

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

COMPEAN'S PETITION FOR PANEL REHEARING

COMES NOW, Jose Alonso Compean, petitioning the court for a panel rehearing and would show as follows:

REASONS FOR PANEL REVIEW

Point No. 1

Rehearing should be granted to address an issue of exceptional importance not addressed by the panel, to wit: Whether or not the balancing test, approved by the panel, is applicable to a witness who lies about his knowledge of and role in the narcotics trade at the time of his testimony, where subsequent criminal acts are offered to impeach the false impression left for the jury?

Point No. II

Rehearing should be granted because the Panel did not properly, if at all, decide Compean’s challenge to the jury instruction errors of omission.

ARGUMENT AND AUTHORITIES

Point No. I

The panel noted that “the crucial factual issue of the trial was whether, as suggested by Ramos and Compean, Aldrete-Davila possessed a gun – which he denied – when he was fleeing from Ramos and Compean.”¹ They also noted that in his testimony, Aldrete-Davila allegedly gave the impression that he was not a real player in the drug business and testified, for example, that he was unfamiliar with the details of drug packaging and did not know what kind of drugs were in the van. Thus, for the purpose of challenging Aldrete-Davila’s credibility on these matters, and to show him more involved in drug trafficking than he admitted – and likely therefore to be lying in denying possessing or brandishing a gun – the evidence of his involvement in the October incident was relevant. In a nutshell, Compean argues that the evidence was probative in determining Aldrete-Davila’s

¹ Which is not really the “crucial factual issue.” Properly instructed (see Point No. 2, *Infra*) the jury would have known the issue was whether the agents reasonably thought he had a weapon, whether mistaken about it or not.

credibility.

It is suggested that the panel's analysis is wrong for several reasons. First, the evidence was offered as impeachment of Aldrete-Davila's trial testimony that, as he sat as a witness before the jury, he did not know who brought the van across the river, did not know his destination, was going to meet an unknown co-conspirator, and that he did not know the location of the stash house. This is in addition to the falsehoods Aldrete-Davila left with the jury as noted by the panel, that he did not see the drugs in the van, that he did not know how narcotics were packaged, that he did not know what kind of narcotics were in the packages, and that he did not know the weight or value of the drugs he was smuggling. Second, to impeach this testimony is both powerful and probing, because not to do so would leave a false impression before the jury, planted by the witness regarding his true role in the offense.

Third, it has long been held proper in this jurisdiction to permit a thorough cross-examination of a testifying defendant as to other crimes committed where that witness leaves the improper impression before the jury that he had committed none. In this situation, the prosecution may impeach the defendant's credibility with evidence that would otherwise had been inadmissible. Williams v. Wainwright, 502 F2d 1115 (5th Cir. 1974). This Court has held that evidence of

prior bad acts offered by the defense may be relevant under Fed. R. Evid. 404(b) to show that a co-defendant had the opportunity and ability to conduct a fraudulent scheme without the defendant-offerror's aid or participation. *U.S. v. Luffred*, 911 F2d 1011 (5th Cir. 1990). A witness may be impeached by the testimony of other witnesses and any other evidence which contradicts him. However, he may not be impeached on collateral issues. *Head v. Halliburton Oilwell Cementing Co.*, 370 F2d 545 (5th Cir. 1966).

Fourth, under the doctrine of specific contradiction, when a defendant makes a false statement during direct testimony, the prosecution is allowed to prove, either through cross-examination or by rebuttal witness, that the defendant lied as to that fact, even if the evidence offered by the prosecution ordinarily might be collateral or otherwise inadmissible. Under that doctrine, the district court does not abuse its discretion when it allows the defendant to be questioned about his failure to file federal income tax returns, as that question goes to the defendant's credibility after he had testified on his own behalf that he had not, and would not ever, advise anyone to cheat on their taxes. *U.S. v. Crockett*, 435 F3d 1305 (10th Cir. 2006), Accord *U.S. v. Jimenez*, 464 F3d 555, 559-62 (5th Cir. 2006) (confrontation clause violated when the court precluded cross-examination regarding witness' position during surveillance of defendant's house because

defendant unable to test testimony's reliability).

It is submitted that the panel erred in holding that Aldrete-Davila's second delivery was not admissible as proof of a subsequent offense. It is clear from his testimony that the witness was referring to his lack of knowledge of and involvement in narcotics trafficking at the time of his testimony, not only at the time of the incident. This is not a collateral matter and goes to the heart of Aldrete-Davila's credibility as a witness, and to show that he would be bold enough to lie to the jury about his role. The third-party evidence directly contradicted Aldrete-Davila's portrayal of himself and his role in the offense. The established safeguards our legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. *Hoffa v. U.S.*, 385 U.S., 293, 87 S.Ct. 408, 17 L.Ed2d 374 (1966). In *Bridge v. Dredke*, 402 F3d 551, 572-73 (5th Cir. 2005), this court held that the confrontation clause was not violated where the court excluded evidence of the witness's civil suit where defendant was permitted extensive cross-examination.

“In order to give the proper scope to the right of confrontation, a court must allow broad cross-examination of a prosecution witness as to bias, prejudice, and motive for testifying. Cross-examination of a witness in matters relevant to credibility or bias ought to be given wide latitude. A witness may be cross-

examined as to any matter tending to show bias or prejudice or circumstances under which he may have a temptation to swear falsely. Cross-examination for this purpose is a matter of right, and a denial thereof may constitute reversible error. This is not a collateral or immaterial matter within the rule limiting cross-examination to matters relevant to the issues. An attempt to impeach a witness on the ground of bias or prejudice is not collateral to the issues, and it does not exceed the scope of direct examination, but to the contrary, it is a direct attack upon the truth of the testimony given, and the fact of bias or prejudice is an independent material fact. American Jurisprudence, 2nd series, Witnesses §878.

The Court posits the October transaction to demonstrate Aldrete-Davila was a “low level transporter of a load of drugs.” Opinion p. 25. Compean respectfully point out that the events also indicate the once caught Aldrete-Davila was a trusted member of a drug cartel, again in charge of delivering over one-half million dollars of drugs, and while he was cooperating with the Government. Compean (and Ramos) sought to impeach and contradict Aldrete-Davila’s lies before the jury which referred to his involvement as a witness. The third party testimony should have been admissible as impeachment to correct the false impressions he left before the jury.

Fifth, Compean also urges that once Aldrete-Davila went into his status in

the drug world, it opened the door to fair questions that he was not an innocent “mule,” but much more, than he told the jury. The Government had the benefit of the false impression, knowing the defense could not effectively impeach it.

Compean cannot enforce Aldrete-Davila’s Fifth Amendment immunities. The Government would not extend the immunities to the October transaction (use immunities statutory) See fn. 9, Opinion p. 24. The Court would not order it (as requested by Ramos’ counsel). Compean hereby adopts the discussion of these facts in Ramos’ able reply brief, p. 4-10, therein. Compean also urges that it is Aldrete-Davila’s falsifications that drive the right of the defense to both cross-examine and impeach through both third party evidence and questions of the witnesses as to matters he opened up. The express terms of the letter are sufficient to provide immunity under these circumstances.

Compean respectfully requests this Panel to reconsider it’s opinion and hold that the defense had the right to fully question Aldrete-Davila himself (under the agreement with the Government), and to call a third party to impeach the false testimony that the trial court’s ruling left before the jury. This is so because, the Government already knew Aldrete-Davila was compromised by the October drug deals at the time they called him as a witness.

The district court candidly admitted that Davila had been less than truthful

with Agent Chris Sanchez when discussing his narcotic trafficking activities pursuant to the immunity agreement. 23R38; 212-214. And, as all concerned now well know, Davila was a major drug dealer, having been indicted in October 2007, for (and subsequently pleaded guilty to) two felony drug possession counts and two conspiracy counts. (Cause No. EP-01-CR-0671-KC):²

The truth is that when Davila testified at the trial of Compean and Ramos in February 2006, there is now absolutely no question that he lied to the jury, a fact conceded during oral argument to this Court on December 3, 2008, by counsel for the Government.

Regarding the Rule 403 point, the district court made it quite clear that the cross-examination was not being disallowed due to Rule 403 considerations. Specifically, the district court stated the following on March 3, 2006, after a full bill was made regarding the events of the October 22, 2006, subsequent drug delivery by Davila to Ortiz, *see* Sealed Volume 6 at 36-40, to wit:

For purpose of all this, and for the purposes of the record on the proffer, **it has always been this Court's understanding that the Court ruled the way it ruled because it's always been the understanding that the immunity agreement only extended to February 17th.** 6R40.

² A copy of the document was attached to Ramos' renewed motion for bond pending appeal, filed with this Court in May 2008.

And, regarding the conclusion that Davila's immunity agreement was not co-extensive with the Fifth Amendment, it is totally inconsistent with the Government's stated intent, as the letter itself assured Davila that it was in fact co-extensive with the Fifth Amendment, as demonstrated by the language itself:

1. The Government agrees to provide you with **all of the protection which would be provided to you under a formal court-ordered grant of immunity pursuant to the provisions of Title 18, United States Code, sections 6002 and 6003. In other words, 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.**

As between Davila and the Government, the Government should have been estopped to claim that the immunity was not co-extensive with court ordered use immunity. Any other conclusion flies in the face of well settled law that an informal grant of use and derivative use immunity has the same basic effect as a formal court order granting use and derivative use immunity. *See e.g., United States v. Williams, 809 F.2d 1072, 1081-82 (5th Cir. 1987); rehearing granted, 817 F.2d 1136, 1139 (5th Cir. 1987), affirmed after remand, 859 F.2d 327 (5th Cir. 1988); United States v. Weiss, 599 F.2d 730, 735 n. 9 (5th Cir. 1979).* The only meaningful difference is that the scope of the immunity agreement is determined by general principles of contract law, not solely by *Kastigar*. *See e.g., United States v.*

Cantu, 185 F.3d 298, 302 (5th Cir. 1999)(applying *Kastigar* to informal use and derivative use immunity agreement and holding that although the Government was released from its obligations under the informal agreement because Cantu had materially breached the agreement, the Government could not use Cantu's immunized statements against him without violating *Kastigar*); United States v. Castaneda, 162 F.3d 832, 835-36 (5th Cir. 1998).

And, had Davila had competent criminal counsel, he would have clearly advised Davila to testify to all of his drug activities between February 2005 and November 2005 at the trial in February 2006, which would have forced the Government to prove an independent source under *Kastigar v. United States*, 406 U.S. 441 (1972), before he could have ever been indicted and prosecuted (as he was in October 2007).

Effectively, the panel has allowed the Government to manipulate and utilize an agreement that it drafted (and which should be construed against the Government as the drafter, if not formally estopped otherwise) to prevent Davila from being forced to tell the truth to the jury, thereby allowing what was then impeachable, suspect testimony (now,, known lies) to go to the jury. This is outrageous government manipulation of the judicial system to achieve its own ends which this Court should not sanction.

Point No. II

Rehearing should be granted because the Panel did not properly, if at all, decide Compean's challenge to the jury instruction errors of omission, because significant principles of applicable law and guidance to the jury's deliberations were left out of the charge. These omissions were so vital to the main defensive issues in the case that there are serious questions whether the jury returned a reliable verdict.

The Panel (opinion at 44) either misconstrued or chose not to decide Compean's complaint that the jury instructions given (1) completely failed to adequately present the applicable law regarding police use of force and (2) did not properly guide the jury in its deliberations. Because the panel relies so heavily on the presumptive effect of the verdict in overruling a number of the appellate points,³ Compean is obliged to urge anew that the jury was so inadequately charged that no influence may be drawn from a verdict rendered under such deficient instructions.

To be sure, there were no objections raised at trial. However, jury instruction can be so defective on core or central issues in a case that plain and harmful error appears. What Compean urges here is that this is one of those rare

³ Particularly regarding the challenges to the application of 18 USC 924(c).

cases where the charge so thoroughly fails to explain the applicable law and guide the jury in its deliberations that the error is both plain, harmful, and affected his substantial right⁴ to trial by a properly instructed jury.

The Panel apparently construed the original appellate complaint as a challenge to the instructions given at trial.⁵ That is not what this is about at all. In fact, the error is in the absence of pertinent instruction on portions of the law applicable to key and central defensive theories and how the jury should apply those laws.

A trial court “must properly instruct the jury on the applicable law and guide the jury to an intelligent understanding of the issues in the case.” *Bender v. Brumely*, 1 F3d 271, 276 (5th Cir. 1993). If there is “substantial and ineradicable doubt whether the jury has been properly guided in its deliberations,” reversal may be required. *Id.*

When jury instructions are “erroneous in matters which go to the very essence of the case, the plain error rule should be applied.” *Screws v. United States*, 325 U.S. 91 (1945). Though it may be “black letter law” that a litigant does

⁴ Rule 52(b), F.R. Cr. P.

⁵ “The instructions were not erroneous and certainly do not rise to the level of plain error.” (Opinion, at 44).

not have the right to jury instructions in the precise terms he may wish, nonetheless the charges as a whole must make it clear to the jury the legal principles governing their deliberations. *United States v. Fontenot*, 483 F2d 315 (5th Cir. 1973).

_____Compean suggests that this case was a close one that “could have gone either way.” (Opinion, at 45). In such a case, the courts should be reluctant to hold harmless ambiguous jury instructions. *Bihn v. United States*, 328 U.S. 633, 638 (1946).⁶ Here an obvious indicator of actual injury to Compean’s rights is the fact that the Panel relies on the factual presumptions of the verdict to overrule several appellate points.

The Panel assumes the jury found, by its verdict, that there was no “tense, uncertain, and rapidly-evolving” situation. Yet the jury was never even told to consider that as a factor to employ or a guide to its deliberations. *Graham v. Connor*, 490 U.S. 386 (1989). The Panel says the jury “resolved” the issue “whether Aldrete-Davila turned towards the defendant with an object in his hand or simply ran empty-handed to Mexico.” (Opinion, at 28, n.12).⁷ Yet that was not really the issue at all. The true issue was the reasonableness of the agent’s belief,

⁶ The strength of the prosecution’s case “is probably the single most important factor” in harm analysis. *Cupit v. Whitley*, 28 F3d 532, 539 (5th Cir. 1994).

⁷ Whether Aldrete-Davila had a gun was the “crucial factual issue.” (Opinion, at 26).

not whether Aldrete-Davila actually had an object in his hand. A properly-instructed jury would have been told that it does matter if there was actual danger, so long as there was a reasonable appearance of it. *Graham v. Connor, supra*. An officer can be mistaken and still not act unlawfully, *Wagner v. Bay City, Texas*, 227 F3d 316 (5th Cir. 2000), but the jury was never told that, either.⁸

_____The jury was not instructed about the *Graham v. Connor, supra*, “calculus of reasonableness.” They were not told that the law requires them to judge from the perspective of the reasonable officer at the moment he acts, and not from hindsight.

In short, even if the instructions actually given were not erroneous in themselves, they only told the jury part of the applicable law, and gave no real guidance as to the principles in play as they decide the case. With respects, Compean believes the Panel has failed to grasp the import of his original complaint and thus failed to address it properly.

The Panel opinion implies, at least, that the missing instructions complained of here were adequately covered by the charge as given. That is simply not so. If, as Compean believes, it would have been error not to give these charges, had they

⁸ The omission would have allowed the jury to conclude, as the Panel apparently did, that the defense would apply only if, in fact, there actually was a gun.

been requested below, it is not logical to say the instructions actually given sufficiently guided the jury. The plain-jane explanation of the law of self-defense and defense of another barely got the basics right, and certainly did not touch on the principles so central to the defensive theories upon which the whole trial was based. The significance of the challenged omission to the substantial rights of these agents demands that more scrutiny be given to the issues by the Court.

CONCLUSION

Jose Alonso Compean asks the Court for rehearing on these points, to sustain them, find the errors harmful, and reverse and remand for new trial on all remaining counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy hereof was served on the following parties by U.S. mail on this 15th day of August, 2008.

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