No. 04-20131

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD GONZALES;
LOUIS GOMEZ;
CARLOS REYNA,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose defendants' requests for oral argument.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against each defendant on February 12, 2004. (1.R.674; 4.R.978; 1.R.Supp.2d.1076).[1] Carlos Reyna filed a notice of appeal the same day.

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[1] The number before the "R" is the volume number of the Record on Appeal. Numbers after the "R" are pages in that volume. The same format is used for "R.Supp." (Supplemental Record on Appeal) and "R.Supp.2d" (Second Supplemental Record on Appeal). "Br. __" indicates the page number of the relevant defendant's opening brief. "GX" and "DX" refer to the government's and defendants' trial exhibits, respectively.

(1.R.676). Defendants Richard Gonzales and Louis Gomez also filed timely notices of appeal (4.R.971; 1.R.Supp.2d.1070). See Fed. R. App. P. 4(b)(2).

With one exception, this Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742. The Court lacks jurisdiction to review the order Gonzales challenges in Issue 19 (pp. 53-56) of his brief. That order, which denied Gonzales' motion to amend and clarify the judgment and presentence report, was entered March 24, 2004 (4.R.989), after Gonzales filed his notice of appeal (4.R.971). His failure to file a new or amended notice of appeal deprives this Court of jurisdiction to review that order. See *Fiess* v. *State Farm Lloyds*, 392 F.3d 802, 806-807 (5th Cir. 2004).

STATEMENT OF THE ISSUES

1. Whether "deliberate indifference" is the equivalent of "willful[ness]" under 18 U.S.C. 242, thus foreclosing defendants' attack on the sufficiency of the indictment.

2. Whether the jury instructions on willfulness were plain error.

3. Whether the evidence was sufficient to convict Gonzales under 18 U.S.C. 242 for willfully using excessive force against Carrera, thereby causing him bodily injury.

4. Whether the evidence was sufficient to convict each defendant under 18 U.S.C. 242 for acting with deliberate indifference to Carrera's serious medical needs, resulting in his bodily injury.

5. Whether Carrera's out-of-court statements were "testimonial" for Sixth Amendment purposes and whether their admission was plain error.

6. Whether Count 5 of the indictment was constructively amended by the jury instructions or by a change in the prosecution's theory at trial, and, if so, whether reversal is warranted under a plain-error standard.

7. Whether the deportation of aliens arrested with Carrera violated Gonzales' Sixth Amendment rights, and, if so, whether such violation would warrant reversal under plain-error review.

8. Whether Gonzales' claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963), which were not pursued below, can be raised for the first time on appeal.

9. Whether the prosecution engaged in misconduct warranting reversal of Gonzales' conviction under a plain-error standard.

10. Whether Gonzales and Reyna have demonstrated, under a plain-error standard, that they are entitled to resentencing in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005), or *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004).

11. Whether the district court clearly erred in finding under Sentencing Guidelines § 2H1.1 that each defendant engaged in an offense involving two or more participants.

12. Whether the district court clearly erred in finding that Gonzales was an organizer, leader, manager, or supervisor under Sentencing Guidelines § 3B1.1.

13. Whether the district court clearly erred in finding that Carrera was a vulnerable victim under Sentencing Guidelines § 3A1.1.

14. Whether the district court erred in imposing a restraint-of-victim enhancement against Gonzales under Sentencing Guidelines § 3A1.3.

15. Whether the district court clearly erred in finding that Gonzales obstructed justice under Sentencing Guidelines § 3C1.1.

16. Whether Gonzales' other arguments have any merit.

STATEMENT OF THE CASE

On September 18, 2002, a five-count indictment was filed charging defendants with acting under color of law to willfully deprive Carrera of his civil rights, in violation of 18 U.S.C. 242. The indictment alleged that each violation of Section 242 resulted in bodily injury to Carrera. (3.R.1-4). At the time of the offenses, defendants were deportation officers with the Immigration and Naturalization Service (INS), and Carrera was a Mexican citizen whom defendants had arrested. (3.R.4). Count 1 charged that Reyna assaulted Carrera and thereby willfully deprived him of his Fourth Amendment right to be free from the use of unreasonable force. Count 2 charged Gonzales with willfully using unreasonable force by pepper-spraying Carrera. Count 3 charged Gonzales with willfully violating Carrera's due process rights by acting with deliberate indifference to his

serious medical needs. Counts 4 and 5 made the same allegation against Reyna and Gomez, respectively.

On June 9, 2003, the jury returned a guilty verdict on Counts 2 through 5, but acquitted Reyna on Count 1. (1.R.475). Each defendant was sentenced to a term of imprisonment, three years of supervised release, and a fine. The prison terms were 78 months for Gonzales, 41 months for Gomez, and 33 months for Reyna. (51.R.5180-5182).

STATEMENT OF FACTS

A. Offense Conduct

On March 25, 2001, defendants were working as deportation officers for the INS office in San Antonio, Texas. On that date, a team from the San Antonio office conducted a joint operation with a team from the INS's Houston office. Gonzales was team leader for the operation, and defendants Gomez and Reyna were among the officers participating. Although Gonzales' supervisor, Alex Rodriguez, participated in parts of the operation, Gonzales was the de facto leader on the scene that day. (15.R.535-546, 580-581; 16.R.873-874; 27.R.1927-1928, 1936-1938, 1960; 28.R.2264-2265; 31.R.2536, 2542-2543; 35.R.3023, 3054-3055; 41.R.4138).

As part of the joint operation, officers raided a house in Bryan, Texas, and arrested 21 undocumented aliens, including Carrera. The raid was completed by

about 8:30 a.m. (15.R.545; 16.R.826-827; 23.R.1414; 27.R.1934-1936; 41.R.4030-4031).

During the raid, Gonzales and another officer tackled Carrera, forced him to the floor, and handcuffed him. Carrera was compliant after the take-down and did not struggle or otherwise resist the officers. (15.R.557-561; 16.R.718; 18.R.1168; 27.R.1946-1947; 33.R.2842-2844; 44.R.4182-4183).

A number of witnesses testified that after the take-down, one or more officers assaulted Carrera while he lay handcuffed on the floor. (18.R.1181-1184, 1194-1196; 23.R.1346-1349). An INS officer testified that Reyna did a "knee drop" from a standing position onto Carrera's back. (15.R.560-563; 16.R.710-713). Another witness testified, however, that Gomez was the one who did the knee drop. (33.R.2843-2844, 2866-2870, 2899-2901). Although Carrera moved his legs immediately after the take-down, his limbs stopped moving while he was restrained on the floor, and thereafter, he was unable to walk and never regained use of his arms or legs. (15.R.582; 18.R.957-962, 969-970, 1059-1063; 27.R.1965; 31.R.2534; 35.R.3017, 3026; 44.R.4195-4196).

Following the take-down and continuing for the next several hours, Carrera moaned loudly, repeatedly complained that he was badly hurt and in pain, and asked to be taken to a hospital. (18.R.960, 1183; 23.R.1346, 1376, 1381-1384; 24.R.1618-1624; 27.R.1748, 1948, 1954-1959, 1963, 1966; 28.R.2133; 33.R.2844-

2847, 2850; 35.R.3014; 44.R.4183, 4197). While lying on the floor handcuffed, Carrera screamed, "Oh, they broke me. They broke me. * * * [T]ell them to kill me because I really think that they hurt me. * * * Tell them to take me to a hospital." (33.R.2844).

Despite his pleas, defendants did not provide Carrera medical attention. Instead of helping Carrera, Reyna cursed and yelled at him while he lay on the floor. (18.R.1181-1183; 23.R.1293; 27.R.1962-1963; 44.R.4303-4304). Gonzales also cursed Carrera and invited another officer to wipe his feet on Carrera's body. (18.R.963-965, 1098). Gomez taunted and cursed Carrera when he complained of injury and requested medical care. (33.R.2843-2844). All three defendants had significant contact with Carrera as he lay injured on the floor. (16.R.709-710; 18.R.957-965, 1096-1098; 27.R.1948-1959; 28.R.2215-2218; 41.R.3963-3964, 4049).

After all the aliens except Carrera were loaded into vans, Gonzales instructed officers: "Bring the van up. I don't want anybody to see what's going on." (15.R.568-569). Another officer asked what was happening, and Reyna responded that the van was "for the ER case inside." (15.R.567-568). When the officer asked whether Reyna was serious, he assured the officer that Carrera was "okay" (15.R.568) and just "faking it" (16.R.732). Reyna told the officer that Carrera had

previously faked a leg injury in order to obtain government benefits. (16.R.733; 15.R.571-572).

At this point, the driver of the van recommended to Gonzales that he get medical attention for Carrera before moving him. (27.R.1963-1964, 2020). Gonzales rejected this recommendation and responded that Carrera would get medical care at the jail. (27.R.1964, 2020). The driver thought Gonzales meant the nearby Brazos County Jail. (27.R.1964).

Gonzales then ordered officers to carry Carrera from the house to the van. (27.R.1960; 44.R.4194). At least one defendant, and perhaps all three, helped carry Carrera to the van. (15.R.569-570; 16.R.729; 27.R.1960-1961, 1965, 1986; 41.R.3967-3968; 44.R.4194; 51.R.5134). As he was being taken toward the van, Carrera's feet were dragging on the ground, his body was limp, and he was moaning and asking for medical attention. (15.R.571; 18.R.968; 24.R.1623-1624; 27.R.1756-1757, 1965; 28.R.2133; 41.R.3968-3970; 44.R.4195).

Gomez pulled Carrera into the van and tried to place him on a seat. Carrera's limp body slumped over, and he was unable to sit up. (18.R.969-971; 23.R.1381; 27.R.1965-1968). At the time, Carrera was moaning, complaining of pain, and asking for an ambulance. (23.R.1381-1382; 27.R.1966-1967; 44.R.4197).

The vans containing Carrera and the other aliens were driven to the Brazos County Jail. During the van ride, Carrera continued moaning, complaining of injury,

and requesting an ambulance. (23.R.1382-1383; 27.R.1968-1969, 1973-1974). He told one of the other aliens that he would prefer to be shot and killed so that his suffering would end. (23.R.1383).

Once at the Brazos County Jail, Carrera was kept in the van in the parking lot. (23.R.1383-1384). Even though a nurse was on duty, defendants did not request medical attention for Carrera at that jail, and did not arrange for him to be taken to the local hospital, which was about four miles away. (33.R.2826-2827, 2938-2942).

Officers on the Houston team were told, either by Gonzales or one of his colleagues, to stay away from Carrera. (16.R.863-864; 24.R.1628-1629; 27.R.1761-1762, 1910-1911). The Houston team, along with Alex Rodriguez, Gonzales' supervisor, left the scene for awhile to handle an unrelated immigration matter. (15.R.583; 24.R.1632).

While in Reyna's presence in the parking lot, Carrera continued moaning, complained that he was "very hurt," and again requested an ambulance. (23.R.1384, 1396-1397; 33.R.2850). When other aliens tried to respond to his pleas, Reyna warned them not to talk to Carrera or else the "same thing" would happen to them. (23.R.1393-1397; 24.R.1481).

Eventually, a bus arrived to take the aliens to San Antonio. (15.R.579-580). Gonzales told the bus driver and another detention officer that Carrera had not been

moving and was unable to walk. (35.R.3013). When the two officers went over to the van, they found Carrera slumped over, and complaining loudly that he was hurt and "broken." (35.R.3013-3014). Gonzales was present when Carrera said this. (35.R.3014).

Gonzales ordered that the bus be brought closer to the van, explaining that "he didn't want anybody to see what was going to happen" to Carrera. (16.R.862). Gonzales directed Reyna and Gomez to help him remove Carrera from the van. (31.R.2524). The three defendants then carried Carrera, who was handcuffed, toward the bus. (31.R.2524-2526, 2534; 35.R.3015-3016, 3063). Carrera's body was limp and motionless as he was being carried. (24.R.1635; 27.R.1895; 35.R.3017). When defendants moved him, they failed to take precautions to stabilize his spine, and allowed his head to flop around and his feet to drag on the ground. (15.R.581-582; 27.R.1895-1896). Carrera's head appeared to strike the van's metal step as he was removed from the vehicle. (24.R.1635-1636; 27.R.1895).

As defendants approached the bus with Carrera, Gonzales told the bus driver to open the luggage compartment. (24.R.1633). Gonzales then cursed Carrera and threatened to put him in the luggage compartment and force him to ride there if he did not start walking. (33.R.2851; 35.R.3017). As they carried Carrera, defendants engaged in horseplay, zigzagging as they went toward the bus and

pretending that they were about to put him in the luggage compartment. (23.R.1385-1387; 24.R.1633-1635; 27.R.1989, 1992, 1995). Despite the threat, Carrera did not move and, instead, continued complaining that he was injured. (33.R.2851; 35.R.3016-3018).

When Carrera failed to move, Gonzales stated, in the presence of Reyna and Gomez, "Let's Mace the fucker, see if he budges." (27.R.1992-1994; accord 31.R.2527; 35.R.3018-3019, 3241). Gonzales had with him a canister of Oleoresin Capsicum (OC) pepper-spray (41.R.4058), a substance that can cause "intense pain." (GX 161 at GJ EX 32 000000121; 38.R.3342; 44.R.4254). The three defendants took Carrera, who was handcuffed, onto the bus. (31.R.2525-2527).

Gilbert Rodriguez, an INS detention officer on board the bus, watched defendants carry Carrera through the entrance of the "cage," a secured portion of the vehicle where arrestees are placed for transport. (31.R.2525-2527). Rodriguez's trial testimony contradicted a key defense theory. According to the defense, as Gonzales carried Carrera through the entrance, the trigger of the pepper-spray canister caught on the cage, causing an accidental discharge that sprayed Carrera. (44.R.4290-4291; 45.R.4532; 48.R.4629-4632). Rodriguez testified, however, that no discharge occurred as defendants passed through the cage entrance. (33.R.2757-2759). Once defendants had entered the cage with

Carrera, Rodriguez got off the bus. (31.R.2525). The only persons remaining on board were the three defendants and Carrera. (28.R.2345-2348; 33.R.2765).

A short time later, the three defendants got off the bus coughing, laughing, and making sarcastic comments. (35.R.3019-3020, 3107-3108). Gonzales, who had a "sarcastic smirk" on his face, stated nonchalantly that he had an "accidental discharge." (35.R.3020; 31.R.2531). Two INS officers, who heard the comment and witnessed defendants' demeanor as they got off the bus, testified that they did not believe the discharge was accidental. (31.R.2531; 35.R.3020, 3085, 3088).

None of the trial witnesses saw the pepper-spraying occur. Defendants did not testify at trial, Carrera was unavailable as a witness because he was dead, and no one else was on the bus when the spraying took place. Gonzales testified at his sentencing hearing, however, that he had pepper-sprayed Carrera (although he claimed the spraying was accidental), that Carrera was handcuffed at the time, and that, when sprayed, Carrera's face twitched but that he did not otherwise move his body. (50.R.4815-4816, 4839-4840, 4848-4851). Gonzales testified that after the spraying, Carrera was coughing and complaining that the spray "had stung him." (50.R.4850-4851).

After the pepper-spraying, defendants left Carrera handcuffed and unattended on the floor of the bus. (See 23.R.1389-1390, 1428-1429; 31.R.2656). When the other aliens boarded the bus, they found Carrera silent and immobile on

the floor; foam was coming out of his mouth, and his eyes and face were swollen. (18.R.1192; 23.R.1355, 1389-1390, 1428-1429; 33.R.2852-2853, 2861-2862).

Before the bus departed, Gonzales came back on board and, referring to Carrera, asked, "Isn't he dead yet?" (33.R.2855-2856; see 33.R.2840). Gonzales told the bus driver that if Carrera gave him any trouble, "just toss him over the side." (31.R.2533). The bus left around 11:30 a.m., about three hours after Carrera's take-down. (See 38.R.3292, 3333).

For the next three hours, Carrera remained on the floor of the bus as it traveled to the Comal County Jail. (23.R.1390; 31.R.2535-2536, 2685; 33.R.2856-2857). When the bus arrived at the jail at about 2:30 p.m. (38.R.3292), Carrera was motionless, unable to walk, and had to be carried off the bus (23.R.1256; 24.R.1479; 31.R.2537-2538; 33.R.2857; 35.R.3026-3027). Carrera was moaning and appeared to be in pain. (38.R.3293-3294, 3414-3418). He told jail personnel that he could not move, explaining, "They broke my body." (38.R.3299, 3340). Carrera's face was still swollen and his eyes were clenched shut. (24.R.1479; 33.R.2916; 35.R.3212; 38.R.3293-3295, 3427). He was complaining about his eyes, and kept repeating in Spanish, "Wash my eyes. * * * They sprayed me." (38.R.3416-3417, 3427).

Because Carrera appeared to be seriously injured, officials at the jail refused to accept him and, instead, called paramedics, who took him to the emergency

room of a nearby hospital. (31.R.2542; 35.R.3028-3029; 38.R.3297-3298, 3363; 41.R.4120). Carrera arrived at the hospital around 3:30 p.m. (38.R.3363, 3395; 39.R.3637), about seven hours after his arrest. By then, Carrera was a quadriplegic. Doctors determined that he had suffered a spinal injury and would never walk again. (38.R.3376-3377, 3419-3420; 39.R.3609-3613). Despite the paralysis, Carrera had feeling in his body from his chest upward. (38.R.3366-3367; 39.R.3611, 3701).

When Carrera arrived at the hospital, he was moaning loudly and complaining of pain in his shoulders, neck, and upper chest. (38.R.3365, 3372-3373; 39.R.3610, 3639-3640). A nurse who treated him testified that "it appeared that the light really hurt his eyes" and that he could not open them. (38.R.3368-3370, 3373). While at the hospital, Carrera was treated for neurogenic shock, a potentially life threatening condition related to his spinal injury, which caused a decrease in his heart rate, blood pressure, and internal body temperature. (38.R.3370-3371, 3374, 3398; see 39.R.3613-3614). As a result of his spinal injury, Carrera was incontinent and had defecated in his pants. (38.R.3366-3367).

Later that day, Carrera was airlifted to a trauma center in San Antonio. (38.R.3374-3375; 39.R.3622-3623). He died several months later. (15.R.478-479).

The day after Carrera's injury, defendants met with other officers to discuss the incident. (35.R.3031). Gonzales told those officers that an investigation would

take place and that they would have to write memos about the incident; he assured them that they "were going to get through this," and that "everything was going to be all right." (35.R.3031-3032). That same day, Gilbert Rodriguez, the driver of the bus that took Carrera to Comal County, wrote a memo about the incident without first consulting Gonzales. (31.R.2548-2549). When Gonzales found out, he summoned Rodriguez to his office and, in the presence of Reyna and Gomez, demanded to see the memo. (31.R.2550-2551). Gonzales became angry and told Rodriguez, "Who the fuck told [you] to write a memo[?] * * * Nobody told you to write any memos. * * * I'm the one that's going to take care of the memos." (31.R.2551-2552). Gonzales showed the memo to Sylvester Ortega, another officer at the meeting, who instructed Rodriguez to state in his memo that Carrera had assaulted Gonzales. Rodriguez refused because he had not witnessed any assault on Gonzales. (31.R.2552-2553, 2639).

On April 5, 2001, investigators interviewed Gonzales, who told them that his pepper-spray canister had accidentally discharged as he was carrying Carrera through the entrance to the cage on the bus. (51.R.5098, 5100-5102, 5104; Gonzales Presentence Report (PSR) at 16 (¶ 53), 21 (¶ 69)).

B. Training

Prior to March 25, 2001, defendants received training in the use of force. They were taught that they must report use of force to a supervisor within one hour

of the incident but that, before complying with this reporting requirement, "INS officers shall offer medical attention to any person who claims or appears to be injured." (GX 161 at GJ EX 32 000000018; 35.R.3040; 38.R.3505, 3507-3509, 3525; see 15.R.572).

Gomez and Reyna also successfully completed a training course on trauma management prior to March 25, 2001. (38.R.3438-3454; GX 158, 158A, 158B, 159, 159A). During the course, they were taught to identify "the signs and symptoms of spinal injuries and demonstrate the proper treatment procedures for someone with a spinal injury." (38.R.3445; GX 158B, 159A). In addition, they were taught "what procedures need to be carried out in order not to make the injury worse" (38.R.3446), and were instructed that, absent an emergency requiring immediate removal, the injured individual "should never be moved unless it is done so under the care of proper medical personnel" (38.R.3450; see 27.R.1895-1896). The "greatest emphasis" during training "was put on the need to obtain * * * competent medical assistance immediately." (38.R.3448; see 38.R.3451-3452). Officers were taught that "it was each individual officer's responsibility to provide * * * medical assistance to anyone injured in their immediate control." (38.R.3449). During the training, officers also learned how to conduct an extremities test to determine if an individual has a spinal injury. (38.R.3451-3452).

The three defendants also had been trained and certified in the use of OC pepper-spray. (35.R.3036-3039; 38.R.3492-3506, 3517-3524; GX 161 at GJ EX 32 000000104-000000225). During training, they were instructed that it was impermissible to pepper-spray an individual who was not actively resisting officers, fleeing, or posing a danger to others. (35.R.3038-3040; 38.R.3511-3512). Defendants were also taught that pepper-spray can cause "intense pain," breathing problems, hyperventilation, and panic in persons exposed to it. (GX 161 at GJ EX 32 000000121, 000000126-127, 000000133; 38.R.3513-3514). They were instructed that "[s]ubjects exposed to OC should be continually monitored to ensure their level of consciousness and ability to breathe normally," and "should not be left alone in a vehicle or room for any period of time." (38.R.3519). Defendants were also taught that "[a]ny subjects exposed to OC who request medical treatment or appear[] to be injured must receive proper and timely medical attention." (38.R.3517; 29.R.2396). They were trained that persons exposed to pepper-spray should be transported "in an upright seated position," and that, due to the risk of asphyxiation, the individual should never be placed "in a prone position or in any other position which restricts the ability of the subject to breathe." (38.R.3518-3519, 3523).

SUMMARY OF ARGUMENT

Each defendant was convicted of violating 18 U.S.C. 242, resulting in bodily injury to Carrera. The jury convicted Gonzales of one count of willfully using excessive force in violation of the Fourth Amendment by pepper-spraying Carrera as he lay handcuffed and paralyzed. Each defendant also was convicted of one count of willfully violating Carrera's rights under the Due Process Clause of the Fifth Amendment by acting with deliberate indifference to his serious medical needs while he was in custody. Gonzales was sentenced to 78 months in prison, while Gomez and Reyna received prison terms of 41 and 33 months, respectively. Defendants challenge both their convictions and sentences on numerous grounds.

1. Gonzales and Reyna challenge the sufficiency of the deliberate-indifference counts of the indictment, arguing that those counts impermissibly equate "deliberate indifference" with "willful[ness]" under 18 U.S.C. 242. Their arguments are meritless because deliberate indifference is a form of willfulness under Section 242.

2. Gonzales asserts that the district court instructed the jury that acting knowingly is the equivalent of willfulness. That is a mischaracterization of the willfulness instructions, which correctly stated the law and are consistent with jury charges this Court has previously approved. The instructions were not an abuse of discretion, much less plain error.

3. The evidence was sufficient to support Gonzales' conviction for willfully using excessive force against Carrera, resulting in his bodily injury. The record contains abundant evidence that Gonzales intentionally pepper-sprayed Carrera, and that the resulting injury was more than *de minimis*.

4. The evidence was sufficient to convict each defendant for willfully violating Carrera's due process rights by acting with deliberate indifference to his serious medical needs, thereby resulting in bodily injury. The jury could reasonably infer that all three defendants were aware that Carrera had serious medical needs, and yet were deliberately indifferent to those needs. While in defendants' presence, Carrera repeatedly moaned, complained that he was injured and in pain, and requested medical attention. Defendants were aware that his body was limp and that he did not move his limbs, even when pepper-sprayed. Instead of helping Carrera by providing medical attention, they cursed or taunted him, and took other actions likely to exacerbate his pain and other injury, such as unnecessarily moving him without stabilizing his head or spine and engaging in horseplay with his limp body. The evidence also supports the jury's finding that, as a result of defendants' deliberate indifference, Carrera suffered bodily injury.

5. The admission into evidence of certain statements that Carrera made while in INS custody was not plain error. Those statements were not "testimonial" and

thus their admission did not violate the Confrontation Clause as interpreted in *Crawford* v. *Washington*, 541 U.S. 36 (2004).

6. Neither the jury instructions nor the government's theory of the case at trial resulted in a constructive amendment of the indictment, and, at any rate, reversal on this ground would be unwarranted under a plain-error standard.

7. The deportation of the aliens arrested with Carrera did not violate Gonzales' Sixth Amendment rights. Even if a violation had occurred, Gonzales has not demonstrated that reversal would be warranted under plain-error review.

8. Gonzales' claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963), are not properly before this Court because he failed to pursue them below.

9. Gonzales' allegations of prosecutorial misconduct are unfounded and certainly do not warrant reversal under a plain-error standard.

10. Gonzales and Reyna have not demonstrated, under a plain-error standard, that they are entitled to resentencing in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005), or *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). They have failed to show that they would have received a more lenient sentence had the district judge treated the Sentencing Guidelines as advisory, rather than mandatory.

11. The district court did not clearly err in finding that each defendant's deliberate-indifference offense involved two or more participants, and thus the appropriate base offense level was 12 under Sentencing Guidelines § 2H1.1(a)(2).

12. The court did not clearly err in finding that Gonzales was an "organizer, leader, manager, or supervisor" in the offense, thus triggering a two-level adjustment in his offense level under Sentencing Guidelines § 3B1.1(c).

13. The district judge did not clearly err in finding that Carrera was a "vulnerable victim," thus justifying a two-level enhancement in Gomez's offense level under Sentencing Guidelines § 3A1.1.

14. The district court did not engage in impermissible double-counting in imposing a two-level restraint-of-victim enhancement in Gonzales' offense level under Sentencing Guidelines § 3A1.3. By pepper-spraying Carrera while he was handcuffed, Gonzales displayed a greater level of culpability than if Carrera had been unrestrained at the time.

15. The district judge did not clearly err in imposing a two-level enhancement in Gonzales' offense level for obstruction of justice under Sentencing Guidelines § 3C1.1. The enhancement was justified because Gonzales testified falsely at his sentencing hearing and gave false statements to investigators about the circumstances surrounding the pepper-spraying of Carrera.

16. Gonzales' remaining arguments, which warrant little discussion, are meritless.

For these reasons, this Court should affirm the convictions and sentences of all three defendants.

ARGUMENT

I

THE DISTRICT COURT PROPERLY REFUSED TO DISMISS THE INDICTMENT

[Gonzales Br. 11-14; Reyna Br. 14-16]

Counts 3 and 4 of the indictment charge violations of 18 U.S.C. 242 and allege that defendants

> while acting under color of law, did act with deliberate indifference to the serious medical needs of Serafin Carrera by denying him medical care and treatment, resulting in bodily injury to Serafin Carrera, and did thereby willfully deprive Serafin Carrera of the right secured and protected by the Constitution and laws of the United States not to be deprived of liberty without due process of law, which includes the right to be free from harm while in official custody.

(3.R.2). Defendants contend that Counts 3 and 4 are flawed because they impermissibly equate "deliberate indifference" with a "willful" deprivation of constitutional rights. Their argument is meritless because deliberate indifference is a form of willfulness under Section 242.

"'Wilfulness,' as defined within the context of section 242, requires the jury to find that a defendant acted 'in open defiance or in *reckless disregard*'" of a federal right "which has been made specific and definite." *United States* v. *Brugman*, 364 F.3d 613, 616 (5th Cir.) (emphasis added) (quoting *Screws* v. *United States*, 325 U.S. 91, 105 (1945) (plurality)), cert. denied, 125 S. Ct. 212 (2004). Thus, under Section 242, such "reckless disregard [of clearly delineated

constitutional rights] * * * is the legal equivalent of willfulness." *United States* v. *Reese*, 2 F.3d 870, 881 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994).

In turn, the Supreme Court has explained that "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994). Although *Farmer* is an Eighth Amendment case, the legal standard in this Circuit for "deliberate indifference" is the same under the Due Process Clause, which applies to individuals in custody who have not yet been convicted. *Hare* v. *City of Corinth*, 74 F.3d 633, 650 (5th Cir. 1996) (en banc).

Consequently, the indictment was not flawed because "deliberate indifference" is the equivalent of "reckless[] disregard[]," *Farmer*, 511 U.S. at 836, which constitutes "wil[l]fulness" under Section 242. *Brugman*, 364 F.3d at 616. See also *Harris* v. *Chanclor*, 537 F.2d 203, 206 (5th Cir. 1976) ("It is well established that a warden's deliberate indifference to an inmate's severe and obvious injuries is tantamount to an intentional infliction of cruel and unusual punishment.").

II

THE JURY INSTRUCTIONS ON WILLFULNESS WERE NOT PLAIN ERROR

[Gonzales Br. 14-16]

Gonzales argues (Br. 16) that the district court improperly "instructed jurors that acting knowingly is the equivalent of acting willfully." That is not what the court's willfulness instructions said. At any rate, the instructions withstand plain-error review.

A. Standard of Review

If a defendant failed to object to a jury instruction below on the grounds he now seeks to raise on appeal, this Court will review the instruction only for plain error. *United States* v. *Daniels*, 281 F.3d 168, 183 (5th Cir.), cert. denied, 535 U.S. 1105 (2002). "Under the plain error standard, the 'appellant must show clear or obvious error that affects his substantial rights; if he does, this court has discretion to correct a forfeited error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, but [the Court is] not required to do so.'" *United States* v. *Redd*, 355 F.3d 866, 874 (5th Cir. 2003).

Although Gonzales objected to the instructions below because they referred to "deliberate indifference,"[2] he did not argue that the jury charge improperly

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[2] That argument is meritless for the reasons explained in Argument I, pp. 22-23, *supra*.

equated willfulness with mere knowledge. (See 7.R.358-361; 3.R.Supp.2d.380-398; 44.R.4350-4360, 4370-4376, 4393-4395). Consequently, the latter issue is subject only to plain-error review.

B. The Willfulness Instruction Correctly Stated The Law

The district court did not abuse its discretion, much less commit plain error, in instructing the jury on willfulness. Those instructions stated:

> [T]he government must establish beyond a reasonable doubt * * * that the defendant acted willfully, that is, that the defendant committed such act or acts with a *bad purpose or evil motive intending to deprive Serafin Carrera of that right.*
>
> * * * * *
>
> Willfully means that the defendant acted voluntarily and *intentionally* with the *intent* not only to act with a *bad or evil purpose*, but *specifically to act with the intent to deprive a person of a federal right* made definite by decisions or other rule of law * * *.
>
> To find that a defendant acted willfully, you must find that the defendant had the *specific intent to deprive another of the federally protected rights* [set forth in the indictment].

(45.R.4421-4422, 4424 (emphasis added)). These instructions correctly stated the law and are consistent with jury charges this Court has approved in Section 242 cases. See *United States* v. *Sipe*, 388 F.3d 471, 479-480 & n.21 (5th Cir. 2004); *United States* v. *Garza*, 754 F.2d 1202, 1210 (5th Cir. 1985). This Court has rejected the argument (Gonzales Br. 15) that a willfulness instruction must include

language about a "good faith" defense. See *United States* v. *Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998). Consequently, there was no error, plain or otherwise.

III

THE EVIDENCE WAS SUFFICIENT TO CONVICT GONZALES OF VIOLATING 18 U.S.C. 242 BY WILLFULLY USING EXCESSIVE FORCE AGAINST CARRERA, RESULTING IN HIS BODILY INJURY

[Gonzales Br. 20-24]

An individual violates 18 U.S.C. 242 if he or she (1) willfully (2) deprives another of a federal right (3) under color of law. *United States* v. *Brugman*, 364 F.3d 613, 616 (5th Cir.), cert. denied, 125 S. Ct. 212 (2004). A Section 242 violation that results in bodily injury is a felony punishable by up to ten years in prison. 18 U.S.C. 242; *United States* v. *Williams*, 343 F.3d 423, 431-434 (5th Cir.), cert. denied, 540 U.S. 1093 (2003).

Count 2 of the indictment charged that Gonzales, while acting under color of law, pepper-sprayed Carrera and thereby willfully deprived him of his Fourth Amendment right to be free from excessive force, resulting in bodily injury. Gonzales contends that the evidence was insufficient to prove either that he acted willfully or that Carrera suffered bodily injury as a result. Gonzales is mistaken on both points.[3]

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[3] Gonzales does not dispute that he acted under color of law, or that the pepper-spraying of Carrera, if intentional, would qualify as excessive force. See *Champion* v. *Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) ("it is

(continued...)

A. Standard Of Review

"The standard of review for a claim of insufficient evidence is whether 'a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt.'" *Brugman*, 364 F.3d at 615. "The court reviews the evidence in the light most favorable to the government with all reasonable inferences and credibility choices to be made in support of the jury's verdict." *Ibid.*

B. The Evidence Was Sufficient To Prove Willfulness

Gonzales attacks the government's proof of willfulness on two grounds, arguing that: (1) the evidence was insufficient to prove that the pepper-spraying of Carrera was intentional, and (2) even if the pepper-spraying was intentional, the evidence failed to show that Gonzales intended to inflict pain on Carrera.

The evidence was more than sufficient to allow a rational jury to find that the pepper-spraying was intentional. An INS officer testified that shortly before the pepper-spraying, Gonzales said, "Let's Mace the fucker, see if he budges." (27.R.1992-1994). Two other INS officers testified that they heard Gonzales make similar statements. (31.R.2527; 35.R.3018-3019). In addition, an officer who watched defendants carry Carrera onto the bus testified that, contrary to the

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[3](...continued)
clearly established that the Officers' use of pepper-spray against Champion after he was handcuffed and hobbled was excessive"), cert. denied, No. 04-1050, 2005 WL 282131 (Apr. 18, 2005).

defense theory, Gonzales' pepper-spray canister did not accidentally discharge as he passed through the entrance to the vehicle's "cage."

Gonzales' second point (Br. 23-24) – that the evidence was insufficient to prove that he intended to inflict pain on Carrera – is premised on a misunderstanding of Section 242's willfulness requirement. The government did not have the burden of proving that Gonzales intended to cause pain or any other type of bodily injury. Fourth Amendment violations are judged by an objective standard of reasonableness, and thus do not require proof of intent to cause pain or other physical harm. *Graham* v. *Connor*, 490 U.S. 386, 397-399 & n.11 (1989).

Moreover, a violation of Section 242 can occur without bodily injury; such injury simply transforms what would otherwise be a misdemeanor into a felony. *Williams*, 343 F.3d at 431-432. The language and structure of Section 242 make clear that the willfulness requirement does not pertain to the bodily injury element. The term "willfully" appears only in the first clause of the statute describing the violation ("willfully subjects any person * * * to the deprivation of any [federal] rights"), not in the second clause which authorizes a prison term of up to ten years "if bodily injury results from the acts committed in violation of this section." 18 U.S.C. 242; see *Williams*, 343 F.3d at 431-432. Thus, a Section 242 violation is a felony if bodily injury results from a willful violation of rights, regardless of whether the defendant intended such injury to occur. See *United States* v. *Hayes*, 589 F.2d

811, 821 (5th Cir.) (adopting same interpretation of "death results" clause of Section 242: "No matter how you slice it, 'if death results' does not mean 'if death was intended.'"), cert. denied, 444 U.S. 847 (1979).

C. The Evidence Was Sufficient To Prove Bodily Injury

"In order to satisfy the [bodily] injury requirement for purposes of section 242, it is not necessary for the jury to find that the victim suffered 'significant injury.'" *Brugman*, 364 F.3d at 618. "The government need only show that the victim suffered 'some' injury although this requires proof of more than '*de minimis* injury.'" *Ibid.* The amount of injury necessary to qualify as more than *de minimis* "is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ibid.*

The evidence was sufficient to prove that the pepper-spraying caused injury to Carrera that was more than *de minimis* when viewed in light of the context in which the force occurred – *i.e.*, while Carrera was paralyzed and handcuffed. The government introduced INS training materials stating that pepper-spray can cause "intense pain," and law enforcement officers who have been exposed to it testified that it is painful. (GX 161 at GJ EX 32 000000121; 38.R.3342; 44.R.4254). Shortly after the pepper-spraying, foam was coming out of Carrera's mouth, and his face and eyes remained swollen for more than three hours after the exposure. When he arrived at the Comal County Jail, Carrera was complaining about his eyes,

and kept asking that they be washed out. Later, at the hospital, he had great difficulty opening his eyes, and a nurse who examined him said that light appeared to hurt his eyes. See p. 14, *supra*. The adverse effects that Carrera suffered as a result of the pepper-spray are no less substantial than the momentary dizziness, loss of breath, and coughing that this Court found to be more than *de minimis* injury in *Williams* v. *Bramer*, 180 F.3d 699, 704 (5th Cir.), clarified on reh'g, 186 F.3d 633 (5th Cir. 1999); see *Brugman*, 364 F.3d at 618-619 (relying on *Bramer* in interpreting Section 242 and finding evidence sufficient to prove "bodily injury" where victim testified he "felt pain and lost his breath").

Although Gonzales relies (Br. 24) on *United States* v. *Lancaster*, 6 F.3d 208 (4th Cir. 1993), that decision does not call into question the jury's finding of bodily injury. Unlike the victim in *Lancaster*, who experienced "only momentary" effects from being maced, *id.* at 210, Carrera was still suffering adverse reactions, including a swollen face, swollen eyes, and sensitivity to light, more than three hours after the pepper-spraying. This evidence was sufficient to support the finding that the pepper-spraying resulted in injury to Carrera that was more than *de minimis*.

IV

THE EVIDENCE WAS SUFFICIENT TO CONVICT EACH DEFENDANT OF WILLFULLY VIOLATING CARRERA'S DUE PROCESS RIGHTS BY ACTING WITH DELIBERATE INDIFFERENCE TO HIS SERIOUS MEDICAL NEEDS, THEREBY CAUSING BODILY INJURY

[Gonzales Br. 24-27; Gomez Br. 50-57; Reyna Br. 17-24]

Defendants contend that the evidence was insufficient to establish that they willfully violated Carrera's rights or that he suffered bodily injury as a result of their deliberate indifference to his medical needs. In fact, the evidence was more than sufficient to support each defendant's conviction.[4]

A. The Evidence Was Sufficient To Prove A Willful Violation Of Carrera's Constitutional Rights

Individuals who are in the custody of law enforcement officers "have a constitutional right, under the Due Process Clause * * *, not to have their serious medical needs met with deliberate indifference on the part of the confining officials." *Thompson* v. *Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001). For due process claims, this Court uses the definition of "deliberate indifference" articulated in *Farmer* v. *Brennan*, 511 U.S. 825 (1994). *Hare* v. *City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc). Under that standard, the official must have "subjective knowledge of a substantial risk of serious harm" to the detainee and must act or fail to act with "deliberate indifference to that risk." *Id.* at 650.

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[4] See Argument III.A., p. 27, *supra*, for the standard of review.

"Whether [an] official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, * * * and a factfinder may conclude that [an] official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842.

1. Awareness Of The Substantial Risk Of Serious Harm

Although defendants assert that they thought Carrera was faking his injuries, the evidence was sufficient to allow a rational jury to find that all three defendants knew Carrera had serious medical needs. Defendants were in Carrera's presence on multiple occasions when he was moaning loudly, complaining of pain and other injury, and requesting medical care. See pp. 6-12, *supra*. Each defendant carried Carrera and thus would have felt the limpness of his body and noticed that his limbs did not move. See pp. 8-11, *supra*. In addition, Gomez and Reyna had received training in trauma management, during which they were taught to identify the symptoms of spinal injuries and how to treat persons with such symptoms. See p. 16, *supra*.

Even if defendants genuinely believed at the beginning of the incident that Carrera was faking, his failure to move when pepper-sprayed made it obvious that was not the case. All three defendants had received training in the effects of pepper-spray and had been instructed that it can cause intense pain, breathing

problems, hyperventilation, and panic. See p. 17, *supra*. The jury could thus reasonably infer that defendants were aware that a person capable of movement would instinctively move if pepper-sprayed. Indeed, Gonzales' proposal to "[m]ace" Carrera to "see if he budges" (27.R.1992-1994) reflects an awareness that the pepper-spray would provoke movement by Carrera if he was merely pretending to be hurt.

Defendants emphasize, however, that other officers testified that they believed Carrera was faking an injury. (Gonzales Br. 26; Gomez Br. 51-54; Reyna Br. 19). Some of those officers assumed, however, that Carrera was pretending to be hurt because that is what they were told by defendants, who implied they had background information indicating that Carrera was faking a leg injury. (15.R.568-569, 571-574; 16.R.731-734, 851-852, 865; 24.R.1625; 28.R.2141-2142, 2242; 35.R.3066). Moreover, one officer on the scene recommended that Gonzales get Carrera medical attention before moving him, but Gonzales rejected that proposal. (27.R.1963-1964, 2020). In addition, most officers had significantly less contact with Carrera at key moments than did the three defendants. None of the other officers was on board the bus to see Carrera's failure to move when Gonzales pepper-sprayed him. Steps were taken to limit other officers' contact with Carrera. (24.R.1628-1629). For example, when Gonzales was ready to move Carrera, he ordered a van brought closer to the house, saying "I don't want anybody to see

what's going on." (15.R.568-569; 16.R.861). Later, he made a similar comment about not wanting anyone to see what was happening to Carrera as he was transferred to the bus. (16.R.862). Some of the officers were instructed to stay away from Carrera and not talk to him. (16.R.863-864, 891-892; 27.R.1762, 1828-1829, 1910-1911, 1917-1918). At any rate, the jury was not required to believe that the officers were truthful when they said they thought Carrera was faking an injury. See *United States* v. *Merida*, 765 F.2d 1205, 1220 (5th Cir. 1985) ("a jury may choose to believe part of what a witness says without believing all of that witness's testimony").

2. Defendants' Deliberate Indifference To The Risk Of Harm

Deliberate indifference to serious medical needs can be established by evidence that officers "refused to treat [an arrestee], ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino* v. *Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). The evidence supports a finding that defendants displayed such disregard for Carrera's serious medical needs.

Although defendants had repeated contact with Carrera, they largely ignored his persistent moaning, complaints of pain and other injury, and requests for medical care. (51.R.5180). When they did pay attention to his pleas, they

responded not by providing care or trying to alleviate his suffering, but rather, by cursing or taunting Carrera.

Indeed, defendants took affirmative steps likely to inflict further harm: They engaged in horseplay with Carrera's limp body; they moved Carrera without stabilizing his spine, and allowed his head to flop around and his feet to drag on the ground, despite having been warned in training against unnecessary movement of persons with possible spinal injuries; and they left Carrera unattended, handcuffed, and lying on the floor of the bus after Gonzales pepper-sprayed him, even though they had been trained that a person exposed to pepper-spray "should not be left alone in a vehicle or room for any period of time" (38.R.3519), and should only be transported in an upright position due to the risk of asphyxiation. Such evidence amply supports a finding that each defendant was deliberately indifferent to Carrera's serious medical needs. See *Harris* v. *Hegmann*, 198 F.3d 153, 159-160 (5th Cir. 1999) (plaintiff stated claim for relief against officials who ignored his "repeated requests for immediate medical treatment for his broken jaw and his complaints of excruciating pain"); *Nerren* v. *Livingston Police Dep't*, 86 F.3d 469, 470, 473 (5th Cir. 1996) (reasonable jury could find that officers, who ignored arrestee's complaints of pain and requests for medical care, were deliberately indifferent to his serious medical needs); *Fielder* v. *Bosshard*, 590 F.2d 105, 108

(5th Cir. 1979) (upholding jury verdict against officials who ignored plaintiff's requests for medical attention and claimed that victim was just "faking").

Reyna tries to portray this case (Br. 19) as analogous to *Domino*, which rejected a deliberate-indifference claim against a prison psychiatrist who failed to predict that an inmate, who ultimately hanged himself, was suicidal. 239 F.3d at 756. The psychiatrist said he did not believe the inmate's suicide threat. *Id.* at 753-756. *Domino* is distinguishable. Whereas this Court noted in *Domino* that "[s]uicide is inherently difficult for anyone to predict, particularly in the depressing prison setting," *id.* at 756, defendants had abundant objective evidence corroborating Carrera's claims of serious injury, including the limpness of his body, the lack of any movement in his limbs (even when he was pepper-sprayed), and the fact that he had been subjected to a significant amount of force during and shortly after the take-down.

Moreover, in contrast to *Domino*, defendants made comments and engaged in other actions that belie their attempt to portray their treatment of Carrera as simply an honest misdiagnosis. For example, Gonzales invited another officer to wipe his feet on Carrera, Gonzales asked whether Carrera was "dead yet" and directed the bus driver to toss Carrera overboard, Gomez taunted Carrera when he asked for medical care, and Reyna cursed Carrera and warned other aliens that they would suffer the same fate as Carrera if they responded to his pleas. As this Court

has stated, "[t]here is a vast difference between an earnest, albeit unsuccessful attempt to care for [an arrestee] and a cold hearted, casual unwillingness to investigate what can be done for a man who is obviously in desperate need of help." *Fielder*, 590 F.2d at 108.

In addition, Reyna compares himself (Br. 22) to the officer in *Ensley* v. *Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998), who was found to have no duty to intervene to stop excessive force by his fellow officers because, while the assault was occurring, he was preoccupied with trying to restrain and arrest a different suspect. Unlike the officer in *Ensley*, Reyna was not preoccupied the entire time with other duties and thus had ample opportunity to come to Carrera's assistance. Indeed, the evidence shows that Reyna spent considerable time with Carrera, including in the house, in the jail parking lot, during the transfer of Carrera to the bus, and on the bus when Carrera was pepper-sprayed. See pp. 7-12, *supra*.

Next, defendants suggest that they cannot be held criminally responsible because supervisors supposedly concurred in the decision not to provide Carrera medical attention prior to his arrival at the Comal County Jail. (Gonzales Br. 26; Gomez Br. 52, 54, 57; Reyna Br. 22, 24). The jury could reasonably infer, however, that those supervisors lacked complete and accurate information about Carrera's condition. Alex Rodriguez, Gonzales' supervisor,[5] was absent from the

[5] Gonzales – not Rodriguez – was de facto leader of the officers on the scene (continued...)

scene at some key moments, including Carrera's transfer to the bus and his pepper-spraying. (15.R.583; 18.R.972; 24.R.1638; 28.R.2347; 41.R.4032-4033, 4047-4048; 44.R.4174, 4176, 4198-4199, 4211, 4219-4220, 4254-4255; see also 27.R.1959). Steve Harris, the supervisor of the Houston team, was on the scene only a portion of the relevant period (15.R.583; 18.R.972; 24.R.1632, 1682), and did not witness the pepper-spraying (see p. 12, *supra*); indeed, steps were taken to limit the Houston team's contact with Carrera (24.R.1628-1629; 27.R.1917; 48.R.4588).

Moreover, the jury could infer that Gonzales withheld key information about Carrera's condition from Grace Winfrey, a supervisor in the San Antonio office with whom he spoke by telephone. (51.R.5093; 35.R.3235-3236). Gonzales told Winfrey that Carrera was claiming to have a "leg injury" but that officers thought he was faking. (41.R.4105-4106; 44.R.4203-4204, 4283-4285; see also 50.R.4821-4825, 4827, 4833-4835). A "leg injury" hardly begins to describe the seriousness of Carrera's condition.

Finally, defendants suggest that they cannot be convicted of deliberate indifference to Carrera's serious medical needs because he had no such needs. According to their theory, Carrera suffered permanent, irreversible paralysis almost

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[5](...continued)
during much of the operation. See p. 5, *supra*.

immediately after the initial take-down and nothing that occurred (or did not occur) afterward could have changed that. See Gonzales Br. 25-26; Gomez Br. 32, 56.

Defendants' argument is flawed. Even if one assumes that there was nothing defendants could have done to reduce the risk of permanent paralysis (which we do not concede), the jury could reasonably infer that Carrera was experiencing intense pain, that the delay in treatment prolonged that suffering, and that defendants' unnecessary movement of Carrera exacerbated his pain. (39.R.3634, 3732). Such intense pain is a serious medical need. See *Harris*, 198 F.3d at 159-160.

Moreover, the government presented medical testimony that Carrera might have benefitted from steroid treatment for his spinal injury had he reached a hospital sooner. (39.R.3714, 3723, 3725-3728, 3746). Although a defense witness disagreed, the jury was entitled to reject that testimony in favor of the contrary views of the government's expert.

At any rate, the government had no obligation to prove that defendants' acts or omissions caused Carrera's quadriplegia or that prompt medical treatment would have avoided or reversed the paralysis. The relevant standard is whether there is "a substantial *risk* of serious harm" to which defendants are deliberately indifferent, *Farmer*, 511 U.S. at 836 (emphasis added), not whether serious harm actually materializes. *Gates* v. *Cook*, 376 F.3d 323, 341 (5th Cir. 2004). Unnecessarily

moving a person with a potential spinal injury without proper precautions poses such a risk. (39.R.3605-3607, 3633, 3729-3731).

B. The Evidence Was Sufficient To Prove That The Deliberate Indifference To Carrera's Medical Needs Resulted In Bodily Injury

Gonzales suggests (Br. 25-26) that the denial of medical care did not cause bodily injury to Carrera. This assertion is incorrect. In fact, the evidence supports a finding that the delay prolonged Carrera's pain. Gonzales' assertion (Br. 25-26, 49) that Carrera did not begin experiencing pain until he reached the Comal County Jail is belied by the evidence of Carrera's moaning and repeated complaints of pain, which started shortly after the take-down and continued for hours. Although Gonzales notes (Br. 26) that Carrera was not administered pain medication at McKenna Hospital, a nurse who treated Carrera explained that "[h]e was too unstable to give him pain medication at that time" because his blood pressure was too low. (38.R.3397). Aside from the pain, the jury could rationally infer that the delay also contributed to the onset of neurogenic shock, a potentially life-threatening condition for which Carrera was treated at the hospital. See p. 14, *supra*. This evidence was sufficient to support a finding that the delay in medical treatment resulted in bodily injury to Carrera.

V

THE ADMISSION OF CARRERA'S OUT-OF-COURT STATEMENTS WAS NOT PLAIN ERROR

[Gonzales Br. 39-40]

Gonzales argues that the district court violated his rights under the Confrontation Clause of the Sixth Amendment by admitting into evidence statements Carrera made while in the custody of INS officers. Specifically, Gonzales claims that those out-of-court statements are "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004). Admission of the statements was not plain error.

A. Standard Of Review

Gonzales did not preserve the Sixth Amendment issue for appeal. Although he filed a motion in limine seeking to exclude some of Carrera's statements on hearsay grounds, he did not argue that admission of those statements would violate the Confrontation Clause. (8.R.106-107). Moreover, we have found no indication in the record that the district judge ever ruled on that motion. Absent a definitive ruling, see Fed. R. Evid. 103(a), Gonzales was required to renew his objection at the time the evidence was offered in order to preserve the issue for review. See *United States* v. *Duffaut*, 314 F.3d 203, 209 (5th Cir. 2002). Gonzales did not object when Carrera's statements were introduced at trial. (See 18.R.1183; 23.R.1376, 1381-1384, 1397; 27.R.1948, 1954, 1956-1959, 1963, 1966-1967;

33.R.2844, 2850-2851; 35.R.3014, 3016; 38.R.3415-3418; 39.R.3610; 44.R.4197). Indeed, some of the testimony about Carrera's complaints of pain and other injury was elicited by defense counsel, including Gonzales' attorney. (23.R.1421; 27.R.2022; 28.R.2133, 2254-2255, 2257; 41.R.4117). Since Gonzales failed to object to this evidence when it was offered, the issue can be reviewed only for plain error. See *Duffaut*, 314 F.3d at 209.

B. Gonzales Has Failed To Demonstrate Plain Error

Gonzales bases his Sixth Amendment challenge on Carrera's statements "that he had 'been broken' and was injured." (Br. 39). At the outset, we note that Gonzales' opening brief challenges the admission of these statements only on Sixth Amendment grounds. Consequently, Gonzales has waived on appeal any non-constitutional challenge to the admission of Carrera's statements. See *Procter & Gamble Co.* v. *Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) (argument waived if not raised in opening brief).[6]

In *Crawford*, the Supreme Court held that out-of-court statements, if "testimonial," are inadmissible under the Confrontation Clause unless the declarants are currently unavailable and the defendant had a prior opportunity to cross-examine them. 541 U.S. at 53-54, 59. Although the Court declined to provide a

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[6] At any rate, Carrera's statements were admissible as non-hearsay to prove that defendants had notice of his serious medical needs. They were also admissible for the truth of the matter asserted under Federal Rule of Evidence 803. (8.R.113-125).

comprehensive definition of "testimonial," it held that the term covers "[p]olice interrogations." *Id.* at 51-52, 68. A key concern of the *Crawford* Court was that the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Id.* at 56 n.7; accord *id.* at 53. Not all statements made in the presence of law enforcement officers raise such concerns.

Admission of Carrera's statements was not error, much less plain error, under *Crawford* because those statements are not "testimonial." They were not elicited through "interrogation" by law enforcement officers who were trying to produce testimony "with an eye toward trial." *Crawford*, 541 U.S. at 56 n.7. See *Mungo* v. *Duncan*, 393 F.3d 327, 336 n.9 (2d Cir. 2004) (Supreme Court likely intended police "interrogations" to refer to questioning "with formality, command, and thoroughness for full information and circumstantial detail"), cert. denied, No. 04-8782, 2005 WL 429805 (Apr. 25, 2005). Defendants had no incentive to elicit Carrera's statements for use at future proceedings because the statements implicated defendants themselves. Moreover, Carrera made most of the statements without prompting from the officers, and addressed many of the comments to the other aliens. Cf. *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who

makes a casual remark to an acquaintance does not."). Thus, no Sixth Amendment concerns are implicated here.

VI

THE INDICTMENT WAS NOT CONSTRUCTIVELY AMENDED, AND, EVEN IF IT HAD BEEN, REVERSAL WOULD BE UNWARRANTED UNDER PLAIN-ERROR REVIEW

[Gomez Br. 44-50]

Count 5 of the indictment charged that Gomez acted "with deliberate indifference to the serious medical needs of Serafin Carrera by denying him medical care and treatment." (3.R.1). Gomez contends that the district court constructively amended Count 5 by instructing the jury that the government must prove that defendants "denied or delayed providing necessary medical care" to Carrera. (3.R.Supp.2d.494). He further asserts that the prosecutors changed their theory of the case during trial, initially alleging a denial of medical care and then later arguing for conviction based on a delay in such care. Gomez's arguments are meritless. There was no constructive amendment, much less plain error warranting reversal.

A. Standard Of Review

Gomez failed to object below to the jury instructions or to the government's theory of the case on constructive amendment grounds, and thus the issue can be reviewed only for plain error. See *United States* v. *Partida*, 385 F.3d 546, 557 (5th Cir. 2004), cert. denied, 125 S. Ct. 1616 (2005).

Although Gomez filed an objection to the government's proposed deliberate-indifference instruction, he simply stated that "DEFENDANT OBJECTS TO INCLUSION OF THIS PROPOSED JURY INSTRUCTION IN IT'S [*sic*] ENTIRETY" (3.R.Supp.2d.388), without mentioning the "delay" language. Such a general objection is "insufficient to preserve a constructive amendment error." *United States* v. *Millet*, 123 F.3d 268, 272 (5th Cir. 1997), cert. denied, 523 U.S. 1023 (1998). Nor did defendants object to the "delay" language during the charge conference (44.R.4337-4405), even though the judge referred to "delay" at least four times in quoting the proposed jury instructions on deliberate indifference. (44.R.4397, 4401, 4403). Defendants also failed to object to the "delay" language in a bench conference immediately following the jury charge, even though the court again quoted the "delay" language. (45.R.4473).

With regard to the prosecution's theory, defendants did not object when the judge stated, in its preliminary jury instructions *at the beginning of trial*, that "[t]he government contends that the delay in treatment caused Mr. Carrera to suffer unnecessary pain and exposed him to a substantial risk of the effects of injury becoming more severe." (15.R.476). This instruction refutes Gomez's assertion that the government changed its theory of the case during trial.

B. Gomez Has Not Demonstrated Plain Error

"A constructive amendment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States* v. *Rubio*, 321 F.3d 517, 521 (5th Cir. 2003). Not all variances between the indictment and the jury instructions rise to the level of a constructive amendment. *United States* v. *Nunez*, 180 F.3d 227, 231 (5th Cir. 1999). Rather, a constructive amendment occurs "only 'when the conviction rested upon a set of facts *distinctly different* from that set forth in the indictment.'" *Ibid.* (emphasis added).

In the context of deliberate indifference to medical needs, "denial" is not distinctly different from "delay." Although courts sometimes refer to "denying or delaying access to medical care," *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976), the two concepts overlap because a "delay" in providing medical care results in a "denial" of care during the period of the delay.

At any rate, Carrera did not receive medical care while in Gomez's custody, and thus Gomez can be said to have *denied* Carrera access to treatment during the entire time he had control over him. Because the term "denial" accurately describes Gomez's conduct, his constructive amendment claim necessarily fails. Where, as here, the indictment "contained an accurate description of the crime, and that crime

was prosecuted at trial, there is no constructive amendment." *United States* v. *Robles-Vertiz*, 155 F.3d 725, 728 (5th Cir. 1998).

In addition, the district court read the indictment to the jurors (45.R.4418-4420), instructed them that "[t]he defendants are not on trial for any act, conduct or offense not alleged in the indictment" (45.R.4417), and provided them a copy of the indictment to use in their deliberations (48.R.4659). These steps further ensured that no constructive amendment occurred. See *United States* v. *Holley*, 23 F.3d 902, 912 (5th Cir.), cert. denied, 513 U.S. 1043 (1994).

VII

THE DEPORTATION OF INDIVIDUALS ARRESTED WITH CARRERA DID NOT VIOLATE GONZALES' SIXTH AMENDMENT RIGHTS, AND, IN ANY EVENT, DOES NOT WARRANT REVERSAL UNDER A PLAIN-ERROR STANDARD

[Gonzales Br. 16-20]

Gonzales asserts that the government deported alien witnesses without first providing notice to the defense, thereby violating his rights under the Confrontation and Compulsory Process Clauses of the Sixth Amendment. He has failed to demonstrate that reversal is warranted under a plain-error standard.

A. Background

Gonzales' brief (Br. 8, 20, 35) creates a misleading impression that after interviewing alien witnesses, the prosecution detained the ones favorable to the

government and deported the rest to Mexico without notice to the defense. That is not what happened.

When defendants raided the house on March 25, 2001, they and their colleagues arrested 21 undocumented aliens. (7.R.227). *On the day of the arrests*, 20 of those aliens (all except Carrera) were deported to Mexico. (7.R.227; 2.R.Supp.6; 15.R.577-579; 23.R.1279-1280; 31.R.2574-2575). Gonzales, the team leader during the operation, was involved in arranging the aliens' return to Mexico. (15.R.579; 50.R.4829, 4831, 4833, 4835).

Prior to the deportation, officers working with Gonzales filled out a form for each alien that included his name, date of birth, physical description, and address in Mexico. (18.R.1001, 1050-1051; 24.R.1629; see, *e.g.*, DX 52). On November 22, 2002 – more than five months prior to the start of trial – the government produced copies of these forms to the defense.[7]

Prosecutors eventually found and interviewed several, but not all, of the aliens who had been deported. (7.R.227-228; 2.R.Supp.6, 12; 51.R.5172). Summaries of these interviews were produced to the defense long before trial. (2.R.Supp.8-9; 12.R.9-10; 7.R.224-227; 39.R.3776-3777). All those aliens who were located were given an opportunity to come to the United States. (7.R.224). Twelve agreed, and the prosecution arranged for them to stay in this country

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[7] Compare bates-stamp numbers for Forms I-213 (8.R.64, 126 (item 4)) with bates-stamps on DX LG1, LG2, 52, 55, 58, 62-63, 137, 139, 163.

temporarily as potential witnesses. One of the 12 later returned to Mexico without notifying federal authorities. (7.R.227-228). The prosecution made the remaining 11 available to the defense for interviews on February 11, 2003, three months before trial. (7.R.224).

After defendants complained about the difficulty they were having in locating some of the deported aliens (8.R.26-27, 142; 11.R.3-4; 2.R.Supp.5, 9-14), the prosecution provided a detailed explanation of the government's efforts to locate the aliens, as well as extensive materials about the ones who had been found. (7.R.224-228; 8.R.128-129; 11.R.4). When Gonzales' attorney again broached the topic at a pretrial hearing (11.R.3-5), the district judge instructed defense counsel to confer with the government and, if still dissatisfied after that consultation, to re-raise the issue of the missing aliens with the court. (11.R.5; see also 2.R.Supp.17, 22-23). The court noted, however, that "based on what the government is telling me, it does sound as if all reasonable efforts and even some unreasonable may already have been taken" to locate the missing aliens. (11.R.5).

Gonzales' attorney did not raise the issue during the next pretrial hearing, even though the district judge asked counsel whether there were any outstanding discovery issues that needed to be addressed. (12.R.9, 20-21). As far as the government can determine, defendants never again raised the issue before the district court.

B. Standard of Review

Gonzales failed to preserve these issues for review. He has not identified, and the government is unable to find in the record, any objection that he made below on confrontation or compulsory process grounds. Consequently, review of those issues is only for plain error. See *United States* v. *Partida*, 385 F.3d 546, 557 (5th Cir. 2004), cert. denied, 125 S. Ct. 1616 (2005).

C. Gonzales Has Failed To Show Plain Error Affecting His Substantial Rights

Gonzales has not demonstrated any error, plain or otherwise. First, the Confrontation Clause is not implicated because the government did not introduce out-of-court statements from the missing deported aliens, and thus the deportation did not deprive Gonzales of the opportunity to cross-examine the witnesses against him. See *United States* v. *Colin*, 928 F.2d 676, 679 (5th Cir. 1991).

Second, the deportation of the aliens did not violate his right to compulsory process. Gonzales relies on *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States* v. *Avila-Dominguez*, 610 F.2d 1266 (5th Cir.), cert. denied, 449 U.S. 887 (1980); and *United States* v. *Hernandez*, 347 F. Supp. 2d 375 (S.D. Tex. 2004). That line of cases is inapposite. Unlike the defendants in those cases, Gonzales had advance notice of the deportation because he himself was involved in arranging the aliens' return to Mexico. Moreover, those cases involved deportation of potential witnesses *after* the defendant had either been arrested or charged.

Here, the deportation occurred the same day as the injury to Carrera – before Gonzales was indicted, arrested, or investigated, and thus before prosecutors even suspected that a crime had been committed. Although Gonzales cites *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 56 (1987), for the proposition that defendants have a right to the government's assistance in compelling the attendance of favorable witnesses at trial, that right is vindicated by the subpoena procedures of Federal Rule of Criminal Procedure 17. See *United States* v. *Soape*, 169 F.3d 257, 267-270 & n.5 (5th Cir.), cert. denied, 527 U.S. 1011 (1999). Gonzales has not alleged that he was denied his rights under Rule 17.

VIII

GONZALES' *BRADY* CLAIMS ARE NOT PROPERLY BEFORE THIS COURT

[Gonzales Br. 16-20, 34-39]

Gonzales contends that the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose exculpatory material. Those *Brady* claims were not pursued below and thus cannot be raised for the first time on appeal. See *United States* v. *Jones*, No. 04-50143, 2004 WL 2368332, at *1 (5th Cir. Oct. 21, 2004) (appellant may not raise *Brady* issues, "which are not purely legal, for the first time on appeal"), cert. denied, 125 S. Ct. 1369 (2005);[8] accord

[8] The *Jones* opinion is in the addendum to this brief.

United States v. *Chorney*, 63 F.3d 78, 80-81 (1st Cir. 1995); *United States* v. *Thomas*, 987 F.2d 697, 705-706 (11th Cir. 1993).

Although Gonzales filed motions for a new trial addressing some of the evidence on which he now bases his *Brady* claims, he did not allege *Brady* violations in those motions. (5.R.771-776; 6.R.567-581). Nor did Gonzales pursue a *Brady* claim below after the district court instructed the defense to consult with the prosecutors on the issue of the deported aliens. See p. 49, *supra*. Consequently, the district court never had an opportunity to assess whether the government complied with its *Brady* obligations. An appellate court is not the proper forum in which to litigate such fact-bound issues in the first instance.[9]

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[9] Gonzales' *Brady* claims are, in any event, meritless. For example, the prosecution had no obligation under *Brady* to help defendants track down the deported aliens. See *United States* v. *Garza*, 165 F.3d 312, 314-315 (5th Cir.), cert. denied, 528 U.S. 1006 (1999); *United States* v. *Gonzalez*, 466 F.2d 1286, 1288 (5th Cir. 1972). As for the Sampayo-Godinez tape-recording, the defense knew about the tape and, in fact, subpoenaed it from a private attorney nine days before that witness testified. (5.R.776, 837, 845, 848; 33.R.2929). If defendants were having difficulty getting the tape, they should have sought a continuance. Their failure to do so was a lack of reasonable diligence fatal to their *Brady* claim. See *United States* v. *Infante*, No. 02-50665, 2005 WL 639619, at *6 (5th Cir. Mar. 21, 2005); *United States* v. *Wall*, 389 F.3d 457, 470 (5th Cir. 2004), cert. denied, No. 04-1228, 2005 WL 596639 (Apr. 18, 2005).

IX

THE ALLEGATIONS OF PROSECUTORIAL MISCONDUCT ARE UNFOUNDED AND, AT ANY RATE, DO NOT WARRANT A NEW TRIAL FOR GONZALES UNDER A PLAIN-ERROR STANDARD

[Gonzales Br. 27-31]

A. Background And Standard Of Review

Gonzales asserts that the prosecution engaged in misconduct by making allegedly false statements during closing argument about the existence of a safety tab and trigger lock on a pepper-spray canister and holster.[10] Although Gonzales' brief does not quote or provide a record citation for the portion of the argument he is challenging, we assume he is referring to the following:

> One more thing about accidental discharge, one thing they neglected to tell you, these canisters have a safety on them. It will not fire unless this tab is pulled.
>
> So unless that tab was previously pulled, which there's no evidence before you, this thing cannot accidentally discharge. It's in evidence. Take it back. Take a look. Now, once the tab is pulled, sure it will. This is not the real stuff, but check them out. See the

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[10] Gonzales' other allegations of misconduct (Br. 27-31) are also meritless. There was nothing improper about cross-examining a defense witness using INS Form G-725 (6.R.558). The prosecution appropriately used the form to impeach the witness by showing that he signed a report alleging that Carrera possessed a weapon and attacked an officer, even though he knew those accusations were false. (44.R.4230-4231, 4248-4252). If defense counsel believed the cross-examination created a misleading impression, he could have clarified the matter on redirect. Moreover, contrary to Gonzales' assertion (Br. 29), the prosecutor did not violate a court order concerning disclosure of Carrera's death. The judge herself told the jury at the beginning of trial that Carrera had died. (15.R.478-479).

> safety tab. It can't just accidentally discharge. Somebody's got to remove that safety and then pull the trigger.

(48.R.4653). Defense counsel did not raise a contemporaneous objection to this closing argument. (48.R.4652-4664; Gonzales Br. 31-32). Consequently, the issue can be reviewed only for plain error. See *United States* v. *Holmes*, No. 03-41739, 2005 WL 768942, at *11 (5th Cir. Apr. 6, 2005).

B. Gonzales Has Not Demonstrated Plain Error Affecting His Substantial Rights

"To prove a due process violation, [Gonzales] must establish that the prosecutor knowingly made a false and material statement during the rebuttal closing." *United States* v. *Williams*, 343 F.3d 423, 439 (5th Cir.), cert. denied, 540 U.S. 1093 (2003). Attorneys are afforded "wide latitude" when presenting jury argument, *Holmes*, 2005 WL 768942, at *11, and "prosecutorial remarks alone rarely are sufficient to warrant reversal." *United States* v. *Ramirez-Velasquez*, 322 F.3d 868, 874 (5th Cir.), cert. denied, 540 U.S. 840 (2003). "The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *Holmes*, 2005 WL 768942, at *11. This Court applies a two-step analysis, first determining whether the prosecutor made an improper remark and, if so, then evaluating whether the remark affected defendant's "substantial rights." *United States* v. *Wise*, 221 F.3d 140, 152 (5th Cir. 2000), cert. denied, 532 U.S. 959 (2001).

Gonzales cannot clear the first hurdle because the prosecutor's remarks were not improper. The evidence introduced at trial supported the prosecutor's assertions. Indeed, it was defense counsel, not the prosecutor, who first elicited testimony that the pepper-spray canisters have safety tabs. (35.R.3149). Moreover, Gonzales' counsel elicited testimony that the OC spray holsters have trigger guards. (28.R.2287). In addition, a certified instructor who trains INS officers in the use of pepper-spray testified that the canister and holster that the government introduced into evidence (GX 169) accurately depicted the type issued to INS officers. (38.R.3526-3528). He further testified that he had never known INS to issue holsters without trigger guards. (38.R.3531). INS training materials, which were introduced into evidence without objection (38.R.3493-3494), state that the holster "has a trigger lock to prevent accidental discharge of OC" and that the canister has a "safety lock" and "safety tab." (GX 161 at GJ EX 32 000000127-000000128). This evidence refutes Gonzales' contention (Br. 27-28) that the prosecutor's remarks were false.

Moreover, contrary to Gonzales' assertion (Br. 27, 31), the prosecutor did not argue that accidental discharge was impossible. Rather, the prosecutor qualified his argument by saying that the canister would not fire *unless* the safety tab had previously been removed. He did not assert that Gonzales' canister still had the tab attached when defendant carried Carrera onto the bus, but merely

pointed out that there was no evidence that it had previously been removed. There was nothing improper about pointing out the absence of evidence to support the defendant's theory. See *United States* v. *Jefferson*, 258 F.3d 405, 414 (5th Cir.), cert. denied, 534 U.S. 967 (2001).

At any rate, the prosecutor's closing argument did not adversely affect Gonzales' substantial rights. The evidence of an intentional discharge was strong (pp. 27-28, *supra*), and the judge instructed the jury that counsel's arguments were not evidence (15.R.472-474; 45.R.4411, 4534-4535; 48.R.4607). These factors minimized the risk of prejudice. See *Wise*, 221 F.3d at 153.

X

DEFENDANTS HAVE NOT DEMONSTRATED, UNDER A PLAIN-ERROR STANDARD, THAT THEY ARE ENTITLED TO RESENTENCING UNDER *BOOKER* OR *BLAKELY*

[Gonzales Br. 44-46; Reyna Br. 27-30]

Gonzales and Reyna challenge their sentences under *United States* v. *Booker*, 125 S. Ct. 738 (2005), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). They argue that the district judge violated their Sixth Amendment rights, as interpreted by *Booker* and *Blakely*, by imposing sentencing enhancements based on facts not found by the jury beyond a reasonable doubt. Gonzales also argues (Br. 52) that the district court violated *Booker* by failing to consider all of the factors set

forth in 18 U.S.C. 3553(a) in imposing sentence. The Court should affirm defendants' sentences under a plain-error standard.

A. Standard Of Review

Because defendants did not raise these arguments below, the Court will review them only for plain error. *United States* v. *Mares*, 402 F.3d 511, 520 (5th Cir. 2005), petition for cert. pending, No. 04-9517 (filed Mar. 31, 2005).[11] Under the plain-error standard,

> An appellate court may not correct an error the defendant failed to raise in the district court unless there is "(1) error, (2) that is plain, and (3) that affects substantial rights. * * * If all three conditions are met an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."

Ibid.

B. Defendants Have Not Demonstrated That The Alleged Errors Affected Their Substantial Rights

In order to justify reversal under the plain-error standard, defendants must "show that the error actually did make a difference: if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is

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[11] Reyna does not claim that he raised the Sixth Amendment issue below. Gonzales concedes (Br. 52) that plain error is the proper standard for the Section 3553(a) issue, but suggests (Br. 44-45) that he preserved the Sixth Amendment issue as to some, though not all, of the sentencing enhancements. The objection he cites (50.R.4708), however, was made by Gomez, not Gonzales, and pertained to the admissibility of expert testimony, not to any *Booker*-type issue. (Compare 50.R.4708 with 39.R.3623, 3632).

uncertain so that we do not know which, if either, side it helped the defendant loses." *Mares*, 402 F.3d at 521. The Sixth Amendment permits judge-made factual findings at sentencing so long as the Sentencing Guidelines are treated as advisory, rather than mandatory. *Booker*, 125 S. Ct. at 750, 756-769. Thus, under the plain-error standard, a defendant who raises a *Booker* claim must demonstrate "that the sentencing judge – sentencing under an advisory scheme rather than a mandatory one – would have reached a significantly different result." *Mares*, 402 F.3d at 521. If "there is no indication in the record from the sentencing judge's remarks or otherwise" what the sentencing judge would have done under an advisory scheme, the defendant necessarily loses under a plain-error standard. *Ibid.*

Gonzales points to nothing in the record to suggest that the district judge would have imposed a more lenient sentence if she had treated the Guidelines as advisory. Indeed, the judge's decisions and comments at sentencing strongly suggest the opposite. Although she had discretion even under the mandatory Guidelines system to sentence him to as little as 63 months in prison (51.R.5104), she chose 78 months, the top of the applicable Guidelines range (51.R.5180). Noting that defense counsel had argued that "those 78 months are going to be tough months" for Gonzales, the judge emphasized: "I am sentencing him on the assumption that that is true and on the belief that that is warranted." (51.R.5180).

Moreover, Gonzales has not demonstrated that the judge's failure to expressly invoke 18 U.S.C. 3553(a) affected his sentence. She clearly had the Section 3553(a) sentencing factors in mind, explaining that "as to each of the defendants, the sentences imposed are consistent with the guideline sentencing objectives of punishment, incapacitation and deterrence." (51.R.5182; compare 18 U.S.C. 3553(a)(2)).

Although the judge sentenced Reyna at the low end of his applicable Guidelines range, that is insufficient to justify a remand under a plain-error standard, without specific evidence that the district court would have imposed a more lenient sentence if the Guidelines had been merely advisory at the time. See *United States* v. *Hernandez-Gonzalez*, No. 04-40923, 2005 WL 724636, at *1 (5th Cir. Mar. 30, 2005). He has offered no such evidence.

XI

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT THE OFFENSES INVOLVED TWO OR MORE PARTICIPANTS UNDER SECTION 2H1.1 OF THE SENTENCING GUIDELINES

[Gonzales Br. 46-47; Reyna Br. 25-27]

Standard Of Review: This Court reviews for clear error a finding as to the number of participants involved in an offense. *United States* v. *Wilder*, 15 F.3d 1292, 1299 (5th Cir. 1994).[12]

✧ ✧ ✧

A conviction under 18 U.S.C. 242 results in a base offense level of at least 12 "if the offense involved two or more participants." Sentencing Guidelines § 2H1.1(a)(2). The district court found that each defendant engaged in an offense involving at least two participants. (51.R.5039-5040). Gonzales and Reyna argue that their offenses did not involve two or more participants because (1) defendants were not charged with conspiracy, (2) their offense (deliberate indifference to serious medical needs) is a crime of omission that, by its nature, cannot involve multiple participants, and (3) each defendant acted independently of the others. Their arguments are unpersuasive.

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[12] See *United States* v. *Villegas*, No. 03-21220, 2005 WL 627963, at *2 (5th Cir. Mar. 17, 2005) (setting forth methodology Court will employ in reviewing Guidelines applications after *Booker*).

"Participant" for purposes of Section 2H1.1 is defined in the commentary to Section 3B1.1. See Sentencing Guidelines § 2H1.1, comment. (n.2). That commentary, in turn, states that "[a] 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." Sentencing Guidelines § 3B1.1, comment. (n.1). "'Offense' refers to the contours of the underlying scheme, which is broader than the offense charged." *United States* v. *Glinsey*, 209 F.3d 386, 396 n.13 (5th Cir.), cert. denied, 531 U.S. 919 (2000). In order to be a participant, "[a]ll that is required is that the person participate knowingly in some part of the criminal enterprise." *Id.* at 396. The key question in determining whether persons are participants is whether their criminal conduct is "anchored to the transaction leading to the conviction." *United States* v. *Kleinebreil*, 966 F.2d 945, 955 (5th Cir. 1992).

Contrary to defendants' arguments, an offense can have multiple participants even if the defendant was neither charged with nor convicted of conspiracy. This Court has upheld a finding that an offense involved multiple participants, even though the defendant was never charged with conspiracy. See *United States* v. *Messervey*, 317 F.3d 457, 464 (5th Cir. 2002); *United States* v. *Boutte*, 13 F.3d 855, 860 (5th Cir.), cert. denied, 513 U.S. 815 (1994). See also *United States* v. *Jones*, 356 F.3d 529, 538 (4th Cir.) ("The fact that [defendant] was not convicted

for conspiracy does not serve as a per se bar" to an enhancement under Section 3B1.1.), cert. denied, 541 U.S. 952 (2004).

Moreover, whether defendants' offenses are considered crimes of omission is irrelevant. Each defendant's criminal conduct was "anchored to the transaction" that led to his co-defendants' convictions. *Kleinebreil*, 966 F.2d at 955. Each acted with deliberate indifference to Carrera's serious medical needs, and this deliberate indifference arose out of the same transaction, during which defendants were together in Carrera's presence when he was complaining of injury and requesting medical care, and when he was pepper-sprayed.

Contrary to defendants' assertions, they were not acting independently. Each defendant's actions facilitated the criminal conduct of his co-defendants. If any one of the defendants had intervened to get Carrera medical care, that action would have thwarted the other defendants' efforts to withhold treatment. Moreover, each defendant took affirmative steps that made it easier for his co-defendants to deny medical care to Carrera. Gonzales, for example, tried to keep other officers from seeing what was happening to Carrera, thus reducing the likelihood that someone would intervene to help Carrera. Gomez made it easier for Gonzales and Reyna to deny medical care to Carrera by helping to carry him to the bus, where he was isolated from others who might have intervened. Reyna also facilitated his co-defendants' denial of medical care by misleading another officer

about the true condition of Carrera and by threatening the other aliens, thus deterring them from coming to his aid. Finally, defendants jointly engaged in conduct, including unnecessarily moving Carrera and engaging in horseplay with his limp body, that contributed to his bodily injury by intensifying his pain.

XII

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT GONZALES WAS AN ORGANIZER, LEADER, MANAGER, OR SUPERVISOR UNDER GUIDELINES § 3B1.1

[Gonzales Br. 47-48]

Standard Of Review: A finding that a defendant "was an organizer, leader, manager, or supervisor" under Sentencing Guidelines § 3B1.1(c) is reviewed for clear error. *United States* v. *Turner*, 319 F.3d 716, 725 (5th Cir.), cert. denied, 538 U.S. 1017 (2003).

✧ ✧ ✧

The district court imposed a two-level adjustment because Gonzales "was an organizer, leader, manager, or supervisor" in the criminal activity (51.R.5082-5094). Sentencing Guidelines § 3B1.1(c). "To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." Sentencing Guidelines § 3B1.1, comment. (n.2). The defendant's leadership role must be "anchored to the transaction leading to the conviction." *United States* v. *Kleinebreil*, 966 F.2d 945, 955 (5th Cir.

1992). "All participation firmly based in that underlying transaction is ripe for consideration in adjudging a leadership role under section 3B1.1." *Ibid.*

The district court did not clearly err in finding that Gonzales played a leadership role in the underlying transaction that gave rise to the criminal conduct. He was team leader of the joint operation that resulted in Carrera's arrest and injury. See p. 5, *supra*. Gonzales issued orders to his co-defendants related to Carrera, and thus exercised authority over at least one other participant who was himself criminally responsible. See pp. 8, 10, *supra*. It was Gonzales who rejected an officer's recommendation that Carrera get medical attention before being moved. In addition, Gonzales ordered (1) that the van be brought close to the house so no one could see what was going on, (2) that Carrera be moved from the house to the van, (3) that the bus be moved close to the van so others would not see what was happening to Carrera, (4) that officers carry Carrera from the van to the bus, and (5) that the bus driver open the luggage compartment so that defendants could pretend that they were going to make Carrera ride there. See pp. 7-11, *supra*. Gonzales also was the person on the scene who communicated with Grace Winfrey, the supervisor in San Antonio, and controlled the flow of information that she received about Carrera's condition. See p. 38, *supra*. This evidence demonstrates that, contrary to Gonzales' assertion (Br. 47), he did more than simply relay orders issued by others.

At any rate, Gonzales need not be the *only* organizer, leader, manager, or supervisor on the scene in order for the adjustment to apply. See *United States* v. *Paden*, 908 F.2d 1229, 1234 (5th Cir. 1990), cert. denied, 498 U.S. 1039 (1991). And he can qualify for the adjustment even if, during the incident, he sometimes took orders from others. See *United States* v. *Hare*, 150 F.3d 419, 425 (5th Cir. 1998), overturned on other grounds, *United States* v. *Doggett*, 230 F.3d 160, 163-164 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001).

XIII

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT CARRERA WAS A "VULNERABLE VICTIM" UNDER GUIDELINES § 3A1.1

[Gomez Br. 58]

Standard Of Review: A finding of vulnerability is reviewed for clear error. *United States* v. *Brugman*, 364 F.3d 613, 621 (5th Cir.), cert. denied, 125 S. Ct. 212 (2004).

✧ ✧ ✧

The district court imposed a two-level enhancement in defendants' offense levels under Sentencing Guidelines § 3A1.1 because they knew or should have known that Carrera was a vulnerable victim. (51.R.5067, 5073, 5178). Only Gomez challenges this enhancement.

"For the two-level enhancement under § 3A1.1(b)(1) to apply, the victim must be 'unusually vulnerable due to age, physical or mental condition, or . . . otherwise particularly susceptible to the criminal conduct.'" *Brugman*, 364 F.3d at 621. As to Gomez, the relevant conduct is the deliberate indifference to Carrera's medical needs. Carrera was unusually vulnerable to this conduct in at least two ways.

First, Carrera was unusually vulnerable due to his physical condition. His paralysis limited his ability to seek help for his medical needs. A person who is badly injured but can nonetheless walk might be able to find medical help on his own, or at least be able to approach other officers or persons at the scene to request their assistance in getting medical attention. But because Carrera could not walk, his contact with others was necessarily limited, thus reducing the likelihood that he could find someone willing to intervene to get him medical care.

Second, Carrera's custodial status further contributed to his vulnerability. This Court has recognized that a victim may be unusually vulnerable when he is in custody and unable to flee or protect himself. See *United States* v. *Lambright*, 320 F.3d 517, 518-519 (5th Cir. 2003) (upholding finding of vulnerability where victim was "completely dependent upon the care of the corrections officers," "locked in his cell prior to the assault," and "could not protect himself from the assault"). The particular circumstances of Carrera's custody – especially his

isolation from many of the other officers at the scene – made him especially dependent on defendants for his care and protection. Gonzales tried to limit the ability of others to see what was going on with Carrera as he was being transferred from the house to the van and later from the van to the bus. A special effort was made to keep the Houston officers away from Carrera during the processing of the aliens in the parking lot of the Brazos County Jail. Carrera was taken onto the bus away from anyone but the three defendants before being pepper-sprayed. This isolation interfered with Carrera's ability "to turn to anyone else to provide medical care" (51.R.5067), thus allowing defendants to control "when he was going to get medical care" (51.R.5072).

Gomez argues (Br. 58), however, that the adjustment applies only if the defendant initially targeted the victim because of his vulnerability, and thus is inappropriate if the victim became vulnerable due to the defendant's offense. That contention is incorrect. This Court has "not required a specific 'targeting' of a vulnerable victim beyond the requirement that the defendant knew or should have known of the vulnerability." *United States* v. *Burgos*, 137 F.3d 841, 843-844 (5th Cir. 1998), cert. denied, 525 U.S. 1085 (1999). The cases on which Gomez relies were decided prior to the amendment of the Guidelines' commentary in November 1995 to clarify that there is no targeting requirement. See *ibid.* In any event, Carrera was seriously injured and unable to walk, and hence vulnerable due to his

physical condition, before Gomez committed the offense by denying him medical care.

XIV

THE DISTRICT COURT DID NOT ERR IN IMPOSING A RESTRAINT-OF-VICTIM ENHANCEMENT AGAINST GONZALES UNDER GUIDELINES § 3A1.3

[Gonzales Br. 49-50]

Standard Of Review: Because Gonzales is challenging the district court's interpretation of the Guidelines, review is *de novo*. *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999).

✧ ✧ ✧

The Guidelines provide for a two-level enhancement in the offense level "[i]f a victim was physically restrained in the course of the offense." Sentencing Guidelines § 3A1.3. The district court imposed this enhancement on Gonzales because Carrera was handcuffed at the time of the pepper-spraying. (51.R.5064-5067, 5081-5082). Gonzales challenges (Br. 49) the enhancement as impermissible double-counting in light of the vulnerable-victim enhancement that he received. He reasons that the handcuffs did not increase Carrera's vulnerability to the pepper-spraying because his arms were already paralyzed, and that such paralysis was taken into account by the vulnerable-victim enhancement. There was no impermissible double-counting.

"[D]ouble counting 'is impermissible only where the guidelines at issue prohibit it,' and § 3A1.3 does not prohibit double counting." *United States* v. *Angeles-Mendoza*, No. 04-50118, 2005 WL 950130, at *5 (5th Cir. Apr. 26, 2005). "The application notes to § 3A1.3 only dictate that the adjustment is inapplicable 'where the offense guideline specifically incorporates this factor, or where the unlawful restraint of the victim is an element of the offense itself.'" *Id.* at *10 n.22 (quoting Sentencing Guidelines § 3A1.3, comment. (n.2)). Restraint of the victim is not an element of a Section 242 violation. *United States* v. *Epley*, 52 F.3d 571, 583 (6th Cir. 1995). Nor does the offense guideline at issue in this case specifically incorporate such restraint. See Sentencing Guidelines § 2H1.1. Consequently, the restraint-of-victim enhancement was appropriately applied even if deemed double-counting.

In any event, no double-counting occurred. "[A]n underlying consideration in applying the guideline is that the physical restraint of a victim during an assault is an aggravating factor that intensifies the wilfulness, the inexcusableness and reprehensibleness of the crime and hence increases the culpability of the defendant." *Clayton*, 172 F.3d at 353. As the district court found, pepper-spraying Carrera while he was handcuffed reflected greater maliciousness than if the attack had occurred while he was unrestrained. (51.R.5073). Although the evidence supports a finding that Gonzales knew, prior to the pepper-spraying, that

Carrera was seriously injured and needed medical attention, Gonzales claimed at sentencing that he did not know the full extent of Carrera's injury. (51.R.5081). Thus, under Gonzales' theory, he was not sure immediately before the pepper-spraying that Carrera had lost all ability to move his arms. Consequently, from Gonzales' perspective, the handcuffs provided added insurance that Carrera would be unable to use his hands or arms to shield his face from the pepper-spray. Thus, the presence of the handcuffs made Gonzales' offense even more reprehensible than it otherwise would have been.

XV

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT GONZALES OBSTRUCTED JUSTICE

[Gonzales Br. 51-52]

Standard Of Review: A finding that a defendant obstructed justice is reviewed for clear error. *United States* v. *Holmes*, No. 03-41739, 2005 WL 768942, at *16 (5th Cir. Apr. 6, 2005).

✧ ✧ ✧

The district court imposed a two-level enhancement under Sentencing Guidelines § 3C1.1 for obstruction of justice, based on Gonzales' false testimony at the sentencing hearing and his false statements to investigators describing what he claimed was an accidental discharge of pepper-spray. (51.R.5103-5104; see

51.R.5098-5100).[13] The finding that Gonzales obstructed justice is not clearly erroneous.

The Guidelines authorize the enhancement

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the *investigation*, prosecution, or *sentencing* of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense.

Sentencing Guidelines § 3C1.1 (emphasis added). Such obstruction includes "committing * * * perjury," and "providing materially false information to a judge." Sentencing Guidelines § 3C1.1, comment. (nn.4(b) & (f)). The enhancement applies if the defendant commits perjury at his sentencing hearing. *United States* v. *Goldfaden*, 987 F.2d 225, 227 (5th Cir. 1993). Obstruction also includes providing "a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." Sentencing Guidelines § 3C1.1, comment. (n.4(g)).

The district court's finding was not clearly erroneous. At the sentencing hearing, Gonzales testified that his pepper-spray canister accidentally discharged as

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[13] Contrary to Gonzales' assertion (Br. 51), the adjustment for obstruction of justice did not violate *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967), which restricts use of a defendant's compelled statements against him in a criminal proceeding. Gonzales' statements to investigators do not implicate *Garrity* because they were not compelled. (Gonzales PSR at 16 (¶ 53) (interview was voluntary)).

he was carrying Carrera through the entrance to the "cage" on the bus. (50.R.4815-4816, 4839-4840, 4848). This was the defense theme at trial, and, as the district court found, the guilty verdict on the excessive force count demonstrates that the jury did not believe this version of events. (51.R.5104). In addition, the judge's ability to assess Gonzales' credibility during his testimony at the sentencing hearing also weighs heavily in favor of the court's finding. See *Holmes*, 2005 WL 768942, at *16. Moreover, Gonzales' false testimony was material because it pertained to his degree of culpability, a factor that could influence whether the judge would grant a downward departure or sentence him at the low end of the applicable Guidelines range. See *Goldfaden*, 987 F.2d at 227 ("Statements at sentencing about the severity of the offense of conviction and similar conduct on other occasions are patently relevant to sentencing.").

Because Gonzales' false testimony at the sentencing hearing was, by itself, sufficient to support the enhancement, the Court need not address Gonzales' claim that his statements to investigators did not obstruct justice. In any event, his argument is meritless. In his statements to investigators, he did not merely deny guilt (Br. 51), but rather, fabricated an account of how the discharge supposedly occurred. (51.R.5104; see also 51.R.5098, 5100-5102).

Although Gonzales asserts that the evidence is insufficient to show that his statements to investigators impeded the investigation, he neglects to mention that

the presentence report found that his statements did, in fact, hinder the investigation because it took federal investigators almost a year after Gonzales' interview to uncover evidence that the pepper-spraying was intentional. (Gonzales PSR at 21 (¶ 69)). Gonzales' statements to investigators took place in April 2001, and investigators did not learn that the pepper-spraying was intentional until nearly a year later when witnesses divulged that information to the grand jury. (PSR at 21 (¶ 69); 51.R.5100-5101; 35.R.3033-3034, 3231; 31.R.2655; 27.R.1996-1997). Gonzales' fabrication caused investigators not to pursue the pepper-spraying and thus "threw [them] off that track," causing them to focus on other alleged misconduct related to the Carrera incident. (51.R.5101-5102). Because Gonzales failed to present evidence rebutting the PSR's finding, the court was entitled to rely on it in making its finding. See *United States* v. *Huerta*, 182 F.3d 361, 364 (5th Cir. 1999) ("A defendant's rebuttal evidence must demonstrate that the information contained in the PSR is 'materially untrue, inaccurate or unreliable,' and '[m]ere objections do not suffice as competent rebuttal evidence.'"), cert. denied, 528 U.S. 1191 (2000).

XVI

GONZALES' REMAINING ARGUMENTS ARE MERITLESS

1. The Court should not consider Gonzales' ineffectiveness-of-counsel claim (Br. 31-34) on direct appeal because he did not raise that issue below. See *United States* v. *Partida*, 385 F.3d 546, 568 (5th Cir. 2004), cert. denied, 125 S. Ct. 1616 (2005).

2. Gonzales has failed to demonstrate (Br. 41-42) that the district court's structuring of the closing arguments caused him prejudice. Because the court allowed each defendant to split his argument into two portions (44.R.4332; 45.R.4477-4489, 4537-4538, 4541; 48.R.4546-4547, 4551), it was appropriate to permit the government to present its rebuttal in two segments.

3. Gonzales argues (Br. 42) that the district court violated the Confrontation Clause and the hearsay rules by admitting out-of-court statements "of others" to prove the truth of the matters asserted. His brief fails to identify which statements he is challenging or the declarants who made them. Because he has not adequately developed this argument in his brief, it is waived on appeal. See *United States* v. *Avants*, 367 F.3d 433, 442 (5th Cir. 2004).

4. Contrary to Gonzales' assertion (Br. 43-44), the district court did not pre-judge his guilt. In the passage he cites (29.R.2371), the court is discussing a hearsay objection, not opining on his guilt.

5. This Court lacks jurisdiction to review the denial of Gonzales' motion to amend the presentence report (Br. 53-56), for the reasons explained at page 2, *supra*.

CONCLUSION

The Court should affirm defendants' convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2005, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, along with a computer disk containing an electronic version of the brief, were served by Federal Express, next business day delivery, on each of the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief exceeds the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 16,271 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

Appellee is filing, simultaneously with this brief, a motion to file an extra-length brief exceeding the 14,000-word limit of Rule 32.

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April 27, 2005