

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 REHEARING *EN BANC*

COMES NOW, JOSE ALONSO COMPEAN, petitioning this Honorable Court for an en banc rehearing of this cause, and would show in support hereof as follows:

STATEMENT OF THE ISSUES

En Banc Issue: This proceeding involves questions of exceptional importance, especially in view of the national attention received, about whether the ten-year mandatory sentence under 18 U.S.C. 924(c) for discharging a firearm “during and in relation to any crime of violence or drug trafficking crime” may

properly be applied to an on-duty peace officer firing his weapon at a dangerous fleeing felon.

COURSE OF PROCEEDINGS AND DISPOSITION

Compean and co-appellant Ignacio Ramos were convicted by a jury of assault with a dangerous weapon, assault resulting in bodily injury, discharge of a firearm in relation to a crime of violence and deprivation of rights under color of law.¹ By revised opinion issued on July 29, 2008, a Panel of this Court affirmed. (Tab One).

STATEMENT OF FACTS NECESSARY TO ARGUMENT

Compean and Ramos were United States Border Patrol Agents, on duty on February 17, 2005, when their attention was called to a possible drug-smuggling operation. After a lengthy and dangerous high-speed pursuit, illegal alien Aldrete-Davila abandoned his vehicle, loaded with a large amount of marijuana, and attempted to flee back into Mexico. Compean stationed himself, with a shotgun, in the alien's path. Aldrete-Davila ignored orders to halt and advanced up a slope directly at Compean, who tried, but failed to deliver a strike with the butt of the shotgun. Compean lost his footing as Aldrete-Davila avoided capture. Compean,

¹ Convictions involving tampering with official proceedings were vacated by the Panel decision. (Tab One).

who had dirt in his eyes, claimed that instead of simply fleeing, Aldrete-Davila turned back toward him with something apparently in his hand.² Fearing it could have been a weapon, Compean fired several times with his service handgun, but missed. Ramos, who heard these shots he while was proceeding through an eleven foot deep canal to assist Compean, also fired one time, striking Aldrete-Davila. However, he successfully continued his flight into Mexico.

ARGUMENT AND AUTHORITIES

_____ It is respectfully urged that the Panel evaluation of this issue misses the mark in a number of significant aspects. First, the Panel gives undeserved weight to the jury verdict,³ which was rendered under a set of jury instructions that woefully failed to present the law governing police use of force. Second, the Panel fails to properly apply the law on police use of force. Third, the Panel relies on precedent from this Circuit that is distinguishable,⁴ if applicable at all. Finally, Compean suggests that if *Williams* and *Winters* control this specific case, they are

² The Panel considered some of these “facts” to have been rejected by the jury verdict. As noted, *infra*, Compean believes that in view of the woefully inadequate instructions given the jury, its verdict should not be read as conclusively establishing the otherwise-relevant factors.

³ “Whether the defendants were justified in shooting Aldrete-Davila in an issue no longer in play after the jury verdict that rejected the defendant’s version of the facts.” (Opinion, at 28).

⁴ Particularly, *United States v. Williams*, 343 F3d 423 (5th Cir. 2003); *United States v. Winters*, 105 F3d 200 (5th Cir. 1997).

wrongfully decided and should be overruled, which only the en banc Court can do. (Opinion, at 31).

Compean respectfully adopts the En Banc Issue Number 1 of co-appellant Ramos in his Petition for Rehearing En Banc. Police use of force issues are governed by and reviewed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386 (1989). If the person against whom that force is used has no Fourth Amendment rights, then as to him and for criminal prosecution purposes, police use of force violates no clearly-established federal right.

Compean suggest that Aldrete-Davila had no Fourth Amendment rights. He was illegally in the country, purely as a felony drug smuggler, with no other connection to the United States sufficient to make him part of “the People.” *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This Court has left for another day the question whether “an alien’s connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees....” *Martinez-Aguero v. Gonzales*, 459 F3d 618, 625 (5th Cir. 2006), cert. denied, ___ U.S. ___, 127 S.Ct. 837 (2006). Since another set of facts cannot be imagined showing a less tenuous connection with this country, perhaps this is that day.

Compean suggests that there was no constitutional “fair warning” that 924

(c) would apply to him. *United States v. Lanier*, 520 U.S. 259 (1997). To evaluate this issue properly requires an examination of the statute not just as written, but as construed. *Id.*, at 267. This means, for the present purposes, there must have been a violation of Aldrete-Davila’s constitutional rights,⁵ and those rights must have been clearly-established at the time. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).⁶

To accomplish this latter examination, courts must make comparisons with materially similar cases. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Compean has found no such “materially similar” case law.

The Panel proclaims that *Tennessee v Garner*, 471 U.S. 1 (1985) “firmly established” that shooting at a fleeing felon who poses no threat or danger violates the Fourth Amendment. (Opinion, at 32). With respect, Compean believes this is too broad a brush-stroke, especially considering the fact-specific analysis that must be done.⁷

⁵ If he has none, the inquiry should end there.

⁶ Would it be “clear to the reasonable officer that his conduct was unlawful in the situation he confronted.”

⁷ *Garner’s* facts are materially different. There the suspect was simply running away. He had not engaged in a high-speed pursuit and had not advanced on the officer. The officer had no reason to suspect a threat of any kind. He shot simply to prevent the suspect from climbing a fence and possibly getting away.

The Supreme Court has recognized that there is a “sometimes hazy border” between excessive and acceptable force. *Saucier v. Katz, supra*. That Court has also declared that *Tennessee v. Garner* did not establish a “magical on/off switch” that triggers rigid preconditions governing an officer’s use of force. *Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 1771 (2007). Rather, each case must be judged on its own facts. *Id.*

This Circuit has said that even if an officer creates a situation in which he can more easily be mistaken as to the amount of force that is allowable, he is not liable. *Young v. City of Killeen*, 775 F2d 1349 (5th Cir. 1985).⁸ More importantly, the Court held that “no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts.” *Id.*, at 1353.

There is no factual dispute in this case that Aldrete-Davila had entered the country illegally, had just led the agents on a high-speed pursuit,⁹ was carrying a large quantity of marijuana, almost crashed his vehicle, ignored orders to stop, advanced on the shot-gun wielding Compean, again ignored commands to halt, and evaded, if not resisted, arrest and ran for the border. Aldrete-Davila himself

⁸ And see, *Fraire v. City of Arlington*, 957 F2d 1268 (5th Cir. 1992).

⁹ Could they have used deadly force then? *Scott v. Harris, supra*.

created a situation where an officer might mistakenly use force.

Leaving aside for the moment the question whether Aldrete-Davila even had Fourth Amendment rights, the issue is whether these agents would have had fair warning that 924(c) would be applied them. Certainly there are no fact-specific cases clearly-establishing such application. Neither case cited by the Panel is in point.

In *Williams* and *Winters*, both, the officers used excessive force against in-custody and under control prisoners. These facts alone distinguish those cases from this one. Certainly those cases give no notice that it would be “patently unlawful”¹⁰ to shoot at the fleeing Aldrete-Davila under the circumstances extant here. Additionally, the issue was neither raised nor decided whether 924(c) could properly be applied to officers whose discharge of a weapon in the line of duty (wrongfully or not) was itself the underlying “crime of violence.” Those cases simply do not control here.

The Panel seizes on the statutory language “any person” as demonstrative that Compean had fair warning his actions would be within the scope of the statute. (Opinion, at 30) (because he is “any person”). Respectfully, such approach ignores the legislative history and congressional purpose of 924 (c),

¹⁰ *United States v. Abod*, 770 F2d 1293, 1297 (5th cir. 1985).

which is to encourage those tempted to commit federal crimes to “leave their guns at home.” See *Muscarello v. United States*, 524 U.S. 125 (1998).¹¹ The statute was intended to reach officers only in the “extremely rare case” where an officer commits a violent or drug crime. See, *United States v. Rivera*, 889 F2d 1029 (11th Cir. 1989).

Officers must resort to the use of force every day. They are told over and over that their actions will not be judged in hindsight. *Graham v. Connor*, *supra*. They are told that reviewing courts (and juries) will judge their actions solely from their standpoint at the time they acted. *Id.* They are told that the law understands that decisions to use force are made in tense, uncertain, and rapidly evolving situations. *Id.* They are told good or evil motive or intent is irrelevant. *Id.* No case law puts them on notice that 924(c) can be applied to them if they mistakenly use force. To allow the statute, and its harsh minimum sentence, to be applied here is wrong and a miscarriage of justice.¹²

Compean must address what the Panel obviously felt was a controlling factor-that the jury verdict precludes any attempt to bring this case within *Graham*

¹¹ Fourteen years after 924 (c) was amended to delete the modifier “unlawfully.”

¹² Even if not raised below. *White v. United States*, 300 F2d 813 (8th Cir. 1968); *United States v. O’Bannion*, 943 F2d 1422 (5th Cir. 1991).

v. Connor's “tense, uncertain, and rapidly evolving” analysis. In other words, Compean had no right to complain because the jury must have found that his conduct was “patently unlawful” or they would have not convicted him. Yet, for all that appears the jury could have rejected the defense, not because they thought Compean knew he did not need to shoot, but because he actually did not need to do so. Because the jury instructions were entirely deficient in telling the jury what the law was and how they should apply it, no controlling weight should be attached to whatever “facts” were implicitly “found” in the verdict.¹³

Under the instructions given, the verdict in this case cannot be relied upon as presumptively foreclosing the matter. The jury was told, for example, it must decide whether the force used was reasonable or unreasonable, a clear misplacing of the burden of proof. 2R 437.

Moreover, the instructions actually given regarding the defensive theories raised by the evidence presented the case primarily under general self-defense and defense of others concepts and not, as should have been the case, within the principles governing police use of force.¹⁴ For example, the jury was not told that

¹³ Complaint about the Panel’s treatment of Compean’s challenge to the jury instructions is made in his Petition for Panel Rehearing, contemporaneously filed. However, that issue plainly has relevance to this discussion of 924(c).

¹⁴ 2R 420-421, 423-424.

an officer can be mistaken about the amount of force necessary, that an officer can react to apparent danger as well as real danger, that the jury must place itself in the shoes of the officer at the time he acts and cannot judge the reasonableness in hindsight. Even in civil cases an officer has the right to the basic *Graham v. Connor* instruction. Fifth Circuit Pattern Jury Instruction 10.1. This jury was so deficiently informed about the applicable law, how it must apply that law, and who had the burden to prove what, that its verdict simply does not represent a conclusive finding of the facts.¹⁵ Equivocal direction of the jury is forbidden. *Bollenbach v. United States*, 326 U.S. 607 (1947). The fairness, integrity, or public reputation of these verdicts is seriously in question. See, *United States v. Johnson*, 520 U.S. 461 (1997). The Panel was wrong to place so much emphasis on the verdict as “credibility determinations” foreclosing any fact-guided examination of the 924(c) application.

Peace officers acting the line of duty are different in kind, not just degree, from the “any person” 924(c) purports to cover. “Any person” would know it is “patently unlawful” to discharge a firearm during a rape, murder, robbery, or

¹⁵ For instance, the Panel says that the jury must have found there was no “tense, uncertain, and rapidly-evolving situation.” (Opinion at 28, a. 12). This is not significant for two reasons: (1) the jury was not properly instructed as to the *Graham v. Connor* standards, and (2) the Panel erroneously limits the “tense, uncertain, and rapidly-evolving situation” only to the moment the decision to fire was made, improperly ignoring all that had gone on before, which was “tense, uncertain, and rapidly-evolving,” thanks to Aldrete-Davila.

narcotics deal.¹⁶ However, there is no scienter requirement in the statute.¹⁷ This leaves open the very real possibility, as was the case here, that intent or guilty knowledge can be determined not at the time, but in the “20/20 vision of hindsight.” *Graham v. Connor, supra*, 397. This second-guessing is what is wrong with the Panel’s overly-broad application of 924(c) to “all persons.”

Congress did not intend 924(c) to apply in cases like this. Here the facts do not show the “patently unlawful” core misconduct plainly present in cases like *Williams* and *Winters*. Peace officers now must naturally guess whether, when they shoot, some prosecutor, judge, or jury (hopefully a properly instructed one) will later conclude, in the sterile courtroom, that their actions were unreasonable. This is an unfortunate, misguided, and possibly hopeless position for officers to be in. The far-reaching ramifications of the Panel opinion demand that the issue be reconsidered. Otherwise there is a real risk law enforcement officers will be cast “loose at their peril on a vast uncharted sea.” *Screws v. United States*, 325 U.S. 65, 97-98 (1945).

¹⁶ So would a peace officer, of course, if he was engaged in such conduct.

¹⁷ Specific scienter requirements eliminate the possibility an accused could be convicted of an offense he could not have understood to exist. *United States v. McClain*, 545 F2d 988, 1002 (5th Cir. 1977), cert. denied, 444 U.S. 918 (1979).

CONCLUSION

If 924(c) is not constitutionally applicable here, the convictions on Count 4 (Ramos) and Count 5 (Compean) cannot stand. If Aldrete-Davila has no Fourth Amendment rights, the convictions under the civil rights counts (11 - Compean, 12-Ramos) must also fall.

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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