

**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.**

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**RAMOS' PETITION FOR REHEARING *EN BANC***

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**CERTIFICATE OF INTERESTED PARTIES**

NO. 06-51489, United States of America v. Ignacio Ramos & Jose Alonso Compean

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

**Ignacio Ramos, Appellant**

Steven Peters & Mary Stillinger, Appellant's co-counsel at trial

David L. Botsford, Appellant's counsel on appeal only

**United States of America, Appellee**

Debra Kanoff & Jose Luis Gonzalez, Counsel at trial

Joseph Gay, Counsel on appeal only

\_\_\_\_\_  
DAVID L. BOTSFORD

## CERTIFICATE OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this case involves an issue of exceptional importance not addressed by the revised panel opinion, to wit: whether the balancing test mandated by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989) for determining the objective "reasonableness" of the use of force must include the fact that this was an illegal border entry by an illegal alien who entered the country strictly to smuggle drugs and was therefore not entitled to any Fourth Amendment protections, as raised by ***En Banc Issue No. 1***.

I also express a belief, based upon a reasoned and studied professional judgment, that the revised panel opinion is contrary to the following decisions of the Supreme Court and/or this Court and that consideration by the *en banc* Court is necessary to secure and maintain uniformity of decisions in this Court: As to ***En Banc Issue No. 3***, the revised panel opinion is contrary to *Harris v. United States*, 536 U.S. 545 (2002) and *United States v. Barton*, 257 F.3d 433 (5th Cir. 2001), and as to ***En Banc Issue No. 2***, the revised panel opinion appears to be contrary to *Fiber Systems Intern., Inc. v. Roehrs*, 470 F.3d 1150, 1168-1171 (5th Cir. 2006) and *United States v. Edwards*, 303 F.3d 606, 639 (5th Cir.2002), and cases from other courts of appeals relied upon by *Fiber Systems*.

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DAVID L. BOTSFORD

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TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW IGNACIO RAMOS, and presents this his petition for rehearing *en banc*, and would show the Court the following:

### **STATEMENT OF THE ISSUES**

***En Banc Issue No. 1:*** *En Banc* Review Should Be Granted Because The Panel Failed To Consider The Exceptionally Important Issue Of Whether The Balancing Test Mandated By The Supreme Court In *Graham v. Connor*, 490 U.S. 386 (1989) For Determining The "Reasonableness" Of The Use Of Force Must Include The Fact That This Was An Illegal Border Entry By An Illegal Alien Who Entered The Country Strictly To Smuggle Drugs And Was Therefore Not Entitled To Any Fourth Amendment Protections.

***En Banc Issue No. 2:*** *En Banc* Review Should Be Granted Because The Panel Failed To Follow Prior Precedent Which Appears To Require It To Consider "Prejudicial Spillover" From Evidence Of Violations Of Border Patrol Policies Admitted To Prove The Vacated Obstruction Counts Which Was Not Admissible On The Non-Vacated Counts.

***En Banc Issue No. 3:*** *En Banc* Review Should Be Granted Because The Panel Misconstrued 18 U.S.C. § 924(c) And Resolved The Indictment Challenge Contrary To *Harris v. United States*, 536 U.S. 545 (2002) And *United States v. Barton*, 257 F.3d 433 (5th Cir. 2001).

### **COURSE OF PROCEEDINGS**

Ramos and Compean proceeded to trial in February 2006. The jury acquitted Ramos and Compean on count 1, but convicted on all other counts. 33R3-7. Ramos was sentenced to a year and one (1) day on counts 2, 3, 8, 9 and 12, and 10 years on count 4, consecutive to the other counts. After oral argument on December 3, 2007, the panel issued an opinion on July 28, 2008 (followed by a revised opinion on July 29, 2008). *See* Tab #1. The panel vacated all of the obstruction counts as to both Ramos and Compean (counts 6 to 10), but otherwise affirmed the convictions, remanding for resentencing due to the vacated counts. Tab #1 at 3, 46.

## **STATEMENT OF FACTS NECESSARY TO EN BANC SUGGESTION**

This trial revolves around the acts and omissions of border patrol agents Ramos and Compean during an approximate seventeen minute span of time on the afternoon of February 17, 2005. An illegal alien, Davila, illegally entered the country to smuggle drugs and after a high speed vehicular chase, attempted to flee back across the Rio Grande. The alien was blocked by Compean and an altercation ensued. Thereafter, Compean fired at Davila, based on his belief that Davila had a gun. Ramos, who was in an eleven foot deep drainage canal when he heard the shots, exited the canal, saw Compean on the ground, and fired one shot at Davila while Davila was turning around towards him with a gun in his hand. Davila was hit by Ramos' shot, but continued his flight across the Rio Grande.

### **REASONS FOR EN BANC REVIEW**

#### **EN BANC ISSUE NO. 1**

At pages 15 to 18 of Ramos' brief, the legal principles regarding "use of force" claims brought under 42 U.S.C. § 1983, as established by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), were set forth.<sup>1</sup> *Graham*<sup>2</sup> held that "excessive force" claims arising "in the context of an arrest or investigatory stop of a *free citizen*" must be analyzed under the Fourth Amendment's "reasonableness"

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<sup>1</sup> Ramos cited and discussed *United States v. Lanier*, 520 U.S. 259 (1997), because the Court there made it clear that 18 U.S.C. § 242 is merely the criminal analog of 42 U.S.C. § 1983, rendering civil precedents equally persuasive in the criminal context. *See also United States v. Bigham*, 812 F.2d 943, 948 (5th Cir. 1987); *United States v. Price*, 383 U.S. 787 (1966); *Screws v. United States*, 325 U.S. 91 (1945). *Lanier* also established that the concept of qualified immunity under 42 U.S.C. § 1983 is the equivalent of the "fair notice" concept that must be applied to criminal prosecutions under 18 U.S.C. § 242. *See Lanier*, 520 U.S., at 270-271.

<sup>2</sup> *Graham* made explicit that which was implicit from *Tennessee v. Garner*, 471 U.S. 1 (1985).

standard. *Graham*, 490 U.S., at 393 (emphasis added). According to *Graham*, the "reasonableness" test requires a

**...careful balancing of` the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake.... *Id.***

Ramos also pointed out that application of the "reasonableness" test

**requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.**

*Graham* also held that the "reasonableness" inquiry

**must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.**

Ramos also pointed out that the balancing test had to be conducted "**without regard to their underlying intent or motivation.**" *Id.* at 396-397.<sup>3</sup>

Ramos further asserted that *Graham's* balancing test had to encompass the realization that this case involved an illegal international border entry, relying on Supreme Court cases addressing the powers of law enforcement officers in connection with international border detentions and searches<sup>4</sup> and the Government's

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<sup>3</sup> As to the civil rights counts, the jury was instructed, contrary to *Graham*, that it could consider the agents intent (whether they acted "with a bad purpose or evil motive," 3R468-469). See Tab #1 at 42-43. Also, the jury was not given a *Graham* balancing test like that required by Fifth Circuit Pattern Civil Jury Instruction No. 10.2. This was not discussed by the panel. Tab #1 at 42-44.

<sup>4</sup> Ramos cited *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) for this proposition.

interest in protecting its "territorial integrity." *United States v. Flores-Montano*, 541 U.S., at 153.

Ramos argued that the evidence, viewed through the lens of an illegal border entry by an illegal alien (Davila was not a "*free citizen*") for the sole purpose of importing illegal drugs, during which there was a high speed chase,<sup>5</sup> followed by Ramos's inability to see everything while he was in the eleven foot deep canal (but hearing shots while he was in it) and encountering Compean on the ground upon exiting that canal, justified his use of deadly force.

Ramos' Rule 28j supplemental authorities cited, *inter alia*, Supreme Court and Fifth Circuit precedent<sup>6</sup> for the proposition that Davila's connection with the United States was too tenuous and that he was not entitled to Fourth Amendment protection as part of the "people." Thus, Ramos asserted that the balancing test of *Graham*, considering the facts of this case, supported the conclusion that a heightened governmental interest (due to the illegal international border entry, coupled with the high speed chase, etc.) outweighed any intrusion into Davila's rights as an illegal alien.

Ramos' claims of insufficient evidence on counts 2 and 3 (assault) and 12 (civil rights), as well as his claim regarding lack of fair notice under 18 U.S.C. § 242

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<sup>5</sup> Ramos relied upon *Scott v. Harris*, 127 S.Ct. 1769 (2007) for the proposition that for some portion of the high speed chase from Fabens to the Rio Grande, Davila clearly presented a danger to others, thereby justifying the use of deadly force, as *Scott*, applying *Graham*, held that the use of "deadly force" to stop a fleeing vehicle was objectively reasonable.

<sup>6</sup> Ramos cited, *inter alia*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), *United States v. Hernandez-Reyes*, 501 F.Supp.2d 852, 855-856 & n.3 (W.D. Tex. 2007), and *Martinez-Aguero v. Gonzalez*, 459 F3d 618, 624 (5th cir.), *cert. denied*, 127 S.Ct. 837 (2006), asserting that they should be considered in connection with Ramos' Issue No. 6 (insufficient evidence as to count 12), which was adopted by reference into Ramos' insufficiency claims as to counts 2 and 3 and his lack of fair notice claim at to § 242.

(relating to count 12), all adopted and relied upon the above principles. However, the panel did not address his assertions that the balancing test of *Graham* should include the Government's heightened interests due to the illegal border entry/exit by Davila or Davila's diminished rights due to his illegal entry/exit solely for the purpose of smuggling drugs into the United States and summarily overruled his sufficiency claims, Tab #1 at 44-45, and his § 242 fair notice claim. Tab #1 at 29 n. 13.

Ramos understands that insufficient evidence claims are not ordinarily appropriate for *en banc* review, but whether the balancing test of *Graham* justifies the use of deadly force given the unique facts of this case is an exceptional issue meriting *en banc* consideration. *Graham* itself states that the proper application of the balancing test "requires **careful attention to the facts and circumstances of each particular case....**" Additionally, none of the Supreme Court's prior cases on "deadly force," including *Tennessee v. Garner* (cited by the panel to hold that Ramos was on notice that shooting Davila would subject him to criminal penalties, Tab #1 at 29, n.13), *Graham, Brosseau v. Haugen*, 543 U.S. 194 (2004), and *Scott v. Harris*, involved an illegal border entry/exit by an illegal alien smuggling drugs.<sup>7</sup>

The resolution of this issue affects not merely counts 2, 3 and 12 (insufficiency of evidence and absence of fair notice as to 18 U.S.C. § 242), but also count 4 (use of gun, upon which Ramos received a 10 year mandatory minimum) because the

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<sup>7</sup> Davila either did not belong to the community of persons covered by the Fourth Amendment and/or his connection with the United States was so tenuous that he was not entitled to such protections. See *United States v. Verdugo-Urquidez*, 494 U.S., at 274-75, *Martinez-Aguero v. Gonzales*, 459 F.3d, at 625. Given the enhanced governmental interests associated with the international border, *Graham's* balancing test weighs on the side of Ramos' use of deadly force, even viewing the case through the lens of the jury's verdict **and** even assuming Davila, whose freedom of movement was not terminated as he fled to Mexico, was actually "seized" within the meaning of the Fourth Amendment. See *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989).

conviction on count 4 required the jury to first find Ramos guilty of counts 1, 2 or 3, *see* 3R453,<sup>8</sup> and Ramos was acquitted on count 1. An appellate reversal on counts 2 or 3, based on the application of *Graham's* balancing test to the unique facts of this case, will eliminate the underlying predicate convictions upon which count 4 (count 5 as to Compean) were based, thus undermining the validity of the conviction(s). Favorable resolution of this issue would also support Ramos' positions that 18 U.S.C. § 924(c) failed to provide "fair warning" (Ramos Issue No. 3) and, as applied to Ramos, violated his right to equal protection (Ramos Issue No. 4), because there was no "clearly established" law providing notice to Ramos that the mistaken use of his weapon while clearly in the line of duty would subject him to the ten year mandatory minimum of 18 U.S.C. § 924(c). *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

*En banc* review should be granted to address this exceptional issue and its ramifications upon Ramos and Compean, including Ramos' Issue No. 3 (fair notice under 18 U.S.C. § 924(c)), Issue No. 4 (equal protection due to application of § 924(c)), Issue No. 6 (insufficient evidence, count 12), Issue No. 7 (fair notice under 18 U.S.C. § 242), and Issue No. 11 (insufficient evidence, counts 2 and 3). Given the need to provide guidance to border patrol agents and the high traffic of illegal aliens along the Texas/Mexico border, *en banc* review is exceptionally important.

### **EN BANC ISSUE NO. 2**

*En banc* review should be granted so that the Court can decide whether the "prejudicial spillover" of evidence properly admissible only as to the vacated

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<sup>8</sup> The first element of count 4 (count 5 as to Compean) required the jury to find "[t]hat the defendant committed one of the crimes alleged in Count One, Two or Three of the Indictment."

obstruction counts (counts 6 to 10, *see* Tab #1 at 35-42, Part D of opinion) justifies a new trial on the non-vacated counts because: (1) of evidence of violations of border patrol policies admitted as to the obstruction counts which was not properly admissible as to the non-vacated counts, **and** (2) the Government's argument that **"if you start with those counts [obstruction counts 6 to 10], your deliberations will be a lot smoother, a lot simpler, because everything will fall into place once you decide those counts."** 30R10 (explanation added). Consideration of "prejudicial spillover" due to the panel's action in vacating the obstruction counts appears to be necessary under this Court's opinion in *Fiber Systems Intern., Inc. v. Roehrs*, 470 F.3d 1150, 1168-1171 (5th Cir. 2006) and *United States v. Edwards*, 303 F.3d 606, 639 (5th Cir.2002), and cases cited in *Fiber Systems*.<sup>9</sup>

The Government's case was premised upon extensive direct examination of virtually every witness it called, as well as extensive cross-examination of Ramos and Compean, regarding violations of four border patrol policies on February 17, 2005.<sup>10</sup>

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<sup>9</sup> *Fiber Systems* cited *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir.1994), stating "[w]hen an appellate court reverses some but not all counts of a multicount conviction, the court must determine if prejudicial spillover from evidence introduced in support of the reversed count requires the remaining convictions to be upset." *Fiber Systems*, at 1170, n. 21.

<sup>10</sup> These four policies were as follows:

Policy #1. The policy requiring agents to obtain permission from a supervisor before engaging in a "pursuit" of a vehicle, and thereafter prepare a "pursuit form" reflecting the particulars of the situation;

Policy #2. The policy outlining the requirements for the use of deadly force, which policy (at least as testified to) does not contain language regarding an officer's mistaken belief that the use of force was necessary under all of the circumstances;

Policy #3. The policy requiring an oral report of the discharge of a weapon to a supervisor within one hour (regardless of whether the agent discharged the weapon or merely heard the discharge or even heard about the discharge), and the corresponding significant incident report which the supervisor would generate after such an oral report; and

The evidence of the violations of Policy #1, #3 and #4 was not admissible or necessary as an extrinsic offense regarding the non-vacated counts of conviction (i.e., counts 2, 3, 4 and 12, to wit: assault with a dangerous weapon, assault with serious bodily injury, use of a firearm in commission of a crime of violence, and deprivation of civil rights) under Rule 401.<sup>11</sup> And, as to Policy #2, the evidence was not admissible as to the non-vacated counts, with the possible exception of count 12.<sup>12</sup>

The violations of these border patrol policies had no "tendency to make the existence of any fact" of consequence to the determination of the elements of the non-vacated counts "more probable or less probable than it would be without the evidence." Review of the elements of the non-vacated counts, as submitted to the jury, supports this position. *See* 3R446-450 (count 2); 450-453 (count 3); 453-454 (count 4); and 467-470 (count 12).

The evidence was also **unnecessary** to prove any element of the non-vacated counts. The assaultive conduct -- firing at Davila and/or Compean's action in using his shotgun -- formed the basis of all of the non-vacated counts.<sup>13</sup> *See* 3R446-450 (count 2); 450-453 (count 3); 453-454 (count 4); and 467-470 (count 12). This

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Policy #4. The policy requiring the Border Patrol's "Sector Evidence Team" to investigate any significant incident report, including the discharge of a weapon.

<sup>11</sup> The panel stated that the "district court admitted this evidence as relevant to intent and knowledge of wrong-doing relative to the defendant's crimes." Tab #1 at 33-34. However, as demonstrated below, as to three of the policies, the Government argued that the violations were offered to prove the predicate "*official proceeding*" necessary to each of the obstruction counts (although the precise "*official proceeding*" was not identified in any of the obstruction counts).

<sup>12</sup> This policy conflicted with *Graham* which excuses the use of deadly force when an officer has formed a mistaken belief that the use of force was necessary under all of the circumstances.

<sup>13</sup> The jury was instructed on count 2 that a "Beretta 40 caliber firearm or a shotgun is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury." 3R449. No other count authorized a conviction on the use of Compean's shotgun.

"assaultive" conduct demonstrates intent itself and the extent to which alleged unlawful intent was established by the firing of the guns (by Compean and then Ramos) or the actions of Compean in using his shotgun to block Davila negated any relevancy and established the prejudicial impact of the violation of border patrol policies as to the non-vacated counts. The non-vacated offenses are such that evidence of their commission demonstrates intent, thus negating a need for extrinsic offense evidence and the violations of border patrol policies.

After the district court concluded that the "pursuit" policy had been discussed "ad nauseam," 27R134, the prosecutor conceded that these policy violations had been admitted to prove the "**official proceeding**" requirement of the vacated obstruction counts by stating:<sup>14</sup>

I apologize to the Court about ever bring up high-speed/high-risk pursuits....

They didn't follow their own rules about deadly force. They didn't follow their own rules about destroying the scene. They didn't follow their own rules about calling out a SET (Sector Evidence Team). They didn't follow their own rules about reporting that they discharged a firearm.

**Every one of those acts, had they properly behaved, would have triggered some kind of an *official proceeding*. Some of them would only have been a mild investigation to see, Hey why didn't you call out to sector communications that you're chasing this guy fast? All the way to a grand jury, depending on which act you're talking about.** (explanation added). 28R141-142.

The violation of these policies was used during the Government's initial final argument, which first asked the jury to consider the now vacated obstruction counts,

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<sup>14</sup> The district court instructed the jury that as to counts 8, 9 and 10 **only**, the violation of the "duty to report" was not a violation of criminal law, but could be considered as to "intent." No such limiting instruction was given as to any of the other three policies or the "duty to report" policy as to the non-vacated counts. 3R459-60; 461-62, 464.

as quoted in the first paragraph of this *en banc* issue.<sup>15</sup> The Government's closing final argument on all counts was also predicated on violations of the four policies.<sup>16</sup>

Ramos was prejudiced by the evidence of violations of border patrol policies which were not admissible as to the non-vacated counts. Looking at the "prejudice" factors identified in *Rooney*, cited in *Fiber Systems*, the evidence would tend to have affected the jury's decision, the evidence was not admissible as to the non-vacated counts, the vacated counts are so dissimilar as to permit the inference that the jurors did not keep the evidence separate in their minds, and the admissible evidence on the non-vacated counts is not so strong that the chance of spillover prejudice was minimized. *Rooney*, 37 F.3d at 855-56. Significantly, prejudice also resulted because evidence of those violations formed the platform for the Government's final

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<sup>15</sup> The Government's argument as to the obstruction counts specifically referred to the policy of failing to report the discharge of the weapons. Thereafter, having set the "hook for the jury" to convict due to the failure to report the shooting, in violation of the policy, the prosecutor argued, contrary to *Graham*, that "**the only way that their actions would have been reasonable and justified is if, in fact, Osvaldo Aldrete-Davila had had a weapon.**" 30R26.

<sup>16</sup> The arguments included the following, among others:

**But that day the defendant's turned themselves out of their Border Patrol uniforms and into vigilantes.** 30R103.

Four policies they violated. The first one is the pursuit policy. You know, why is that important? Yea, you know, we spent lots of time listening to cross-examination about the pursuit policy... (continuing talking about this policy from 30R103 to 30R105).

The second thing they violated was the deadly force policy. And I'll get to that later. But there are less restrictive means of, you know - of stopping a person that's not a threat to you.... 30R105.

The third thing that they did not do was to give the sector evidence team an opportunity to come out.... 30R106.

They did not follow the shooting policy. That's the fourth policy they failed to follow. You must report that accidental discharge.... 30R110.

Their behavior was egregious. **They used their weapons in rank violation of the rules of the Border Patrol** and of the United States Constitution. 30R133.

argument. Rehearing *en banc* should be granted to determine whether Ramos (and Compean) is entitled to a new trial on the non-vacated counts due to "prejudicial spillover."

### **EN BANC ISSUE NO. 3**

In addressing the challenge to the sufficiency of the indictment, the panel misconstrued 18 U.S.C. § 924(c) and decided the issue contrary to *Harris v. United States*, 536 U.S. 545 (2002) and *United States v. Barton*, 257 F.3d 433 (5th Cir. 2001). *En banc* review should be granted.

The panel appears to have misconstrued the statute, because it states the following:<sup>17</sup>

"... Congress **directed** a mandatory minimum sentence of **ten years** for **all** defendants convicted under this statute, i.e., **using** a gun in relation to the commission of a crime of violence." Tab #1 at 3 (emphasis added).

Section 924(c)(1)(A)(i) states that any person convicted of so **using** a gun be "sentenced to a term of imprisonment of not less than **5 years**," not 10 years. The 5 year minimum sentence may be increased based upon the type of use. Where the firearm is "brandished," the sentence is set at a **7-year** minimum. *See* §

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<sup>17</sup> The panel appears to reiterate this misinterpretation of the statute with the following statements:

"Once the defendants were charged by the government and convicted by the jury under this statute, the district court had **no discretion** but to impose at least a **ten-year** sentence." Tab #1 at 3 (emphasis added).

"Thus, the sentences in this case reflect the **mandatory ten years for violation of § 924(c)**, and one year and a day and two years, respectively, for the remaining several convictions." Tab #1 at 3 (emphasis added).

"[W]e say again that the sentence is predominantly influenced by their convictions under 18 U.S.C. § 924(c)(1)(A), which carried **mandatory minimum terms of ten years**" Tab #1 at 9. (emphasis added).

924(c)(1)(A)(ii). If the firearm is "discharged," the sentence is a **10-year** minimum. See § 924(c)(1)(A)(iii); *Harris v. United States*, 536 U.S. 545, 551-56 (2002). Thus, the statute prescribes three minimum sentences: 5, 7 or 10 years, depending upon whether the wrongful use of the gun amounted to "brandishing" or "discharging."

More importantly, the panel adopted a position directly contrary to *Harris v. United States*, 536 U.S. 545 (2002), and *United States v. Barton*, 257 F.3d 433 (5th Cir. 2001), because it effectively holds that a sentencing factor can be substituted for an element of the crime at the discretion of the prosecutor. Tab #1 at 32-33.

In *Harris*, the Supreme Court ruled that § 924(c)(1)(A) dictated only a **five-year minimum** sentence, upon a conviction for **use** (or to possess or carry) of a firearm in relation to a crime of violence, observing that "subsection (i) [of § 924(c)(1)(A)] sets a **catchall minimum**." 536 U.S., at 554. Further, **the Supreme Court barred use of the exact same indictment language approved by the panel** when it ruled that the 7-year and 10-year minimum sentences prescribed by the "brandishing" subsection (ii) and "**discharging**" subsection (iii), respectively, were "sentencing factors **to be found by the judge, not offense elements to be found by the jury**." 536 U.S., at 556 (Emphasis added). The Court pointed out that "there is no ... federal tradition of treating brandishing and discharging as offense elements," instead finding them to be sentencing factors. 536 U.S., at 554.

One year prior to *Harris*, this Court ruled the same way in *Barton*. Rejecting a defendant's claim that the ten-year minimum sentence could not be imposed upon him unless "the jury [found] beyond a reasonable doubt ... the element of discharging a firearm ...[thereby] subjecting him to the increased mandatory minimum sentence

under [§ 924(c)(1)(A)(iii)]," this Court "conclud[ed] that subsections (i), (ii), and (iii) set forth sentencing factors, not separate elements of different offenses." *Barton*, 257 F.3d at 441, 443. And as the Supreme Court ruled in *Harris*, the question whether a firearm was "brandished" or "discharged" was a **sentencing factor** to be found by the trial court **after** a jury had found a defendant guilty of wrongful **use**, **not** an element to be found by the jury. *See Harris*, 536 U.S., at 556.

In the present case, however, the indictment — having charged Ramos and Compean in counts 4 and 5 with "discharging," rather than "using" a firearm — conflated the two issues into one. The panel found this justified, based on a misunderstanding of the statute, without any attempt to reconcile its decision with *Harris* and *Barton*, even though Compean cited *Harris* and both cases were cited and discussed by the *amicus* brief filed on behalf of Congressman Walter Jones. *See Brief Amicus Curiae of Congressman Walter Jones, et al.*, pp. 4, 6-8, 10, 12-13, 16-17.

The panel acknowledged that the counts alleging violations of § 924(c)(1)(a) had **not** alleged that Ramos and Compean had "used" a firearm, but had alleged that the two had "discharged" a firearm. Tab #1 at 32. The panel found the indictment's use of the term "discharges" instead of the statutory word "uses" suffic[ient] to charge a crime under § 924(c)(1)(A), because "the term `discharge' is but a specific manner of use of the broad term `use.'" Tab #1 at 32-33. Reasoning that "[t]he validity of an indictment is governed by practical, not technical, considerations," the panel concluded that the indictment charged the crime of "use" of a firearm in relation to a crime of violence. Tab #1 at 32-33.

While discharging a firearm may, in ordinary discourse, be as the panel stated

— "but a specific manner of use of the broad term `use'" — the question before the panel was **not** one of the sufficiency of the evidence to prove the "use" element of the crime, as was the case in *Bailey v. United States*, 516 U.S. 137 (1995), upon which the panel relied. Tab #1 at 33. Rather, the question before the panel was whether the prosecution could **substitute** "discharge" for "use" in an indictment for violation of § 924(c)(1)(A). In failing to address the legal question before it, the panel ignored the "practical" consequences that the panel stated "governed" the "validity of an indictment." Tab #1 at 32-33.

As a tactical matter, the prosecutor changed an element of the crime from "use" to "discharge" so that the Government could draw the jury's attention to the **moment of discharge**, without having to deal with the undeniable fact that, prior to the moment of discharge, Ramos and Compean were **lawfully using, carrying and possessing** their firearms in their capacity as border patrol agents and, at a minimum, had the right to use deadly force during the high speed chase from Fabens to the river.. *See Scott v. Harris, supra*. Surely no prosecutor would choose a trial strategy that would require him to prove "discharge" beyond a reasonable doubt to the jury, rather than by a preponderance of the evidence to the judge at sentencing, unless the prosecutor believed that by charging "discharge" as an element of the offense it would increase the likelihood of a conviction.<sup>18</sup> According to established Supreme Court precedent, "[a]n indictment must set forth **each element** of the crime that it charges," *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998), which is done in the

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<sup>18</sup> If the jury had actually been required to find that Ramos and Compean were illegally using, possessing, or carrying, then the fact that they were required to have their weapons with them while on duty would have made conviction in this case more difficult.

language of the statute, not in some other language chosen for the tactical advantage of the prosecutor.

Because the panel did not find the indictment defective, it did not reach the issue of whether the “plain error” doctrine was satisfied. Not only did the indictment substantially affect those rights, but permitting the prosecution to substitute "discharge" for "use" seriously and adversely affected the fairness, integrity and reputation of the judicial proceedings. *En banc* review should be granted.<sup>19</sup>

### CONCLUSION

WHEREFORE, PREMISES CONSIDERED, *en banc* review should be granted.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I certify that on August \_\_\_\_, 2008, two copies of this document were mailed to Mark Stelmach, 816 Congress Avenue, Suite 1000, Austin, Texas, 78701, and to Robert Baskett, 2612 Boll Street, Dallas, Texas 75204.

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<sup>19</sup> Again, Ramos asserts that the Government substituted "discharges" for "use" in order to focus the jury on the **events immediately preceding the shooting**, making it more difficult for the defense to develop the theme that, as border patrol agents, it was not only **lawful for them to carry and use a firearm**, but their required duty.

In justification of its decision to defer to the "prosecutor's discretion" to charge Ramos and Compean with a violation of § 924(c), the panel stated that it "cannot overrule our own precedents; only an *en banc* court can do that." Tab #1 at 31. However, that is exactly what the panel did: it effectively overruled, *sub silencio*, *Barton* and *Harris* in resolving this issue.

**TAB #1**

**REVISED PANEL OPINION OF JULY 29, 2008**