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

BRIEF *AMICUS CURIAE* OF CONGRESSMAN WALTER B. JONES, CONGRESSMAN VIRGIL H. GOODE, JR., CONGRESSMAN TED POE, GUN OWNERS FOUNDATION, U.S. BORDER CONTROL FOUNDATION, U.S. BORDER CONTROL, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPELLANTS

J. MARK BREWER
BREWER & PRITCHARD
Three Riverway, 14th Floor
Houston, TX 77056
(713) 209-2950

Attorney of Record

WILLIAM J. OLSON
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C
8180 Greensboro Drive, Suite 1070
McLean, VA 22102-3860
(703) 356-5070

Counsel for *Amici Curiae*

May 24, 2007

Case No. 06-51489

IN THE UNTIED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Plaintiff-Appellee

v.

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Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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 and Jose Alonso Compean, Appellants

David L. Botsford and Mary Stillinger, Appellant Ramos' counsel on appeal

Robert T. Baskett, Appellant Compean's counsel on appeal

United States of America, Appellee

Congressman Walter B. Jones, Congressman Virgil H. Goode, Jr., Congressman Ted Poe, Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund, *Amici Curiae*

Mark Brewer, William J. Olson, Herbert W. Titus, John S. Miles, and Jeremiah L. Morgan, counsel for *Amici Curiae*

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

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J. Mark Brewer
Attorney of Record for *Amici Curiae*

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MISCELLANEOUS

INTEREST OF AMICI CURIAE

Congressmen Walter B. Jones, Congressman Virgil H. Goode, Jr., and Congressman Ted Poe are members of the United States House of Representatives, representing the citizens of the Third Congressional District of North Carolina, the Fifth Congressional District of Virginia, and the Second Congressional District of Texas, respectively. All three Congressmen have a keen interest in the correct interpretation and implementation of the law, and particularly federal law. Each of them has demonstrated a special interest in this case because of the serious concerns each has about the interpretation and implementation of 18 U.S.C. Section 924(c)(1)(A) against the defendants in the court below.

Gun Owners Foundation ("GOF"), U.S. Border Control Foundation ("USBCF"), U.S. Border Control ("USBC") and Conservative Legal Defense and Education Fund ("CLDEF") are nonprofit corporations established in the Commonwealth of Virginia (GOF, USBCF and USBC) and in the District of Columbia (CLDEF). Three of the organizational *amici* are nonprofit educational organizations, exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code ("IRC"), and public charities. The other, USBC, is a nonprofit social welfare organization exempt from federal taxation under IRC Section 501(c)(4). All of the organizational *amici* are dedicated, *inter alia*, to the correct construction,

interpretation and application of the law, and engage in educational activities concerning such matters.

GOF primarily engages in nonpartisan research and public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the right to own and use firearms, and related issues. USBCF and USBC engage in nonnpartisan research and public education, as well as public interest litigation involving the construction of constitutions and statutes related to policies concerning the protection of our nation's borders, immigration, and related matters. CLDEF engages in nonpartisan research and education and public interest litigation, particularly that related to the correct construction of the U.S. Constitution and federal and state statutes. In the past, each of the *amici*, except for USBCF, has filed *amicus curiae* briefs in other federal litigation involving constitutional and statutory issues. They share the concerns of Congressmen Jones, Goode, and Poe, expressed above, concerning the interpretation and implementation of 18 U.S.C. Section 924(c)(1)(A) against the defendants in the court below, and believe that their joint perspective on this matter may be of assistance to this Court in considering and resolving the legal issues herein.

ARGUMENT

I. THE PLAIN ERROR RULE APPLIES TO DEFENDANT RAMOS' AND DEFENDANT COMPEAN'S CHALLENGES TO THE LEGAL SUFFICIENCY OF COUNTS FOUR AND FIVE OF THE INDICTMENT.

Although at trial neither Defendant challenged the legal sufficiency of Counts Four and Five of the indictment, both Defendants-Appellants have now based their appeal, *inter alia*, on the claim that the allegations in Counts Four and Five are "fatally defective," failing "to charge an offense." *See* Brief of Appellant Jose Alonso Compean ("Compean Br."), pp. 4, 56 (Issue Number Eleven); Appellant Ignacio Ramos' Brief on Appeal ("Ramos Br."), pp. 2, 89 (Issue No. 13).

According to their titles, Counts Four and Five of the indictment charged Defendants Ramos and Compean, respectively, with a violation of "18 U.S.C. §924(c)(1)(A)(iii) - **Discharge** of a Firearm in Relation to a Crime of Violence," Document No. 66, pp. 3-4; 1R-119-126 (emphasis added). *See* Appellant Ignacio Ramos' Brief on Appeal (Ramos Brief, p. 2). Likewise, the body of each of the two Counts of the indictment alleged that:

> On or about the February 17, 2005 ... defendant ... knowingly **discharged** a firearm, to wit: a Beretta 40 caliber firearm, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit: Assault with Intent to Commit Murder ... Assault with a Dangerous Weapon ... and,

> Assault with Serious Bodily Injury ... in violation of Title 18, United States Code, Section 924(c)(1)(A). [Document No. 66 (emphasis added).]

However, for the reasons set out below, the subsection which Ramos and Compean are charged with violating — 18 U.S.C. section 924(c)(1)(A)(iii) — does not define a crime, but contains only a sentencing factor to be addressed by the court after conviction of a crime, the elements of which are set out in the first paragraph of 18 U.S.C. section 924(c)(1)(A). *See* Harris v. United States, 536 U.S. 545, 552 (2002). Why the prosecution avoided using one or more of the Congressionally-fashioned *actus reus* words of "use," "carry" or "possess" a firearm contained in that first paragraph — contrary to the Government's normal practice in charging a Section 924(c)(1)(A) offense[1] — choosing instead to substitute the sentencing factor "discharge" of a firearm is not immediately apparent. However, as demonstrated below, crafting the two counts in this peculiar way had the demonstrable effect of misfocusing the defendants, counsel, and jury on a non-existent crime of unlawful discharge of a firearm in a case where Defendants, both United States Border Patrol Agents, were authorized to possess, carry and use a firearm in the normal course of their employment.

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[1] *See, e.g.,* United States v. Barton, 257 F.3d 433, 443 (5th Cir. 2001) and United States v. McGilberry, 480 F.3d 326 (5th Cir. 2007).

Because Defendants failed, in the court below, to raise any objection to the sufficiency of the charges in Counts Four and Five of the indictment, this Court reviews their challenges to Counts Four and Five "for plain error." *See* United States v. Meshack, 225 F.3d 556, 575 (5th Cir. 2000), *cert. den. sub nom.* Parker v. United States, 531 U.S. 1100 (2001). The rule of plain error "requires the defendants to show '(1) an error; (2) that is clear or plain; (3) that affects the defendant's substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.' *United States v. Vasquez*, *216 F.3d 456, 459 (5th Cir. 2000)*." Meshack, 225 F.3d at 575. *See also* United States v. McGilberry, 480 F.3d 326, 328-329 (5th Cir. 2007). As demonstrated below, this standard is met by both Defendant Ramos and Defendant Compean.

II. THE FAILURE TO CHARGE DEFENDANTS IN COUNTS FOUR AND FIVE WITH THE CRIME DEFINED IN 18 U.S.C. SECTION 924(c)(1)(A) MEETS EACH OF THE FOUR PLAIN ERROR FACTORS.

Indictment Count Four charges Defendant Ramos with violating 18 U.S.C. Section 924(c)(1)(A) by the "knowing[] discharge[] [of] a ... firearm ... during and in relation to a crime of violence...." Count Five charges Defendant Compean similarly. As set out in the indictment, Counts Four and Five are insufficient, failing to:

(a) "contain[] all essential elements of the offense charged";

(b) charge those elements with "particularity"; and

(c) "preclude a subsequent prosecution of the same offense."

See McGilberry, 480 F.3d at 329.

A. Each of Counts Four and Five of the Indictment Contains an Erroneous Allegation of the Offense Defined in 18 U.S.C. Section 924(c)(1)(A).

In McGilberry, this Court ruled that, in order to charge a crime under 18 U.S.C. Section 924(c)(1)(A), an indictment must allege that a defendant either has "**use[d]** or **carrie[d]** a firearm ... during and in relation to any [crime of violence]" or has "**possess[ed]** a firearm" "in furtherance of" such a crime. McGilberry, 480 F.3d at 329 (emphasis added). Conspicuously absent from this ruling is any mention that an indictment charging a violation of 18 U.S.C. Section 924(c)(1)(A) would be sufficient if it alleged that a defendant "**discharged"**a firearm during and in relation to a crime of violence, such as was alleged in Counts Four and Five of the indictment in this case. Indeed, six years before McGilberry, this Court ruled that "discharging a firearm during and in relation to a crime of violence" was **not** an "actus reus" element of the offense defined by 18 U.S.C. Section 924(c)(1)(A), but only a "sentencing factor." *See* United States v. Barton, 257 F.3d 433, 441-43 (5th Cir. 2001).

One year after Barton, the Supreme Court affirmed this 5th Circuit rule, concluding that 18 U.S.C. Section 924(c)(1)(A) defines a "single crime," namely, the use or carrying of a firearm during and in relation to a crime of violence or the

possession of a firearm in furtherance of such a crime. *See* Harris v. United States, 536 U.S. 545, 550-53 (2002). In Harris, the Supreme Court determined that 18 U.S.C. Section 924(c)(1)(A)(iii), which referred to the discharge of a firearm, did not define a separate offense. Rather, it ruled that subsection (iii), like its companions (i) and (ii), identified only certain "sentencing factors" to be considered by the trial judge **after** conviction of the offense that is fully defined in the paragraph immediately preceding subsection (i). *Id.*, 536 U.S. at 552-54.

In disregard of these definitive rulings, the prosecution in this case obtained from the Grand Jury an indictment setting forth Counts Four and Five, which charged Defendants with the crime of having "knowingly **discharged** a firearm ... during and in relation to a crime of violence...." Document No. 66, p. 3, 1R-119-126 (emphasis added). Having misstated the crime defined by 18 U.S.C. Section 924(c)(1)(A), Counts Four and Five failed to charge either Defendant with any criminal offense whatsoever. *See* McGilberry, 480 F.3d at 329 and Barton, 257 F.3d at 443.

B. The Misdescription in Counts Four and Five of the Offense Defined in 18 U.S.C. Section 924(c)(1)(A) Was Plainly Erroneous.

Even before the United States Supreme Court decided Harris, and years prior to the indictment and trial of Defendants Ramos and Compean, this Circuit ruled that the "discharge" of a firearm was **neither** an element of the offense defined by 18

U.S.C. Section 924(c)(1)(A) **nor** a separate offense defined by 18 U.S.C. Section 924(c)(1)(A)(iii), but was only a sentencing factor. *See* United States v. Barton, 257 F.3d 433, 441-43 (5th Cir. 2001). Notwithstanding those pertinent precedents, the prosecution in this case erased that well-established distinction, substituting "discharge" for one of the statutorily-identified actus reus elements — use, carry, and possess. As was true in McGilberry, where the prosecution "erroneously combined the 'possession' prong of the statute with the 'during and in relation to' prong," it was "plain error" for the prosecution to combine the "during and in relation to" prong with the "discharge" factor, thereby creating a purported criminal offense never enacted into law by Congress. *See* McGilberry, 480 F.3d at 329-30.

Although McGilberry may have been decided after the trial of this case, it is well established that "it is enough that an error be 'plain' at the time of appellate consideration." *See* Johnson v. United States, 520 U.S. 461, 468 (1997). Moreover, at the time of trial, both Harris and Barton made it obvious that an indictment charging a violation of 18 U.S.C. Section 924(c)(1)(A) could not rest on an allegation of "discharge" of a firearm, such act not being an element of the offense, but only a sentencing factor. Thus, the substitution of "discharge" of a firearm for the "use, carry or possession" of a firearm as an element of the offense was **plain** error. *See* United States v. Olano, 507 U.S. 725, 734 (1993).

C. The Misdescription in Counts Four and Five of the Offense Defined in 18 U.S.C. Section 924(c)(1)(A) Affected Defendants' Substantial Rights.

According to Rule 52(b) of the Federal Rules of Criminal Procedure, only "'[p]lain errors ... **affecting substantial rights** may be noticed'" by an appellate court when such error or defect, as in this case, was not brought to the attention of the trial court. *See* Olano, 507 U.S. at 731 (emphasis added). "Normally ... the defendant must make a specific showing of prejudice," unless the error is a "structural ... 'defect affecting the framework within which the trial proceeds." *See* Johnson, 520 U.S. at 468. The error in this case was both structural and prejudicial and, therefore, it affected Defendants' substantial rights.

The error was structural because it enabled the jury to find Defendants guilty of a nonexistent crime, and in doing so deprived Defendants: (a) of their Fifth Amendment due process right that the prosecution "prov[e] all elements of the offense charged ... and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements"; and (b) of their Sixth Amendment right to jury trial. *See* Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993).

Not only did the prosecution misdescribe in Counts Four and Five of the indictment the crime defined by 18 U.S.C. Section 924(c)(1)(A), the trial court misdirected the jury.

First, the court erroneously told the jury that "Title 18, United States Code, Section 924(c)(1), makes it a crime for anyone to **discharge** a firearm during and in relation to a crime of violence." *See* Jury Instructions, pp. 27-28; 2R424-425 (emphasis added). As pointed out in sections II. A. and B. above, that instruction to the jury is flatly contradicted by Harris, Barton, and McGilberry.

Second, having misdescribed the elements of the offense, the trial court erroneously directed the jury that "to find the defendant[s] guilty of **this** crime, you must be convinced that the government has proven ... beyond a reasonable doubt ... [t]hat the defendant[s] knowingly **discharged** a firearm during and in relation to one or more of the crimes charged in Count One, Two or Three." Jury Instructions, pp. 28-29; 2R425-26 (emphasis added). By this instruction, the trial court invited the jury to return a verdict of guilty **not** based any *actus reus* element of the offense defined in 18 U.S.C. Section 924(c)(1)(A), but on a *mens rea* element disconnected from any *actus reus* specified in the offense.

And by instructing the jury that the offenses charged in Counts I, II, and III were "crimes of violence," and that it only need to find that the "firearm" had "some

purpose, role, or effect with respect to those crimes, the trial court deprived Defendants of their constitutional right to have the jury decide whether the Defendants' "use" or "carrying" of the firearms was "during and in relation to" a "crime of violence" or "during and in relation to" their employment as Border Patrol Agents. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) ("[I]n a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.")

In summary, taken as a whole, the jury instructions on Counts Four and Five deprived Defendants of their right to have the jury as the primary finders of fact with respect to every element of the offense **as** defined in 18 U.S.C. Section 924(c)(1)(A), **not** as erroneously alleged in the indictment. The trial court's instructional errors are so fundamentally wrong that, as was the case in Sullivan v. Louisiana, it would be "pure speculation" for this Court to attempt to determine what a "reasonable jury would have done," if the jury instructions on Counts Four and Five had faithfully recited the elements of the offense actually contained in 18 U.S.C. Section 924(c)(1)(A) and if the trial court had submitted to the jury every element of that offense to be proved beyond a reasonable doubt. *See* Sullivan, 508 U.S. at 281. Thus, this case, like Sullivan, calls for reversal without specific proof that Defendants

were prejudiced, the trial court's instructions having totally misdescribed the offense, thereby "vitiat[ing] *all* the jury's findings" with respect to Counts Four and Five. *See id.* (italics original).

In addition to suffering from this total breakdown of due process, Defendants were also individually prejudiced by the prosecution's apparently well-calculated decision to charge them with having "discharged" a firearm during and in relation to a crime of violence. Prior to the return of the indictment in this case, it appears without a doubt that the Government's consistent position has been that neither the "brandish[ing]" nor the "discharge" of a firearm was an element of the offense to be proved beyond a reasonable doubt to the jury, but only a sentencing factor to be proved by a preponderance of the evidence before the judge **after** conviction. *See, e.g.,* Harris, 536 U.S. at 551 (brandishing); Barton, 257 F.3d at 438-39 (discharging). Thus, as a matter of prosecutorial practice, in an indictment charging a violation of 18 U.S.C. Section 924(c)(1)(A), the Government did not allege either the brandishing of a firearm or the discharge thereof. *See* Barton, 257 F.3d at 435, 441-43. Apparently, as pointed out in Harris, the Government routinely:

> proceeded on the assumption that § 924(c)(1)(A) defines a single crime and that brandishing is a sentencing factor to be considered by the judge after the trial. For this reason the indictment said nothing of brandishing and made no reference to subsection (ii). Instead, it simply alleged the

> elements the statute's principal paragraph: that "during and in relation to a drug trafficking crime," petitioner had "knowingly carried a firearm." [Harris, 536 U.S. at 551.]

However, in this case, the Government deliberately departed from this practice, crafting Counts Four and Five of this indictment to charge Defendants with the supposed "crime" of the "Discharge of a Firearm in Relation to a Crime of Violence." The Government's reason for doing so may never be known for certain, but its departure from prior policy tactically facilitated the prosecutorial strategy in this case — bringing into sharp focus the culminating shooting event in an effort to divert attention from the immediately preceding lawful and determined effort by two lawfully armed United States Border Patrol Agents to apprehend a fleeing suspected drug smuggler — as a careful review of the indictment reveals.

Counts Four and Five of the indictment are sandwiched between Counts One through Three — charging violations of three assault statutes, each of which focused upon the firearm discharge event — and Counts Five through Ten, charging violations of tampering with an official proceeding, each of which concerned Defendants' actions or failures to act with respect to the reporting of the firearms discharge event. *See* Indictment, pp. 1-7, Record 66. By alleging a violation of 18 U.S.C. Section 924(c)(1)(A) on the basis of the "discharge of a firearm in relation to a crime of violence," Counts Four and Five were tailored to fit the prosecutorial

theme that the two Defendants, who were Border Patrol Agents, had "discharged" their otherwise lawfully possessed, used and carried firearms in relation to an unlawful assault on a suspect.

Had the prosecutor conformed Counts Four and Five to the Government's previous policy of charging "use" or "carry," it would have provided Defendants with an opportunity to show that their initial "use" and "carry" of the discharged firearm in the chase-down was lawful. Clearly, this would have weakened the prosecutor's case. Having dispensed with "use" and "carry" as elements of the offense charged in Counts Four and Five, the prosecutor facilitated a set of jury instructions that directed the jury's **attention to** the events immediately preceding the alleged assault crimes and **away from** the earlier events, with respect to which Defendants were arguably lawfully possessing, carrying and using their firearms "during and in relation to" their work as Border Patrol Agents.

Indeed, as pointed out in Defendant Ramos' brief to this Court, the prosecutor placed special emphasis upon Defendants' failure to abide by Border Patrol policies governing the discharge of their lawfully used, carried and possessed firearms to rebut Defendants' defense that the discharge of the firearm was in reasonable self-defense. *See* Ramos Br., Issue No. 2, pp. 13, 35-46. Had the jury been instructed according to either the "use" or "carry" element, or the "possess" element instead of

the "discharge" sentencing factor, then the jury could very well have returned a not guilty verdict on the charges contained in Counts Four and Five. To fail to instruct the jury according to the elements of 18 U.S.C. Section 924(c)(1)(A) was, therefore, at the very least, highly prejudicial to Defendants.

D. The Misdescription of the Offense Purportedly Charged in Counts Four and Five Seriously Affects the Fairness, Integrity and Reputation of Judicial Proceedings.

The criminal code cannot be treated by the prosecution as a legal chameleon, changing elements to fit the circumstances of the case that the Government, in its discretion, wants to present to the jury and to the judge. Rather, the rule of law requires the Government to proceed "evenhanded[ly] in the administration of justice and to eliminate the oppressive and arbitrary exercise of official discretion." *See* H. Packer, The Limits of the Criminal Sanction, p. 80 (Stanford Univ. Press: 1968). To ensure such equal treatment, there should be no place for the kind of ex post facto lawmaking as occurred in this case by the prosecutorial substitution of "discharge of a firearm" for the statutorily-prescribed "use," "carry" or "possession" of a firearm.

To be sure, the Government might argue that the jury's finding of "discharge" of the firearm was tantamount to its finding "use" of that firearm — the discharge of a firearm being a "subset" of the use of that firearm. *See* Barton, 257 F.3d at 442.

See also Bailey v. United States, 516 U.S. 137, 148 (1995). Such a claim should be rejected for at least three reasons.

First, it is within Congress' province to define a crime, using the terms that it chooses, and then expect that prosecutors and courts will operate within those parameters. After all, the Constitution has vested legislative power in the Congress, not in the President or in the courts. Thus, it is not within the prosecutor's or trial court's province to redefine a crime using other terms, even if those terms share some similarities, especially in a case like this one where the substitute language would facilitate a conviction. *See, e.g.,* Bailey, 516 U.S. at 144-45. Such an outcome would result in prosecutorial "gaming" of indictment language that would bring disrespect on the entire federal criminal justice system.

Second, it is not the general "use" of a firearm that constitutes the offense defined by 18 U.S.C. Section 924(c)(1)(A), but the specific use of a firearm during and in relation to a crime of violence. *See* Smith v. United States, 508 U.S. 223, 237 (1993). Thus, in order for a particular firearm discharge to be a subset of such a specific use, it must arise out of circumstances that constitute such specific use, not just be a subset of a general use. *See* Barton, 257 U.S. at 442 ("'The first clause of § 924(c)(1)(A), standing alone, defines the offense of using or carrying a firearm during a crime of violence while subsection[] (iii) do[es] 'no more than single out

subsets of those persons [who carry or use firearms during crimes of violence] for more severe punishment....'").

Third, instructing the jury to determine only if a firearm is "discharged during and in relation to a crime of violence" does not ensure that the jury would first decide if the firearm was so "used." Thus, unlike the McGilberry case where the jury "was properly instructed on the elements of § 924," there was in this case no comparable jury instruction "mitigat[ing]" the erroneous allegations in the indictment. *Compare* Jury Instructions on Counts Four and Five (Record 66) *with* the jury instruction in McGilberry, 480 F.3d at 331.

Indeed, had the jury been instructed that it must find "use" of a firearm "during and in relation to a crime of violence," before finding discharge of the firearm, it might very well have concluded that the overall "use" of the firearms was during and in relation to their lawful possession and carrying in their capacity as Border Patrol Agents and not in relation to the assaults. As pointed out above, under the instructions given by the trial court, the jury would have had no opportunity to have considered such use, having been limited solely to addressing whether Defendants discharged their firearms during and in relation to the alleged assaults. By narrowing the issue to the discharge of the firearm, the prosecution and the trial court actions adversely affected the fairness of the entire trial, depriving Defendants of any

opportunity to present to the jury that they were using and carrying their firearms during and in relation to their employment as Border Patrol Agents, or possessing such firearms in furtherance of their duties as Border Patrol Agents.

CONCLUSION

Although it may be within the discretion of this Court to determine that plain error had been committed below, and yet to allow the convictions to stand, these *amici* respectfully submit that it must not do so. If Defendants' convictions for violation of Counts Four and Five are not overturned, Defendants will have been convicted of a crime that this Court and the Supreme Court have ruled does not exist. That fact alone is sufficient to support a finding that the integrity and public reputation of the judicial proceedings in the trial below have been put in jeopardy, and cannot be allowed to stand.

Respectfully submitted,

J. Mark Brewer
Brewer & Pritchard
Three Riverway, 18th Floor
Houston, TX 77056
(713) 209-2950

Attorney of Record

May 24, 2007

William J. Olson
Herbert W. Titus
John S. Miles
Jeremiah L. Morgan
William J. Olson, P.C
8180 Greensboro Drive, Suite 1070
McLean, VA 22102-3860
(703) 356-5070
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief Amicus Curiae of Congressman Walter B. Jones, Congressman Virgil H. Goode, Jr., Congressman Ted Poe, Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund in Support of Appellants, was made, this 24th day of May, 2007, by depositing an electronic copy of the brief and sufficient hard copies thereof in the United States Mail, First-Class, postage prepaid, addressed to the following:

David L. Botsford, Esquire
1307 West Avenue
Austin, TX 78701
Counsel for Defendant-Appellant Ramos

Robert T. Baskett, Esquire
2612 Boll Street
Dallas, TX 75204-1002
Counsel for Defendant-Appellant Compean

and

Joseph H. Gay, Jr., Esquire
Assistant United States Attorney
601 NW Loop 410, Suite 600
San Antonio, TX 78216-5597
Counsel for Plaintiff-Appellee

J. Mark Brewer

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief Amicus Curiae of Congressman Walter B. Jones, Congressman Virgil H. Goode, Jr., Congressman Ted Poe, Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund in Support of Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,247 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32(a)(1), because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 10.0.0.990 in 14-point Times New Roman.

_____
J. Mark Brewer
Attorney for *Amici Curiae*

_____
Dated