacquez “that he shot at the driver of the van,” and then “chased after the driver” (26 R. 77-78). The only injury Agent Jacquez noticed was that Agent Compean had a cut on his right hand between his thumb and index finger (26 R. 90).

Agent Compean did not say to Agent Jacquez that he was in fear for his life trying to apprehend the fleeing driver or that he had an altercation with the driver or that the driver assaulted him (26 R. 79). Nor did Agent Compean relate that he thought the driver had a gun or that he saw a shiny object in the driver’s hand (26 R. 80).

Agent Yrigoyen Arrived On The Scene;
He Observed Aldrete-Davila Assisted Into A Car In Mexico

Border Patrol Agent Lorenzo Yrigoyen testified that on February 17, he heard Agent Compean’s radio call, and also Agent Ramos’ transmission that a van was headed southbound towards Mexico (26 R. 124, 127). Agent Yrigoyen, with his partner Agent Mendez, drove on the levee road until he arrived at Compean’s vehicle, and he parked nearby, and observed Agents Compean and Ramos standing together on the “western side” of Compean’s vehicle (26 R. 128-30).

After he exited his vehicle, Agent Mendez pointed out to Agent Yrigoyen an individual, in Mexico, “in the agricultural fields south of us, moving southbound” (26 R. 134-35). Agent Yrigoyen saw a “white car [had] pulled up,” and a person exited the vehicle and either “assisted” or “grabbed” the individual allowing him to finish crossing the field (26 R. 139). When a blue van pulled up on the roadway, the two individuals got into the van (26 R. 139-40).

Agent Compean Told Agent Mendoza
That He Had “Slipped On The Levee”
While Trying To Apprehend the Van Driver

Border Patrol Agent Jose Luis Mendoza testified that on February 17, he heard Agent Compean’s radio call to be on the lookout for a van, and also Agent Ramos’ message, on local radio traffic, that he had a “visual on the van” as it made a U-turn and was heading back to the south, towards Agent Mendoza’s position (26 R. 14-15). Agent Mendoza saw the van race by on Jess Harris Road followed closely by the patrol units (26 R. 17-19).

Agent Mendoza proceeded to the scene at the drainage ditch, and parked behind the other units (26 R. 21). When he got out of his vehicle, he did not hear any shots (26 R. 22). He did hear Agent Vasquez say something about a shotgun being on the ground (*id.*). No one at the scene mentioned that there had been a shooting (26 R. 24). Agent Mendoza assumed that the van driver had fled and that Agents Compean and

Ramos had tried to apprehend him (26 R. 28). Either Agent Compean or Agent Ramos said that the driver had been picked up by a vehicle on the Mexican side of the river (26 R. 29). They did not mention that the driver had been shot (*id.*).

After they arrived back at the station, Agent Mendoza noticed that Agent Compean was “on the computer” filling out a “drug seizure form” (26 R. 31-32). Mendoza saw that Compean had a “small” bloodstain on his chin, and Mendoza asked “what happened to him” (26 R. 32). Compean replied “that he had slipped on the levee while trying to apprehend the driver” (26 R. 33). According to Mendoza, Compean did not say that the fleeing person tried to assault him or threw dirt in his eyes (26 R. 34).

In Post-Arrest Statements, Agent Compean Admitted:
That Aldrete-Davila Had Raised His Empty Hands At The Ditch;
That He Tried To Push Aldrete-Davia With A Shotgun,
But Slipped And Fell Into The Ditch; That He Shot At Aldrete-Davila;
That He Threw His Cartridge Casings Into The Ditch;
And That He Saw Aldrete-Davila Limping As A Result Of Being Shot

Agent Christopher Sanchez further testified that Agent Compean provided statements after his arrest (28 R. 24). Compean said that, armed with a shotgun, he saw Aldrete-Davila, whom he called “the driver,” coming up the “south side of the drainage ditch” (28 R. 24-25). Compean said he told the driver, in Spanish, to stop and put his hands up (*id.*).

Agent Compean admitted that Aldrete-Davila raised his hands (28 R. 26). Compean demonstrated to Agent Sanchez how Aldrete-Davila held up his hands (which was demonstrated to the jury); “basically bent at the elbow, palms facing outward, towards Mr. Compean,” with “fingers spread apart” (*id.*).

Agent Compean said that at this time, Ramos had arrived, and other agents were arriving (28 R. 27). Compean said he heard someone yell, “hit him, hit him” (*id.*).

Agent Compean further debriefed to Agent Sanchez, claiming that he “attempted to push Aldrete-Davila into the drainage ditch (28 R. 28). This push was supposedly accomplished with the butt of the shotgun; Agent Sanchez, however, pointed out to Compean that such an action would have been unsafe by presenting “access to the trigger” and by allowing access to the shotgun (28 R. 29-30).

Compean related that “[w]hen he was maneuvering to push Aldrete-Davila back into the drainage ditch . . . he slipped into the drainage ditch” (28 R. 30). He stated that “when he slipped, Aldrete-Davila ran around him and over the levee” (*id.*).

Compean alleged that “he recovered from slipping into the drainage ditch and ran after Mr. Davila,” going “over the levee, and he . . . [j]umped on the back of Aldrete-Davila, and they rolled into the south slope of the levee into the vega, and they wrestled” (28 R. 31). Then, according to Compean’s oral statement, “Aldrete-

Davila might have thrown dirt in his eyes”; but according to his written statement, he said he just thought he “got dirt” in his eyes (28 R. 32-33, 42).

According to Compean, “Aldrete-Davila broke free from his grasp and began to run toward Mexico” (28 R. 33). Compean said that when Aldrete-Davila broke free, “he did not observe any weapons [in his] hands or anything (*id.*).

His further post-arrest account provided that as Aldrete-Davila was running towards Mexico, Compean “observed something shiny” in Aldrete-Davila’s left hand (*id.*). Compean additionally said, however, that “he was never certain” (*id.*). Compean’s claim was that “he saw something shiny, which he thought was a gun, and that’s why he started firing” (28 R. 33-34). Again, “he was never certain that Aldrete-Davila had a gun” (28 R. 36). Also, Compean never said that the “shiny object” was ever pointed at him (28 R. 34). He said he first saw the shiny object while he was in the vega (*id.*).

Agent Sanchez testified that, Aldrete-Davila was right-handed, and that he used his right hand in writing and reaching for items (28 R. 34-35). Further, Aldrete-Davila stated that “I did not have a gun or anything shiny in my hand, and I’m right-handed” (28 R. 57-58).

Compean admitted that he shot at Aldrete-Davila “10 or 11 times” (28 R. 36). Compean related that “after shooting at Aldrete-Davila, he holstered his weapon and

went on the levee to retrieve his casings”; he did not say he retrieved them down in the vega where he alleged he did the shooting (28 R. 36-37).

Compean said “he stopped shooting at Aldrete-Davila just before he reached the bank of the Rio Grande River” (28 R. 37). Compean told Agent Sanchez that from his vantage point in the middle of the vega, he saw “Aldrete-Davila come up on the south side of the river, on the Mexican vega” (*id.*). Compean confessed that he “observed Aldrete-Davila limping and assumed he had been shot,” and that was when “he went back to the levee, to pick up his casings on the levee” (28 R. 36-38).

Compean admitted that while he was exiting the levee from the C.C. Bills gate, he had a conversation with Agent Vasquez in which he stated: “I didn’t pick up all the casings, can you go back and pick up some of the casings?” (28 R. 40). Compean reported that: “Arturo Vasquez called him at the station and told him that he had picked up the casings and threw them in the drainage ditch” (28 R. 41). Compean confessed that he did not report that he discharged his firearm because: “I thought I would get in trouble” (*id.*). Finally, Compean admitted in his written statement that when he shot at Aldrete-Davila his intent was to shoot to kill (28 R. 41-42).

Ramos’ Testimony

Ramos testified that on February 17, he joined in the pursuit of a van (29 R. 29). There was little radio traffic concerning the chase (29 R. 29, 33). Ramos did not

report the license plate of the van (29 R. 30). Even though he saw the van's driver, he did not report a description (29 R. 23, 32). Although he suspected the van was involved with illegal drugs, he did not know whether Aldrete-Davila had committed a felony (28 R. 27, 32).

After the van stopped before the ditch, he saw the driver jump out of the van and into the ditch (28 R. 184-85; 29 R. 41). Ramos drew his service weapon, and watched the driver "make a move" around Agent Compean (28 R. 189; 29 R. 52, 56). According to Ramos, Aldrete-Davila's "move" was not a threatening gesture (29 R. 52-53). In fact, Ramos agreed he did not see Aldrete-Davila do anything threatening (29 R. 53).²

Prior to Aldrete-Davila moving around Agent Compean, Ramos claimed that he did not see Aldrete-Davila put his hands up (29 R. 50). He also claimed that he saw no confrontation between Compean and Aldrete-Davila at the ditch (28 R. 226). He said he did not hear anyone say: "Hit him" (29 R. 45). Ramos asserted that he did not see Compean point the shotgun at Aldrete-Davila, and that Compean "might have been wrong" on that point (29 R. 49). Ramos claimed he did not see Compean fall into the ditch (29 R. 53). He said he never saw Agent Juarez (29 R. 50).

² The inquiry was: "Q. Well, was there another time you saw him do something else that was threatening? A. No, ma'am" (29 R. 53).

After Aldrete-Davila moved around Agent Compean, Ramos said he moved through the ditch to assist Compean, although after Aldrete-Davila took off running, Ramos agreed that at this time he was not concerned that Aldrete-Davila would hurt anyone (29 R. 54). Ramos said he heard shots while in the ditch; in fact, he did not hear any further shooting after he emerged from the ditch (28 R. 206; 29 R. 62). Thus, he did not see Compean shoot his weapon (29 R. 62).

Ramos had been a firearms instructor, he was a sharpshooter, and the sound of their service .40 caliber Baretta's was familiar to him (29 R. 5, 19, 63). Nevertheless, he testified that he could not tell if he heard a different weapon firing (29 R. 63).

Ramos testified that he saw Ramos on the "floor" or ground, and thinking that Compean might have been shot, Ramos ran past him and yelled for Aldrete-Davila to stop (28 R. 207; 29 R. 68). According to Ramos, as Aldrete-Davila was running away toward the river, he turned and Ramos saw a "shiny object" in his left hand (28 R. 208-09; 29 R. 72). Ramos discharged one shot at Aldrete-Davila (*id.*). Ramos said he did not see Aldrete-Davila go down (28 R. 208-11).

Ramos acknowledged that he had been involved in a shooting incident in 1996 (29 R. 11-16). At that prior time, he called "shots fired" or "fire, fire" on his portable radio (29 R. 13, 15). On this occasion on February 17, however, he did not call out on his portable radio that shots had been fired (19 R. 16).

Ramos turned around and went back to Compean to check on his condition (28 R. 213). Although Compean had acknowledged picking up shell casings as they walked back together to the levee, Ramos testified that he did not see Ramos pick up any casings (29 R. 64).

When he returned with Compean, Ramos reported to his supervisors (29 R. 82). Ramos did not mention to his supervisors that he had discharged his firearm (29 R. 82). As former firearms instructor Ramos acknowledged in his testimony, this was a “reportable shooting” (29 R. 84). He agreed that if he had reported the shooting, a determination would have been made as to whether it was a “good shoot,” and a thick report would have been generated (29 R. 82). The shooting scene would have been secured, and the sector evidence team would have been involved (29 R. 106). Someone would have taken custody of his firearm (29 R. 85-86).

Also, by not reporting the shooting, there was no effort to recover evidence about the driver of the van, such as possible blood samples (29 R. 88).

Ramos was asked the reason he did not report the shooting, and he testified: “I just messed up” (29 R. 82).

Ramos asserted that he assumed someone else reported the shooting (29 R. 83). He agreed, however, that if someone else had reported the shooting, his supervisor would have been asking him questions about it, which never happened (*id.*).

Compean's Testimony Contradicted
Agent Juarez' Testimony On Many Key Points

Compean testified that initially, Aldrete-Davila "put his hands up" while in the ditch (29 R. 154). Compean said, however, that Aldrete-Davila moved fast in trying to get around him (29 R. 156). Compean heard someone behind Aldrete-Davila to "hit him" (29 R. 179). Compean characterized his use of the shotgun as trying to "push" Aldrete-davila back into the ditch(29 R. 158). In the failed to "push" him, Compean said he went down on "one knee" (29 R. 159).

Compean claimed that although Aldrete-Davila "moved fast" in getting around him, and ran away from him to Aldtere-Davila's right, Compean was able to get up, throw the shotgun down, catch Aldrete-Davila, jump on his back and succeed in "tackling him," whereupon they tumbled down the slope of the levee (29 R. 156, 159-60). Compean testified that Aldrete-Davila threw dirt in his fact (29 R. 160-61).

Compean asserted that as Aldrete-Davila ran away toward the levee, he turned around and was pointing something at him (29 R. 161). It was something "shiny black"; both shiny and black (162). Compean drew his weapon, and firing from one knee, shot 10 to 11 rounds, with the weapon never going empty (it having a capacity of 11 rounds in the magazine and plus in the chamber) (29 R. 162-63).

Although his weapon was not empty, Compean withdrew the magazine and attempted to make a magazine change, but he had trouble getting the replacement

magazine out of his belt (29 R. 163). He did not see Ramos pass by his position (29 R. 164). As he stood up to load, he heard another shot (29 R. 163).

According to Compean, Ramos did not come back to his location, instead he walked up to Ramos (29 R. 164). As he walked back Compean picked up his shell casings and he tosses them into the ditch (29 R. 165-66). Compean testified the reason for this action was: “I just wasn’t thinking. I just - I just saw them, and picked them up” (29 R. 165).

When he reported to Agent Richards, Compean did not report that he had fired his weapon (29 R. 168-69). Compean testified that his reason was: “I was afraid he wasn’t going to believe me,” as they did not have a suspect and there was “nobody to, I guess, corroborate what had happened or what had occurred” (*id.*).

Compean claimed that when he had a discussion about the shooting with Agent Vasquez at the gate, he never showed him spent shell casings (29 R. 169-70). Instead, Compean said he was reloading a magazine with new ammunition (29 R. 171).

Compean admitted telling Agent Vasquez that, back at the levee, he would see shell casings, but Compean did not ask Vasquez to pick them up (29 R. 172-73).

SUMMARY OF THE ARGUMENTS

I. Aldrete-Davila received immunity through a letter and oral assurances on March 16, 2005. The understanding of the parties was that this immunity applied to

Aldrete-Davila's criminal activities, drug trafficking, on February 17, 2005, the day of the shootings. The agreement did not extent into the future to cover crimes not yet committed. Thus, when defense counsel wanted to question Aldrete-Davila as to whether he was involved in drug trafficking in October of 2005, he asserted his Fifth Amendment privilege. The district court's determination as to the scope of the March 16 immunity agreement was not clearly erroneous. The court did not err in allowing Aldrete-Davila to assert his Fifth Amendment rights as to the alleged October of 2005 offenses.

II. The district court did not commit plain error in allowing evidence and questioning about Border Patrol regulations and policies. The defense elicited testimony concerning the regulations, using it in support of their own theories. The evidence related to the Defendants' knowledge and intent.

III. There was no plain error regarding whether their was "fair warning" that section 924(c) applied to law enforcement officers. Congress had concluded that those who commit a felony while lawfully carrying a firearm deserved the same punishment as others.

IV. There was no Equal Protection Clause plain error concerning the 924(c) violations.

V. The jury instructions did not constitute plain error. The instructions Appellants propose on appeal were not presented to the district court. The instructions given by the court allowed the defense to present its theories. Appellants have shown no grave miscarriage of justice.

VI. The evidence was constitutionally sufficient as to the assault and civil rights convictions. The evidence showed that the Defendants shot an unarmed, fleeing suspect, that did not present an apparent threat. The jury found the Defendants' version of the events not worthy of belief.

VII. There was no plain error as to whether there was "fair warning" that Defendants' actions constituted a criminal civil rights violation.

VIII. There was sufficient evidence that Defendants' failure to report the discharge of their firearms was a violation of section 1512(c)(2), as this conduct was within the wide range of obstruction of justice conduct prohibited by this section.

IX. X. Appellants claim as to whether there was sufficient evidence that Defendants' failure to report the discharge of their firearms was a violation of section 1512(c)(1) appears to have arguable merit as this section is less wide ranging.

XI. There was no plain error as to the sufficiency of the indictment as to the section 924(c) charges. "Discharge" is a specific form of "use."

XII. There was no appreciable cumulative error.

ARGUMENT AND AUTHORITIES

I. AFTER ALDRETE-DAVILA ASSERTED HIS FIFTH-AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, THE DISTRICT COURT DID NOT ERR IN DISALLOWING CROSS-EXAMINATION OF ALDRETE-DAVILA AS TO WHETHER HE WAS INVOLVED IN DRUG TRANSPORTATION IN OCTOBER OF 2005, SEVEN MONTHS AFTER HE RECEIVED IMMUNITY FOR OFFENSES ARISING OUT OF HIS DRUG TRANSPORTATION ON FEBRUARY 17, 2005;

ALDRETE-DAVILA WAS NOT GRANTED IMMUNITY FOR ALL FUTURE OFFENSES; DERIVATIVE USE IMMUNITY CANNOT EXTEND TO FUTURE CRIMES

OTHER CROSS-EXAMINATION WAS NOT SIGNIFICANTLY RESTRICTED

(Responsive to **Ramos’** Brief, **Issue 1**, 19-35;
Compean’s Brief **Issue One**, 13-28).

Overview

Appellants contend that the district court erred in restricting cross-examination of Aldrete-Davila as to possible illegal drug activities prior to February 17, 2005, certain circumstances surrounding the drug-transportation of February 17, and an alleged offense in October of 2005. As discussed below, the cross-examination of Aldrete-Davila as to February 17, the day of the shooting, was not significantly restricted. There was no evidence of prior drug activity. And as to the key issue, the district court did not err in allowing Aldrete-Davila to assert his Fifth Amendment

privilege as to an alleged October crime, as the March 17 immunity agreement, expanded by oral assurances, did not apply to future offenses.

Standard Of Review As To Restriction Of Cross-Examination

A district court possesses “wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on, among other things, harassment, prejudice, confusion of the issues, repetitive or only marginally relevant evidence.” *United States v. Tansley*, 986 F.2d 880, 886 (5th Cir. 1993) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). “The relevant inquiry is whether the jury had sufficient information to appraise the bias and motives of the witness.” *Id.* (citation omitted). This Court reviews the restriction of the scope of cross-examination for abuse of discretion. *United States v. Stewart*, 93 F.3d 189, 193 (5th Cir. 1996). Even where the district court abuses its discretion, this Court will not order a new trial unless the harm is plainly prejudicial. *See United States v. Cooks*, 52 F.3d 101, 104 (5th Cir. 1995).

The Defense Was Given Reasonable Latitude In Cross-Examining Aldrete-Davila Concerning His Drug-Transportation On February 17 And Other Aspects Of His Testimony; There Was No Abuse Of Discretion

Considerable Evidence Of The “Huge” February 17 Load Was, In Fact, Allowed

In the first part of the argument section of this issue , Ramos argues that the trial court erred in restricting cross-examination concerning Aldrete-Davila’s prior drug

transportation experience and his “experience in the present case” (Ramos’ Brief at 29-30). Actually, the record shows that the defense had a fairly wide latitude in questioning Aldrete-Davila about the drug transportation on February 17 that took place prior to the agents shooting Aldrete-Davila, which was the subject of this trial.³

One specific assertion made by Appellants is that the district court erred in not allowing evidence that the load Aldrete-Davila was transporting on February 17, the day of the shooting, was approximately 750 pounds of marijuana (Ramos’ Brief at 30-31). Although evidence of the exact weight was restricted, because Aldrete-Davila testified he did not know the exact weight,⁴ plenty of evidence was received that Aldrete-Davila was transporting a “large load,” a “huge amount” of marijuana, and he was confronted on the witness stand with a photograph of this large load.

In the prosecutor’s direct examination of Aldrete-Davila, he testified that on February 17, 2005, he had been recruited to deliver a van full of drugs within the United States for a fee of between \$1,000 and \$1,500 (23 R. 152, 159, 165). Aldrete-

³ The background for this issue in Ramos’ brief focuses on preliminary hearings regarding motions in limine (Ramos’ Brief at 20-23). The actual rulings at trial, however, allowed a broader range of impeachment and other evidence.

⁴ During the cross-examination of Aldrete-Davila, the Court ruled that: “You can ask him if he owned the marijuana, if he knew what the drug was” (23 R. 157). The court agreed that the defense could “ask him if he knew what the weight was” (23 R. 158).

Later, the court ruled that the defense could ask Aldrete-Davila on cross-examination “if he knows how long the marijuana was in there,” and “if he saw it loaded” (24 R. 23-24).

Davila admitted that “they had told me it was drugs” (23 R. 159). He knew that what he was doing was illegal, and a “serious offense” (23 R. 165, 175-76).

During the cross-examination of Aldrete-Davila, the district court allowed the defense to introduce into evidence a photograph of the load as it appeared inside the van (23 R. 164; Ramos Ex. 8). The large bundles could clearly be seen (*id.*).

Because Aldrete-Davila acknowledged that he was transporting a load of drugs, that he did not know the quantity, and that the bags of drugs appeared in the van just as in the photograph admitted into evidence, evidence of the actual weight or value would not have been impeachment. It would not have contradicted anything Aldrete-Davila said. There was no error in not allowing collateral evidence of the specific weight or value of the marijuana.

Later in the trial, in cross-examining Agent Juarez, defense counsel elicited agreement from the agent that the van he was following “had a huge amount of marijuana” (25 R. 58). Also, Agent Juarez revealed in cross-examination that the amount of marijuana in the van was such that it required two trips to transport (26 R. 30). Additionally, on cross-examination, Agent Juarez agreed that the van contained a “big load,” and that many of the agents were staring “at all the bundles that were there” (26 R. 100-01).

Defendants Were Free To Make Their “Vital Points”
That Aldrete-Davila Was A Drug Dealer
Who Presented A Danger To Officers
And Who Should Not Be Believed

Appellants argue that restriction of cross-examination and introduction of collateral evidence prevented or inhibited the defense from making the “vital point” that “[t]he value and weight of the drugs went directly to Davila’s motive to flee, to protect his investment, to escape prosecution for the crime, and justified Ramos’ reasonable belief that he might engage in violence in doing so” (Ramos’ Brief at 30-31; Compean’s Brief at 24). This argument is without merit. As discussed above, Appellants were free to argue from the testimony and exhibits that Aldrete-Davila’s marijuana load was a “big load,” containing “a huge amount of marijuana,” that could be seen from the defense exhibit photograph. Again, the exact weight or number of bundles would only have been cumulative of the other evidence admitted. The Defendants were free to make the arguments that Ramos says were inhibited: that Aldrete-Davila had a “motive to flee, to protect his investment, and to escape prosecution for the crime, and that, Ramos would have had a “reasonable belief that he might engage in violence in doing so.”

And, in fact, the Appellants did make such arguments. Counsel for Ramos argued in closing:

Of course, we've got a bunch of marijuana that they found in the van afterwards. All it takes is a furtive movement . . . on the part of a person, and that the shoot is justified.

(31 R. 48-49);

Are you going to believe an admitted drug trafficker, or are you going to believe the agents?

(31 R. 50); and

Who could believe a word that man said, really? . . .

I'm calling him a drug trafficker because that's what he was that day. He was a drug trafficker. And you know what? He's not just a little mule. . . .

Somebody driving a van, carrying this kind of marijuana, that is a person in a position of trust. That is a person who knows where the stash house is, where he is going to take the marijuana. And we know that he knew who hired him. We know that he has friends in the drug trafficking organization that picked him up, friends that were making threats against other Border Patrol agents in retaliation for this. . . .

(31 R. 50-51).

Similarly, Compean's counsel argued in closing that:

Because if I was all alone on the south side of that ditch and somebody I believed had drugs was coming at me in a van, which didn't appear to be stopping real quick, I think I would have gotten the shotgun and stood there, too, all alone. . . .

He's trying to stop the drug smuggler and to arrest him.

(31 R. 81-82);

He's [Aldrete-Davila has] got an immunity agreement for bringing a ton of dope into this country, for being here illegally. He's got reason to lie . . .

(31 R. 89);

I certainly would ask you to consider the credibility and reason to lie that the doper had in this case, and there were a number of them.

(31 R. 94).

Thus, with the extensive cross-examination that was allowed, the defense was further free to argue, and did argue, the vital points they contend were denied to them.

Additional evidence concerning the exact weight and value of the marijuana, even if allowable under Rule 608, would have been cumulative and would not have appreciably affected the above arguments available to and used by defense counsel. The jury would not have found any increased impetus on the part of Aldrete-Davila to fight or escape had they known the specific weight of the drugs in addition to knowing that he was carrying a huge load and viewing the photograph of the load as it appeared to him.⁵

⁵ In the "Facts" section of this issue, Ramos also seems to complain that cross-examination was restricted with Agent Christopher Sanchez as to "why Davila did not want to come back into the United States (to talk to Sanchez)" (Ramos' Brief at 23). Actually, this question was well-explored. The reason behind Aldrete-Davila's reluctance to debrief and come back into the United States was that he did not want to be prosecuted for the marijuana load. Agent Christopher Sanchez testified that Aldrete-Davila "required" immunity and the immunity letter before "he would speak" to the agent about the case (23 R. 11). The agent also
(continued...)

There Was No Evidence Of Aldrete-Davila's
Prior Drug Transportation

At the trial, at a bench conference, counsel explored the issue concerning asking Aldrete-Davila about past drug transportation, as well as other matters (24 R. 3-16). Ramos' counsel said that she did not have any specific information about Aldrete-Davila's prior involvement in drug trafficking (23 R. 214; 24 R. 11). The prosecutor agreed that, prior to February 17, 2005, the government also had no information that Aldrete-Davila participated in drug trafficking activity (24 R. 12). The court implicitly denied the request (24 R. 16).

As discussed and shown above, Aldrete-Davila's transportation of a large amount of marijuana on February 17, 2005, was fully explored. Defense counsel was free to argue, and did argue, that Aldrete-Davila's interest in transporting a large amount of drugs showed his bias, that the immunity agreement showed his interest in cooperation and benefits from cooperating, and that Aldrete-Davila's interest and motivation could include his defense of the valuable load and in escape. The defense was further free to argue, and did argue, that Aldrete-Davila's interest in the load could affect the calculus of reasonableness regarding the Defendants' use of force.

⁵(...continued)

testified that Aldrete-Davila was worried about prosecution by the Mexican authorities (23 R. 5). The agent agreed that when he contacted Aldrete-Davila on the telephone on March 11, one of the first things Aldrete-Davila said was "Yes, I had a load of marijuana in the van" (28 R. 50).

There is no reason to believe that Aldrete-Davila would have answered affirmatively a question as to past activity. And, as discussed above, even if collateral evidence would have been allowable under Rule 608, there was no contrary collateral evidence as to any past drug trafficking activity. Nevertheless, questioning and evidence of past activity would have been cumulative and would not have appreciably affected the above arguments available to and used by defense counsel. Aldrete-Davila would not have been inclined to fight harder or try more desperately to escape from the “huge” marijuana load if he had prior experience. The collateral attack, that he was not a novice, would not have significantly affected these arguments or the general credibility attack.

The Defense Took Advantage Of
Many Avenues of Impeachment

A review of the transcript shows cross-examination of Aldrete-Davila on approximately 84 pages on one day followed by 82 pages the next day (23 R. 138-222; 24 R. 17-79). Among the points discussed on cross-examination were: that Aldrete-Davila had received an immunity agreement and the benefits of that agreement (that he would not be prosecuted for the events of February 17); that Aldrete-Davila was worried about being prosecuted for transporting drugs on February 17; that he took possession of the van based on instructions from the drug owners; that when he was being followed by the Border Patrol, he made the decision

to get away from them and try to go back to Mexico (23 R. 174); that he was concerned about being arrested and going to jail (23 R. 275); that he engaged in high speed flight (23 R. 176); that he ignored the agents' lights and did not pull over (23 R. 178); that he had a combination cell phone-Nextel radio given to him by the traffickers (23 R. 193, 197); that he had an acquaintanceship with Agent Rene Sanchez (23 R. 207); that he was still angry about being shot that day (23 R. 215); that the government had offered surgery to him at no cost (23 R. 219); that he was in fear from the moment he saw the Border Patrol units (24 R. 36), and he wanted to "flee" to Mexico (24 R. 60); that although he had testified he believed his commercial driving permit to "go into Premex" had expired, the document showed that it had not expired (24 R. 51-55); that he was "not going to serve one day in prison for the offenses that [he] committed that day" (24 R. 61); and that he had a civil suit against the United States based on the shooting in which he was seeking "\$5 million" (24 R. 61).⁶

⁶ Additionally, Agent Christopher Sanchez provided impeachment material regarding Aldrete-Davila for closing argument, including: that Aldrete-Davila's initial report of getting out of the van with his hands up also was not true (28 R. 51-53); that Aldrete-Davila's initial statement, regarding the time he had crossed the river back into Mexico and had "flagged down a passerby," was a lie (28 R. 53); that he eventually admitted that the individuals who picked him up were the two organization members that had dropped him off (28 R. 54-55); that Aldrete-Davila had refused to divulge the name of a friend who took him to the clinic (28 R. 55-56); and that, after reviewing the documents, contrary to Aldrete-Davila's assertions, his commercial driver's license had not expired (28 R. 60).

**Testimony Was Not Overly Restricted;
Any Error Would Have Been Harmless**

As noted above, a district court possesses “wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on among other things, harassment, prejudice, confusion of the issues, repetitive or only marginally relevant,” and the important inquiry is whether the jury had sufficient information to appraise the bias and motives of the witness.” *Tansley*, 986 F.2d at 886. As discussed above, Aldrete-Davila’s transportation of a large amount of marijuana on February 17, 2005, was fully explored. Defense counsel was free to argue, and did argue, that Aldrete-Davila’s immunity agreement was a great benefit that he had a strong interest in keeping. Bias also could be argued concerning Aldrete-Davila’s civil suit. Again, Defense counsel was free to argue, and did argue, that Aldrete-Davila had a strong interest in defense of the “huge” and obviously valuable load and in escaping. Thus, counsel was free to argue, and did argue, that Aldrete-Davila’s interest in the load could affect the calculus of reasonableness regarding the Defendants’ use of force. Finally, there were a multitude of instances available for defense counsel to attack Aldrete-Davila’s credibility. Evidence of other drug activity either pre-February 2005 or post-February 2005⁷ would have been cumulative, repetitive, and only marginally

⁷ See *United States v. Hollis*, 208 F.3d 227 (10th Cir. 1999) (unpublished) 2000 WL 235250 (accusation or mere pendency of charges against a witness is not a valid basis for (continued...))

relevant. It would have been confusing as to who was being tried, Aldrete-Davila or the Defendants. The evidence would not have had any additional relevance to whether the agents believed they faced a deadly threat from Aldrete-Davila.

Rule 608 Does Not Allow Admission Of Collateral Evidence To Attack Character For Truthfulness

The district court was correct in determining that certain evidence of specific instances of past and subsequent conduct was not admissible. Evidence that non-defendant witness Aldrete-Davila engaged in past drug trafficking or in drug trafficking months after the February 2005 would have been collateral evidence.

Federal Rule of Evidence 608(b) provides, in relevant part:

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction for a crime as provided in [R]ule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness. . .

A trial court has “broad discretion in determining how and why bias may be proved and what collateral evidence is material to that purpose.” *United States v. Landes*, 704 F.2d 152, 153 (5th Cir. 1983). In the instant case, the district court was

⁷(...continued)

impeachment); *United States v. Garcia*, 531 F.2d 1303, 1306 (5th Cir. 1976) (effort to impeach witness credibility on basis of mere accusation or arrest not generally permissible).

correct in determining that matters as to which Aldrete-Davila testified he had no knowledge of, such as the weight of the marijuana, how marijuana is typically packaged, and other alleged instances of drug conduct, could not be proved by collateral evidence.⁸

In March Of 2005, Aldrete-Davila Received Immunity From Prosecution Regarding His Offenses Of February 17, 2005, The Day Of The Shooting

Aldrete-Davila Received An Immunity Letter In March Of 2005, Which Was Expanded By Oral Assurances Of Transactional Immunity, For Disclosed Offenses Of February 17, 2005

At the beginning of the government's case, the immunity agreement with Aldrete-Davila was initially explored with the second witness of the trial, case agent Christopher Sanchez. The agent testified that as of March 11, 2005, Aldrete-Davila did not want to speak with him (22 R. 276). The agent arranged a meeting at the American Consulate in Ciudad Juarez where Aldrete-Davila would receive a letter from the prosecutor who was handling the case at that time, for "limited use immunity" (22 R. 276). The previous prosecutor, however, had additionally

⁸ Appellant Compean postulates that evidence of alleged October bad acts was not barred by Rule 404(b) (Compean's Brief at 25). Aldrete-Davila's alleged activities in October of 2005 were not intrinsic to the activities taking place on February 17, 2005. (Compean's Brief at 25). Further, they are not intrinsic to the charged offenses, the offenses charged against the Defendants.

instructed Agent Sanchez that in exchange for “full cooperation” by Aldrete-Davila, “he would not be prosecuted” “for the incidents that occurred that day” (22 R. 277).

On cross-examination, the parameters of the immunity agreement were explored further (22 R. 295-300). Agent Sanchez agreed that Ramos’ Exhibit 2 was the “immunity agreement” that he gave to Aldrete-Davila at the consulate (22 R. 296).

Using the immunity agreement as a reference, Agent Sanchez testified that the document provided immunity from the use of his testimony, but the text of the agreement did not grant full immunity from any criminal offense committed on February 17, 2005 (22 R. 298-99). When the agent also gave Aldrete-Davila oral assurance that he was not going to be prosecuted at all for the criminal offenses that he committed that day, that this was a “broader immunity” than what was reflected in the document, Ramos Exhibit 2 (22 R. 300). It was reiterated, for the first of more than a dozen times during the course of the trial, that there was an “oral agreement” that Aldrete-Davila was not going to be prosecuted for offenses committed on February 17, 2005.

Agent Sanchez testified that one of the provisions of the agreement was that Aldrete-Davila cooperate about the shooting and answer questions (23 R. 48). Another provision was that Aldrete-Davila was not to attempt to protect any person or entity (23 R. 49).

Aldrete-Davila, the third witness in the trial, testified extensively as to the immunity agreement and his understanding of the immunity agreement. Aldrete-Davila testified that his understanding of the agreement was that: “There’s going to be no charges for the offenses that I may have committed on the 17th of February” (23 R. 138). He said that the agreement was conveyed to him both in writing and orally (23 R. 138-39).

Aldrete-Davila was confronted with the written immunity agreement (23 R. 139). He agreed that the written agreement did not contain a promise not to prosecute him (*id.*). Aldrete-Davila, however, reiterated his understanding of the agreement, that there would be no charges against him about what happened that day, as long as he told the truth (23 R. 140). Further, another condition of the agreement was that he not withhold information or try to protect anybody (*id.*).

While on the witness stand, Aldrete-Davila was handed the one-page immunity agreement (23 R. 143-44). An interpreter translated the document and read it to him in Spanish (23 R. 144). This was done, apparently, in the presence of the jury (*id.*). After reviewing the written agreement, Aldrete-Davila agreed that the written agreement provided that his statements and testimony would not be used against him; and that the written agreement did not say the government would refrain from prosecution of him (*id.*). Again, Aldrete-Davila testified that his understanding of the

agreement was that he would not be charged as explained by Agent Sanchez (23 R. 145).⁹He related that he had refused to be interviewed or cooperate unless he received immunity (23 R. 146). Aldrete-Davila testified that he was worried about being prosecuted for his transportation of drugs offense on February 17, 2005 (23 R. 152).

The Allegations Of Aldrete-Davila's Involvement
In Drug Transportation In October Of 2005

A bench conference was held during Aldrete-Davila's cross-examination regarding whether counsel could ask questions about marijuana activities in October of 2005 (23 R. 222). The district court indicated that documents concerning the matter of Aldrete-Davila's alleged involvement in another load in October of 2005 would be sealed for purposes of an appeal (23 R. 225).¹⁰

⁹ There was a bench conference concerning Ramos' counsel's desire to ask Aldrete-Davila about the value of the immunity agreement to him and "what did he do that day that he's getting immunity for" (23 R. 147). The court was concerned that Aldrete-Davila was incriminating himself and called Aldrete-Davila's counsel up to the conference (23 R. 148). The court said that the letter indicated that Aldrete-Davila had only use immunity, but that the discussion indicated that "there was prosecutorial immunity offered to him orally" (*id.*). The prosecutor stated that the agent had "expanded" on the written agreement, and that the agreement was that "if you committed a crime that day and you tell us about it, you will not be prosecuted for that, as long as you tell the truth" (*id.*). Ramos' counsel noted that: "I think Agent Sanchez was very clear he orally communicated the instructions, [prosecutor] Brandy Gardes' instructions, that he has prosecutorial or transactional immunity for anything that happened that day" (23 R. 149). The district court ruled that, given that Aldrete-Davila had prosecutorial or transactional immunity, the defense could inquire as to what Aldrete-Davila "did that day," including the amount of the marijuana in the van, if Aldrete-Davila knew the amount (23 R. 151-52).

¹⁰ Those documents include a Department of Homeland Security Memorandum of Activity stating that the name "Osbaldo Davila showed up on a report concerning marijuana seizures (continued...)

Counsel For Aldrete-Davila Informed
The District Court That Aldrete-Davila Would Exercise
His Fifth Amendment Right Not To Answer Questions
About Alleged Criminal Activities In October Of 2005

At the bench conference, the prosecutor indicated that Aldrete-Davila's lawyer, Mr. Walter Boyaki, had indicated that Aldrete-Davila would assert his Fifth Amendment rights (23 R. 223). Later in the conference, it was asserted by co-counsel for Ramos that Aldrete-Davila had immunity for anything he testified to, but the court answered: "No, not true," and counsel for Ramos said: "[he had immunity] only with respect to what happened on February 17th" (23 R. 224-25). In further discussing the alleged "October load," both Aldrete-Davila's counsel and the prosecutor asserted that Aldrete-Davila did not know about the existence or extent of the government's evidence as to that subject (23 R. 225-26). The court stated that Aldrete-Davila could be questioned again as to his understanding of the immunity agreement, although Aldrete-Davila "has said at least – I was sitting here counting – at least five times, I

¹⁰(...continued)

on October 22 and 23, 2005 (*see* Sealed Documents, Government's *Ex Parte* Request For *In Camera* Inspection, filed January 31, 2006, Tab 1). The memorandum related that after A. Vasquez was arrested with marijuana on October 22, he guided agents to a stash house in Clint, Texas, where on October 23, more marijuana was found (*id.*). The memorandum stated that the owner of the stash house C. Ortiz said that marijuana had been transported there by "Osbaldo Davila," a person that had shown him his catheter (*id.*). On November 16, 2005, DEA agents met with A. Vasquez and he was shown a black and white photo lineup containing Aldrete-Davila's photograph in space six (*id.*). Vasquez initially stated that he did not recognize anyone in the photo line up (*id.*). He also stated "he never heard of a person called Osbaldo Davila" (*id.*). C. Ortiz, however, said the photograph in space six looked like "Osbaldo Davila" but that he was not absolutely positive (*id.*).

had immunity . . . for that day – for that day. And the record is replete with that day, nothing about subsequent [conduct]” (23 R. 226-27). At the conference, outside the presence of the jury the following questioning took place:

Q. Mr. Aldrete, the immunity agreement that the Government gave you – and I’m talking about the written agreement, as well as any other oral promises that have been made to you – did you understand that gave you immunity for any criminal conduct from February 17th on?

A. No. The 17th, just that day.

Q. Okay. Would you expect , because of your cooperation with the Government in this case, that you would be given any more favorable treatment for any other criminal activity other than the February 17th?

A. No. No, of course not. I believe it was just in reference to that day and in reference to this case.

(23 R. 231-32).

The district court then noted that Aldrete-Davila was invoking his Fifth Amendment right (23 R. 232). Implicit in this ruling was that the immunity agreement did not apply to conduct or offenses after February 17, 2005.

The Prosecution Did Not Mislead The Court
Or The Defense As To The Content And Scope
Of The Immunity Agreement With Aldrete-Davila;
There Was No “Misunderstanding” Of The Agreement

As part of his background and argument on this issue, Ramos argues that the prosecution did not correctly represent the nature of the immunity agreement with

Aldrete-Davila (Ramos' Brief at 27). This is incorrect. As demonstrated with the sample of references above, the immunity agreement was consistently described. The second witness at the trial, the case agent who delivered the offer of immunity, testified that at a meeting at the American consulate in Ciudad Juarez, Aldrete-Davila received from him a letter from the prosecutor who was handling the case at that time, for "limited use immunity" (22 R. 276). The previous prosecutor, however, had additionally instructed Agent Sanchez to deliver the promise that in exchange for "full cooperation" by Aldrete-Davila, "he would not be prosecuted" "for the incidents that occurred that day" (22 R. 277). This was the information as presented to the district court at a bench conference. The court said the letter indicated that Aldrete-Davila had only use immunity, but that the discussion indicated that "there was prosecutorial immunity offered to him orally" (*id.*). The prosecutor stated that the agent had "expanded" on the written agreement, and that the agreement was that "if you committed a crime that day and you tell us about it, you will not be prosecuted for that, as long as you tell the truth" (*id.*).

As noted above, at a subsequent conference, the district court found that the record was replete with testimony that the immunity agreement applied as to Aldrete-Davila's activities "that day" and did not apply to subsequent conduct (23 R. 226-27).

Use And Derivative Use Immunity;
Transactional Immunity

“Use immunity” or “derivative use immunity” describes an agreement not to utilize particular testimony, as well as information derived directly or indirectly from it, in any later prosecution of the witness. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972). “Transactional immunity” accords full immunity from prosecution for the offense to which the compelled testimony relates, and it “affords the witness considerably broader protection than does the Fifth Amendment privilege.” *Id.*

A defendant must rely on the executive branch to grant use immunity because generally a court has no independent power. *See United States v. Moussaoui*, 382 F.3d 453, 466 (4th Cir. 2004) (executive branch alone determines whether to immunize).

**Aldrete-Davila Did Not Receive Immunity For Future Offenses, and
Aldrete-Davila Could Not Receive Immunity For Future Offenses**

Overview

The gravamen of this issue is Ramos’ contention that the limited use immunity Aldrete-Davila received in the written immunity letter of March 16, 2005, gave him not only immunity for the drug transportation offense on the day of the shooting, but additionally, sufficient immunity regarding his alleged drug transportation in October of 2005 such that the district court erred in failing to compel him to testify about this alleged offense as impeachment material on cross-examination. In other words, the

essence of this claim is that the written limited use immunity letter of March 16, 2005, was so broad it somehow conferred immunity for future offenses, specifically an offense allegedly committed by Aldrete-Davila seven months after he received the letter and the oral assurances from the agent. This contention is entirely without merit, because (1) no reasonable interpretation of the written contract would be that it confers future immunity; (2) the evidence demonstrated no future immunity was contemplated by the parties; and (3) immunity for future offenses could not be conferred as a matter of law.

The Omission Of A Coverage Date In The Agreement
Does Not Mean It Extended Infinitely Into The Future,
Or That It Extended Immunity To Future Offenses

The basis for Appellants' contention on this issue, that the written limited use immunity letter of March 16, 2005, conveys immunity for any and all offenses even months in the future, is that no date was included in the body of the letter as to the date of the offense or offenses to which it applied (Ramos' Brief at 32, 34). The letter provides, in pertinent part, that "[i]n connection with your cooperation with the Department of Homeland Security, Office of the Inspector General," and any subsequent grand jury testimony, hearings and/or trials, the government agreed to provide Aldrete-Davila immunity such that "no testimony or other information provided by you, or any information directly or indirectly derived from that testimony

or other information, will be used against you in any criminal case in this district, provided you do not violate the terms of this agreement” (*see* Ramos’ Brief at 23).

Even though the agreement contained no limiting date, the initial reference was that the agreement related to Aldrete-Davila’s “cooperation with the Department of Homeland Security, Office of the Inspector General,” and the date of the letter of March 16, 2005, implied that immunity was to apply to the information that he would then divulge. Although future court appearances are referenced, there is nothing in the written agreement indicating that immunity would apply to acts committed after the start of his cooperation. This agreement “does not state or imply that immunity will apply to future crimes he may commit.” *See United States v. Black*, 776 F.2d 1321, 1327 (6th Cir. 1985).

The Unambiguous Understanding Of Both Parties
Was That Immunity, Both Use And Transactional,
Applied Only As To Aldrete-Davila’s Conduct
On February 17, 2007

Determination of the extent of immunity afforded by an immunity agreement is in accordance with the basic principles of contractual analysis. *See, e.g., United States v. Weaver*, 905 F.2d 1466, 1472 (11th Cir. 1990). In the context of an agreement with a criminal defendant, promises by the government that go beyond a written agreement may be enforced as a matter of fair conduct. *See, e.g., Rowe v. Griffin*, 676 F.2d 524, 526-28 (11th Cir. 1982). The agreement is interpreted in

accordance with the reasonable understanding of the parties. *See, e.g., United States v. Rogers*, 101 F.3d 247, 253 (2nd Cir. 1996).

This was an area, the parties' understanding of the agreement, that the district court considered to be of great importance (23 R. 224-27; 231-32). Without reiterating the above, the unambiguous understanding of both the government and Aldrete-Davila was that the immunity agreement applied only to the "17th, just that day," and that "of course" it did not apply to subsequent conduct (23 R. 231-32). Immunity related only to the "this case," the subject of the trial. Immunity was granted as a *quid pro quo* for information and testimony concerning the shooting of February 17, 2005. There was no ambiguity.

A Grant Of Use Immunity
Does Not Apply To Future Offenses

Additionally, the authorities provide that use immunity does not immunize a witness from prosecution for an act committed subsequent to the granting of the immunity. In *United States v. Freed*, 401 U.S. 601, 606-07 (1971), the Supreme Court explained that:

Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

Thus, the implication is that from the perspective of the person receiving immunity, as matter of both law and public policy, he cannot seek immunity for future crimes.¹¹

In *United States v. Quatermain*, 613 F.2d 38 (3rd Cir. 1980), Drax Quatermain testified against Zelman Fairorth in return for a promise of immunity. As in the instant case, Quatermain's immunity letter, using the term "immunity from prosecution" did not include any dates limiting the immunity. *Id.* at 44 n.1. In a turn of events, Fairorth later became an informant and cooperator for the government regarding Quatermain's criminal involvement in manufacturing silencers. After Quatermain was indicted for the firearms offense, he argued that he was protected by the agreement which had provided use and fruits immunity. Avoiding the question of whether the agreement conferred use immunity or limited transactional immunity, a majority of the court held that even derivative use immunity cannot extend to future crimes. *Id.* at 40-42.¹²

¹¹ Similarly, this Court has stated: "We are of the opinion that, in general, the privilege against compulsory self-incrimination contemplates a crime already committed. . . ." *Rule v. United States*, 362 F.2d 215, 217 (5th Cir. 1966).

¹² In *Quatermain* the majority considered the Supreme Court's decision in *Marchetti v. United States*, 390 U.S. 39, 54 (1968), where the Court recognized that although "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination," under certain circumstances the privilege against self-incrimination was not entirely inapplicable to prospective acts. The court in *Quatermain*, 613 F.2d at 42, as well as other courts, recognized, however, that the subsequent case of *Freed* "emphasized the narrowness of the privilege's application to future conduct."

In another case involving the issue of the extent of use immunity, *United States v. Brimberry*, 779 F.2d 1339, 1345-47 (8th Cir. 1985), Appellant Brimberry filed a motion to dismiss counts of an indictment on the basis that charges were barred by the immunity agreement which he entered into on November 2, 1981. In that agreement, the government agreed not to prosecute Brimberry “for, or on account of any information he provided.” *Id.* at 1345-46. Brimberry at that time also agreed to plead guilty to a charge of filing a false tax return. *Id.* The circuit court agreed with the magistrate and district court that the immunity agreement did not bar prosecution for an offense that took place after the agreement. *Id.* at 1347-47. The Eighth Circuit explained:

In this case, the magistrate made a finding that the immunity agreement did not extend to future criminal acts such as those charged in Counts 9 and 10. This finding is supported by the fact that “**a grant of use immunity does not immunize the witness from prosecution for an act committed subsequent to the granting of the immunity.**” *United States v. Caron*, 551 F.Supp. 662, 672 (E.D.Va. 1982) [further citations omitted] . . .

Although there is broad language in the immunity agreement between Brimberry and the government, there is nothing in the agreement which supports an intention to grant Brimberry immunity to violate the law in the future. Since counts 9 and 10 involved acts which took place after November 2, 1981, the immunity agreement did not apply to these charges. Thus, the trial court properly denied Brimberry’s motion.

Id. (emphasis added)

In *Caron*, 551 F.Supp. at 672, cited in *Brimberry*, the court stated: “. . . the fact remains that a grant of use immunity does not immunize the witness from prosecution for an act committed subsequent to the granting of the immunity.” *Id.*

In *Black*, 776 F.2d at 237-38, where Appellant asserted that his immunity agreement granted immunity for future criminal violations during the course of the investigation. The court remarked that although “[t]he poor draftsmanship of the agreement lends support for this argument,” the agreement in *Black* “does not state or imply that immunity will apply to future crimes he may commit.” *Id.* The court explained that: “It is too firmly established that grants of immunity do not license future criminal conduct to permit any other construction of the language in the agreement.” *Id.*

**The District Court’s Determination That The Scope
Of The Immunity Agreement Was Limited To Aldrete-Davila’s
Feb 17, 2005, Activities, And Did Not Extend To October of 2005,
Was Not Clearly Erroneous**

Because immunity agreements are examined under contract principles, the district court’s factual determinations as to the agreement are reviewed for clear error. *See United States v. Wilson*, 392 F.3d 1055, 1059 (9th Cir. 2004) (citation omitted). “[D]eterminations relating to formation of an enforceable agreement” are also

reviewed for clear error. *Id.* (citation omitted).¹³ In the instant case, the district court's determination that the scope of the March 16, 2005, immunity agreement did not apply to future offenses was not erroneous or clearly erroneous.

**The District Court Was Correct
That Aldrete-Davila Could Not Be Compelled To Testify
Over The Assertion Of His Fifth Amendment Privilege As To Allegations
He Was Involved In Drug Transportation In October Of 2005**

The purpose of the privilege against self-incrimination is to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The Fifth Amendment privilege extends to situations which present the witness with a real and appreciable fear of self-incrimination. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

A defendant's right to present a defense must yield to a witness's Fifth Amendment privilege. *United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005). In *Serrano*, the district court found that two witnesses had properly invoked their Fifth Amendment privilege against self-incrimination. The court explained that: after the witnesses invoked the privilege, the "Defendants did not have the constitutional right to compel [the witnesses] to waive their Fifth Amendment

¹³ See also, *United States v. Romero*, 166 Fed.Appx. 34 (4th Cir. 2006), 2006 WL 250720 (unpublished) (trial court's factual determination as to scope of immunity agreement reviewed for clear error).

privileges. Defendant's right to compel and offer testimony had to bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 1216.

In the instant case, although there is broad language in the immunity agreement between Aldrete-Davila and the government, there is nothing in the agreement which supports an intention to grant Aldrete-Davila immunity to violate the law in the future. *Brimberry*, 779 F.2d at 1345-47; *Black*, 776 F.2d at 237-38. Contrary to Appellant Ramos' contention, even derivative use immunity cannot extend to future crimes. *Quatermain*, 613 F.2d at 40-42. The essence of Appellants' argument as to this entire issue, that the district court erroneously concluded that the March 16 immunity agreement applied to the alleged October 2005 conduct, is incorrect, because (1) no reasonable interpretation of the written contract would be that it confers future immunity; (2) the evidence demonstrates no future immunity was contemplated by the parties; and (3) immunity for future offenses could not be conferred (except possibly in very rare cases) as a matter of law. There was no abuse of discretion in disallowing cross-examination as to a subject to which Aldrete-Davila exercised his Fifth Amendment privilege.

Any Error Would Have Been Harmless

As to matters to which there was an objection, any error would have been harmless. Although Appellants try to frame the issue as their word against that of

drug trafficker Aldrete-Davila, as to whether they saw something “shiny” or “shiny and black,” as shown below in the sufficiency of the evidence section, it was the belated nature of their claims, and particularly that Defendants’ stories contradict the testimony of the other agents, that composed the weight of the evidence against them.

Appellants cite *United States v. Jimenez*, 464 F.3d 555, 558-65 (5th Cir. 2006), in support of their claim that any error here was not harmless. In *Jimenez*, the district court limited cross-examination of witness Lopez regarding of his description of what appeared to be drug transactions. Specifically, the defense was denied the opportunity to ask Lopez questions regarding where he had parked when he made his observations. *Id.* at 561. This Court found this error not harmless because Lopez provided key evidence. *Id.* at 563-65. In the instant case, on the other hand, no evidence was restricted as to the key events of the shooting. As to evidence affecting credibility, as discussed above, the jury was fully apprised that Aldrete-Davila was transporting a large load of marijuana on February 17. His bias and motives were fully explored. Whether he was also a drug-transporter on other occasions would have cumulative.

In this case, based on the overall strength of the case and the circumstances surrounding the testimony, any error as to restriction of evidence as to collateral drug transportation would have been harmless. *See Cooks*, 52 F.3d at 103-04).

**II. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR
IN ALLOWING EVIDENCE AND QUESTIONING
FROM BOTH THE PROSECUTION AND THE DEFENSE
ABOUT BORDER PATROL POLICIES;**

**BOTH THE PROSECUTION AND THE DEFENSE USED
THE POLICIES AS AN AID IN EVALUATING
THE REASONABLENESS OF THE DEFENDANTS' ACTIONS**

**THE JURY'S CHARGE REQUIRED THE JURY
TO DETERMINE GUILT OR INNOCENCE ON THE BASIS
OF THE ELEMENTS OF THE OFFENSES**

(Responsive to **Ramos'** Brief, **Issue 2**, 35-46;
Compean's Brief, **Issue Ten**, 55).

Overview

Appellant Ramos argues in this issue that he was impermissibly convicted on the basis of the Border Patrol's civil regulations and the violation of those regulations, and that it was plain error to admit evidence of those regulations. This argument is entirely without merit. Appellants' convictions for assault, use of a firearm by discharge in commission of a crime of violence, tampering, and deprivation of civil rights, were based on the facts and circumstances establishing the elements of those offenses. In the instant case, the policies and regulations were discussed to illuminate the Defendants' intent. The government did not maintain that a violation of a regulation established a criminal violation. Also, the jury instructions did not adopt the regulations or instruct that a violation of regulations could establish an offense.

Quite the contrary, the only reference to the regulations in the jury charge was a specific instruction under three counts that violation of a regulation did not mean a violation of the statute.

Further, both the prosecution and the defense elicited testimony regarding regulations and used the regulations to support arguments as to whether the actions of the defendants were reasonable under the circumstances of this case. The conduct of defendants in relation to the regulations was properly referenced as a manifestation of the intent of the Defendants. There was no error or plain error.

**Background: Both The Prosecution And The Defense
Utilized The Border Patrol Regulations And Policies**

In this issue, Appellant Ramos complains about “extensive and repetitive testimony” regarding Border Patrol policies, and he quotes references by the witnesses and prosecutors. What is not clear from Appellant’s background statement, however, is that the defense also often elicited testimony regarding the policies and regulations in an attempt to show that the actions of the Defendants were reasonable.

In Ramos’ trial counsel’s opening statement, she argued that she believed the evidence would show that the “shooting of a suspected drug trafficker who led authorities on a chase” was “justified,” and that the central question of the entire trial was whether it was “a justified shooting” (22 R. 205). She remarked that the evidence should be examined from Agent Ramos’ perspective that day, who had to make split-

second decisions in tense, “unpredictable, and rapidly evolving” circumstances (22 R. 206). Ramos’ counsel explained that in examining the reasonableness of the agent’s belief, the jury would hear “policies” - “Government policies” (*id.*). Defense counsel reminded the jury: “And I want you to be clear, as you listen to the evidence, there is a difference between a violation of policies and a violation of law” (22 R. 207).

In her opening statement, Compean’s counsel also anticipated evidence of policies, stating (22 R. 223-24):

There will be evidence of policies. And please remember that there’s a difference between policies, breaking a policy, and committing a crime. I believe that the evidence will show you that Mr. Compean’s conduct in this case did not constitute a crime, did not rise to the level of constituting criminal conduct.

Thus, at the beginning of the trial, before any evidence was admitted, there was not only a lack of objection by the defense as to evidence of policies and regulations, but additionally, this evidence actually was strategically embraced by the defense as helping their cause.

Evidence as to policies was elicited by both the prosecution and the defense. In one example, during the cross-examination of Agent Christopher Sanchez, Ramos’ counsel asked questions concerning the regulation that discharge of a firearm should be reported within one hour, and produced the written firearms policy for the agent to refresh his recollection (22 R. 302-06). The purpose of this evidence was to show

that the administrative penalty for a first instance of violating this policy ranged only from a “written reprimand to five days’ suspension” (22 R. 305). Interestingly, **it was the defense** who **first proposed** that the written regulations should be admitted into evidence (22 R. 305; Ramos Exhibit 5) (the government opposed admission on the basis of lack of completeness and other grounds).

In another representative example, the defense used the firearms policies and regulations to argue the reasonableness of the Defendants’ discharging their service firearms. While cross-examining Agent Yrigoyen, Ramos’ counsel extensively questioned the agent concerning “the use of deadly force guidelines that Border Patrol agents are required to follow” (26 R. 152-54). Defense counsel quoted statements from the regulations, asking if the agent agreed that these were correct statements of the rules that apply to Border Patrol agents in that situation (26 R. 152-53).¹⁴ Another regulation defense counsel quoted emphasized that the officer on the scene “may often be forced to make split second decisions in circumstances that are tense, unpredictable, and rapidly evolving” (26 R. 153). This was one of a number of

¹⁴ One of the rules defense counsel quoted was that the use of deadly force was justified: “when the officer reasonably believes that the person at whom the firearm is to be discharged possesses the means, the intent, and the opportunity of causing death or grievous bodily harm upon the officer or another person” (26 R. 152).

Another rule or regulation defense counsel quoted was: “An officer can use deadly force when he had probable cause to believe that the person against who the force is directed has the means, the intent, and the opportunity to cause death or grievous bodily harm upon the agent or third person” (26 R. 153).

instances where defense counsel strategically used the regulations in questioning a fellow agent as to the reasonableness of the use of force to meet a perceived threat. The defense used that testimony in arguments supporting the defense.

Although regulations and policies are mentioned in the closing arguments, there are vast expanses of those arguments in which nothing about regulations is discussed. Further, arguments emphasized that regulations and policies, by themselves, would not constitute sufficient evidence that the defendants committed crimes.

One of the prosecutors, initially in closing argument, in discussing the failure to report, argued that the failure was “an administration violation,” but then emphasized the reason the Defendants did not report the shooting: “They were trying to conceal the crime that had been committed, the crimes against Oswaldo Aldrete-Davila” (31 R. 16).

And defense counsel stated:

So the failure to report the discharge of a firearm is an administrative oversight. It's not a crime

(31 R. 50).

The reason that we brought up violations of policy is because that's what went on in this case. The Border Patrol has policies for tons of stuff. It's a bureaucratic Government agency. They have a policy on discharge of a

firearm. They have a policy on pursuit. They have policies on everything. You heard all that ad nauseum.

Violations of these policies carry administrative penalties. These penalties range from reprimands up to suspensions and possibly termination. Some of that may happen as a result of the investigation the Border Patrol finally does into this case. I don't know. But are those things criminal? No, they're not.

(31 R. 79-80).¹⁵

Standard Of Review

Appellant Ramos argues that the government violated Appellants' due process rights when they impermissibly used regulatory violations as a substitute for proof beyond a reasonable doubt of the elements of the crime. This alleged error is subject to plain-error analysis because, as Appellants acknowledge, they failed to object on this basis at trial. *See United States v. Olano*, 507 U.S. 725, 732-35 (1993). Their burden is to show: (1) an error, (2) that is plain or obvious, (3) that affects a defendant's substantial rights, and (4) that affects the fairness and integrity of the district court proceedings so that the appellate court should use its discretion to recognize the error. *Id.*

¹⁵ Earlier, another defense attorney also emphasized: "the Court has told you that the failure to report the – discharge of a firearm is a violation of a regulation, and is not in and of itself a crime. You've been told that you may consider it for evidence of his state of mind" (31 R. 40-41).

Admission and Use Of Border Patrol Regulatory Violations Was Not Error And Did Not Violate Appellants' Due Process Rights

In *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980), the Fifth Circuit held that civil violations could not be used to establish criminal liability. In subsequent cases this Court explained that *Christo* is primarily concerned with the “bootstrapping of civil violations into criminal liability.” *United States v. Brechtel*, 997 F.2d 1108, 1114-15 (5th Cir. 1993).¹⁶

In *United States v. Butler*, 429 F.3d 140, 149-51 (5th Cir. 2005), the Appellant, relying on *Christo*, challenged the district court’s testimony of “policies” as evidence of criminal wrongdoing, because the witnesses “suggested” that failure to comply with policies would ultimately be determinative of Defendant’s guilt or innocence, and the government “blurred the distinction” between a violation of policies and criminal law. The government responded that it never presented a theory that violations of policies automatically meant a violation of criminal law, and those policies were in aid of establishing the Defendant’s intent. *Id.* This Court ruled that evidence of regulatory

¹⁶ In *Brechtel*, relying on *Christo*, the appellants claimed that the district court had erred in permitting testimony suggesting criminal liability flowing from a civil violation. *Id.* The Court concluded that testimony regarding civil regulations did not infect the very purpose for which the trial was conducted, mentioning, *inter alia*, that the government had not argued that civil violations alone could give rise to criminal liability, that the testimony concerning civil violations properly reflected the defendants’ motive, and the court had given limiting instructions. *Id.*

policies to establish criminal intent was proper, and even if the Court were to identify an error, the limiting instruction would have cured any such error. *Id.* at 151.

Relying on *Christo*, Ramos argues that repetitious use of the regulatory violations “impermissibly infected[ed] the very purpose for which the trial was being conducted” (Ramos’ Brief at 45 (citing *Christo*, 614 F.2d at 492)). This issue is without merit even under an ordinary error standard. The significant question is whether the government created a risk that the jury would substitute a violation of the civil statute for criminal liability through improper use of regulatory violations. Here, there was no such risk. The prosecution properly used the regulatory violations as evidence of Defendants’ criminal intent and motive without equating civil violations with criminal liability. The defense strategically used the regulations to argue that Defendants’ actions were reasonable. The proper use of the regulatory violations did not create the risk that the jury would substitute a violation of civil regulations for criminal liability.

As shown above, the deadly force policy was invoked by both the prosecution and the defense¹⁷ as an aid in evaluating reasonableness. Defendants’ failure to report the shooting was indicative of their state of mind, that they never believed Aldrete-

¹⁷ See *United States v. Solis*, 299 F.3d 420, 452 (5th Cir. 2002) (defendant cannot complain on appeal of alleged errors which he invited or induced, especially where the defendant may not have been prejudiced by the alleged error).

Davila was really a threat. The violation of the weapon discharge report policy was some support for the inference that Defendants were covering up activity they knew to be illegal. The radio/repeater policy was discussed to show that car-to-car radio transmissions are unrecorded, and thus, Defendants knew that supervisors were not aware of all that was happening. Actions taken by Defendants to make their transmissions unrecorded could be relevant to their knowledge and intent. Similarly, the failure to report high speed pursuit could be relevant to their knowledge and intent.

In contrast to *Christo*, the government never put forth a theory that attempted to substitute violations of border patrol regulations for the substantive elements of the crimes charged. The government's use of regulatory violations was proper and not error in light of *Butler*. The regulatory-violation evidence was used by both the prosecution and the defense. The regulations and policies were highly probative of Defendants' mental state and knowledge at the time of the shootings. There was no error. The Appellants' due process rights were not violated.

Appellant Ramos cites to cases that were remanded because of improper "bootstrapping" of civil violations into criminal liability. These cases are distinguishable from the instant case.¹⁸

¹⁸ In *Christo*, 614 F.2d at 489-92, this Court held that in a trial for misapplication of bank funds it was error to instruct the jury that the defendant could be found guilty of the misapplication counts on the basis of a violation of a civil banking statutory regulation. In
(continued...)

There Was No Plain Error

To establish the second prong of the plain error requirements, Appellants must show a “plain or obvious error.” One formulation of this kind of error is “an error, which was so conspicuous that the trial judge and prosecutor were derelict in countenancing it.” *See United States v. Musa*, 45 F.3d 922, 924 (5th Cir. 1995).

¹⁸(...continued)

Christo both the indictment and the jury instructions erroneously emphasized the civil violations. *Id.* at 492. This Court remanded because the government and the trial court (through jury instructions) affirmatively emphasized the link between violations of a civil banking regulation and criminal liability. *Id.* The government’s argument attempted to substitute violation of a civil statute for the elements of the crime, and the jury instructions exacerbated the error by equating civil and criminal liability. In the instant case, neither the indictment nor the court’s instructions emphasized a theory that equated regulatory violations with criminal liability. At trial there were references to the non-criminal nature of civil violations and the jury instructions. Also, jury arguments made it clear that violations did not equal criminal liability. Finally, unlike *Christo*, in the instant case the defense sought to strategically exploit the regulations to support its theories.

In *United States v. Schnitzer*, 145 F.3d 721, 730 (5th Cir. 1998), this Court remanded because evidence of civil violations was not used to prove motive or criminal intent for the underlying criminal offense. The non-probative nature of the civil violations created in unjustifiable risk that they would be bootstrapped into criminal liability. *Id.* In addition, there was no limiting instruction that countered the error. *Id.* Conversely, in the instant case, as discussed above, the government properly used the regulatory violations as evidence of the criminal intent or motive of the appellants.

And in *United States v. Riddle*, 103 F.3d 423, 431 (5th Cir. 1997), the case was remanded because the overly prejudicial effect of bank reports which implicated the defendant in civil violations before and after the charged crime outweighed their probative value to defendant’s motive and criminal intent. Additionally, this Court concluded that it was only when this error was combined with three other substantial errors that a remand was justified. The Court expressed no view as to whether the error alone would be sufficient to require a new trial. *Riddle*, 103 F.3d at 435. In the instant case, the regulatory matters referenced were all part of or related to the same incident, that was the subject of the charges, and had no improper prejudicial effect. As noted above, the regulatory-violation evidence was used by both the prosecution and the defense. Additionally, the regulations and policies were highly probative to Defendants’ mental state at the time of the incident.

In the instant case, even if the admission of evidence of the policies and regulations was error, it was not plain error. This case is at least similar to *Butler*, where testimony that regulatory violations were not criminal acts were found to be indicative of proper use and a lack of harm. *Butler*, 429 F.3d at 150. Any possible harm was further mitigated by a limiting instruction for counts 8, 9, and 10.¹⁹ Although the limiting instruction was not given as to other counts, the idea that regulatory violations are not criminal acts was effectively conveyed to the jury by the instructions. This idea was also conveyed by testimony and arguments to the jury. Thus, any possible error did not affect a “substantial right” of the defendants. The jury instructions on all of the counts emphasized that the government must prove all elements of all the offenses beyond a reasonable doubt. The instructions for each count definitively laid the elements of each crime charged without any reference to the regulatory violations. Additionally, after the instructions on each individual count, the court generally instructed the jury that “the defendant is not on trial for any act, conduct, or offense not alleged in the indictment” (2 S.R. 472). The jury instructions taken as a whole in conjunction with the manner the evidence was received eliminated the possibility that regulatory violations were bootstrapped into criminal liability.

¹⁹ The instructions provided: “The violation of this regulation should not be considered a violation of criminal law. You may consider, however, evidence of violations of civil regulations as you would any other evidence in determining whether the defendant had the required intent to violate the criminal laws charged in this indictment” (2 S.R. 459-64).

**III. THE APPLICATION OF SECTION 924(c)
TO A PEACE OFFICER WHO COMMITS A CRIME
WHILE ON DUTY DOES NOT VIOLATE “FAIR WARNING”
FIFTH AMENDMENT DUE PROCESS PROTECTIONS;**

THERE WAS NO ERROR OR PLAIN ERROR

(Responsive to **Ramos’** Brief, **Issue 3**, 46;
Compean’s Brief, **Issue Two**, 29-40)

Overview

Appellants contend that application of section 924(c) to a law enforcement officer who commits a crime while on duty violates Fifth Amendment due process protections because of a lack of “fair warning” as to the scope of prohibited conduct. However, both the legislative history of the 1984 amendments and subsequent cases show that the statute applies to officers that commit crimes, and provides fair warning.

Standard Of Review

Neither Ramos nor Compean suggest that this issue was ever raised before the district court during the trial. The issue was not raised in Ramos’ Motion For New Trial (4 R. 538-39), nor in Compean’s post-verdict motion (2 S.R. 486-87).

A constitutional challenge raised for the first time on appeal is reviewable for plain error only. *See, e.g., United States v. Bourgeois*, 423 F.3d 501, 506 (5th Cir. 2005). A judicial determination that a plain error should be rectified requires (1) an error, (2) that is plain or obvious, (3) that affects a defendant’s substantial rights, and

(4) that affects the fairness and integrity of the district court proceedings. *Id.*; *Olano*, 507 U.S. at 732-35.

“Fair Warning” Claims

In *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964), the Supreme Court held that the South Carolina Supreme Court’s retroactive application of its construction of the criminal trespass statute to the petitioners violated due process by not providing “fair warning” that the conduct proscribed was criminal. The decision in *Bouie* was based on the principle “that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Id.* at 351 (quoting *United States v. Harris*, 347 U.S. 612, 617 (1954)).

There are three related manifestations of the fair warning requirement. *United States v. Lanier*, 520 U.S. 259, 266 (1997). First, the vagueness doctrine bars enforcement of a statute where the terms are so vague that individuals of common intelligence must necessarily guess at its meaning and differ as to its application. *Id.* (citations omitted). Second, relatedly, the rule of lenity ensures fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *Id.* (citations omitted). “Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute

nor any prior judicial decision has fairly disclosed to be within its scope.” *Id.*
(citations omitted).

The Statute

Section 924(c)(1)(A)(iii) provides, in relevant part, that:

any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

If the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A)(iii). According to 18 U.S.C. § 924(c)(1)(D)(ii), the sentence is to be imposed consecutively to the term of imprisonment for the crime of violence.

Appellants’ Argument

Compean argues that the Defendants did not have “fair warning” that their conduct violated section 924(c). On the contrary, Compean and Ramos had “fair warning” that using their firearms in the assault offenses violated section 924(c). In order for section 924(c) to attach, the defendant must have used or carried a firearm “during and in relation to any crime of violence or drug trafficking crime.” 18 U.S.C. § 924(c). The statute sets forth the elements of the offense without ambiguity. Appellant Compean does not contend that the statutory language is vague. He does

not challenge that the predicate assault offenses are technically categorized as “crimes of violence.” His primary contention is that Appellants could not have known that the statute applied to on-duty law enforcement officers. The legislative history and judicial application of 924(c), however, both run counter to this proposition. His other contentions - that the facts of the instant case are too unique to apply the statute - are based on the Defendants’ version of the events, that they acted reasonably based on a perceived threat. That version was rejected by the jury. These contentions are subsumed within their challenges to the sufficiency of evidence for the assault charges. The section 924(c) statute clearly applied to defendants who used a firearm to commit an assault, notwithstanding their law enforcement officer status.

**Section 924(c) Applies To Law Enforcement Officers
According To The Legislative Intent Of The More Recent 1984 Amendments**

Contrary to Appellants’ contention, Congress intended section 924(c), as amended in 1984, to apply to law enforcement officers. The legislative history that Appellants rely on (Compean’s Brief at 30-31) relates to the original passage of section 924(c) in 1968, not the statute as amended in 1984.

“[T]he predecessor statute to § 924(c)(1) was designed ‘to avoid imposing additional penalties on persons, such as policemen, who commit federal felonies while lawfully carrying firearms.’” *United States v. Rivera*, 889 F.2d 1029, 1031 (11th Cir. 1989) (quoting *United States v. Bower*, 575 F.2d 499, 501 (5th Cir. 1978)). The

predecessor statute “only made it illegal for an individual to *unlawfully* carry a firearm during the commission of a felony.” *Id.* at 1031 & n.4 (emphasis original). As to the predecessor statute, “the government was required to prove as an element of the offense that the defendant’s act of carrying the firearm must, in and of itself, have violated Federal, state, or local law.” *Id.* at 1031 n.4 (citation and internal quotation marks omitted). “However, when Congress amended this statute as part of the Comprehensive Crime Control Act of 1984, **it expanded the law’s scope.**” *Id.* at 1031 (citation omitted) (emphasis added). As the court in *Rivera* explained, “[t]he reason for this change can be found in the Act’s legislative history” *Id.*

The legislative history of the 1984 amendments provided:

The requirement in present section 924(c) that the gun be carried **unlawfully**, a fact usually proven by showing that the defendant was in violation of a State or local law, **has been eliminated as unnecessary.** The “unlawfully” provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subjected to additional penalties, even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an offense weapon for a specific criminal act

Id. (quoting S.Rep. No. 98-225, 98th Cong., 2d Sess., 314 n.10 (1983), *reprinted in 1984 U.S.Code Cong. & Admin. News*, 3182, 3490-92, n. 10) (emphasis added).

The legislative history of the 1984 amendments further provided:

The Committee has concluded that persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, **as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment** as a person whose possession of the gun violates State or local ordinance.

Id. (quoting S.Rep. No. 98-225) (emphasis added).

Thus, when Congress amended § 924(c) as part of the Comprehensive Crime Control Act of 1984, the original “unlawful” provision was removed from § 924(c).

Id. The legislative history, as well as subsequent case law, discussed below, clarify that the armed law enforcement officer who commits a crime of violence deserves to be punished like any other crime of violence offender. *Id.*

Prior Cases Have Applied Section 924(c) to Peace Officers

A number of cases have applied section 924(c) to law enforcement and other peace officers. For example, in *United States v. Williams*, 343 F.3d 423 (5th Cir. 2003), the defendant, “a deputy sheriff, shot an apprehended, unarmed suspect in the back.” *Id.* at 429. After an initial apprehension, followed by a high speed chase and a second apprehension, Williams shot the victim, Hall, in the upper back. *Id.* at 429-31. Just as in the instant case, Williams made belated claims of a threat. These claims included: that Hall had returned to his truck and grabbed something (implying a weapon); and that Hall had reached into his pockets or waistband, and had turned toward the deputies. *Id.* Williams’ version of events, however, conflicted with other

officers' testimony, Williams' earlier statements, and the "limited real evidence," such as the absence of a firearm. *Id.* Williams received the mandatory minimum ten years imprisonment on the section 924(c) count. *Id.*

In *United States v. Winters*, 174 F.3d 478, 480-81 (5th Cir. 1999), inmate Floyd escaped from prison in a stolen vehicle and sustained injuries upon wrecking the vehicle. He was captured at an abandoned house. *Id.* On the return trip to the prison, while Floyd was handcuffed, on-duty corrections officer Winters hit Floyd several times on the head with his service revolver, knocking him unconscious. *Id.* Winters was convicted of use of a firearm during and in relation to a crime of violence (the section 242 civil rights violation). *Id.*

**Prior Cases Have Rejected The Contention
That Section 924(c) Should Not Apply To Peace Officers**

As noted above, in *Rivera*, an Appellant argued that he should not have been convicted of § 924(c)(1) "because as a police officer he was instructed to carry a firearm with him at all times." *Rivera*, 889 F.2d at 1031. As discussed above, the court rejected this argument because the legislative history of the statute demonstrated a legislative intent that the statute had been amended so that it could be applied to officers. Further, the court observed that his status as an officer at the time of the offense "does not give him license to flaunt the clear dictates of the law." *Id.*

In *United States v. Radcliff*, 331 F.3d 1153, 1159-61 (10th Cir. 2003), the defendant, a sheriff's deputy in uniform who carried his service firearm, accompanied and protected his wife's transportation of methamphetamine. Radcliff challenged his conviction for using or carrying his service firearm during and in relation to a drug trafficking crime, in violation of § 924(c)(1). *Id.* at 1157-61. Specifically, the court addressed the issue of "whether a defendant who carries a firearm as part of his law enforcement uniform and commits a crime while so attired, carries the firearm 'in relation to' that crime." *Id.* at 1159. The court concluded that sufficient evidence supported the conviction. *Id.* at 159-60.

In *United States v. Skinner*, 2005 WL 782811 (W.D.N.Y 2005) (unpublished), one of the police officer defendants, Acosta, was charged with section 242 and section 924(c) violations based on executing search warrants upon the victims' residences, knowing that such warrants were obtained on false information, for the purpose of taking the victims' property. Acosta argued "that even if he was using or carrying a firearm when the search warrants at issue were executed, he was doing so pursuant to his duties as a police officer, and therefore cannot be found guilty of violating § 924(c)." *Id.* The court found this argument unavailing, and quoted the language from the legislative history of section 924(c), discussed above, that an armed police officer who commits a crime is "as deserving of punishment" under section 924(c) as other

violators. *Id.* (quoting S.Rep. No. 98-225). The court explained that: “The legislative history of the 1984 amendments to § 924(c) makes clear Congress’ intent that the statute applied to an armed police officer using or carrying his weapon during and in relation to the commission of a crime of violence” *Id.*²⁰

The Appellants’ Arguments And Complaints Are Without Merit

The Jury Determined That Shooting Aldrete-Davila Was Not Reasonable, Not In Self-Defense, And Constituted Assault With A Dangerous Weapon And Assault With Serious Bodily Injury

In his brief, Compean argues that the instant § 924(c) prosecution concerned a grey area, and without fair warning, based on Defendants’ testimony that the shooting was reasonable, as a result of split-second decision making, and in self-defense, while in the performance of their hazardous duties. The reasonableness of the shooting, however, and whether it was really based on their belated claims of seeing a shiny object in Aldrete-Davila’s hand, were questions that were fully presented to the jury.

²⁰ In *United States v. Ballenger*, 894 F.2d 402 (4th Cir. 1990), 1990 WL 2206 (unpublished), Ballenger, an off-duty police officer, then carrying his badge and gun, assisted someone in the delivery of cocaine by driving a vehicle. Ballenger challenged his section 924(c) conviction on the basis that “he was lawfully in possession of a service revolver at the time of his arrest.” *Id.* The court easily determined that this contention was without merit based on the statutory language and the legislative history, as discussed above, that explained that persons who are licensed to carry firearms, such as law enforcement officers, and abuse that privilege by committing a crime with the weapon, “are as deserving of punishment” as other violators. *Id.* (quoting Senate Report No. 98-225). Thus, the court concluded, “the lawful possession of a firearm is not an impediment to a conviction under Section 924(c).” *Id.*

After evaluating the evidence and the testimony of all of the witnesses, including the Defendants', the jury soundly rejected their claims.

In his argument on this issue, based on his own trial testimony, Compean characterizes his conduct as legitimate and reasonable because "from Compean's perspective, instead of simply continuing his essentially unfettered dash for the border, the suspect made the unusual move of turning back towards him as he lay on the ground with dirt in his face" (Compean's Brief at 34). This argument, however, is based on Compean's story that was rejected by the jury. As discussed in more detail above, Aldrete-Davila (23 R. 107, 110-12) and Agent Juarez (24 R. 175-76) related that Compran took a full swing at Aldrete-Davila and missed. Agent Juarez observed that after Compean swung the shotgun at Aldrete-Davila, he slipped and fell forward into the drainage ditch and that Aldrete-Davila ran around him over the levee (24 R. 176-77; 25 R. 131-32). Although Compean had fallen down, and Aldrete-Davila, who was "very fast," and had run away from him, the heavysset Compean alleged that, with NFL type closing speed, he somehow got up and quickly caught Aldrete-Davila from behind, at which time the altercation, supposedly causing him to be on the ground, took place. Of course, the jury could have rejected this story as, at least, highly implausible on its face. Furthermore, the jury was entitled to believe Aldrete-Davila, who said there was no altercation after the shotgun swinging and that

he simply kept running as the bullets struck the ground. Significantly, Agent Juarez saw no such altercation involving Compean. After seeing Compean swing the shotgun and fall into the ditch, and Aldrete-Davila run away, and after briefly turning around, Agent Juarez heard shots and saw Compean fire his service weapon, make a magazine exchange, and continue firing. In reality, Compean did not catch Aldrete-Davila from behind either before or after firing. His story showed guilty knowledge.

Other Fact-Based Arguments

Relatedly, Compean states that, based on the authorities, an officer has a right to defend himself against apparent danger if he acts upon a reasonable apprehension of danger as it appears to him at the time; and, that the use of deadly force by an officer is not unreasonable when an officer has reason to believe the suspect poses a threat of serious harm to the officer or others (Compean's Brief at 33-35). He also does not believe the jury was instructed on the principles of self-defense (Compean's Brief at 33 n.5). Again, Defendants' allegations of danger and self-defense, not mentioned by them contemporaneously with the incident, but to which they testified, were presented to the jury and rejected. The predicate offenses for the section 924(c) offenses were Counts Two and Three, Assault with a Dangerous Weapon and Assault with Serious Bodily Injury. The jury was instructed as to the assault offenses, *inter alia*: that they must find beyond a reasonable doubt that each defendant "voluntarily

participated” in the commission of the offense “with the intent to violate the law”; that they must find beyond a reasonable doubt that each defendant used their firearms “with the specific intent to do bodily harm” to Aldrete-Davila; that the defendants “offered evidence of having acted in self-defense”; that “[u]se of force is justified when a person reasonably believed that it is necessary for the defense of oneself or another against the immediate use of unlawful force”; and that “[t]he government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense.” Thus, if the jury had believed the Defendants’ allegations of a reasonable response to an apparent threat they would not have been convicted of the predicate offenses or the section 924(c) offenses.²¹

²¹ Compean cites to the 1985 case of *United States v. Abod*, 770 F.2d 1293, 1297 (5th Cir. 1985) (Compean’s Brief at 36), where this Court rejected a claim that a defendant did not receive fair notice of the construction of the use-of-a-counterfeit-credit-card statute, noting that there was no doubt that the transactions constituted offenses and satisfied the monetary jurisdictional requirements, and that “[w]here a defendant embarks on a patently unlawful course of conduct, due process does not require that a statute demark the limits of his offense with algebraic exactitude.” *Id.* The “patently unlawful course of conduct” language, however, has not become a requirement in making a fair warning determination. Nevertheless, in the instant case, as discussed above, based on the jury instructions, the jury found beyond a reasonable doubt that each defendant “voluntarily participated” in the commission of the offense “with the intent to violate the law” and used their firearms “with the specific intent to do bodily harm,” and that defendants did not act in reasonable self-defense. The argument that their offenses were not patently unlawful again stems only from their testimony, which was rejected by the jury.

Comparison To Civil Liability

As support for his argument, Compean contends that it is easier for an officer to get a mandatory 10 year sentence under § 924(c) than it is to be held civilly liable for a shooting (Compean's Brief, 35-36). Compean cites *Tennessee v. Garner*, 471 U.S. 1 (1985), for the proposition that a mistaken belief of justification for a shooting at least impacts liability. The evidence in the instant case, however, did not show a mistaken belief of justification, only a belated, self-serving rationalization that the jury rejected after hearing Defendants' testimony. As discussed above, to find the Defendants guilty of the predicate assault offense, the jury had to find, beyond a reasonable doubt that each defendant "voluntarily participated" in the commission of the offense "with the intent to violate the law," that each defendant discharged his firearm "with the specific intent to do bodily harm," and that the defendant did not act in reasonable self-defense. For the § 924(c) offense, the jury also had to find beyond a reasonable doubt that each defendant discharged a firearm "during and in relation" to that crime. This was a higher standard than finding a deprivation of constitutional rights under color of state law by a preponderance of the evidence under § 1983.

The Rule Of Lenity Is Not Applicable

When there is ambiguity as to the scope of a statute, and where doubts remain, these doubts are resolved in favor of the defendant. *Rewis v. United States*, 401 U.S.

808 (1971). The rule of lenity, however, is not called for in this case. As discussed above, the legislative history and judicial application clearly indicates § 924(c) was meant to apply to officers who use a firearm during and in relation to assault offenses.

Conclusion

As discussed above, Compean's contentions that the legislative history barred application of section 924(c) to on-duty law enforcement officers is without merit as the 1984 amendments to the statute were made with a view to include the rare crimes committed by officers within its scope. Compean's claim that application of section 924(c) to the factual situation of the instant case is anomalous is based on the Defendants' own testimony, which the jury found to be implausible. His claim looks at the evidence in the light most favorable to the rejected theories of innocence.

Compean also makes the contention that application of section 924(c) to law enforcement officers will create absurd results in future cases. Compean asks the question: "Does anyone think for a second that a peace officer should know 924(c) requires him to leave his gun at home?" (Compean's Brief at 36). The legislative history of the amended § 924(c), however, made it clear the case of the armed police officer who commits a crime is "as deserving of punishment" under section 924(c) as other violators. The lawful possession of a firearm is not an impediment to a conviction under § 924(c). There is no unwarranted "chilling effect" to officers

knowing that if they use a firearm by discharging it during and in relation to criminal assaults or other crimes of violence, they will be prosecuted. Application of § 924(c) to law enforcement officers will not detrimentally affect their ability to perform their job. Based on the required showing to establish the elements of the criminal offenses, it is that severely unjustified scenarios for use of force that will be found to be criminal. The “chilling effect” on law enforcement use of force that Appellant invokes has not and will not come to fruition.

The § 924(c) statute has terms that are not so vague that individuals of common intelligence must necessarily guess at their meaning and differ as to their application. It applies only to conduct clearly covered.²² There was no fair warning due process violation in applying the statute to law enforcement officers who use a firearm by discharging it during and in relation to criminal assaults.²³ This prosecution was not a novel construction of § 924(c). There was no constitutional fair warning violation. There was no error, much less a plain or obvious error.

²² See *United States v. Hoch*, 837 F.Supp. 542, 545 (W.D.N.Y. 1993) (“the 1984 amendments to § 924(c) make it explicit that conduct which is proscribed by the statute” and a “[p]lain reading of the statute makes this clear”).

²³ Although there was no fair warning due process violation here, additionally, as this Court has observed, the “fair notice” requirement cannot be used as a shield “by one who is already bent on serious wrongdoing.” See *United States v. Griffin*, 589 F.2d 200, 207 (5th Cir. 1979) (citing *United States v. Ragen*, 314 U.S. 513, 524 (1942)). At the very least, Defendants knew that they were not to use their service firearms to commit assaults. See *United States v. Brewer*, 835 F.2d 550, 553 (5th Cir. 1987) (no due process fair notice violation of use of unauthorized access device, observing that defendant had to know conduct was wrongful).

Amicus' Arguments

The amicus brief of the Washington Legal Foundation reiterates many of Appellant Compean's arguments. The amicus quotes extensively from the legislative history of the 1968 Act (WLF Brief at 8-12), however, as discussed above, the 1984 amendments and legislative history make it clear that the statute was to apply to officers. Just as with Appellant Compean, the amicus views the evidence in the light most favorable to the Defendants rather than the light most favorable to the jury's verdicts, infecting its analysis. The amicus brief posits dire results from the fact that the instant Defendants were convicted of a § 242 offense, and the application of *Williams*, 343 F.3d at 434, a case holding that a § 242 offense may be a predicate crime of violence for a § 924(c) conviction (WLF Brief at 15). The amicus argues that: "Therefore, if the government's application of § 924(c) each time they attempt to capture or hold a fleeing criminal even if they do not draw or discharge their firearm" (Brief at 15). The instant case produces no such circumstances. This Court's holding in *Williams* was in line with other circuits. And in the instant case, the predicate offenses for the § 924(c) convictions were assault offenses not the civil rights violations. If officers use their firearms during and in relation to their duties, and avoid using them by discharging their service firearms during and in relation to committing criminal assaults, they run no risk under the precedent of this case.

IV. THE TEN YEAR MANDATORY MINIMUM SENTENCE REQUIRED BY SECTION 924(c) WAS NOT A PLAIN-ERROR VIOLATION OF THE EQUAL PROTECTION CLAUSE

(Responsive to **Ramos’** Brief, **Issue 4**, 46;
Compean’s Brief, **Issue Three**, 40-41).

Standard Of Review

Constitutional challenges raised for the first time on appeal are reviewable for plain error only. *Bourgeois*, 423 F.3d at 506.

Standards Of Analysis

To sustain an equal protection challenge, the challenging party must “negative any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Additionally, “legislative solutions must be respected . . . if some legitimate state interest is advanced.” *McGinnis v. Royster*, 410 U.S. 263, 276 (1973).

There Was No Plain Error

Appellant Compean’s claim on this issue also stems from his reliance on the original legislative intent behind section 924(c), and ignores the 1984 amendments. As discussed above, courts have applied 924(c) to law enforcement officers who commit crimes of violence and drug trafficking crimes while on duty. The legislative history and judicial application of 924(c) leave no doubt that the statute was intended

to apply to crimes committed by law enforcement officers while on duty. Appellants have failed to carry their burden of negating any “reasonably conceivable state of facts that could provide a rational basis for the classification.” *Garret*, 531 U.S. at 367. The “rational basis” test is satisfied and the statute was applied constitutionally. There was no error or plain error.

**V. THE JURY INSTRUCTIONS AS TO COUNTS 11 & 12,
THE CIVIL RIGHTS CHARGES
DID NOT CONSTITUTE PLAIN ERROR**

(Responsive to **Ramos’** Brief, **Issue 5**, 46-59;
Compean’s Brief, **Issues Four**, 42-46, and **Five** 46-52).

Standard Of Review

As they acknowledge (Ramos’ Brief at 47) (Compean’s Brief at 42), Appellants failed to object to the jury instructions for Counts 11 & 12 (the section 242 charges) on the grounds they assert on appeal. Therefore, they have the burden of showing: (1) an error, (2) that is plain or obvious, (3) that affects a defendant’s substantial rights, and (4) that affects the fairness and integrity of the district court proceedings so that an appellate court should use its discretion to recognize the error. *Olano*, at 732-35.

Standards Of Analysis

As explained by the court in *United States v. Hook*, 781 F.2d 1166, 1172-73 (6th Cir. 1986), an improper jury instruction will rarely justify reversal of a criminal conviction when no objection has been made at trial, “and an omitted or incomplete

instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law” (citing *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977)).

Plain error only occurs when the jury instructions, viewed as a whole, were so clearly erroneous as to result in the likelihood of a grave miscarriage of justice. *United States v. Martin*, 332 F.3d 827, 834 (5th Cir. 2003).

Background: The Charge And Instructions

Count 12 charged a Deprivation of Rights Under Color of Law, in violation of 18 U.S.C. section 242. This section provides, in relevant part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of rights privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens . . . and if bodily injury results from the acts committed in violation of this section, or if such acts include the use, attempted use, or threatened use of a dangerous weapon . . . shall be fined under this title or imprisoned not more than ten years, or both . . . [and if from the acts committed in violation of this section included] an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both . . .

The jury instructions as to Counts 11 and 12 exactly tracked the relevant Fifth Circuit Pattern Jury Instructions (Criminal), 2.18 “Deprivation Of Civil Rights” (West 2001) (at pages 105-06).

The instructions as to Counts 11 & 12 provided (2 S.R. 435-41), in relevant part:

For you to find the defendant guilty of this crime, you must be convinced that the government proved each of the following beyond a reasonable doubt:

First: That the defendant deprived O.A-D. [Aldrete-Davila] of a right secured by the Constitution or laws of the United States by committing one or more of the acts charged in the indictment;

Second: That the defendant acted willfully, that is, that the defendant committed such act or acts with a bad purpose or evil motive, intending to deprive O.A-D. of that right:

Third: That the defendant acted under color of law; and

Fourth: That the defendant’s conduct resulted in bodily injury to the victim; that the defendant used, attempted to use or threatened to use a dangerous weapon; or that the defendant attempted to kill the victim.

The jury instructions further explained that the indictment had charged “that the defendant deprived the victim of the following right: right to be free from the use of unreasonable force.”

The jury was instructed: “Whether or not the force used by a law enforcement officer was unreasonable is an issue to be determined by you in the light of all the

surrounding circumstances, on the basis of that degree of force a reasonable and prudent officer would have applied under circumstances in this case.”

The jury was further instructed:

The term “unreasonable force” means force that has no legitimate law enforcement purpose. A law enforcement official is justified in using only that amount of force which he reasonably believes to be necessary to hold a person who has been arrested in custody, prevent escape or defend himself or another from bodily harm. He may not, however, use more force than is reasonably necessary to accomplish these purposes.

In this case, if you find beyond a reasonable doubt that the defendant used force against O.A-D., then you must determine whether the force he used was reasonable or unreasonable. In other words, you must determine whether the defendant used an amount of force reasonably necessary to hold O.A-D. in custody, prevent escape or defend himself or another against bodily harm, or whether, instead, the defendant used more force than reasonably necessary to accomplish these purposes. In making that determination, you should consider all the circumstances of the case from the point of view of an ordinary and reasonable officer on the scene. . . .

**The Use Of The Defining Phrase For “Willfully,”
“With Bad Purpose Or Evil Motive,”
Comported With This Court’s Pattern Instructions
And Was Approved For A Section 242 Charge In *Snipe***

Ramos’ first of four asserted “plain errors” in the instructions for the civil rights counts is: “(1) that the definition of willfully was clearly contrary to Supreme Court precedent” (Ramos’ Brief at 49). Ramos contends that the words of the second

element of the charge, explaining that the jury must find defendant acted “willfully” - “with bad purpose or evil motive” - was erroneous (Ramos’ Brief at 55). This first claim is without merit, as the instructions given by the district court to the jury on the section 242 charge as to the definition of “willfully” tracked this Court’s pattern instructions for section 242 offenses, and the challenged language had been specifically approved by this Court’s authority.

The civil rights statute that was the subject of Counts 11 & 12, proscribes “willfully” subjecting any person “to the deprivation of any rights” 18 U.S.C. § 242. This Circuit’s pattern instructions for the second element of a § 242 violation provide that the jury must find: “That the defendant acted **willfully**, that is, that the defendant committed such act or acts **with a bad purpose or evil motive**, intending to deprive the victim of [a right secured by the Constitution or laws of the United States].” Fifth Circuit Pattern Jury Instructions (Criminal) § 2.18 (2001) (emphasis added).

The actual jury instructions in the instant case charged that, for the second element of Counts Eleven and Twelve, the jury had to find, beyond a reasonable doubt, that the Appellant acted “**willfully**,” that is, that he acted “**with a bad purpose or evil motive**,” intending to deprive the victim of a right secured by the Constitution or laws of the United States (3 R. 465, 468) (emphasis added).

Thus, in the instant case, the district court's instructions as to the willfully element exactly tracked this Court's pattern instructions. In *United States v. Tomblin*, 46 F.3d 1369, 1380 n.16 (5th Cir. 1995), this Court reiterated that while the pattern instructions are not conclusively correct, this Court encourages their use and considers them a useful guide in fashioning accurate and consistent instructions. It was not plain error to use the pattern instruction without objection by the Defendants.²⁴

Furthermore, this Court has specifically approved the challenged instruction. In *United States v. Sipe*, 388 F.3d 471, 279-80 (5th Cir. 2004), this Court explained that the district court had properly instructed the jury on the elements of a § 242 violation when it “described willful conduct as conduct engaged in ‘with a bad purpose or evil motive to disobey or disregard the law.’”²⁵ As noted above, in the instant case the district court used the same “bad purpose or evil motive.” It was not plain error to use the pattern instruction and language approved by this Court without objection by the Defendants.

²⁴ Cf. *United States v. Zaia*, 35 F.3d 567 (6th Cir. 1994) (unpublished), 1994 WL 478707 (“It would be anomalous for us to find one of our own pattern instructions to be erroneous; this is especially true when the test here is whether the inadequacy of the instruction rises to the level of plain error, i.e., whether the error is ‘clear’ or ‘obvious’ [citing *Olano*]”).

²⁵ See also *United States v. Ruiz*, 213 Fed.Appx. 345 (5th Cir. 2007) (unpublished) (district court's use of pattern instruction as to willfulness element, including “bad purpose or evil motive language,” was “well within its latitude to instruct the jury”).

Additionally, the pattern instruction notes the Supreme Court case of *Screws v. United States*, 325 U.S. 91 (1945), analyzing the predecessor statute of section 242. In *Screws*, the Court explained that when “willfully” is used in a criminal statute, “it generally means an act done with a bad purpose.” *Id.* at 101 (citations omitted). The Court further explained that the “willfully” element was added to the statute in order “to make it applicable only where the requisite bad purpose was present” *Id.* at 103. Thus, the “bad purpose” definition of willfully in interpreting the criminal civil rights violation has a long lineage, and using it was not plain error here.

Ramos’ complaint stems from *Graham v. Connor*, an excessive force case under section 1983, where the Supreme Court held that in Fourth Amendment contexts, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officer’s actions were “objectively reasonable,” without taking into account the defendant’s underlying intent or motivation. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Appellant Ramos takes the *Graham* Court’s language rejecting the intent/motive analysis in terms of the “reasonableness” inquiry to argue that the intent/motive analysis in terms of the “willfulness” inquiry also should be rejected. However, the two inquiries are inapposite.²⁶ As discussed above,

²⁶ See *Williams*, 343 F.3d at 435, explaining, in an evidentiary context, that the reasonableness of the use of force is not a mental state, and “the requisite mental state of any § 242 offense is willfulness.”

the pattern jury instructions for the Fifth Circuit, and the Fifth Circuit authority, provide that jury instructions for “willful” acts regarding deprivation of civil rights under 18 U.S.C. § 242 rightly charge the jury that “willfully” means the Defendant or Appellant acted with a “bad purpose or evil motive.” This segment of the charge does not conflict with the holding of the *Graham* Court regarding the parameters of the “reasonableness” inquiry.

**Inclusion Of The Statutory Element Of Willfully
In The Charge Necessarily Implied “Intentionally”**

Seemingly as part of this first complaint, Ramos asserts that omission of the word “knowingly” from the jury charge did not mirror the indictment language of “knowingly and willfully” (Ramos Brief at 51). While the statute requires only that the deprivation of rights be done “willfully,” 18 U.S.C. § 242, the indictment charged “knowingly and willfully.” The addition of “knowingly” in the indictment was surplusage. The jury instruction correctly charged the statutory element of “willfully.” As discussed above, the charge included the pattern instruction that “willfully” means the Defendant acted with a “bad purpose or evil motive.” To act willfully and purposefully is to act intentionally. Therefore, the concept of “intentionally” also was implicitly included in the jury charge.

Historically, a usual definition of “willfully” is that “the act was committed voluntarily and purposely, with the specific intent to do something the law forbids;

that is to say, with bad purpose either to disobey or disregard the law.” Fifth Circuit Pattern Jury Instructions (Criminal) § 1.38 (2001). Again, something done willfully includes at least the idea of intentionally.²⁷ There was no error or plain error.

**Omission Of The Descriptive Phrase For Willfulness From *Screws*,
“In Open Defiance Or In Reckless Disregard Of A Constitutional
Requirement Which Has Been Made Specific And Definite,”
Was Not Plain Error As Willfulness Was Properly Defined**

Also as part of Appellant Ramos’ assertion that the definition of “willfully” as given in the instant case (and as set forth in the pattern instruction) was plain error, Ramos points to the sufficiency-of-evidence discussion in *United States v. Brugman*, 364 F.3d 613 (5th Cir. 2004), which, quoting from *Screws* stated that willfulness “requires that the jury find a person acted in open defiance or in reckless disregard for a specific and definite constitutional requirement.” *Id.* (quoting *Screws*, 325 U.S. at 105). *Brugman*, however, did not purport to analyze the jury instructions for a section 242 offense or change the law concerning appropriate jury instructions.

Appellant asserts that the definition of willfulness, as described in *Brugman*, was required to have been charged to the jury verbatim in the instant case. However,

²⁷ In *United States v. Murdock*, 290 U.S. 389 (1933), the Supreme Court explained that: the word willfully “often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with bad purpose.” *Id.* at 394 (citation omitted). Therefore, in the instant case, by instructing that the act had to be done “willfully” that concept included, at least, the idea of intentionality.

the district court took care to define “willfulness” pursuant to the pattern jury instructions for the Fifth Circuit and other Fifth Circuit cases. Because *Brugman* did not set a new standard for the meaning of the word “willfulness,” the district court’s failure to adopt its language in this case is not plain or obvious error.²⁸

The Court’s Definition Of Unreasonable Force Was Not Plain Error

Ramos’ next plain-error complaint is “(2) the definition of ‘unreasonable force’ was wrong as it referred not to the ‘use of force’ in the context of a seizure/arrest (a Fourth Amendment standard), but to the ‘use of force’ in the context of a detainee (a Due Process standard), thus constructively amending the indictment via the charge” (Ramos’ Brief at 49-50). This complaint is entirely without merit. As noted above, the instructions explained that the indictment had charged “that the defendant deprived the victim of the following right: right to be free from the use of unreasonable force.” The instructions further explained that the term “unreasonable force” means force that has no legitimate law enforcement purpose.” Thus, the jury’s focus was on the force used to seize Aldrete-Davila. This was not a “wrong” standard.

²⁸ Furthermore, as explained in *Screws*, a violator of the civil rights statute “either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional right or other federal right.” *Screws*, 325 U.S. at 104. In the instant case, the jury charge required finding beyond a reasonable doubt that Defendants intended to deprive Aldrete-Davila of a right secured by the Constitution or laws of the United States (2 S.R. 465, 468).

Additionally the explanation that “a law enforcement official is justified in using only that amount of force which he reasonably believes to be necessary to hold a person who has been arrested in custody, prevent escape or defend himself or another from bodily harm” was not erroneous. As defense counsel said a multitude of times, the central issue of the entire trial was the reasonability of the agents use of force if they had perceived a threat from the alleged “shiny object” or “shiny black object.” The portion of the challenged instruction as to the force necessary to “defend himself or another from bodily harm” was appropriate and relevant in the instant case. Again, “the charge must be read as a whole,” and the other paragraphs of the charge set forth an appropriate reasonableness standard.²⁹ There was no “constructive amendment” of the indictment.³⁰ Ramos has shown no error, much less plain error.

²⁹ The district court instructed the jury that a conviction can only rest on a finding beyond reasonable doubt that the officer used force against Aldrete-Davila, and that Defendant “used more force than reasonably necessary to accomplish those purposes,” one of which was to protect himself or another against bodily harm.” In *United States v. Sipe*, 388 F.3d 471, 480 (5th Cir. 2004), one of the approved findings was that force used was “greater than necessary than the force which would have been reasonably necessary under the circumstances to an ordinary and reasonable officer in the same circumstances.

³⁰ A constructive amendment of the indictment occurs “when the jury is permitted to convict the Defendant upon a factual basis that modifies an essential element of the offense charged [in the indictment].” See *United States v. Reasor*, 418 F.3d 466, 474 (5th Cir. 2005). Appellants have not demonstrated any modification of an essential element.

The Jury Had To Find The Elements Beyond A Reasonable Doubt

In a claim related to the second claim, Ramos third plain-error argument is that the charge “failed to include a requirement that the jury find beyond a reasonable doubt that the force used to seize/attempt to arrest Davila was unreasonable before it could convict” (Ramos’ Brief at 50). This argument is also without merit. The jury charge set forth all of the elements of a section 242 offense, as set forth by the Supreme Court and this circuit, and it required the jury to find each element beyond a reasonable doubt.

Furthermore, as noted above, the instructions required in the first element that the jury had to find beyond a reasonable doubt that the Defendant deprived Aldrete-Davila of a Constitutional right by “committing one or more acts charged in the indictment.” The instructions required in the second element that the jury had to find beyond a reasonable doubt that the Defendant acted willfully and committed such acts “intending to deprive” Aldrete-Davila of that right. And that the indictment charged that the Defendant “deprived” Aldrete-Davila of the “right to be free from the use of unreasonable force.” Thus, the jury had to find beyond a reasonable doubt that the Defendant willfully committed acts that deprived Aldrete-Davila of the right to be free from the use of unreasonable force. Therefore, by necessity the force had to be unreasonable. There was no error, much less plain error.

The Burden Of Proof Was Not Misplaced

Appellants assert that the charge misplaced the burden of proof in the instructions to the jury as to the determination of whether the force used by Ramos was reasonable or unreasonable (Ramos' Brief at 56; Compean's Brief at 42)). This assertion ignores the instructions as a whole. Specifically this assertion ignores the district court's instructions that to convict a defendant of this crime the jury must find, beyond a reasonable doubt, that the Defendant willfully committed an act, intending to deprive Aldrete-Davila of the right "to be free from the use of unreasonable force" (2 SR 468-69). The charge properly placed the burden of proof as to use of unreasonable force on the government. Appellants have demonstrated no error or plain error. *See United States v. Thomas*, 768 F.2d 611, 616 (5th Cir. 1985) (assertion that particular instruction misplaced burden of proof without merit because "the charge must be read as a whole" and other paragraphs the charge as well as general instructions set forth beyond-a-reasonable-doubt standard).

Ramos also asserts that the jury was not instructed that the reasonableness inquiry must be conducted "without the 20/20 vision of hindsight." The jury, however was instructed that: "In making that determination [of the reasonable use of force], you should consider all the circumstances of the case from the point of view of an ordinary and reasonable officer on the scene." Thus, the jury was instructed to

consider the specific circumstances which the Defendant’s counsel argued in closing. Appellants have demonstrated no error or plain error.³¹

The Instruction To Seek The Truth Was Not Plain Error

Finally, both Appellants claim that the jury instruction to “seek the truth . . . was plain error (Ramos’ Brief at 57; Compean’s Brief at 44). This instruction was included , a single time in the entire instructions, under the next-to-last section of “Duty To Deliberate” (2 SR 474). This instruction provided, as to the part now contested:

Remember at all times, you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

In *United States v. Winn*, 948 F.2d 145, 159-60 (5th Cir. 1991), just as in the instant case, the Appellant argued that the “seek the truth” instruction constituted plain error. This Court held, however, that when the government’s burden of proof of

³¹ Relatedly, Ramos claims that the jury should have been instructed that he had the right to use reasonable force in order to arrest the victim (Ramos’ Brief at 53). As noted above, the district court instructed the jury that they were to determine whether the Defendant used unreasonable force, “on the basis of that degree of force a reasonable and prudent officer would have applied under the circumstances of the case” (2 SR 469). This indicates that there is a permissible amount of force that an officer, acting under color of the law, may use when making a lawful arrest. The court went on in Count Twelve to say “a law enforcement official is justified in using only that amount of force which he reasonably believes to be necessary to hold a person who has been arrested in custody”(2 SR 469). Again, this informs the jury that an officer may use reasonable force when making a lawful arrest. Given the jury instructions as a whole, the jury was informed that the use of reasonable force was necessarily appropriate.

“beyond a reasonable doubt” had been reiterated in the jury instructions no less than 21 times, one instruction “to seek the truth” from the evidence presented did not create the necessary “egregious error” to merit plain-error relief. *Id.* at 160. In fact, the Court explained that: “Accordingly, we affirm as to the Court’s comment “seek the truth” which in the context herein relates to issues of credibility, and considering the jury instructions as a whole does not begin to rise to the level of ‘plain error.’” *Id.*

A few years later, this Court examined the “seek the truth” charge where the issue had been preserved by an objection and held, under the standard of plenary review, that “the charge is not erroneous” (although, “in an abundance of caution,” courts “may wish to delete it from their instructions”). *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994). A key circumstance in the Court’s holding was that, just as in the instant case (*see* 2 S.R. 430), “the seek the truth” instruction was not embedded in the explanation of proof beyond a reasonable doubt. *Id.*

In the instant case, the jury was initially instructed: “You are to be guided solely by the evidence, and the question you must ask is: “Has the government proven the guilt of the defendant beyond a reasonable doubt?” (2 SR 429 (further discussing reasonable doubt in this section). In the next section, “Presumption Of Innocence, Burden Of Proof, Reasonable Doubt,” the necessity of the evidence proving guilt

“beyond a reasonable doubt” is stated seven times (and “the seek the truth instruction is not mentioned) (2 SR 430). In the next section, “Evidence - Inferences Direct And Circumstantial,” it was again emphasized: “Only if you are convinced of defendant’s guilt, based on all the evidence, beyond a reasonable doubt, can he be convicted” (2 SR 432). In the remainder of the instructions the “beyond a reasonable standard” is stated at least 26 more times.

In the instant case, based on the multitude of times the government’s burden of proof of “beyond a reasonable doubt” was emphasized and explained in the charge, the fact that the section explaining the burden of proof and “proof beyond a reasonable doubt” was correct (and did not include the challenged section), and considering the jury instructions as a whole, the instruction in the deliberation section to “seek the truth,” was not error, and certainly not plain error. *Gonzalez-Balderas*, 11 F.3d at 1223; *Winn*, 948 F.2d at 159-60.

Conclusion

Appellants have shown no error or plain error as to the jury instructions. The instructions as given did not seriously impair their ability to present a defense. They certainly have not shown any grave miscarriage of justice.

**VI. THE EVIDENCE WAS CONSTITUTIONALLY SUFFICIENT
AS TO THE ASSAULT AND CIVIL RIGHTS CONVICTIONS;**

THERE WAS NO PLAIN ERROR ON THE INSTRUCTIONS

(Responsive to Ramos' Brief, **Issue 6**, 59-66 (sufficiency as to Count 12);
Responsive to Ramos' Brief, **Issue 11**, 87-88 (sufficiency as to Counts 2 & 3);
Responsive to Ramos' Brief, **Issue 12**, 88-89;

Responsive to **Compean's** Brief, **Issue Nine**, 55 (sufficiency as to Cts. 2, 3 & 5)
Responsive to **Compean's** Brief, **Issue Five**

General Standards In Reviewing A Sufficiency Claim

“In reviewing an appeal based on insufficient evidence, the standard is whether any reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt.” *United States v. Jaramillo*, 42 F.3d 920, 922-23 (5th Cir. 1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The evidence need not exclude every reasonable hypothesis of innocence. *Id.* at 923 (citation omitted). “All reasonable inferences must be drawn, and all credibility determinations made, in the light most favorable to the verdict.” *United States v. Villarreal*, 324 F.3d 319, 322 (5th Cir. 2003). It is the jury's responsibility “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson*, 443 U.S. at 319. Thus, the relevant inquiry is not “whether the trier of fact made the correct guilt or innocence

determination, but rather whether it made a rational decision to convict or acquit.”

Herrera v. Collins, 506 U.S. 390, 420 (1993); *Jaramillo*, 42 F.3d. at 923.

Sufficiency As To Counts Two And Three, The Assault Counts
Sufficiency As To Counts Eleven And Twelve, The Civil Rights Counts

(Responsive to Ramos’ Brief, Issue 6, 59-66);
(Responsive to Ramos’ Brief, Issue 11, 87-88);
Responsive to Compean’s Brief, Issue Nine, 55)

The Charged Offenses

Counts Two And Three

In Count Two, Ramos and Compean were charged with, on February 17, 2005, at a place within the special maritime and territorial jurisdiction of the United States, aided and abetted by each other, assaulting Aldrete-Davila with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. sections 7(3), 113(a)(3) and 2 (Count Two) and assaulting Aldrete-Davila resulting in serious bodily injury, by shooting him with a firearm, in violation of 18 U.S.C. sections 7(3), 113(a)(6) and 2 (Count Three).

The Count Twelve civil rights offense was that Ramos violated section 242 by acting under color of law to willfully deprive Aldrete-Davila of a right secured by the Constitution and laws of the United States, the right to be free from the use of unreasonable force (2 S.R. 469).

**There Was Plenty Of Evidence Supporting
The Assault Violations And Ramos' Civil Rights Violation³²**

The Evidence Showed That Ramos And Compean Shot
At Aldrete-Davila As He Was Running Away

There was plenty of evidence supporting the charged offenses. Although Ramos and Compean have attempted to reduce this case to a choice between the factual accounts of drug-trafficker Aldrete-Davila and their accounts, there was far more evidence against them. The stories of Ramos and Compean directly contradict the eyewitness account of Agent Juarez, and the jury reasonably could have found the stories told by Ramos and Compean to be inconsistent and highly implausible. Furthermore, although Ramos and Compean contend that this was a “good shoot,” their failure to report it belies this contention. Their first mention of a “shiny object” in Aldrete-Davila’s hand does not occur until weeks after the shooting, when Defendants are being investigated. Compean even destroyed evidence as to his shooting, and asked another agent to also find and dispose of his shell casings.

As discussed in more detail above, after agreeing to deliver a van full of drugs to a location inside the United States, Aldrete-Davila was driving the large marijuana shipment into the border town of Fabens, Texas. When Aldrete-Davila noticed that

³² Compean does not appear to challenge the sufficiency of the evidence for his Count Eleven civil rights conviction.

he was being followed by Border Patrol vehicles, he fled back toward the border, precipitating a high-speed chase. Upon reaching the drainage ditch, Aldrete-Davila jumped out of the van and went into the ditch. Agent Compean, holding a shotgun, was on the south side of the ditch, in front of Aldrete-Davila, blocking his way. Agent Ramos, on the north side of the ditch, bracketed Aldrete-Davila.

Aldrete-Davila testified that when he saw Compean pointing the shotgun at him, “I put my hands up” (23 R. 101, 105). Aldrete-Davila twice said to Compean: “Take it easy man. Don’t hit me” (23 R. 106). Aldrete-Davila, showing his palms to the agent, had nothing in his hands (23 R. 106-07).

Aldrete-Davila described to the jury what happened next: “He [the agent] gets closer to me. He turns the rifle over. He tries to hit me with the butt of the rifle” (23 R. 107). The agent took a full swing (23 R. 110). Aldrete-Davila ran away to the right, over the levee road and into the vega (23 R. 110-12). As Aldrete-Davila ran away, he never slowed down (23 R. 112).

Even more significantly, Aldrete-Davila’s attempted “surrender,” Compean’s “swing” at Aldrete-Davila with a shotgun, and Compean’s fall into the ditch were observed by Agent Oscar Juarez. Agent Juarez testified that as he walked toward the ditch, he noticed “the driver of the van” was in the ditch, on the north side, almost

across from the van (24 R. 172-73). Agent Juarez testified that he did not “pull” his weapon because “I felt it was no threat” (24 R. 173).

Agent Juarez observed Compean, on the south side of the ditch, move in front of Aldrete-Davila’s path and raise the butt of his weapon (24 R. 174; 25 R. 137). According to Agent Juarez, Compean took a “full swing” with the shotgun at the driver of the van (24 R. 175). Agent Juarez explained that Aldrete-Davila’s hands were raised in the air (24 R. 175; 25 R. 120), and he believed he was trying to “surrender” (25 R. 87). Agent Juarez saw nothing in Aldrete-Davila’s hands (*id.*). No agent yelled “cover” or otherwise indicated that the subject had a weapon (24 R. 176). Agent Juarez stated that the driver “was quick, he dodged the shotgun” (25 R. 13, 86). Compean fell forward (25 R. 131-32). Agent Juarez explained that when Compean “attempted to hit” Aldrete-Davila, Compean was on the edge of the ditch, and “that’s when he lost [his] balance,” hit the ground and dropped the shotgun (24 R. 177). Agent Juarez demonstrated for the jury “how he fell” (*id.*). Then, Aldrete-Davila fled around Compean, toward and over the levee (24 R. 176; 25 R. 15). After Compean fell, Agent Juarez observed him get up and run after Aldrete-Davila over the levee (24 R. 177-78; 25 R. 94). He never saw Aldrete-Davila “touch” Compean (24 R. 178).

Of even more significance is Agent Juarez' description of Compean's shooting his service weapon. Compean's testimony was completely different from Agent Juarez' eyewitness account.

Agent Juarez testified that after Aldrete-Davila fled around Compean, Juarez walked back toward his unit, and "that's when I hear the shots" (25 R. 15, 123). From Agent Juarez' vantage point, which was on the road on the north side of, and adjacent to, the ditch or canal, he saw Compean to the south of the canal and the levee road, about "halfway down from the levee" (25 R. 15-18). Agent Juarez could see Compean's body from the "waist up" (25 R. 18, 25). Compean was shooting south "towards Mexico" (25 R. 25).

Agent Juarez explained that when he turned around upon hearing the shots, he saw Compean in a "fire stance position," which he demonstrated for the jury (25 R. 18-19). Agent Juarez described watching Compean firing his weapon, making a "magazine exchange, and firing his weapon more times (25 R. 19, 23, 111).

After Compean finished discharging his weapon, he proceeded south, into the vega, where Agent Juarez could no longer see him (25 R. 19, 23, 111). Compean fired at least eleven rounds before the magazine exchange (25 R. 19-20).

Agent Juarez testified that when he heard the shots, "I just stood there" (25 R. 21). Agent Juarez did not draw his own weapon "[b]ecause I didn't feel there was a

threat,” as the driver was “almost in Mexico” (25 R. 22). Agent Juarez never heard Agent Compean or anyone else say “stop” as that person was fleeing (25 R. 22).

There Was Nothing In Aldrete-Davila’s Hands

Aldrete-Davila testified that as he was running, about one-half way through the vega, heading for the river, he realized he was being shot at, based on “puffs” of dust, “bullets that were picking up dust” (23 R. 113). He explained to the jury that when he “began to see the bullets in the sand” as he was running, he was “just covering my head” (23 R. 115-16, 199). He was looking for a place to “cross to Mexico” (23 R. 116-17). As Aldrete-Davila fell, he felt as if he had been shot, in his “left buttock”; he touched the wound with his hand, and “saw the blood” (23 R. 115, 122).

Aldrete-Davila testified that he was not wearing a watch or any jewelry on February 17 (23 R. 132). He had nothing “shiny in his hands” (23 R. 132). The only cell phone he had was given to him by the drug-trafficking leaders for the purpose of helping his drug transportation, and it was left in the truck (23 R. 197). He did not have a cell phone of his own (23 R. 198). He never looked behind him while he was running away (23 R. 200).

Compean claimed that although Aldrete-Davila “moved fast” in getting around him, and ran away from him to Aldrete-Davila’s right, Compean was able to get up, throw the shotgun down, catch Aldrete-Davila, jump on his back and succeed in

“tackling him,” whereupon they tumbled down the slope of the levee (29 R. 156, 159-60). Compean testified that Aldrete-Davila then threw dirt in his face (29 R. 160-61).

Compean asserted that as Aldrete-Davila ran away toward the levee, he turned around and was pointing something at him (29 R. 161). He said it was something “shiny black”; both shiny and black (29 R. 162). Compean testified that he drew his weapon, and firing from one knee, shot 10 to 11 rounds (29 R. 162-63). He claimed he did not make a magazine exchange and fire more rounds, but that he looked in his belt for another magazine (29 R. 163-64). He said did not see Ramos pass by his position (29 R. 163-64). As he stood up to re-load, he said he heard another shot (29 R. 163). He said he did not see Ramos fire.

In his testimony, Ramos said that he heard shots while in the ditch; in fact, he did not hear any further shooting after he emerged from the ditch (28 R. 206; 29 R. 62). Ramos testified that he saw Ramos on the “floor” or ground, and thinking that Compean might have been shot, Ramos ran past him and yelled for Aldrete-Davila to stop (28 R. 207; 29 R. 68). According to Ramos, as Aldrete-Davila was running away toward the river, Aldrete-Davila turned and Ramos saw a “shiny object” in his left hand (28 R. 208-09; 29 R. 72). Ramos discharged one shot at Aldrete-Davila (*id.*).

Thus, although Ramos and Compean shot at different times, and each agent claimed not to see the other agent shoot, they both asserted that they saw Aldrete-Davila, despite running away, turn toward them, with a shiny object in his hand. Aldrete-Davila's alleged second turn towards Ramos was apparently made even though he received a hail of gunfire from Compean after the first time he allegedly turned around.

The jury properly rejected the stories told by Ramos and Compean. One of the great defects in their versions is that they waited until being investigated before ever mentioning to anyone the alleged "shiny" object.³³

Additionally, it was a gray day and yet they saw a shiny object. Aldrete-Davila is right handed, yet Defendants said they saw the object in his left hand. The object is "shiny," but Compean also thinks it was "black."

Further, Compean's post arrest statement never said that Aldrete-Davila pointed the "shiny object" at him (28 R. 34).

Finally, the jury could have found that Defendants' stories as to the shiny object made no sense. When first confronted, Aldrete-Davila raised his hands; he had nothing in his hands. Yet, according to Defendants' stories, he chose to retrieve this

³³ The "failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. . . ." *United States v. Leach*, 613 F.2d 1295, 1305 (5th Cir. 1980).

shiny object as he was running away. And, as noted above, to make their stories fit, Aldrete-Davila must have turned toward the agents with the “shiny object” not once but twice, and the second time, for Ramos, even after receiving Compean’s fusillade of 14 shots.

Compean’s Claims Were Contrary To The Evidence

The statements of Compean constituted some of the most powerful evidence in this case, as they were illogical, incredible, and completely contrary to the evidence. Ramos’ story incorporated Compean’s version in large measure.

As discussed above, not only Aldrete-Davila (23 R. 107, 110-12) but also Agent Juarez (24 R. 175-76) testified unambiguously that Compean took a full swing at Aldrete-Davila. Yet Compean’s characterization was that he just tried to push Aldrete-Davila. Agent Juarez testified that he saw Compean fall into the top part of the ditch. On the other hand, Compean said that he just went to one knee. All agreed that Aldrete-Davila ran away around Compean.

Although Compean had fallen down face forward, and Aldrete-Davila, who was “very fast,” and had run away from him, the heavysset Compean (30 R. 82; G.Ex. 100) (at 5'2" and 180 pounds and carrying additional equipment), alleged that, with what must have been a phenomenal burst of speed, he somehow got up and quickly caught

Aldrete-Davila from behind, at which time the altercation, supposedly causing him to be on the ground, took place.

The jury reasonably could have found, even without consideration of Aldrete-Davila's testimony, that Compean never caught Aldrete-Davila from behind and there was no altercation between Compean and Aldrete-Davila. Instead, as was observed by Agent Juarez, after Aldrete-Davila dodged the shotgun, Compean got up after falling down, pulled out his service handgun, and, shot at the fleeing Aldrete-Davila.

There were many more inconsistencies in Compean's story. Compean claimed at trial that he fired about 11 times, without changing magazines, from a kneeling position. Agent Juarez saw Compean fire many times, change magazines, and continue firing.

Compean said that he picked up his shell casings and threw them into the water in the ditch. He claimed that while talking to Agent Vasquez at the gate, he was reloading ammunition. Agent Vasquez, however, clearly testified that while at the gate he saw Compean holding empty shell casings (2nd S.R. 213-14, 280), and that Compean counted nine of them in front of him (2nd S.R. 214).

Compean testified that he did not ask Agent Vasquez who was returning to the levee to watch Aldrete-Davila's marijuana load, to pick up Compean's shell casings (29 R. 172-73). Yet, Agent Vasquez testified that Compean asked "can you find those

casings for me?” (2nd S.R. 215, 279). Agent Vasquez complied with the request, and after finding five more of the .40 caliber shell casings, he disposed of this evidence for Compean, throwing them into the water, and informing Compean of what he had done (2nd S.R. 217-18, 220-23).

Compean’s destruction of the evidence of his shooting, and asking another to assist him, was strong evidence of his consciousness of guilt, that his shooting was not in response to a threat, and that he had committed an illegal assault.

Compean did not report to his supervisor at the scene that he had fired his weapon (29 R. 168-69). Compean testified that his reason was: “I was afraid he wasn’t going to believe me,” as they did not have a suspect and there was “nobody to, I guess, corroborate what had happened or what had occurred” (*id.*). The jury could have found this explanation also to be evidence of consciousness of guilt.

Ramos’ Claims Were Also Properly
Rejected By The Jury As Implausible

The jury also properly found evidence of consciousness of guilt in Ramos’ claims. Ramos’ story became contorted in trying to conform it with Compean’s story.

As discussed above, there was testimony from Aldrete-Davila and Agent Juarez that Compean swung the shotgun at Aldrete-Davila. There was testimony from Agent Juarez that Compean fell forward into the ditch. Even Agent Compean’s testimony admitted he went down on one knee. All three witnesses, Aldrete-Davila, Agent

Juarez, and Compean testified that after either the swinging or pushing of the shotgun, Aldrete-Davila ran around Compean without touching him. Although Ramos also testified that he saw Aldrete-Davila run around Compean, in his testimony, he denied seeing a Compean swing or push with the shotgun, he denied hearing “hit him,” and he also denied seeing Compean fall down.

Agent Ramos entered the ditch, and, conveniently, he missed witnessing Compean firing all fourteen shots, even after a magazine exchange, and he also missed the alleged tackle and altercation. Although Ramos is a firearms instructor, he said he could not tell that all the firing was from their service handguns.

Next, without repeating the above citations, Agent Juarez saw Compean swing the shotgun at Aldrete-Davila, he saw that Compean fell forward into the ditch, and he saw Aldrete-Davila run away. Agent Juarez described Aldrete-Davila as “fast,” “very fast.” Although he briefly turned his back, Agent Juarez turned around upon hearing shots. Agent Juarez observed Compean firing shots from a standing position. Compean’s story of jumping up and catching Aldrete-Davila from behind, tackling him, and struggling with him cannot be reconciled with Agent Juarez’ testimony. Agent Juarez’ testimony, about Compean’s position when firing, was corroborated by the location in which Agent Vasquez found four of Compean’s expended shell casings, on the north slope of the levee road, and not down in the vega where

Compean said he fired. The jury certainly could believe the testimony of Agent Juarez and Agent Vasquez. The jury could reasonably have found that Compean did not tackle or struggle with Aldrete-Davila either prior to or after Compean fired the fourteen shots.

Thus, Ramos' attempt to conform his story with this claim by Compean reasonably could have been found by the jury to be evidence of consciousness of guilt.

If there was no struggle, and Compean fired from a standing position back where he was placed by Agent Juarez, Ramos could not have seen Compean on the ground.

While Compean missed Aldrete-Davila with all fourteen shots, firearms expert Ramos ran past Compean and fired once, hitting Aldrete-Davila. Ramos' claims that he did not know he hit Aldrete-Davila,³⁴ that he did not see Aldrete-Davila go down, and that he did not see Aldrete-Davila limping across the river (as Compean admitted seeing) also could have been found by the jury, based on all the evidence, as implausible.

Although Ramos had been involved in a shooting previously, calling out routine warnings on his radio that shots had been fired, on this occasion, Ramos did not announce to his fellow agents that shots had been fired.

³⁴ It was stipulated that Ramos' gun fired the bullet removed from Aldrete-Davila.

Although Ramos understood that after a shooting, there would be an investigation, he did not report the shooting. Ramos was asked the reason he did not report the shooting, and he testified: “I just messed up” (29 R. 82).

Although Ramos asserted that he thought someone else would report the shooting, his testimony on cross-examination as to this topic would properly have been found by the jury to be highly suspicious. Ramos asserted that he assumed someone else reported the shooting (29 R. 83). He agreed, however, that if someone else had reported the shooting, his supervisor would have been asking him questions about it, which never happened (29 R. 83).

All of Ramos’ testimony, that he did not see Compean firing, that he came up on Compean while he was on the ground and thought he may have been hit, and, as discussed above, that he saw a shiny object, reasonably could have been found by the jury as implausible.

The jury reasonably could have determined that Compean and Ramos deliberately shot an unarmed man in the back without justification, destroyed evidence to cover up the crimes, and lied about it.

**Ramos’ Specific Complaints As To Counts Two And Three
Are Without Merit (Ramos’ Issue 11, 87-88)**

Ramos alleged he had just cause and excuse to use force. As discussed above, Ramos is examining the evidence in the light most favorable to the defendants, instead

of the light most favorable to the jury's verdicts. The jury rejected Ramos' claims that he saw a "shiny" object or that he had a reasonable basis to perceive an apparent threat from Aldrete-Davila.

**Compean's Specific Complaints As To Counts Two, Three, And Five
Are Without Merit Or Waived (Compean's Issue Nine, 55)**

In his Issue Nine, Compean, in a one-paragraph statement, attempts to "adopt" the sufficiency-of-the-evidence arguments of Appellant Ramos regarding the constitutional sufficiency of evidence to support Compean's convictions on Counts Two, Three, and Five (Compean's Brief at 55). However, one appellant may not adopt a sufficiency argument of another appellant. *See United States v. Solis*, 299 F.3d 420, 444 n.70 (5th Cir. 2002) ("All the other defendants move to adopt the arguments of the other defendants by reference pursuant to Rule 28(i). However, "[s]ufficiency of the evidence challenges are fact-specific, so we will not allow the appellants to adopt those arguments" (citing and quoting *United States v. Baptiste*, 264 F.3d 578, 586 n.6 (5th Cir. 2001)).

**Ramos' Specific Complaints As To Count Twelve
Are Without Merit (Ramos' Issue 6, 59-66)**

Again, Ramos' theories in challenging the sufficiency of the evidence to support the civil rights violation are based on the Defendants' testimony, rejected by the jury. For example, Ramos alleges that he could have objectively believed that

there was a situation justifying the use of deadly force because when he came up on the levee he “saw Compean on the ground, and thereafter saw a fleeing Davila with what Ramos believed to be a weapon in his hand” (Ramos’ Brief at 61). As discussed above, this theory is based on Compean’s story that, despite being overweight and giving Aldrete-Davila a lead, Compean was able to catch Aldrete-Davila from behind and tackle him. There was no physical altercation between Compean and Aldrete-Davila, The jury rejected this version. Compean was not on the ground, and Ramos’ effort to conform his story to Compean’s story was unavailing and was itself, as the jury reasonably could have found, a false story and evidence of his guilt. Again, the jury rejected the belated “shiny object” theory as well. The jury found Ramos used “unreasonable force” that had no legitimate law enforcement purpose.

Ramos cites to cases where force is used on a fleeing suspect, in a vehicle, during a high-speed chase, involving a suspect that presented a risk to others. Of course, in the instant case Aldrete-Davila’s vehicular flight is divorced from the time of the shooting. Aldrete-Davila was on foot, and had his hands up to surrender when Compean, taking a full swing, tried to hit him with the butt of a shotgun. Without touching Compen, Aldrete-Davila was running away. There was no a high-speed

chase that was reasonably related to the shootings in the instant case. The jury reasonably found no apparent threat.³⁵

**VII. APPELLANTS HAD FAIR WARNING
THAT THEIR ACTIONS WOULD BE CRIMINAL
UNDER 18 U.S.C. SECTION 242;**

THERE WAS NO ERROR OR PLAIN ERROR

(Responsive to **Ramos**' Brief, **Issue 7**, 66-67).

Standard of Review

Ramos does not indicate that he raised this issue before the district court. It should be reviewed for plain error.

Argument

18 U.S.C. § 242 makes it “criminal to act (1) ‘willfully’ and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States.” *United States v. Lanier*, 520 U.S. 259, 264 (1997) (quoting 18 U.S.C. § 242). The indictment charged that Ramos deprived Aldrete-Davila of the right to

³⁵ Appellants contend that the court’s instructions constituted plain error because they did not adequately explain their defensive theories (Ramos’ Brief at 88-89; Compean’s Brief at 47-50). Appellants did not object on this basis. They failed to propose these instructions. The instructions as to the assault counts required the government to prove beyond a reasonable doubt that the agents “did not act in reasonable self defense.” The instructions as to the other issues, and the instructions as a whole provided for their defensive theory of reasonability of their actions under the circumstances. Appellants have shown no error or plain error as to the jury instructions. The instructions as given did not seriously impair their ability to present a defense. They certainly have not shown any grave miscarriage of justice.

be free from official use of unreasonable force during an arrest, a right covered under the Fourth Amendment. Ramos asserts that he had no fair warning that acting willfully and under color of law to deprive Aldrete-Davila of the right to be free from unreasonable force would be criminal.

In *Lanier*, the Supreme Court announced the proper gauge for determining “whether prior judicial decisions” provided fair warning that a defendant’s “actions violated constitutional rights.” *Lanier*, 520 U.S. at 272. The Court rejected the view that an extreme level of factual specificity is necessary in every instance to give fair warning. *Id.* at 269-72. Decisions of lower courts may provide “fair warning.” *Id.*

Applying *Lanier* to the instant case, the issue is whether prior to February 17, 2005, any court gave reasonable warning that depriving a person of the right to be free from official use of unreasonable/unnecessary force during an arrest violated constitutional rights. The Supreme Court has given reasonable warning that the conduct at issue here, namely, shooting person running away violated Aldrete-Davila’s constitutional rights.

In *Tennessee v. Garner*, 471 U.S. 1, 4 (1985), an officer shot a fleeing burglary suspect. Analyzing the constitutionality of the officer’s actions, the Supreme Court found that the officer “could not reasonably have believed that [the suspect]—young, slight, and unarmed—posed any threat,” and, that the officer “did not have probable

cause to believe that [the suspect], whom he correctly believed to be unarmed, posed any physical danger to himself or others.” *Id.* at 21.³⁶

Additionally, prior case law has held that the Fourth Amendment secures the right of an arrestee to be free from the use of excessive force. *United States v. Branch*, 91 F.3d 699, 749 (5th Cir. 1996). Other prior cases have applied § 242 to excessive use of force by law enforcement officers. *Brugman*, 364 F.3d 613; *Sipe*, 388 F.3d 471; *Williams*, 343 F.3d 423; *Harris*, 293 F.3d 863; *United States v. Winters*, 174 F.3d 478 (5th Cir. 1999). In each case, § 242 was applied to police officers who used excessive force.

Appellants attempt to distinguish these and other previous excessive force 242 cases from the instant case by pointing to factual differences between the above cases and the instant case. Under *Lanier*, however, even “notable factual distinctions” between prior precedent and the instant case are irrelevant to the “fair warning” issue under appeal. *Lanier*, 520 U.S. at 269. Those facts go to the original question of whether excessive force was used at all, not to whether appellants had “fair warning” that their conduct would fall under § 242. All that is necessary under *Lanier* is that

³⁶ See *Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769, 1777 (2007) (“*Garner* held that it was unreasonable to kill a ‘young, slight, and unarmed’ burglary suspect . . . by shooting him ‘in the back of the head’ while he was running away on foot . . . and when the officer ‘could not reasonably have believed that [the suspect] . . . posed any threat,’ and ‘never attempted to justify his actions on any basis other than the need to prevent an escape’”).

prior decisions gave “reasonable warning that the conduct at issue violated Constitutional rights.” *Id.* The cases cited above and others gave “reasonable warning” that the use of excessive force against an arrestee was a violation of Constitutional rights and therefore a violation of § 242. Appellant has not demonstrated error or any of the elements of plain error.

**VIII. THE EVIDENCE WAS SUFFICIENT AS TO COUNT EIGHT,
THE 18 U.S.C. §1512(c)(2) OBSTRUCTION OF JUSTICE OFFENSES;**

**FAILURE TO REPORT THE DISCHARGE OF A FIREARM
A VIOLATION OF SECTION 1512(c)(2)
BY TAMPERING WITH AN OFFICIAL PROCEEDING IN THE FORM
OF AN INVESTIGATION BY A GOVERNMENT AGENCY**

(Responsive to **Ramos’** Brief, **Issue 8**, 68-79);
(Responsive to **Compean’s** Brief, **Issue Six**, 52-53).

Background

The evidence from the trial showed that when Aldrete-Davila’s mother called to complain that her son had been shot, the Border Patrol’s national computer system was checked, which would have contained a record of the shooting, if it had been reported (22 R. 235-36). Agent Christopher Sanchez testified that Border Patrol regulations provide that the discharge of a weapon must be reported within one hour, and that after a shooting a “significant incident report” would be written (22 R. 280, 307). As Appellant Ramos notes, a memorandum of a reported shooting is sent up the chain of command. A report of the discharge of a firearm causes an investigation of

the shooting by the Border Patrol Sector Evidence Team, whose members would investigate and preserve the scene, collect evidence, and generate a report. This report would be used for a number of purposes, including administrative review and possible disciplinary action (Ramos' Brief at 69-70). Agent Ramos testified that the February 17 shooting was a "reportable shooting" (29 R. 84). He agreed that if he had reported the shooting, a determination would have been made as to whether it was a "good shoot," and a thick report would have been generated (29 R. 82). The shooting scene would have been secured, and the sector evidence team would have been involved (29 R. 106). Someone would have taken custody of his firearm (29 R. 85-86). By not reporting the shooting, there was no effort to recover evidence about the driver of the van, such as possible blood samples (29 R. 88). Ramos was asked the reason he did not report the shooting, and he testified: "I just messed up" (29 R. 82). Ramos asserted that he assumed someone else reported the shooting (29 R. 83). He agreed, however, that if someone else had reported the shooting, his supervisor would have been asking him questions about it, which never happened (*id.*).

The Section 1512(c)(2) Offense

Section 1512(c)(2) provides, in relevant part, that "whoever corruptly otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. §

1512(c)(2). A Section 1512(c)(2) claim requires the government to prove that the defendant: 1) knowingly; 2) corruptly obstructed, influenced and impeded, or attempted to do so; 3) an official proceeding. *United States v. Peel*, 2006 WL 2864106 at *2 (S.D. Ill. Oct. 2, 2006).

Ramos and Compean were charged with violating section 1512(c)(2) by having a duty, pursuant to Border Patrol regulations, to report the discharge of their service firearms, and by failing to report their firearm discharge they impeded a contemporaneous investigation of the facts and circumstances surrounding the shooting for use in an official proceeding.

Appellants' Official Proceeding Argument

Ramos and Compean argue, among other points, that a potential Border Patrol investigation is not an “official proceeding” within the meaning of the statute, the evidence does not establish corrupt intent, and that the statute requires more than a failure to report. In other words, Appellants contend that section 1512(c)(2) is not applicable to the charged conduct. Proper interpretation and analysis of the elements, however, demonstrates that the charged conduct is encompassed within the statute.³⁷

³⁷ Compean does not challenge Counts 6 and 7, which found him in violation of 18 U.S.C. § 1512(c)(1) and (2), respectively, for collecting and disposing of spent casings which had been expelled from a firearm as a result of the discharging of a firearm.

A Potential Border Patrol Investigation Is an Official Proceeding Under Section 1512(c)(2)

Section 1512(c)(2), with its residual language, has been held to be “the omnibus clause that intends to punish the myriad of obstructive conduct that cannot be adequately defined in the statute.” *United States v. Hutcherson*, 2006 WL 1875955, at * 3 (W.D. Va. July 6, 2006); *see also United States v. Hutcherson*, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006) (“...§ 1512(c)(2) is intended to account for unenumerated conduct that violates the subsection”); *United States v. Singleton*, 2006 WL 1984467, at *3 (S.D. Tex. Aug. 13, 1984) (“Section 1512(c)(2) is the ‘catch all’ that follows the prohibition in § 1512(c)(1)...”). It is also important to note that § 1512(c) uses the more expansive term “official proceeding” as opposed to “judicial proceeding.” 18 U.S.C. § 1512(c)(2). Government agency actions would be considered “official proceedings” under Section 1512, “whether or not a grand jury has been convened,” reflecting Congress’ intent to “deter obstruction of more than judicial proceedings.” *Hutcherson*, 2006 WL 1875955, at *3 (finding an FBI investigation of fraud to be an official proceeding).

In fact, the statutory definition of “official proceeding” as used in §1512 also includes “a proceeding before a Federal Government agency which is authorized by law.” 18 U.S.C. § 1515(a)(1)(C). Other cases have also broadly interpreted the term “official proceeding” in § 1512 to include investigatory proceedings by government

agencies in order to “effectuate Congress’ purpose in passing it.” *United States v. Gonzalez*, 922 F.2d 1044, 1055-56 (2d Cir. 1991) (holding that a DEA investigation constitutes an official proceeding); *see also United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (defining the USAID Inspector General’s investigation as an official proceeding); *United States v. Guardiola Ramirez*, 2006 WL 573917 (D. Puerto Rico Mar. 8, 2006) (allowing indictment alleging violation of § 1512(c)(2) where the official proceeding was an investigation by the General Services Administration/Office of the Inspector General).

Defendants’ contention that an official proceeding connotes a hearing as held in *United States v. Dunn*, 434 F.Supp.2d 1203 (M.D.Ala. 2006), fails to give weight to the broad language of § 1512(c)(2) (“otherwise obstructs...”) and limits the reach of the statute. In analyzing the meaning of an “official proceeding” in § 1512(h), the Second Circuit reasoned that Congress did not intend to have a person who kills a witness while a judicial proceeding is pending or in progress be subject to prosecution while having that same person avoid prosecution if he happens to commit the same murder during the investigatory stage. *See Gonzalez*, 922 F.2d at 1055-56. Similarly, it would go against Congress’ intent to punish conduct that obstructs a judicial or grand jury proceeding but not punish conduct that obstructs an agency investigation. A potential Border Patrol investigation would be an investigatory proceeding by a

government agency and qualifies as an “official proceeding” under the statute. Likewise, the argument that events occurring before the initiation of the “proceeding” cannot obstruct that proceeding because an investigation is not an “official proceeding” is without merit.³⁸

Defendant’s Knowledge That Failure to Report the Discharge Would Prevent An Investigation Is Proof of Corrupt Intent

A conviction under § 1512 expressly does not require that an official proceeding be pending or instituted at the time of the offense. *See* 18 U.S.C. § 1512(f)(1) (providing “an official proceeding need not be pending or about to be instituted at the time of the offense”). It necessarily follows that § 1512 does not require proof that the defendant had knowledge that a proceeding was pending or about to be instituted. Therefore, it is sufficient if it can be reasonably inferred that the defendant, fearing that a proceeding might be instituted, committed the charged conduct with the intent to obstruct or impede such a proceeding. *See United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (holding that intent under § 1512(c)(2) is proven circumstantially where defendant, fearing that a grand jury proceeding had been or might be instituted, corruptly persuaded persons with the intent to influence their possible testimony in such a proceeding). Stated differently, if the defendant

³⁸ Indeed, section 1515(a)(1)(c) expressly defines official proceedings to include proceedings before a federal government agency.

lacks knowledge that his actions are likely to affect the proceeding, he lacks the requisite intent to obstruct. *See United States v. Brenson*, 104 F.3d 1267, 1277 (11th Cir. 1997).

Under this evidentiary burden, the official proceeding must be foreseeable at the time of the obstructive act before a person can be liable for obstruction of justice under § 1512. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 (2005). Something is foreseeable if it is a “necessary or natural consequence of the unlawful [conduct].” *United States v. Cover*, 199 F.3d 1270, 1275 (11th Cir. 2000).

In the instant case, Ramos and Compean knew that the failure to report the incident would influence an official proceeding in eliminating or greatly diminishing the likelihood of an agency investigation, which is an official proceeding under the statute. It is immaterial that no investigation was pending or about to be instituted at the time of Defendants’ conduct. Rather, it can be inferred that Defendants knew and had foreseen at the time they committed the charged conduct that an investigation would result as the natural consequence of making a report. Defendants also knew that by not reporting the discharge, an investigatory proceeding could be significantly delayed or prevented entirely. Since Ramos and Compean had the knowledge that their actions would interfere with an agency investigation, the failure to report the discharge shows the requisite intent to obstruct.

**Failure to Report Discharge To Avoid An Investigation
Establishes a Reasonable Nexus to Prove Intent To Obstruct and
Impede An Official Proceeding**

Under section 1512(c)(2), the charged conduct “must have some reasonable nexus to a record, document, or tangible object.” *Singleton*, 2006 WL 1984467 at *3; *see also Hutcherson*, 2006 WL 270019 at *2 (“If an individual corruptly obstructs an official proceeding through his conduct in relation to a tangible object, such person violates this subsection”). To establish a reasonable nexus, conviction under the statute requires a showing that the defendant’s actions “demonstrate his intent to do something that has the ‘natural and probable effect’ of interfering with the due administration of justice, *i.e.*, obstructing justice.” *Singleton*, 2006 WL 1984467, at *5 (applying the nexus requirement to § 1512(c)(2) as described in *United States v. Aguilar*, 515 U.S. 593, 599, 115 S.Ct. 2357 (1995)); *see also United States v. Reich*, 479 F.3d 179, 185-86 (2d Cir. 2007) (holding that § 1512(c)(2) incorporates a “nexus requirement” as articulated in *Aguilar*). In other words, the government must show that the alleged obstruction of justice has a “relationship in time, causation, or logic” with the proceedings. *Reich*, 479 F.3d 179, 185 (2d Cir. 2007); *see also United States v. Kumar*, 2006 U.S. Dist. LEXIS 96142 (E.D.N.Y. Feb. 21, 2006) (finding nexus to official proceeding where defendant intentionally concealed information he knew was

material to a government investigation and would have the effect of obstructing and impeding the investigation).

In the instant case, the charged conduct shows a reasonable nexus to the tangible evidence in that the failure to report created an egregious omission in the record which would not have occurred had the defendant followed proper procedure. Ramos and Compean knew that this absence of a record of the incident had the natural and probable effect of forestalling an agency investigation, causing the obstruction of an official proceeding. If Defendants had been forthcoming, the investigation would not have had to contend with complications arising from their initial lack of cooperation. Had the incident been timely reported as required, an investigation would have been commenced earlier and closer to the time of the incident, in which the crime scene would have been better preserved, and evidence such as the shell casings, and blood from Aldrete-Davila would have been recovered. Because making a report to be included in the record would trigger an investigation while non-reporting would result in the opposite or at least a significant delay in the proceeding, the Defendants' charged conduct demonstrates a clear, causal relationship to the investigatory proceeding to satisfy the nexus requirement.

No Affirmative Action Is Required Under 18 § 1512(c)(2): Failure to Report Discharge Constitutes A Violation Under the Statute

It is important to note that obstruction of justice in an official proceeding under § 1512 is not to be confused with obstruction of administration of justice in a judicial proceeding. “Justice may be obstructed by mere inaction, but obstruction of the administration of justice requires something more...” *United States v. Warlick*, 742 F.2d 113, 115-16 (4th Cir. 1984). Therefore, while an affirmative act is required for obstruction of a judicial proceeding, mere inaction would be conduct sufficient for the obstruction of justice in interfering with an agency investigation.

In the case at bar, the failure of Ramos and Compean to report the discharge according to proper agency procedure constitutes conduct proscribed under section 1512(c)(2). Even if such conduct is considered mere inaction, Ramos and Compean still committed an obstruction of justice. The failure to act in this instance created a false impression that nothing had happened in an attempt to thwart an investigatory proceeding. At the very least, by not reporting the discharge, Defendants successfully delayed an investigation into the incident and compromised its effectiveness.

Contrary to the Appellants’ characterization of section 1512(c)(2), the statute’s application is intended to be broad and extensive, proscribing a wide range of obstructive acts. As a result, there is sufficient basis to establish that the charged

conduct conforms with the conduct proscribed under § 1512(c)(2). An agency investigation is an official proceeding. And there was evidence of corrupt intent.

**IX. WHETHER THE EVIDENCE WAS SUFFICIENT
AS TO COUNTS NINE AND TEN, THE 18 U.S.C. §1512(c)(1)
OBSTRUCTION OF JUSTICE OFFENSES;**

(Responsive to **Ramos’** Brief, **Issue 9**, 81-86);
(Responsive to **Compean’s** Brief, **Issue Seven**, 53-54)

**X. WHETHER THE COURT ERRED
IN DENYING THE PROPOSED JURY
INSTRUCTION AS TO COUNT NINE;**

(Responsive to **Ramos’** Brief, **Issue 10**, 86-87);
(Responsive to **Compean’s** Brief, **Issue Eight**, 54).

**Whether Defendants’ Failure To Report Constituted A Violation
Of 18 U.S.C. § 1512(c)(1);**

**Appellants’ Contentions As To These Issues
Have Arguable Merit**

Section 1512(c)(1) Claim

Section 1512(c)(1) punishes a defendant who “corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding.” 18 U.S.C. § 1512(c)(1).

Ramos and Compean were charged in Counts Nine and Ten with violating section 1512(c)(1) by having a duty, pursuant to Border Patrol regulations, to report

the discharge of their service firearms, and by failing to report their firearm discharge they impeded the generation of a written report and document preventing it from being available in an official proceeding.

Appellants' Argument

Appellants Ramos and Compean challenge their convictions under 18 U.S.C. § 1512(c)(1) on the grounds that: (1) the evidence does not establish corrupt intent, (2) the statute requires more than non-reporting, and (3) that a potential Border Patrol investigation is not an “official proceeding.” Finally, Appellants contend that there must be a record, document, or other object in existence in order for the statute to be violated.

The Merits Of The Arguments

Ramos' and Compean's first challenges mirror their challenges to subsection (c)(2), and are answered by the arguments advanced above.

As to the challenge that for a section (c)(1) conviction something in existence, section (c)(1) outlines specific obstructive conduct regarding the tampering of tangible evidence. *See Hutcherson*, 2006 WL 270019, at *2. The language of subsection (c)(1) implies that “the record, document, or other object is in existence when the defendant acts to alter, destroy, or conceal it.” *Singleton*, 2006 WL 1984467, at *3. This requirement is in contrast with section (c)(2), which, being the section that captures

all other obstructive conduct, does not require that tangible evidence be in existence prior to the prohibited conduct. *See id.*

Arguably, a reply to the assertion that there was no record, document, or other object in existence, is that there was in existence the collection of records of discharges by firearms kept by the Border Patrol prior to and during the time of the prohibited conduct. In the instant case, Defendants, in neglecting to include a report of the discharge, violated this subsection by impairing the integrity of the records kept by the Border Patrol of reported discharges. Defendants were required to report the discharge, from which a record of the incident would have been generated to be available for use in an official proceeding. However, Defendants' actions altered the records of reported discharges from what should have been a complete record documenting all discharges to an incomplete record with a significant omission, which hampered the investigatory proceeding into the incident. Because a detrimental effect on the integrity of the records of discharges can be directly attributed to Ramos' and Compean's failure to make a report, their conduct could be considered to fall under section (c)(1). Furthermore, by failing to report there was the consequent failure to generate a document and the consequent failure to have a document available for an official proceeding. Arguably, in causing this missing report, Defendants attempted

to prevent an investigation and, in effect, tried to obstruct an official proceeding contrary to § (c)(1).

Nevertheless, this Court may decide that section (c)(1) does not apply. Although it appears that no case has explicitly held that section (c)(1) requires tampering with tangible evidence, the cases interpreting this section have involved tangible evidence that has been altered, concealed, or destroyed.³⁹ There are no cases applying (c)(1) to a failure to report situation. Thus, if the argument as to the integrity of the corpus of records and unavailability of the document is determined to be unavailing, the convictions on Counts Nine and Ten should be vacated.⁴⁰

³⁹ See, e.g., *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006) (destruction of cell phone in front of police); *United States v. Black*, 469 F.Supp.2d 513 (N.D. Ill. 2006) (concealment of corporate records by removing boxes).

⁴⁰ The jury instructions as to Counts Nine and Ten required the jury to find beyond a reasonable doubt “that the defendant altered, destroyed, mutilated or concealed a document, record or object, or attempted to alter, destroy, mutilate or conceal a document, record or object.” Thus, Appellants were able to argue, and did argue, that this element implies something already in existence. The instruction that they requested, that the jury had to find beyond a reasonable doubt that “There existed a record, document or other object” was subsumed within the instructions as given. There was no impairment of the ability to present a defense. However, if successful as a matter of sufficiency of the evidence, these issues would be moot.

**XI. THERE WAS NO PLAIN ERROR
AS TO THE SUFFICIENCY OF THE INDICTMENT
FOR THE 924(c) CHARGES**

(Responsive to **Ramos’** Brief, **Issue 13**, 89);
Compean’s Brief, **Issue Eleven**, 56-57).

Background

In an argument of about one page, Appellant Compean argues that the indictment charging the section 924(c) offense was fatally defective because instead of the statutory language, making it an offense for someone who “uses” a firearm during and in relation to any crime of violence, the indictment charged that Defendants “discharged” a firearm during and in relation to a crime of violence. Compean briefly argues that discharging the firearm was only a sentencing element, according to *United States v. Harris*, 536 U.S. 545 (2002), and therefore, “[t]he indictment did not charge the statutory offense and is defective” (Compean’s Brief at 56-57). Compean states that “this issue is intended to be addressed at greater length in an amicus brief” (Compean’s Brief at 57).⁴¹

⁴¹ Indeed, this issue is presented in the Amicus Brief of Jones, etc. at 3-18. An amicus brief generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal. See *Resident Counsel of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993). Although this issue is nominally raised by the slightly-more-than-one-page argument by Compean, *Cf Trevino v. Johnson*, 168 F.3d 173, 181 n.3 (undeveloped, inadequately argued issues are waived) (citing cases), it appears that the spirit of this rule is violated by a party briefly stating an issue and then relying on an amicus to actually argue it. See *Becker v. Federal Election Commission*, 112 F.Supp2d 172, 185 n.6 (court would not address argument by amicus where issue was “inadequately briefed (continued...)”) (continued...)

As noted above, the statute provides, in relevant part, that:

any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

If the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A)(iii).

The indictment charged that defendants:

“knowingly discharged a firearm, to wit: a Beretta 40 caliber firearm, during and in relation to a crime of violence for which the person may be prosecuted in a court of the United States, to wit . . . Assault with a Dangerous Weapon . . . and, Assault with Serious Bodily Injury

(3 R. 453).

Standard Of Review

A challenge to an indictment that is first raised on appeal is reviewed only for plain error. *United States v. Hoover*, 467 F.3d 496, 498 (5th Cir. 2006); *United States v. Rodriguez*, 360 F.2d 949, 958 (9th Cir. 2004).

⁴¹(...continued)
by the parties”).

There Was No Plain Error

Requirements Of An Indictment

An indictment “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed.R.Crim.P. 7(c)(1). Generally, an indictment is sufficient if it sets forth the elements of the charged offense so as to ensure the right of the defendant not to be placed in double jeopardy and to be informed of the offense charged. *Rodriguez*, at 958.

Standards Of Analysis

The test of the validity of an indictment is “not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards.” *Wilson*, 884 F.2d at 179. An indictment is read for its clear meaning and convictions are not reversed for minor deficiencies that do not prejudice the accused. *United States v. Shelton*, 937 F.2d 140, 142 (5th Cir. 1991).

Synonyms And Other Substitutions, As Well As Omissions Of Statutory Language Have Been Held To Be Nevertheless Adequate

In *Rodriguez*, 360 F.3d at 958-59, the indictment charged a Hobbs Act violation, where the statutory language of the offense was that the robbery offense “obstructs, delays or affects commerce.” Instead of using the exact terminology of the statute, however, the indictment in *Rodriguez* charged “interference with

commerce.” *Id.* In rejecting the argument that the indictment was insufficient to charge an offense because it failed to track the statutory language, the Ninth Circuit observed that: “‘Interfere,’ although not in the statute, is a clear synonym for the terms that are.” *Id.*⁴²

Similarly, in *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993), the Appellant urged that the indictment for bank fraud was fatally defective because it did not allege the elements “knowingly” and “executes or attempts to execute” from the statutory. This Court explained, however, that: “An indictment does not have to allege the elements in precise statutory terms . . . [a] count should be read in its entirety, including its use of statutory section numbers . . . [s]ince the indictment fairly imports all the elements and includes the statutory section number, we find that it was not defective.” *Id.* (citations omitted).⁴³

⁴² In *United States v. Pennington*, 168 F.3d 1060, 1064-65 (8th Cir. 1999), the court equated the statutory language for a mail fraud offense that the scheme to defraud deprived another of the “intangible right of honest services” with language in the indictment charging that the scheme to defraud deprived another of the right of “faithful and impartial services.” The court rejected a challenge that the indictment did not charge a crime, explaining that: “An indictment need not use the specific words of the statute, so long as by fair implication it alleges an offense recognized by law.” *Id.* (citation and internal quotation omitted).

⁴³ *See also, United States v. Barksdale-Conteras*, 972 F.2d 111, 113-14 (5th Cir. 1992) (“[T]his court has held that an indictment need not precisely track the language of the statute; it is sufficient if it informs the defendant of every element of the offense charged” (citation and internal quotation omitted)).

Hernandez, A Section 924(c) Case

In *United States v. Hernandez*, 891 F.2d 521, 523-25 (5th Cir. 1989), the Defendant was indicted on a section 924(c) offense. Instead of tracking the statutory language of statute, that the Defendant was carrying a firearm during and in relation to a crime drug trafficking crime, Hernandez' indictment omitted the words "and in relation to," charging him only with carrying a firearm unlawfully "during the commission of a drug trafficking crime." *Id.* Raising the issue for the first time on appeal, Appellant argued that the omission was fatal to the indictment because "the relationship between the firearm and the offense is an essential element of the crime." *Id.* at 524. This Court disagreed, explaining that although "[it] would have been better if the indictment had included the words "and in relation to," the indictment satisfied constitutional requirements because a plain reading of the indictment did inform the Defendant of the elements of the charge he would have to defend, and provided sufficient detail to enable him to rely upon the indictment for a double jeopardy defense in the event of a future prosecution. *Id.* at 524-25.

Reliance On *McGilberry* And *Harris* Is Misplaced

Compean's Brief and the amicus briefs rely on *United States v. McGilberry*, 480 F.3d 326, 329-331 (5th Cir. 2007), where this Court found error but not correctable plain error as to the indictment in a section 924(c) case. In *McGilberry*,

this Court explained that in the structure of section 924(c), when the conduct charged is possession of a firearm, “the appropriate standard of participation is ‘in furtherance of’ a crime.”” *Id.* at 329. However, when the conduct charged is uses or carries a firearm, the appropriate standard of participation is “during and in relation” to a crime. *Id.* In *McGilberry*, the government erroneously combined the “possession” prong of the statute with the “during and in relation” participation, thereby failing to list the essential elements of the offense. *Id.* This Court, however, affirmed the conviction after determining that the plain error did not affect the fairness, integrity, or public reputation of the proceedings. *Id.* at 330-31.

The instant case has no such error or plain error. The conduct charged against Defendants-Appellants, of discharging a firearm, which is a specific kind of use, set forth the appropriate standard of participation of “during and in relation” to a crime. *Id.* at 329.

Additionally, in *Harris*, 536 U.S. at 550-54, the Supreme Court held that section 924(c) created a sentence enhancement rather than a separate offense. The *Harris* Court did not address the evaluation of language used in an indictment. Further, *McGilberry* did not analyze the sufficiency of a an indictment charging a section 924(c) violation in terms of *Harris*. *Harris* provides no support for Appellant’s

position. A jury finding a firearm was “discharged,” beyond a reasonable doubt, could be a detrimental or prejudicial factor for Defendants.

**There Was No Error, Or Plain Error,
In Substituting The More Specific Word “Discharge”
For The Statutory Term “Use”**

In *Bailey v. United States*, 516 U.S. 137 143 (1995), the Supreme Court, held that with regard to the statutory element in section 924(c) of “uses” a firearm “during and in relation to a crime of violence or drug trafficking crime,” there is a requirement of “evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.” *Id.* at 143 (emphasis original). The Court further provided an answer to the more difficult question of what the government must show to establish “‘use’ for purposes of the statute.” *Id.* at 145. The Court explained that: “[t]he active employment understanding of ‘use’ certainly includes brandishing, displaying, bartering, striking with, and, **most obviously firing** or attempting to fire **a firearm.**” *Id.* at 148 (emphasis added).

In the instant case, the charge in the indictment of “discharging” a firearm during and in relation to a crime of violence, rather than “used” a firearm during and in relation to a crime of violence, did not render the indictment fatally defective. Firing or discharging a firearm is “obviously” an active employment or use of the

firearm under the statute and *Bailey*. “Discharge,” although not in the statute, is a clear synonym, and a more specific term, for “use.” *See Rodriguez*, 360 F.3d at 358-59. It is not required to use the specific words of the statute, “so long as by fair implication it alleges an offense recognized by law.” *Pennington*, 168 F.3d 164-65. The indictment here, when read in its entirety, including its use of statutory section numbers, fairly imported all the elements; it was not defective. *See Blackburn*, 9 F.3d at 357. The indictment here informed the Defendant of the elements of the charge he would have to defend, and provided sufficient detail to enable him to rely upon the indictment for a double jeopardy defense in the event of a future prosecution. *See Hernandez*, at 524-25.

XII. THERE WAS NO CUMULATIVE ERROR

Finally, Appellants contention that there was significant cumulative is without merit.

CONCLUSION

For the foregoing reasons, Appellants’ convictions should be affirmed.

Respectfully submitted,

JOHNNY SUTTON
United States Attorney

By:

Mark R. Stelmach
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief for the United States of America and computerized disk have been mailed to David L. Botsford, Counsel for Appellant Ramos, 1307 West Avenue, Austin, Texas 78701, and Robert T. Baskett, Counsel for Appellant Compean, 2612 Boll Street, Dallas, Texas 75204, on this the 6th day of August, 2007.

Mark R. Stelmach
Assistant United States Attorney
Western District of Texas
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
(210) 384-7090

CERTIFICATE OF NON-COMPLIANCE

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE THE BACK COVER)

Pursuant to 5th CIR. R. 32.2.7 (c), the undersigned certifies this brief **does not** comply with the type-volume limitations of 5th CIR. R. 32.2.7 (b)

A motion to file in excess of the word limit is being filed.

1. INCLUDING THE EXEMPTED PORTIONS IN 5th CIR. R. 32.2.7 (b)3), THE BRIEF CONTAINS :
 - A. __38,565 words
2. THE BRIEF HAS BEEN PREPARED:
 - A. in proportionally spaced typeface using:
Software Name and Version: WordPerfect 12
In (Typeface Name and Font Size): Times New Roman, 14 pt Font (12 pt footnotes)
3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORD OR LINE PRINTOUT.
4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5TH CIR. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

Mark R. Stelmach